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The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare

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THE PROTECTION OF CHILDREN IN ARMED CONFLICT: A HUMAN RIGHTS ANALYSIS OF THE PROTECTION AFFORDED TO CHILDREN IN WARFARE

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I. HUMANITARIAN LAW

International law attempts to modify the inherent inhumanity of war by providing guidelines of acceptable conduct for international actors. The laws attempt to provide "guidance regarding the moral boundaries of the exercise of power in situations which most exclusively breed excess."¹ In the area of armed conflicts, the object of international law is primarily to protect, and aid, victims of armed conflicts.² Historically, special considerations given to civilians during armed conflict have pervaded all types of warfare.³ It is clear that civilians, those individuals who retain noncombatant status, are predominantly the women and children who remain in the territory of the conflict.⁴ International law virtually ignores the specific protection of these groups. Even in the midst of conflict, an emphasis must be placed on humanitarian instincts which modify the exclu-

¹ Demarest, *Updating the Geneva Convention: The 1977 Protocols*, ARMY LAWYER, Nov. 1983 16, 26. "The codification of the laws of war provides a common base of expectation and reaffirms humanitarian principles by which leaders can measure their own decisions." *Id.*

² Solf, *The American Red Cross-Washington College of Law Conference: International Humanitarian Law Commentator*, 31 AM. U.L. REV. 927 (1982).

³ Cantrell, *Civilian Protection*, 11 TEX. INT'L L.J. 305, 316 (1976).

⁴ Mann, *The International Child Soldier*, 36 INT'L & COMP. L.Q. 32, 34 (1987).

The general protection of the civilian population may be seen as encompassing the notions of not attacking them, of preventing the effects of war from harming them to the greatest extent possible, of not using them as hostages against attack.

The special protection of specific groups in the population was intended to benefit those persons likely to suffer the most from the effects of an armed conflict. These groups include the sick, the elderly, the infirm, children and the mothers of young children.

Id.

sive emphasis on military strategy.⁵ Wartime often results in a conscious disregard of international humanitarian ideals.⁶ The exercise of inviolable autonomy often justifies inhumane acts which subject the victims of international conflicts to excessive brutality.

To limit aberrations from acceptable norms of human conduct, the international community has created and approved various international bodies to provide neutral assistance in, and monitor, international conflicts.⁷ By codifying the international standards which apply to warring countries, these bodies help to foster a "climate of international accountability."⁸ This climate cannot be controlled by any individual government, and forces all nations to recognize that their actions are subject to international comment and censure.⁹

The most serious obstacle to the maintenance of humanitarian law standards stems from the use in modern conflicts of primarily guerrilla-style tactics. These conflicts are both international and internal in nature, but many sovereign countries refuse to acknowledge the international aspects of the conflicts. Such a denial bars any international action because domestic insurgencies are not subject to international intervention.

The most striking problem of humanitarian law today is its general lack of applicability. In the past fifteen years several internal and international armed conflicts have occurred. However, in almost every case at least one of the parties to the conflict did not consider international humanitarian law to be applicable.¹⁰

⁵ Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 115 (1985). "In essence, the necessities of war must be balanced against the laws of humanity. In traditional terms, this balance requires a consideration of three basic principles; chivalry, military necessity, and humanity." *Id.*

⁶ Gerster & Meyer, *New Developments in Humanitarian Law: Challenge to the Concept of Sovereignty*, 34 INT'L. & COMP. L.Q. 267, 274 (1985). "States defending their national sovereign interests may prevent the enforcement of humanitarian law not necessarily because they are inhuman, but because they give their national interests higher priority." *Id.*

⁷ *Id.* at 272. "The ingenuity is the enforcement procedure which gives impartial humanitarian organizations the opportunity not to condemn governments but rather protect the individual. . . ." *Id.*

⁸ Ramcharan, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights in Non-International Armed Conflicts*, 33 AM. U.L. REV. 99, 100 (1983).

⁹ *Id.* "The practical consequence of accountability is that no government can feel secure that its transgressions will be kept secret for long, or that it will not be called upon, at some time, to answer to world public opinion." *Id.*

¹⁰ Gerster & Meyer, *supra* note 6, at 267.

The need to devise some type of international protection for the victims of "internal" conflict is obvious. Eighty percent of the casualties of internal conflict since World War II have been women and children.¹¹ International organizations in recent years have been vocal, but ineffectual, proponents of protection for war victims. This protection has focused on the women and children caught in these internal types of conflict.¹²

The continuing increase in the number of conflicts in the world is largely attributable to domestic insurgencies which are both internal and international in scope.¹³ Despite the severity of the problem, there is no uniform international standard which has been used to monitor the standards of conduct in these situations. This problem requires a modification of traditional concepts of immunity afforded to sovereign nations when dealing with domestic conflicts. Where an insurgent group seriously threatens an existing government, and enjoys significant civilian support, it wields some portion of the sovereign power. As one commentator noted, "the traditional concept of sovereignty no longer fits the necessities of modern international law. The idea that sovereignty can neither be limited or divided is contrary to modern developments in international sovereignty."¹⁴ Because of this bifurcation of a country's sovereign power, the conflict is between "sovereign" actors and should warrant the application of international standards of conduct.

In an effort to apply international standards to these conflicts, proponents of international humanitarian law recently attempted to develop a "gradation of the legal norms applicable to protect the victims of domestic conflicts."¹⁵ These attempts flow from the practical realization that, absent the assistance of the international community, the victims of internal conflicts are subject to unmitigated suffering and abuse. The International Committee of the Red Cross (ICRC) has aided victims of domestic conflicts since the Russian Revolution of 1917,¹⁶ and performs most of its activities in domestic conflicts. The ICRC remains severely restricted when helping civil-

¹¹ Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflict*, 72 AM. J. INT'L L. 272 (1978).

¹² Ramcharan, *supra* note 8, at 103.

¹³ Baxter, *Humanitarian Law or Humanitarian Politics*, 16 HARV. INT'L L.J. 1, 8 (1975). "There have been non-international conflicts in abundance in recent years, and a great many international armed conflicts like that in Vietnam have an element of internal armed conflict as well." *Id.*

¹⁴ Ramcharan, *supra* note 8, at 277.

¹⁵ Junod, *Additional Protocol II: History and Scope*, 33 AM. U.L. REV. 29 (1983).

