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**INTERNATIONAL HUMANITARIAN LAW
AND THE RIGHTS OF THE CHILD:
ARTICLE 38***

*Lisa M. Hitch***

Article 20 of the February 24, 1988 Working Group Draft of a Convention on the Rights of the Child, with the addition of the second sentence in subsection 2 by the report dated April 6, 1988, set out, in three parts, the rights of the child in the context of war,¹ a subject of continuing concern to

* The comments are made in the author's personal capacity and do not reflect the views of the Department of Justice.

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1. 1. The States Parties to the present Convention undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties to the present Convention shall take all feasible measures to ensure that no child takes a direct part in hostilities and they shall refrain in particular from recruiting any child who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the States Parties to the present Convention shall endeavour to give priority to those who are oldest.

3. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties to this Convention shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Draft article 20 of the Draft Convention on the Rights of the Child, 44 U.N. ESCOR at 19-20, U.N. Doc. E/CN.4/1988/28 (1988) [hereinafter DRAFT ARTICLE 20], was adopted by the UN Working Group and completed in 1988, subject to technical review and second reading prior to submission to the General Assembly of the United Nations. The Articles of the draft Convention were renumbered following the second reading in December 1988. Armed Conflicts are currently discussed in Article 38 of the Draft Convention, which states:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

the world community.² Since that time, the Working Group of government representatives charged by the United Nations Commission on Human Rights with drafting the Convention on the Rights of the Child has finished the second reading of that Convention. On December 20, 1988, the Working Group presented its final draft which amended some of the wording, renumbered and reordered the previously published Articles. This December version, which will be presented to the United Nations Commission on Human Rights for debate in February or March of 1989, changed the wording of the earlier draft article 20 and renumbered it as Article 38.³ This comment will discuss the earlier version with some additional comment as to the effect, if any, of the new wording reflected in Article 38 of the December, 1988 version.

The new provision in Article 38 continues, with good reason, to be the center of controversy. The new wording has changed only slightly the earlier version with the same major

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Adoption of A Convention on the Rights of the Child, G.A. Res. --, -- U.N. GOAR --, U.N. Doc. A/44/616 (1989) [hereinafter Convention]. Since this paper was written, the Convention has been adopted by the United Nations General Assembly on November 20, 1989, U.N. Doc. A/C.3/44/C.44, in the form of draft Article 38 above. Draft Convention on the Rights of the Child, 43 U.N. ESCOR (85th mtg.), U.N. Doc. E/1988/85 (1988), [hereinafter DRAFT ARTICLE 38].

2. The concern of the world community with human rights in armed conflict has had a long history. See generally Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959); United Nations Conference On Human Rights, Final Act of the International Conference on Human Rights, Res. I and XXIII at 5 and 18, U.N. Doc. A/Conf. 32/41, U.N. Sales No. E.68.XIV.2 (1968); G.A. Res. --, 24 U.N. GAOR (Agenda Item 61) at 5, U.N. Doc. A/7720 (1969); Respect for Human Rights in Armed Conflicts, G.A. Res. --, U.N. GAOR (Agenda Item 47) at 5, U.N. Doc. A/8052 (1970); G.A. Res. 2673-2677, U.N. GAOR Supp. (No. 14) at 75-78, U.N. Doc. A/6014 (1970).

3. See *supra*, note 1.

concerns remaining despite the fact that the Article is now divided into four parts.

The first and fourth parts of the revised Article incorporate the present state of the law concerning armed conflicts without directly adding to it by referring States to their pre-existing obligations under international humanitarian law,⁴ including the four Geneva Conventions and two optional Protocols.⁵ It is only the second and third parts of draft Article 38, and the second part of the earlier Article 20, that appear to extend the present state of the law in this area. Thus, an examination of the extent of the protections contained in the draft Convention must begin with an understanding of the present state of the law in this area.⁶

I. HISTORY OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law has had a long and detailed history that this comment will of necessity only be able to touch upon.⁷ It is almost, necessarily, as long and complicated as that of mankind itself. In its broad range, it attempts to govern both internal and international conflicts and to protect combatants and non-combatants alike. Although widely lauded for its efforts to curb the excesses of mankind, at the same time, it is widely criticized for its inability to be as effective as many would hope. It is, as is most international law, hampered precisely because of its

4. *Id.*

5. See *infra* notes 13-53 and accompanying text.

6. See generally Draft Article 20, *supra* note 1 and Draft Article 38, *supra* note 1.

7. For a more detailed history of international humanitarian law see COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (J. Pictet ed. 1958) [hereinafter COMMENTARY]; E. ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT (1979); STUDIES AND ESSAYS ON INTERNATIONAL LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET at 313-24 (C. Swinarski ed. 1984).