¹⁶ A. ROBERTS & R. GUELFES, DOCUMENTS ON THE RULES OF WAR 447 (1982).

ians in such domestic conflicts.¹⁷ It is the victims of these domestic conflicts who most desperately require protection. The United Nations has not adequately addressed the issue of civilian protection within these internal types of conflicts.¹⁸

Recently the international community has begun to recognize the need to protect women and children victimized by domestic wars. The U.N. declared 1979 as the International Year of the Child.¹⁹ This declaration was one of the first concerted efforts to bring the rights of children to the forefront of the international consciousness.²⁰ The focus on children's rights during periods of conflicts is a product of a universally held ideal that children should not be involved in armed combat, and that the protection of these innocent victims of war should be treated as a top priority. "The essence of special protection for children, indeed its very root, is the notion that their blood should not be spilled during armed conflicts."²¹

This Note addresses the protection of the rights of children during internal and international conflict. The conscious desire of the international community to protect children has its roots in traditional noncombatant protection, designed to protect the innocent civilian population, as articulated in the Geneva Convention of 1949.²² The desire to protect children through international legal instruments emerged in the 1970s, and was specifically applied to children in the amendments to the Geneva Convention in the Protocols of 1977.²³ It was most recently discussed and altered in the International Diplomatic Conference of the Commission on Human Rights in 1986.²⁴ This Note analyzes the limitations and problems of the accepted codifications, explores the goals stated by the international bodies, and evaluates the potential success of the proposed solutions. Remaining voids in the protection of children today are then specifically addressed in an analysis of the report of an Adjunct Committee of the International Rights of the Child, a working

¹⁷ Veuthy, *Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Commission of the Red Cross*, 33 AM. U.L. REV. 83 (1983).

¹⁸ Mann, *supra* note 4, at 56.

¹⁹ Cohen, *The Human Rights of Children*, 12 CAP. U.L. REV. 373 (1983).

²⁰ Schwertzer, *A Children's Rights Convention — What is the U.N. Accomplishing?*, in FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS 115 (1981).

²¹ Mann, *supra* note 4, at 48.

²² Meron, *The Geneva Convention as Customary Law*, 81 AM. J. INT'L L. 348, 366 (1987).

²³ Lysaght, *Protocol II and Common Article III*, 33 AM. U.L. REV. 11 (1983).

²⁴ Mann, *supra* note 4.

group of the U.N.'s Human Rights Commission.²⁵ Although this report, and the proposals which remain in the preliminary drafting stages, have not been formally presented to the U.N., they provide valuable insight into the inadequacies of the existing laws regarding child protection and of the proposed revisions of those laws.²⁶

II. THE GENEVA CONVENTION OF 1949

As a result of worldwide outrage at the Third Reich's treatment of civilians during World War II, there was a universal call to codify international law protections for civilians during combat situations.²⁷ This call was embodied in the Geneva Convention of 1949 (the Convention), a Convention which remains widely accepted.²⁸ A variety of international bodies emerged to insure adherence to the Convention standards.²⁹ Unfortunately, the Convention's application has been severely restricted by its traditional inapplicability to internal armed conflict.³⁰ Its language allows for intercession of some international bodies, such as U.N. Commissions and the Red Cross, in a completely neutral manner.³¹ Nonetheless, any proposed intervention may be barred by the sovereign government if it believes it would constitute an intrusion into domestic affairs.³²

Article III³³ of the Convention notes that "victims in an armed conflict not of an international character deserve some

²⁵ *Pre-sessional Working Group of the Commission on Human Rights, statement submitted by Radda Barnen in consultative status with ESCOR on behalf of itself*, U.N. Doc. E/CN.4/1987/WG.1/WP.3 (1987) [hereinafter *Radda Barnen Statement*].

²⁶ *Id.*

²⁷ Meron, *supra* note 22, at 348.

²⁸ *Id.* at 365.

²⁹ Gerster & Meyer, *supra* note 6, at 270. "If a humanitarian organization such as the ICRC requires the parties to the conflict to apply the provisions of the Geneva Conventions, such a request will almost always be regarded by at least one of the parties as political interference." *Id.*

³⁰ Lysaght, *supra* note 23, at 11. Regarding Article III of the Geneva Convention, "It provides victims of an armed conflict not of international character some protection, but much less protection than the remaining articles of the four Conventions prescribe for victims of international conflicts." *Id.*

³¹ Gerster & Meyer, *supra* note 6, at 282.

³² *Id.* at 270.

³³ M. BOTHE, *NEW RULES FOR VICTIMS OF ARMED CONFLICT* 477 (1982). The pertinent provisions of Article III are:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness,

protection,"³⁴ but, this limited protection does not specifically or adequately protect them.³⁵ The Article leaves many of the dangers confronted by civilians in today's conflicts unaddressed. Modern internal guerrilla warfare often results in insurgents looking to the civilian population for support.³⁶ This close interaction between guerrillas and civilians causes a "blending" of the two groups and makes identification of civilians difficult.³⁷

Traditionally, children were protected by cultural presumptions that they were noncombatants.³⁸ The use of children as participants by the Third Reich, and by underground movements fighting the Nazis in the Second World War, were the first widespread uses of children in combat in modern conflicts.³⁹ In the 1960s the

wounds, detention, or in any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.

To this end, the following acts shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons;

a) violence to life and person, in particular murder of all kind, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized by civilized peoples.

(2) The wounded and the sick shall all be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id.

³⁴ Junod, *supra* note 15, at 30. "Parties to an internal armed conflict have identical rights and obligations of purely humanitarian character under Article III, although Article III specifies clearly that it does not affect the legal status of the parties." *Id.*

³⁵ Mann, *supra* note 4, at 34.

³⁶ *Id.* at 36. "Thus the general imbalance of parties in such conflicts and the often seen recourse by the guerrilla movements to the civilian populations for support and assistance would have to be considered." *Id.*

³⁷ *Id.* "Anti-guerrilla warfare, usually aimed at destroying the guerrilla infrastructures, also raised new dangers for the traditional concept of distinction between combatants and noncombatants." *Id.*

³⁸ *Id.* at 56.

³⁹ *Id.* at 35. "It is apparent that the use of children in the army of the Third Reich at the end of World War II and the participation of children in some of the partisan campaigns against the Nazis, were seen as aberrations which did not disturb the pre-existing assumption." *Id.*

traditional lack of child involvement in combat virtually disappeared.⁴⁰ It is because of this escalation in the use of children during combat that Article III has become inadequate. Article III's blanket protections are no longer sufficient to protect children from their participation in the new types of warfare.⁴¹ Article III was a compromise between countries favoring absolute autonomy for internal disputes and countries calling for uniform adherence to the international standards.⁴² The compromise virtually eliminated any remnants of the intentions of the original drafting countries to apply the Article to internal conflicts.⁴³

However limited the application of Article III may be, it requires that signatories nominally observe those standards of conduct deemed fundamental to humanitarian standards even in internal conflicts.⁴⁴ In reality, Article III does little more than protect the most fundamental human values, and prescribes no extensive codification of standards applicable to belligerents in internal conflicts.⁴⁵ Its provisions are severely limited because they do not oblige sovereign governments to permit intervention.⁴⁶ Enforcement of any norms for humane action therefore relies almost entirely on the prescriptions of domestic law.⁴⁷ This situation creates problems in providing protection because rebel forces are, by nature, inherently illegal. Perceived as traitors, the guerrillas are provided with only the most minimal, if any, protections by the national government. In addition, domestic law does not typically protect civilians coerced into cooperating with the guerrillas.

⁴⁰ *Id.* at 56.

⁴¹ Gerster & Meyer, *supra* note 6, at 380.

⁴² Bothe, *Article III and Protocol II: Case Studies of Nigeria and El Salvador*, 31 AM. U.L. REV. 899 (1982).

⁴³ Lysaght, *supra* note 23, at 11. Common Article III is the outcome of a compromise hammered out at the 1949 Diplomatic Conference between those who believed that the Geneva Conventions should apply to all wars of a sufficient scale and those who felt that they should have no application except in armed conflicts between the states. *Id.*

⁴⁴ A. ROBERTS & R. GUELFs, *supra* note 16, at 477. The 1949 Geneva Convention rejected the notion that all laws of war should apply to internal conflicts. But negotiations resulted in the adoption of Common Article III of the four 1949 Geneva Conventions, which binds parties to observe a number of fundamental humanitarian principles in "armed conflicts" of an international character. *Id.*

⁴⁵ *Id.* at 448. Useful as Common Article III is, its provisions do little more than extend certain fundamental humanitarian protection to the noncombatants. They do not provide any definite codification of the laws of war for non-international armed conflicts. Moreover, the provisions are so general and incomplete that they cannot be regarded as an adequate guide for the conduct of belligerents. *Id.*

⁴⁶ Veuthy, *supra* note 17, at 87.

⁴⁷ Self, *The Status of Combatants in Non-international Armed Conflicts Under Domestic Law & Transnational Practice*, 33 AM. U.L. REV. 53, 54 (1983).

Although global acceptance of the Convention is remarkable, one commentator reported that international consensus defines Article III as an "inadequate safeguard of humanitarian rights in internal armed conflicts."⁴⁸ Limitations in the language of the Article itself, and drastic changes in military tactics which indiscriminately use children in combat, render Article III incapable of adequately protecting children in modern warfare.

The use of children as combatants has traditionally been rejected by military tacticians.⁴⁹ Today it is the norm, however, not the exception, to see children as soldiers in many of the global conflicts.⁵⁰ The Vietnamese and Kampuchean hostilities were marked by the active recruitment of children for military "manpower."⁵¹ Modern warfare has both destroyed the presumption of innocence associated with children in war-torn territory, and allowed for the active recruitment and abduction of children as acceptable methods to augment military forces.⁵² Widespread child recruitment in the Middle East reveals an altered attitude towards active child involvement in combat.⁵³ In many Middle Eastern countries involved in combat, cultural leaders characterize the voluntary participation of young men in the conflict as an "honor."⁵⁴ Unfortunately, even if a government would espouse adherence to international standards prohibiting child involvement, most sovereigns are reluctant to recognize the status of the insurgent group as a semi-sovereign power.⁵⁵ Without this recognition, the conflict remains categorized as an internal problem not subject to interna-

⁴⁸ Cantrell, *supra* note 3, at 310.

⁴⁹ Veuthy, *supra* note 17, at 50.

⁵⁰ *Id.* at 51. "Children have been observed in the Ethiopia-Eritrea conflict. In Indo-China children have participated in the hostilities since at least the 1960s. This pattern has, if anything, worsened over time. The on-going battle between Kampuchean resistance fighters and the Vietnamese forces has led to increased recourse to children for 'manpower.'" *Id.*

⁵¹ *Id.* at 35. "The wars in Indo-China and elsewhere had seen a growing number of children used in a variety of capacities. Any assumption that children could not contribute to the war effort was no longer sustainable." *Id.*

⁵² Mann, *supra* note 4, at 51. The pervasive use of children in combat has altered traditional presumptions of the innocence of children by military personnel. "In Nicaragua children played an active role in the fighting versus the Somosa regime, and were likely to be shot on sight by the National Guard as a result. Today they can be found on both sides of the continuing struggle between the Sandinista government and the US-backed contras." *Id.*

⁵³ *Id.*

⁵⁴ U.N. Doc. E/CN:4/Sub.2/1983/SR.12 25 Aug. 1983 paras. 27, 28.

⁵⁵ A. ROBERTS & R. GUELFES, *supra* note 16, at 447.

tional intervention and the enforcement of international standards of conduct against the guerrilla group is effectively prevented.⁵⁶

III. THE PERIOD BETWEEN THE GENEVA CONVENTION AND THE 1977 PROTOCOLS

With the adoption of the Geneva Convention in 1949, the world codified standards to protect war victims. Limits placed by sovereign nations on international agencies, such as the U.N. and the Red Cross, restrict their ability to help those victims of internal conflicts. The ICRC formally addressed the problem for the first time, at the 21st International Conference, when it suggested that "additional rules relating to noninternational armed conflicts be adopted in the form of a Protocol or a separate, additional convention."⁵⁷ This suggestion followed an international debate throughout the 1960s regarding the need to improve Article III⁵⁸ and provide more complete protection to civilians.⁵⁹ The problems inherent in Article III caused concern among many of the U.N. member states, and for the first time there was recognition of the U.N.'s failure to develop instruments to protect effectively civilian children.⁶⁰

Historically, the world community has treated irregular combatants as aberrants from the rules of conflict. The community believed that their tactics inherently violate the laws of war, and that they deserve severe punishment, not protection.⁶¹ Contemporary conflicts, such as the Ethiopian-Eritrean and Indo-Chinese wars,⁶² have been fought by irregular forces consisting of civilian children. The children were used in actual combat and, more often, in "auxiliary capacities" by both sides of the conflict.⁶³ The use of children

⁵⁶ Solf, *supra* note 2, at 932. "Unfortunately, the El Salvador government's zeal to assume humanitarian and human rights obligations is not matched by any effort to enforce their norms." *Id.*

⁵⁷ A. ROBERTS & R. GUELFES, *supra* note 16, at 448.

⁵⁸ Junod, *supra* note 15, at 31.

⁵⁹ Lysaght, *supra* note 23, at 14. "It was felt that provisions regulating the methods of combat in non-international armed conflict and in particular safeguarding the civilian population were needed." *Id.*

⁶⁰ Schwertzer, *supra* note 20, at 130.