dependence on international accord and State political will.⁸

With regard to the specific aspect of the effect of international humanitarian law on the rights and status of children, little has actually been codified to date in the international sphere. This is due, in large measure, to the history of childhood itself as a social concept. A brief historical explanation is useful in order to put this situation in the necessary perspective, although this subject has been considered at length elsewhere.⁹

It is significant, and readily noticeable from even a cursory review of international humanitarian law, that until relatively recently, children were not specifically mentioned in the codification of the law dealing with war. Customary international humanitarian law dealing with children centered on the two traditional notions of: the general protection of civilians or non-combatants in time of war; and the special protection of groups considered especially vulnerable to the effects of war.¹⁰ The fact that children were not dealt with separately has as a major cause an assumption that many of us now take for granted: that the basic premise of childhood is, *per se*, a relatively recent phenomenon and that it is really only in the post World War II period that significant portions of the world community have had as much money and time to spend on extending the average length of childhood to the proportions that we now see today.

Historically, many societies considered children as "miniature adults" or "adults in training" whose status as full adults was something to be earned as quickly as possible. Until the late seventeenth or early eighteenth centuries, most

8. See generally G. Aldrich, *Establishing Legal Norms Through Multilateral Negotiation-The Laws of War*, 9 CASE W. RES. J. INT'L L. 9 (1977).

9. See generally P. ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (R. Baldick trans. 1962).

10. The concepts of general and special protection of civilians have been considered in great detail elsewhere. See generally COMMENTARY, *supra* note 7; E. ROSENBLAD, *supra* note 7.

societies considered it normal for children to be granted the protection we now associate with childhood only until an age at which they were physically independent of their mother, i.e. were weaned, generally no later than age seven. This protection could be extended, somewhat, to an age where children could earn their own keep. Childhood ended much earlier chronologically than the concept as it is understood today. Children were often seen as "property" of the social group or clan to be disposed of through marriage or into apprenticeship so that they would no longer be a burden on the financial resources of the family unit where they were unable to contribute to it directly.

Because of this, it was considered normal that "children" were ordinarily involved in fighting at a much younger age than would be thought normal in parts of the world today. Thus, it was not considered necessary to specifically deal with the issue of special protection for children in wartime. Children directly involved in combat were ordinarily treated in the same way as all other combatants. The issue of special protection for children not involved in hostilities was, in turn, sublimated into the more general issue of the protection of the civilian population.

However, the protection of civilian population was itself not specifically codified in international humanitarian law until the adoption, in 1949, of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War,¹¹ although the customary law concepts were indeed well recognized in humanitarian law prior to this time. The horrors of World War II demonstrated the need to specifically protect civilian populations in general and children in particular in wartime.¹² It is an interesting aside that although the Fourth Convention was intended in part to correct this lack of specific protection for children (and there is clear

11. Geneva Convention, August 12, 1949, Relative To The Protection Of Civilian Persons In Time Of War, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

12. COMMENTARY, *supra* note 7, at 284-90.

reference to children in most of the major provisions including those dealing with aspects of special protection), children were not specifically included in the provision setting out the principle of special protection.¹³ Experience had shown, however, that as more sophisticated forms of technology were used to augment the international warfare arsenal, the spillover effects from the field of combat, and thus the number of civilian casualties, increased dramatically.

Fighting and war have changed dramatically over the course of recent history. For much of the history of mankind, fighting and war has taken place in isolation from much of everyday living. Thus, it is only recently that a significant proportion of casualties resulting from war have been civilians not actually involved in the fighting. In more recent conflicts, this trend has continued, resulting in a dramatic increase in the numbers of civilian casualties. Until recently it was not thought to be necessary to give explicit protection to civilians, including children, in time of war, because protection was needed more for those directly involved.

Changes in the nature of war continue. Since World War II, international conflicts, to which the great body of international humanitarian law is addressed, have declined in number as compared with conflicts between regular armed forces and irregular combatants, which have become markedly more frequent. As well, there has been a dramatic increase in the use of "children" under the age of 18 both as regular armed forces and as irregular or "guerilla" combatants in both international and non-international armed conflicts.¹⁴

13. Although children are included in Articles. 14, 15, 17, 23, 24, 38, 50, 51, 82 and 89, Article 16 does not specifically include them but states: "[t]he wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect." Geneva Convention of 1927, *supra* note 11, at 298-344.