⁶¹ Roberts, *supra* note 5, at 129. "[The] traditional international perspective that irregulars, insofar as they conceal their identity as combatants to gain the advantage of surprise, violate[s] the principle of humanity underlying the laws of war and are undeserving of legal recognition and protection." *Id.*

⁶² Veuthy, *supra* note 17, at 51.

⁶³ Mann, *supra* note 4, at 36. At the Conference of Government Experts called by the

as soldiers has established a new level of participation by children as actual combatants.⁶⁴ This departs from the traditional image of irregular forces as rebels who masquerade as civilians while employing terrorist tactics against government troops. Guerrilla infiltration of, and assimilation into, the civilian population has also become a common means to increase civilian participation in the insurgent movement. This results in a "blurring" of the identity of noncombatants and causes most civilians within conflict territories to assume, accurately or not, a "quasi-guerrilla" status.⁶⁵ Thus, the protection afforded to civilians is jeopardized, while protection of guerrilla forces is increased.⁶⁶

Increased use of civilians by irregular forces also justifies lowering the already minimal protection of the civilian population.⁶⁷ The civilian role as an active combatant is apparently so pervasive as to no longer allow governmental forces to presume that civilians are not involved. The reaction of state troops to the marked increase in the use of civilians has been to refuse to presume that any civilian group located in areas controlled by the guerrilla forces are not belligerent.⁶⁸ This presumption of innocence has been one of the strongest tools in the protection of children.

The active use of children in combat has become more pervasive due to the unique moral codes espoused by some insurgent forces. Many insurgent groups involved in wars of insurgency and ideological rebellion recognize a child's ability to choose to participate in the protection or expansion of the group's ideological be-

ICRC in 1971, "concerns reflected not only on the direct use of children as soldiers, but also their use in various auxiliary capacities in such conflicts, most notably by the guerrilla groups." *Id.*

⁶⁴ *Id.* at 37.

⁶⁵ Roberts, *supra* note 5, at 131-32.

⁶⁶ Mann, *supra* note 4, at 36. "The general imbalance of the parties in such conflicts and the often seen recourse by guerrilla movements to the civilian population for support and assistance would have to be considered." *Id.*

⁶⁷ Roberts, *supra* note 5, at 129. "The consequence of these changes is to tip the balance of protection in favor of irregular combatants to the detriment of the regular soldiers and the civilians." *Id.*

⁶⁸ Gerster & Meyer, *supra* note 6, at 271.

Women, children and others outside the hostilities are at the mercy of, and may be terrorized by uncontrollable armed forces and they may continue to be tortured, deported and killed arbitrarily without trial. In these cases, the chances of getting the Geneva Conventions formally accepted are slim. The most important issue, therefore, is how to get the contents of humanitarian law accepted without taking a political position with regard to the classification of the conflict.

Id.

liefs.⁶⁹ Support for this role of children rejects the international community's traditional abhorrence of child participation in armed conflict. As the delegate from the Republic of Vietnam remarked to the General Assembly of the U.N., "[a]ll women and children would be happy to see a child do something to show his love for his country. Since patriotism could only be demonstrated in war, there could be no question but that humanitarian law be applicable to it."⁷⁰ This perspective rejects any international standards that protect children by prohibiting their participation in armed conflict, because such standards would prohibit a child from demonstrating his patriotism.

Concern for the protection of victims in armed conflicts and the inadequacies of Article III was formally expressed in the 1977 Protocols to the Geneva Convention.⁷¹ The First Protocol applies to the victims of international conflicts, and the Second Protocol specifically addresses those conflicts not defined as international by Protocol I.⁷² The Second Protocol manifests the desires to modify international humanitarian law to make it more applicable to domestic conflicts.⁷³

⁶⁹ Mann, *supra* note 4, at 42.

⁷⁰ *Id.*

⁷¹ M. BOTHE, *supra* note 33, at 473. Protocol I, Article 77:

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of age or any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not yet attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into the armed forces. In recruiting among those persons who have attained the age of fifteen years, but have not attained the age of eighteen years the Parties to the conflict shall endeavor to give priority to those who are oldest.

3. If in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the hands of the adverse party, they shall continue to benefit from the special protection afforded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of the adults, except where families are accommodated as family units.

5. The death penalty for an offense related to the armed conflict shall not be executed on persons who have not attained the age of eighteen years at the time the offense was committed.

Id.

⁷² *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Respect for Human Rights in Armed Conflicts*, 1977 U.N.Y.B. 706, U.N. Doc. E/CN.4/1977/SR113.

⁷³ Forsythe, *supra* note 11, at 293. "Those who prepared Protocol II of 1977 on non-

The initial controversy surrounding the 1977 Protocol stemmed from pressure exerted by Third World countries to allow worldwide national liberation groups, which comprise the majority of insurgent forces in "internal conflicts," to represent themselves on the drafting committee.⁷⁴ Such representation was vehemently opposed by the U.S. and Western European delegates because these groups did not have the official status required of participating members. Any recognition of the status of national liberation groups would warrant the characterization of the conflicts in which they were involved as international and allow for the application of the Geneva Convention protections for civilians.⁷⁵ This first hurdle was indicative of the problems that the Convention would face throughout the debates, emphasizing the disparate perspectives between the Western and Third World countries. The preliminary problem of determining committee representation foreshadowed accusations that the Protocols attempt to invade areas previously considered "sacrosanct" by the sovereigns.⁷⁶

The draft articles provided for the explicit protection of children, rather than including children by implication in a blanket civilian protection.⁷⁷ Many delegates felt that the documented increase of direct participation by children eliminated the international obligation to provide special protections to them.⁷⁸ The protection of children raised specific questions as to the definitions of direct and indirect combat participation, and as to the determination of an international age of minority status.⁷⁹ The concern for children survived the debates and reappeared throughout the drafting process either as a desire to remove children from combat

international armed conflicts sought, at least initially, a solution for most of the humanitarian problems encountered in internal war." *Id.*

⁷⁴ Baxter, *supra* note 13, at 10.

⁷⁵ Gerster & Meyer, *supra* note 6, at 347. "In order to insure broad participation, the Conference invited certain national liberation movements to participate fully in the deliberations, although only states were entitled to vote." *Id.*

⁷⁶ Forsythe, *supra* note 11, at 278. "At the start of the 1977 session the Pakistan delegations carried on the discussions with numerous other delegations and realized that there was considerable dissatisfaction with . . . the fact that it ventured into domains which they considered sacrosanct . . ." *Id.*

⁷⁷ See M. BOTHE, *supra* note 33, at 473.

⁷⁸ Mann, *supra* note 4, at 37.

⁷⁹ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, (1978). U.N. Doc. CDDH/III/304 para.17 [hereinafter *Diplomatic Conference Records*].

territory, or as a recognition that their participation in combat interfered with the application of protective instruments.⁸⁰

Modifications were proposed to create standards that apply to children participating in armed conflicts rather than to unrealistically bar all child participation in armed conflicts.⁸¹ These modifications appear to decrease the actual protection of children because they accept the inevitable involvement of children in combat, but they are an attempt to create practical guidelines that insure some adherence by participating nations.⁸² Unfortunately, the final draft of the Protocol rejected the modifications and maintained a strict prohibition against the use of children as members of the combat forces, finding it the most unacceptable and offensive form of direct participation in hostilities.⁸³ The unyielding language adopted by the Commission ignores the reality of child participation in combat, and nullifies the usefulness of the Protocol standards.⁸⁴

The other area of debate was in determining an age of minority.⁸⁵ The ICRC proposal defining the minimum age as fifteen received widespread criticism. Many Third World delegates acknowledged the fact that children of fifteen and sixteen were physically superior to the adult males in their countries.⁸⁶ As a result of their physical advantage, any requirement that eliminates the participation of fifteen and sixteen year olds in combat would be ignored by a large number of countries.⁸⁷ Simultaneously, the Brazilian delegation articulated sentiments of other countries that any age limit below eighteen failed to protect children adequately.⁸⁸ The most practical response came from Vietnam, which accepted the inevitable participation of children under the age of eighteen. The Viet-

⁸⁰ Mann, *supra* note 4, at 38.

⁸¹ See *Diplomatic Conference Records*, *supra* note 79.

⁸² *Id.*

⁸³ *Id.* at 48. "The original ICRC proposals provided that children not be allowed to take any part in any hostility." *Id.*

⁸⁴ *Id.* at 40. "[I]n view of what might unfortunately be considered the military necessity of using children in such types of conflict it is important not to put the age limit on their use at an unreasonably high level lest we invite wholesale disregard for the provision." *Id.*

⁸⁵ *Id.* at 39.

⁸⁶ *Id.* at 42. "It was also noted that persons of age fifteen and sixteen were often better equipped to fight than were their fathers. It was therefore suggested that an age limit of eighteen would be unacceptable to a large number of states." *Id.*

⁸⁷ *Id.*

⁸⁸ *Diplomatic Conference Records*, *supra* note 79, at 328. Brazil proposed amendments to both Protocols raising the age for participation to eighteen as a "condemnation of the policy of using minors for military purposes". *Id.*

name proposal maintained the eighteen year age limit, but called on parties to treat those combatants under the age of eighteen with special consideration.⁸⁹ This position adopted by the Protocols advocates preferential treatment for children, but recognizes the inescapable reality of child participation in conflicts.

Additionally, the Protocols introduce protections not expressed in the previous Convention,⁹⁰ such as language encouraging the use of all “feasible measures” to remove the children under the age of fifteen from the area of conflict.⁹¹ The language of the Protocols was altered in the transition from the original drafts to the final edition. The changed version required that the nations employ all “feasible measures” to remove children from participation in the hostilities, rather than the stricter requirement of the earlier versions which required the removal of children from the hostile territory.⁹² Even though some commentators identify this modification as a fundamental flaw in the Protocols by providing a defense for the use of children due to the “infeasibility” of removing them from the area,⁹³ the Protocol retains its essential objective protecting children.

Unlike general prohibitions on civilian involvement, sanctions punishing child involvement fall on the party responsible rather than on the children who become participants. “It should be noted that in the context of the loss of civilian protections, the obligation is on the civilian not to do the prohibited act of forfeiting his or her protections. In the context of the protection of children, the obligation lies on the party to the conflict to insure that children do not do the prohibited acts.”⁹⁴ It is in this fundamental distinction that traditional allowances for children remain alive. If it is determined that children are not responsible for their actions, then there can be no “voluntary” child participation.

Traditionally, the requirement of direct participation as a prerequisite to combatant status encourages the continuing protection of incidentally involved civilians.⁹⁵ The requirement of direct par-

⁸⁹ *Id.* at 303.

⁹⁰ Lysaght, *supra* note 23, at 23.

⁹¹ *Id.* Protocol II 4(8)(c) states that “Children under the age of fifteen are not allowed to take part in the hostilities, and measures are to be taken to remove them from the area of hostilities.” *Id.*

⁹² Mann, *supra* note 4, at 47.

⁹³ M. BOTHE, *supra* note 33, at 477 n.16.

⁹⁴ Mann, *supra* note 4, at 47.

⁹⁵ Forsythe, *supra* note 11, at 295. “Further, the very existence of the Protocol and the

ticipation is extremely relevant in the protection of children, whose roles are primarily of an indirect nature. "Direct part in hostilities is a phrase which includes attempting to kill, injure, or capture enemy persons or to damage material, artillery shooting, ground observation, logistic support both in preparation for and return from combat and the delivery of arms."⁹⁶ Indirectly involved children would not be subject to the severe penalties imposed on civilians who participate directly in the hostilities. Children would remain protected until the time that their actions could be classified as direct participation.⁹⁷ By only barring direct participation of children, the Protocols fail to achieve fundamental goals of the ICRC. The original drafters wanted to prevent the participation of children in any capacity in armed conflicts.⁹⁸ By protecting children only from participating directly, there remains great latitude to use children legally in combat.

The language condemning those civilians who directly participate emerges from the belief that civilians who participate directly voluntarily abdicate their status as a protected class.⁹⁹ This condemnation would never apply to children who are incapable of voluntarily choosing to relinquish their civilian status. Therefore, children could never be considered as combatants, regardless of the level of their participation. This argument extends one of the basic principles of Protocol I, that the tactics used by the guerrilla forces to enlist civilian cooperation eliminate any true choice by civilians to participate. In light of the illegitimate tactics employed by guerrilla forces to recruit soldiers, it appears that all civilians, regardless of the level of their involvement with the guerrilla forces, should remain protected.¹⁰⁰

The Protocols require that government forces assume that unidentifiable individuals are noncombatants, rather than accept that all civilians are quasi-belligerents.¹⁰¹ This requirement would specifically protect children who are not typically identifiable as belligerents.

debates thereon lend further legitimacy to the basic notion of human treatment for those taking no active part in hostilities." *Id.*

⁹⁶ Mann, *supra* note 4, at 46.