14. Mann, *International Law and the Child Soldier*, 36 INTL & COMP. L. Q. 32, 50-56 (1987); Elahi, *The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier*, 19 COLUM. HUM. RTS. L. REV. 259 (1988). Several current topical issues in international humanitarian law that have been widely dealt with elsewhere cannot be dealt with at any length here due to the restrictions of this paper. They include: the issue of privileged and non-privileged combatants; the distinction between combatants and non-combatants; and the characterization of wars of national liberation and self-determination as international or non-

These changes in the face of war in modern times led to the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts¹⁵ from 1974 to 1977, which was convened to study changes made necessary in international humanitarian law due to the further changes in the nature and effects of war since 1949.¹⁶ As a result of this Diplomatic Conference, the additional Protocols I¹⁷ and II,¹⁸ relating, respectively, to international armed conflicts and to non-international armed conflicts were adopted in 1977 and expanded the protections available under international humanitarian law.¹⁹

II. CHILDREN AND INTERNATIONAL HUMANITARIAN LAW

At present, there are two kinds of protection afforded children during wartime by international humanitarian law. Historically, the protection of children in war has been traditionally linked to the protection of other groups perceived as unable to participate in the fighting and so given non-

international conflicts (presently considered as international armed conflicts under art. 1, 4 of Protocol I, G.A. Res., 32 U.N. GAOR (144th mtg.), U.N. Doc. A/32/144 (1977), [hereinafter PROTOCOL I]). See generally Baxter, *So-called "Unprivileged" Belligerency: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y. B. INT'L L. 323 (1951); M. Veuthey, *GUERRILLA ET DROIT HUMANITAIRE* (1983); Aldrich, *New Life for the Laws of War*, 75 A.J.I.L. 764 (1981); Cassese, *Wars of National Liberation and Humanitarian Law*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET* 313 (C. Swiniarski ed. 1984).

15. 1977 U.N.Y.B. 706, U.N. Sales No. E.79.I.1 [hereinafter Diplomatic Conference].

16. For an account of this conference, see Baxter, *Humanitarian Law or Humanitarian Politics: The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. I. L.J. 1 (1975). For a history of the negotiation of the Protocol provisions see Mann, *supra* note 14, at 36-50.

17. PROTOCOL I, *supra* note 14.

18. G.A. Res., 32 U.N. GAOR (144th mtg.) (Annex 2), U.N. Doc. A/32/144 (1977) [hereinafter PROTOCOL II].

19. 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; and 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, both signed on December 12, 1977.

combatant status, such as women, the disabled and the elderly. This type of protection is general protection as civilian persons taking no part in the hostilities. These groups were traditionally viewed as being unlikely and/or unable to contribute to the war effort. General protection in international armed conflicts is embodied mostly in the Fourth Geneva Convention²⁰ and the provisions dealing with the treatment of protected persons including, *inter alia*, respect for life, physical and moral integrity, and the protection from coercion, corporal punishment, torture, collective penalties and reprisals.²¹ These protections stem from a basic premise in international humanitarian law characterized by the distinction between combatants and non-combatants and are extended to all civilians as long as they remain "non-combatants." This general protection is further developed under Protocol I.²²

With regard to non-international armed conflicts, a similar general protection exists and is outlined in Article 3 of the four Geneva Conventions.²³ Under this Article children, and others taking no part in the hostilities, must be treated humanely and no violence to their lives, persons, or dignity is allowed. Protocol II further develops and codifies these

20. Articles 14, 16, 17, 23, 24, 38, 50, 51, 82 and 89 of Geneva Convention, *supra* note 11, at 298-344.

21. *Id.* at 306-84.

22. PROTOCOL I, *supra* note 14, at 32-36.

23. Article 3 reads:

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 the armed forces who have laid down their arms . . . shall in all circumstances be treated humanely To this end, the following acts are and 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 kinds, 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 executions without previous judgment pronounced by a regularly constituted court

Geneva Convention, *supra* note 11, at 288.

protections so that the civilian population, as well as individual civilians, may not be the subject of attack.²⁴

As is mentioned above, the Fourth Geneva Convention contains many provisions which are applicable to children, including Article 3, which appears in each of the four Geneva Conventions. However, children are not explicitly given separate special treatment anywhere in these Conventions. Special protection for children as members of the civilian population who are particularly vulnerable is enshrined in the two additional Protocols. Protocol I, Article 77(1) provides generally that:

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 their age or for any other reason.²⁵

This protection is limited, as is the rest of Protocol I, to international armed conflicts.²⁶ However, Protocol II, which applies to non-international armed conflicts, also contains an explicit protection for children in article 4(3) which provides generally that: "[c]hildren shall be provided with the care and aid they require"²⁷

Several specific provisions relating to the protection of children are included in the two additional Protocols. For example, new-born babies are to be treated as "wounded" persons for the purposes of Protocol I (Art. 8(1));²⁸ children should be among those evacuated from besieged areas

24. PROTOCOL II, *supra* note 18, at 6.

25. PROTOCOL I, *supra* note 14, at 55. *See also* the other four subsections of Article 77 and Article 78. *Id.*

26. *Id.* at 11.