⁹⁷ *Id.*

⁹⁸ *Id.* at 44. "No longer does any reference to voluntary enrollment raise the possibility that voluntary participation in hostilities would be permitted." *Id.*

⁹⁹ *Id.*

¹⁰⁰ Junod, *supra* note 15, at 320. "It may be argued that the individual civilian who takes a direct part in hostilities does not deserve a protected status coequal with civilians who never took up any arms." *Id.*

¹⁰¹ Roberts, *supra* note 5, at 150.

erents. Protocol II extends and identifies new standards of protection for noncombatants.¹⁰² It admits the need for definitional flexibility in interpreting the rules of war, and pragmatism in creating reasonable standards of conduct.¹⁰³ The Protocols have taken into account modern developments in warfare and have helped articulate practical standards of civilian protection.¹⁰⁴ Civilian protection requirements are noted as the most important achievements of the Protocols.¹⁰⁵ They expand on the protections afforded by Common Article III of the Geneva Convention but also specifically provide for the application of international standards to many internal conflicts.¹⁰⁶ Additionally, the Protocols modify the strict definition of international conflict promulgated by the Geneva Convention by expanding the definition to include a variety of conflicts not previously addressed.¹⁰⁷

The Protocols introduce more stringent policies of civilian protection, especially for children, than previously articulated in the Geneva Convention.¹⁰⁸ The rationale behind these policies is not solely to increase the protection afforded to children in conflicts, but also to eliminate the advantages of insurgent groups that inculcate children into their forces.¹⁰⁹ The guerrillas, through the use of various threats and propaganda, are able to elicit extensive civilian support,¹¹⁰ including large numbers of child recruits.¹¹¹ By creating an international standard applicable to both parties to a conflict, the U.N. would eliminate the growing use of children in armed conflicts.¹¹² But, where sovereign states choose to ignore the status of rebel forces and define the conflict as internal, the international community cannot intervene and sanction the insurgent group.¹¹³

¹⁰² Mann, *supra* note 4, at 39.

¹⁰³ *Id.*

¹⁰⁴ Gasser, *Brief Analysis of the 1977 Geneva Protocols*, 19 AKRON L.REV. 527, 528 (1986).

¹⁰⁵ Kalshoven, *Humanitarian Law-Reaffirmation and Development*, AM. U.L.REV. 107 (1978). "[Protocol I] reaffirmed the principle of distinction between the civilian population and combatants" The obligation to make this distinction serves, as the Article states, to "insure respect for and protection of the civilian population and civilian objects." *Id.*

¹⁰⁶ Sepurveda, *Interrelationships in the Implementation and Enforcement of International Humanitarian and Human Rights Law*, 33 AM.U.L.REV. 117, 118 (1983).

¹⁰⁷ A. ROBERTS & R. GUELFES, *supra* note 16, at 448.

¹⁰⁸ Kalshoven, *supra* note 105, at 93.

¹⁰⁹ Junod, *supra* note 15, at 34.

¹¹⁰ Roberts, *supra* note 5, at 131-2.

¹¹¹ Mann, *supra* note 4, at 36.

¹¹² Moreillon, *Humanitarian Law, the ICRC and Promoting the Geneva Convention*, 31 AM.U.L.REV. 824 (1982).

¹¹³ Veuthy, *supra* note 17, at 44.

Unfortunately, the creation of international standards has not solved the problem of child participation in warfare. Governments desire to remain autonomous in deciding whether or not internal conflict mandates international attention. Therefore, governments may refuse to acknowledge the applicability of the Convention to the hostilities until it is strategically advantageous to them to interfere with guerrilla use of the civilian population.¹¹⁴

The additional Protocols were formally adopted by consensus on June 8, 1977.¹¹⁵ The final drafts were opened for ratification after being passed by a vote of eighty-seven to one.¹¹⁶ Even the most vocal supporters of international human rights proceeded slowly in ratifying the Protocols.¹¹⁷ This passage marked recognition by the international community of the need to address the problem of civilian protection, and it reiterated the principles underlying the 1949 Convention that civilian protection had to become a priority of concern in the international community. Regardless of their shortcomings, the additional Protocols advance humanitarian concepts of civilian protection within the framework of the laws of war.¹¹⁸ The Protocols represent a step towards reducing suffering caused by internal and international conflicts.¹¹⁹

IV. RECENT ATTEMPTS TO INCREASE PROTECTIVE INSTRUMENTS FOR CHILDREN IN ARMED CONFLICTS

Adoption of the two Protocols¹²⁰ was noted by the international community as a major advancement in the cause of human rights, but, "[b]ehind the facade of support lay profound reservations about the Protocol by a large number of states, most of them in the

¹¹⁴ A. ROBERTS & R. GUELFIS, *supra* note 16, at 448. "In the past governments have often denied the application of Common Article III of the 1949 Geneva Conventions and this may raise questions regarding the extent to which the 1977 Geneva Protocols will be applied in practice." *Id.*

¹¹⁵ *Diplomatic Conference Records*, *supra* note 79, at 706.

¹¹⁶ *Id.*

¹¹⁷ *Id.* See also DeSaussure, *Introduction to the Symposium on the 1977 Protocols*, 19 AKRON L.REV. 523 (1986). The U.S. Senate, which must give its advice and consent before any treaty can come into force in the U.S., is well-known for its failure to give its consent to many seemingly meritorious treaties. Moreover, there are numerous treaties which have been signed by the U.S. delegates to international conferences which for one reason or another, have never been submitted to the Senate for their advice and consent. *Id.*

¹¹⁸ Demarest, *supra* note 1, at 26. "The additional Protocols advance the laws of war and may help relieve unnecessary suffering and waste in future combat." *Id.*

¹¹⁹ *Id.*

¹²⁰ 16 I.L.M. 1391 (1977).

By creating an international issue out of the Iranian violations in 1983, the international community was forced to recognize the need to protect the civilian population during periods of armed conflict. This recognition emerged in a general debate on human rights, and resulted in the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.¹³⁸ The Declaration reasserts the dedication of the U.N. and its members to the special protection of women and children during a conflict by virtue of their civilian status.¹³⁹ The importance of the Declaration lies in its acknowledgment that civilians do participate in guerrilla conflict.¹⁴⁰ This realistic attitude is a major advancement in the creation of effective international protective devices.

The Declaration reaffirms the U.N.'s commitment to the protection of children during armed conflict. It has not been effective, however, because it lacks official codification of international standards of conduct, and merely represents a consensus of the members. Despite its apparent ineffectiveness, the agreement did prompt the U.N. to place the issue of children's rights before the International Diplomatic Conference of the Commission on Human Rights (the Conference) in 1986 in the context of protecting human rights in general.¹⁴¹

Among the primary concerns of the Conference was the vacuum left by international legal instruments regarding the protection of children's rights in general.¹⁴² Because of the escalating involvement of children in conflicts, and the lack of global adherence to the Protocols of 1977, mechanisms were needed to protect children specifically. Many participants at the Conference wanted to prohibit the participation of children in armed conflict and insure that, by virtue of their age, they would maintain noncombatant status.¹⁴³

One of the subcommittees of the Conference, the Working Group on the Rights of Children, noted the need to address children's involvement in combat because this issue is completely absent

¹³⁸ *Declaration on the Protection of Women and Children in Emergency and Armed Conflicts*, G.A. Res. 3318, 39 U.N. GAOR at 307, U.N. Doc. A/AN.3/1982/SR115 (1984).