27. PROTOCOL I, *supra* note 18, at 6. *See also* the five subparagraphs of Article 4(3) setting out the particular special protections for children. *Id.*

28. PROTOCOL I, *supra* note 14, at 15.

(Protocol I, Art. 78, and Protocol II, Art. 4(3)(e));²⁹ children have a right if arrested to be held in quarters separate from adults, except where accommodated as part of a family unit (Protocol I, Art. 77(4));³⁰ children retain a right to an education (Protocol I, Art. 78(2) and Protocol II, Article 4(3)(a));³¹ the death penalty may not be carried out on a person under 18 (Protocol I, Article 77(5) and Protocol II, Article 6(4)).³²

Children who participate in hostilities, and thus no longer qualify for protections extended to "non-combatants," were not separately dealt with under codified international humanitarian law until the adoption of the additional Protocols in 1977.³³ This issue is becoming more and more a world-wide problem, particularly in the more frequent non-international conflicts between regular armed forces and irregular combatants, where civilians and combatants are often difficult to conclusively identify and separate. Prior to the 1977 Protocols, the involvement of children in hostilities nullified the child's rights to general protection under international humanitarian law, which was based on their status as non-combatants. This applied whether the child was involved indirectly by aiding combatants or directly by actually taking part in the fighting, either as part of the armed forces or outside the regular armed forces. Even after the 1977 Protocols, although both Protocols specifically forbid the recruitment of children under the age of 15, and Protocol I requires the enlistment of the oldest first where children

29. *Id.* at 56; PROTOCOL II, *supra* note 18, at 7.

30. PROTOCOL I, *supra* note 14, at 55.

31. *Id.* at 56; PROTOCOL II, *supra* note 18, at 6.

32. PROTOCOL I, *supra* note 14, at 55; PROTOCOL II, *supra* note 18, at 9. Article 68 of the Fourth Geneva Convention also prohibits the imposition of the death penalty on an individual under the age of 18 at the time of the offense but only extends that protection to protected persons of an occupied territory. Geneva Convention, *supra* note 11, at 330. For a more complete examination see D. Plattner, *Protection of Children in International Humanitarian Law*, 240 INT'L REV. OF THE RED CROSS 140 (May-June 1984).

33. PROTOCOL I, *supra* note 14, at 55; PROTOCOL II, *supra* note 18, at 6.

between 15 and 18 are enlisted,³⁴ children under the age of 15 who do in reality take part in hostilities, and are captured, continue to benefit only from limited special protection in the Protocols.³⁵

Protection is, therefore, even more limited for those children who are between the ages of 15 and 18.

Thus, it is apparent that the two additional Protocols significantly added to the codified international humanitarian law in this area. They did so by importing a large number of the protections available in international armed conflicts to non-international armed conflicts and by extending the definition of international armed conflicts to include wars of liberation and self-determination. However, this extension of additional protection was not unanimously agreed upon by the participating States. In fact, most of the developing States were opposed to this significant a change.³⁶ Thus, the scope of this protection of children in the present international humanitarian law adopted by the draft Convention is limited still further by the fact that the two additional Protocols have

34. Article 77(2) of PROTOCOL I reads:

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

PROTOCOL I, *supra* note 14, at 55. Article 4(3)(c) of PROTOCOL II reads: "4(3)(c) Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities." PROTOCOL II, *supra* note 18, at 6.

35. Art. 77(3) of PROTOCOL I, *supra* note 14, at 55 reads:

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 power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

Id. Art. 4(3)(d) of PROTOCOL II, *supra* note 18, at 7 reads: "[t]he special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured." *Id.*

36. Many States were more concerned with not limiting their ability to deal with internal conflict. Mann, *supra* note 14, at 49 n.70.

not been widely ratified.³⁷ As a result, a simple reference to obligations under pre-existing international humanitarian law, such as that contained in the draft Convention, may in fact be even less likely to be enforced than appears from this brief review.