¹³⁹ *Id.* Specifically, the Declaration noted "the need to provide special protection for women and children belonging to the civilian population." *Id.*

¹⁴⁰ Mann, *supra* note 4, at 54. "The language seems to have acknowledged the fact an assumption of nonparticipation in hostilities by these groups could no longer be made." *Id.*

¹⁴¹ *Id.* at 55.

¹⁴² *Id.* at 48. "One of the original objectives of the Diplomatic Conference was to draft provisions insuring that children would not lose their status as civilians and the rights to general and special protections from it." *Id.*

¹⁴³ *Id.* at 45.

from existing human rights documents.¹⁴⁴ The Working Group produced a draft provision which ignored the long debates over the terminology of the Protocols and committed grave errors by reducing the already minimal protection afforded to children involved in conflicts.¹⁴⁵ The language of the draft provision implies an allowance for the voluntary participation of children, reflecting a preference for military manpower rather than for keeping children uninvolved.¹⁴⁶ By its ambiguous language the provision has weakened, rather than reinforced, the protection afforded to children.¹⁴⁷ By broadening categorical exceptions which allow children to participate in combat, the provision dramatically reduces the limitations on the use of child combatants.¹⁴⁸

The Conference even challenged the prohibition on the recruitment of children to the armed forces.¹⁴⁹ The Conference indicated its lack of commitment to children by its willingness to sustain a debate on eradicating the Protocol's absolute ban on the recruitment of children into the armed forces.¹⁵⁰ Additionally, the Conference refrained from completely barring the voluntary enrollment of children.¹⁵¹ The Conference thus virtually eliminated all real protection afforded to children, in terms of both special and general protection,¹⁵² because it will be nearly impossible to disprove alleged voluntary involvement by children.

The reluctance of the Conference to specify limits on the use of children stemmed, in part, from the concern of many delegates that the codification of international law would restrain the freedom of sovereign governments to use their discretion in disposing of insurgents.¹⁵³ By recognizing the official status of guerrilla forces the guerrillas are protected by the laws of war. While codification expands protection to guerrillas, the resulting presumption of civilian involvement minimizes the protection afforded to civilians.¹⁵⁴

¹⁴⁴ *Id.* at 55.

¹⁴⁵ *Id.* at 56.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 49.

¹⁴⁸ *Radda Barnen Statement, supra* note 25, at 3.

¹⁴⁹ Mann, *supra* note 4, at 44.

¹⁵⁰ *Id.* at 49.

¹⁵¹ *Id.* "Permitting voluntary enrollment of children under fifteen would also appear to violate the proscription on any participation in the hostilities." *Id.*

¹⁵² *Id.* at 47.

¹⁵³ Veuthy, *supra* note 17, at 88. "Too many of the governments participating in the Conference were trying to avoid a codification that would restrict their freedom of action in repressing insurgent or secessionist movements." *Id.*

¹⁵⁴ Roberts, *supra* note 5, at 130. "[Y]ou allow the irregular combatant to be brought

One effect of official recognition of the legitimacy of guerrilla forces is that national government has greater latitude in assuming the combatant status of the civilians with whom the guerrillas associate.

Another problem recognized by the Conference participants is the inability of the international community to effectively monitor adherence to the codified standards by the insurgent groups.¹⁵⁵ Without clearly demarcated territory or encampments, something highly unusual in guerrilla warfare, the insurgent forces become difficult to locate and monitor.¹⁵⁶ Additionally, the "grassroots" nature of most insurgencies lends itself to close interaction with civilians, therefore multiplying the problems of distinguishing true military targets from civilian areas.¹⁵⁷

The Conference provision used vague language because of the reluctance of many governments to protect those civilians assisting rebel forces.¹⁵⁸ Although one of the most vocal proponents of children's rights, the ICRC, supports the granting of immunity for those civilians who are only indirectly involved,¹⁵⁹ the final Conference proposal reflects no concept of immunity. Not all of the ICRC concerns were ignored. The ICRC wants to extend protection to all children located in the area of conflict, and not limit the protection to a specifically demarcated area.¹⁶⁰ While this is an unusually broad request for protection in the international arena, insurgent warfare is traditionally geographically transient. The Conference, noting these trademarks of guerrilla warfare, acknowledged the need to expand the geographical area of protection for noncombatants.¹⁶¹

The primary goal of the Conference was to completely protect children involved in a conflict, irrespective of the internal or inter-

within the proper ambit of *jus in bello*, then you open 'Pandora's Box' and you make unmitigated misery for every civilian who loses what precious little protection he has under the Law of War." *Id.*

¹⁵⁵ Dinstein, *Intrastate Armed Conflict*, 31 AM.U.L.REV. 550 (1982).

¹⁵⁶ *Id.*

¹⁵⁷ 16 I.L.M. 1391 (1977). The letter stated in part, "Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population or otherwise comply with the laws of war. This would endanger the civilians among whom terrorists and other irregulars attempt to conceal themselves." *Id.*

¹⁵⁸ Cantrell, *supra* note 3, at 320. "Government forces have no compelling reason to tolerate civilians assisting rebels, and undoubtedly they will not extend this principle as far as desired." *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Mann, *supra* note 4, at 40. "The ICRC also makes it clear that the draft articles were intended to benefit all children in the whole of the territory of the parties to a conflict. This would mean a wider scope than that normally envisaged for humanitarian law." *Id.*

¹⁶¹ *Id.*

national nature of the conflict. Many concerned proponents of children's rights believe that mechanisms to administer international aid should be allowed to protect civilians in any type of armed conflict.¹⁶² Unfortunately, these goals were not achieved in the 1949 Convention or in the 1977 Protocols. The 1986 Conference rather than achieved the goals of protecting children, virtually abandoned that responsibility.¹⁶³ The U.N. records from 1983 through 1986 recorded only three instances of child participation in armed conflict around the world.¹⁶⁴ While this figure looks encouraging, it is more likely that the lack of documented infractions stems from the lack of substantiated information, rather than the lack of actual violations.¹⁶⁵

Commentators found the proposals of the 1986 Convention on Human Rights regarding children to be less compelling and less effective than the admittedly weak Protocols.¹⁶⁶ The ICRC criticized the new proposals which they perceived as further weakening the international protection of children.¹⁶⁷

The ICRC noted that an increasing number of international relief agencies were becoming active in internal conflicts, but remained severely restricted by the limited applicability of the 1977 Protocols.¹⁶⁸ The controversies surrounding the Protocols, both in their limited applicability and language, reaffirm the continued importance of Article III of the Geneva Convention as the "single, simple set of basic humanitarian standards with a flexible scope of application."¹⁶⁹ The lack of specific protection for children in Article III remains unacceptable.¹⁷⁰

¹⁶² Gerster & Meyer, *supra* note 6, at 282. "Finally, the Convention should give nongovernmental organizations the right to offer their services in order to protect victims notwithstanding the national or international status of the persons or parties involved." *Id.*

¹⁶³ *Radda Barnen Statement*, *supra* note 25, at 1. "The formulations agreed so far do not provide further protection for minors, on the contrary, they represent steps backward." *Id.*

¹⁶⁴ Mann, *supra* note 4, at 53.

¹⁶⁵ *Id.*

¹⁶⁶ *Radda Barnen Statement*, *supra* note 25, at 4. The Radda Barnen submission articulated the belief that Article 20 was not strong enough, in actuality it was weaker and less stringent than the other existing codified humanitarian law protections.

¹⁶⁷ *Id.* at 5. "The conference stressed that the protection accorded by the new Convention should be at least the same as the one provided by existing international law." *Id.*

¹⁶⁸ Mann, *supra* note 4, at 52. "A number of nongovernmental relief agencies have become active but their real impact is, of necessity, limited to dealing with the problems that arise for those children who are captured/detained." *Id.*

¹⁶⁹ Veuthy, *supra* note 17, at 89. "Because of the controversy over Article 1(4) of Protocol I and the reluctance of many of the countries to adopt Protocol II, Common Article III retains its value in all armed conflicts . . ." *Id.*

¹⁷⁰ *Radda Barnen Statement*, *supra* note 25, at 1.

A U.N. Commission is forming to specifically address the Rights of the Child. This Committee, an adjunct committee to the Human Rights Commission, is specifically interested in the protection of the child in armed conflict.¹⁷¹ The Committee met in January of 1987 and discussed the void left in the protection of children by the 1977 Protocols and the 1986 International Humanitarian Conference. By accepting the adopted structure of the Protocols, the Committee attempted to rectify the ambiguous and troublesome language of the Protocols.

The Committee suggested first a change in the second article which would require military forces to use all available, rather than all "feasible," measures to keep children uninvolved in the conflict.¹⁷² The standard of all available measures replacing all feasible measures eliminates any justification for the military use of children. This reiterates the principles of the Protocols placing responsibility for the protection of children on the parties that use them in combat.¹⁷³

Second, the committee would eliminate the language prohibiting only direct participation of children in military conflict.¹⁷⁴ This is essential if the safeguards to protect children are to be effective. If indirect participation is allowed, children living in a combative territory remain viable military instruments to be employed by the opposing parties. By disallowing child participation in any capacity there is greater incentive to remove children from the area of conflict altogether.

Finally, the area of most vociferous debate remains the determination of an age of majority. The ICRC has completely abandoned the struggle to define a uniform age of majority.¹⁷⁵ This results from the previous international disagreements regarding the age question. First, by specifying fifteen as the age of minority, traditionally recognized minors under eighteen can be recruited. This is intolerable to many of the Western nations, but it is de-

¹⁷¹ *Id.* at 1. "One important aspect of the development of an International Convention of the U.N. on the Rights of Children is the discussion of the protection of children in times of war." *Id.*

¹⁷² *Id.* at 4.

¹⁷³ M. BOTHE, *supra* note 33, at 497. "The essential purposes of Article 77(3) Protocol I and Article 4(3)d of Protocol II are that the children who participate in the hostilities in violation of the prohibitions should not suffer unduly for the failures of the party under whose control they are." *Id.*

¹⁷⁴ *Id.* at 47.

¹⁷⁵ *Radda Barnen Statement, supra* note 25.

manded to be a practical necessity by many Third World countries.¹⁷⁶

The Protocol allows for special preference for children between the ages of fifteen and eighteen in the event of their capture.¹⁷⁷ The Conference drafts ignore this element and merely state the fifteen year old age limit. Without any modifying language there is no consideration for the minors between the ages of fifteen and eighteen involved in combat, thereby eliminating the compromise language secured by the Protocols.

The Committee's report, aside from the specific issues it addresses, implies that specific and substantial revisions need to be made in the 1977 Protocols as they stand. The weakening of the protective language manifests disregard for the protection of children in armed conflicts. The Committee's suggestions mirror U.N. sentiments that the trend must be toward the increased protection of children in global armed conflicts, rather than the creation of ambiguous standards of conduct.

The need to formally address discrepancies between the 1986 drafts and the 1977 Protocols is stressed in the Committee findings, to insure that the protection of children continues to expand.

V. CONCLUSION

Many commentators seem to despair of ever creating effective tools to minimize the effects of war. This view of conflict perpetuates the status quo and can only leave the innocent victims of the conflicts with less hope of protection. The victims rely on the concern of the international community to ameliorate their suffering: "A little less talk about the obsolescence of the laws of war might be welcomed by the victims of war."¹⁷⁸ We can do little else but continually try to lessen the effects of armed conflict on all of its victims.

It is time for the international community to reaffirm its dedication to the protection of children. "The presumption of nonparticipation of children is not unique to Western or Judeo-Christian thought. Traditional African and Islamic religious laws also required that children be spared from the effects of war, and that they not be allowed to participate in it."¹⁷⁹ This fundamental ideal must be reaffirmed and manifested in an international consensus

¹⁷⁶ Mann, *supra* note 4.

¹⁷⁷ 46 U.N. ESCOR (1109 mtg) at 42, U.N. Doc. CDDH/III/376 77(3).

¹⁷⁸ Baxter, *A Wearied Word on the Law of War*, 59 AM.J.INT'L.L. 920 (1965).

¹⁷⁹ Mann, *supra* note 4, at 35.

to protect children from the atrocities of war, and to recognize the global commitment to the future of the world. A delegate from Tanganyika expressed the importance of the protection of children's rights:

The inclusion of an article relating specifically to children is justified in any instrument. This is so because of the special status children occupy in every society. It is even more true for the developing countries, for the sacrifices and efforts we make today are made for our children, and our children's children.¹⁸⁰

It is a contradiction of international humanitarian law to tolerate any use of children in armed conflicts. The problem must be addressed by the international community to insure that today's political upheavals do not destroy hope for the world of tomorrow by decimating future generations.

Colleen C. Maher

¹⁸⁰ Cohen, *supra* note 19, at 376, 379.