III. THE CONVENTION ON THE RIGHTS OF THE CHILD AND INTERNATIONAL HUMANITARIAN LAW

Upon a closer examination of the new draft Article 38³⁸ and the earlier Article 20,³⁹ which appear to go beyond importing the present state of the law in this area into the draft Convention, one is immediately struck by how similar the wording of the second and third portions of the provision in draft Article 38 appear to be to Protocol I, Article 77(2).⁴⁰ As such, it adopts unquestioningly all of the problems hitherto encountered with this provision in the Protocol, including the fact that that provision actually represents the results of extensive negotiation from the provisions originally proposed by the International Committee of the Red Cross (ICRC). In particular, there remains a certain lack of clarity in the definition of several of the key terms utilized in the draft article, including "hostilities," "all feasible measures," "direct part" and "recruitment."⁴¹ As well, several additional protections which were suggested in the context of the draft Protocols, but not included in the final Protocols due to negotiation, appear not to have been re-examined or given further consideration here, a fact which is hard to reconcile given the intent of this document. These additional protections included: a prohibition on the acceptance of

37. As of 1985, 48 States had ratified PROTOCOL I and 41 States had ratified PROTOCOL II.

38. Draft Article 38, *supra* note 3.

39. Draft Article 20, *supra* note 1.

40. Draft Article 38, *supra* note 3; PROTOCOL I, *supra* note 14, at 55.

41. Draft Article 38, *supra* note 3.

volunteers under the age of 15; protection for children used outside of the regular armed forces (such as spies); and explicit protection for children under 15 who are used in violation of the general prohibition.

Indeed, it would appear that the new draft Article 38 goes a step backward from the earlier Article 20, as the effect of dividing the old paragraph 2 into the new paragraphs 2 and 3 is that the earlier obligation on the State to "[t]ake all feasible measures to ensure that *no child* takes a direct part in hostilities"⁴² has been even further cut down by the new wording of the obligation to "[t]ake all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities."⁴³

The draft Article's choice of age 15 as a cut-off for the protection of this section is noticeable, as the remainder of the draft Convention is applied to children up to the age of 18.⁴⁴ However, the use of age of 15 as an age at which the child is considered to have reached a stage of development that is no longer in need of special protection is generally accepted and utilized in international humanitarian law.⁴⁵ It is therefore probably untenable to uniformly raise the age specified in this protection in connection with the draft Convention, as the result might well be to open the provision to widespread disregard, and render it unacceptable to a large number of States.

Further, it is unfortunate that the draft Convention adopts the wording of the Protocol I, as it thereby simultaneously adopts two phrases which were deliberately changed during the negotiations concerning the Protocols, in order to adopt qualifiers. First, the phrase "feasible measures" was originally drafted in the Protocols as "necessary

42. Draft Article 20, *supra* note 1 (emphasis added).

43. Draft Article 38, *supra* note 3.

44. *Id.*

45. COMMENTARY, *supra* note 7, at 395-96. *But see supra* note 22 and accompanying text.

measures."⁴⁶ This change of wording from *necessary* to *feasible* clearly lowers the standard, thus allowing greater emphasis on the principle of military necessity. One scholarly review of the Protocols defines the term "feasible measures" as "that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations."⁴⁷ This lowering of the standard is particularly worrisome in that the resulting lower obligation on the State, merely to "take all feasible measures," is not an absolute ban, such as that contained in Protocol II.⁴⁸ This lower level of State obligation may not suffice to ensure that in all cases children are protected and retain their status as non-combatants.

Second, the draft Article has adopted the wording "[e]nsure that persons, who have not attained the age of 15 years do not take a *direct* part"⁴⁹ instead of the broader wording originally proposed in connection with the Protocols, which was "shall not take any part."⁵⁰ Again, it appears that the original wording is wider and would constitute more protection than that contained in the present draft Article. Although to some extent the adopted wording has advantages in that it appears to create clear obligations for a State, the phrase "direct part" remains difficult to define and may allow too much flexibility in terms of allowing some participation by children in armed conflicts. Allowing flexibility, rather than an absolute ban, becomes even more important when combined with other instances of wording that is not clearly definable.

46. The original draft of Article 77(2) of Protocol I, as suggested by the ICRC, stated: "2. The parties to the conflict shall take all necessary measures in order that children aged under fifteen years shall not take any part in hostilities and, in particular they shall refrain from recruiting them in their armed forces or accepting their voluntary enrollment." See Mann, *supra* note 14, at 44-45.

47. Mann, *supra* note 14, at 44-45 (quoting M. BOTHE, K. PARTSCH & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 372-73 (1982)).

48. PROTOCOL II, *supra* note 18, at 6.

49. Draft Article 38, *supra* note 3 (emphasis added).

50. Mann, *supra* note 14, at 44-45.

First, the term "hostilities" appears to be incapable of an undisputed definition. During the negotiations involving the Protocols, the ICRC attempted to define this term as being somewhere in between the term "military effort" and the term "military operations."⁵¹ However, the dividing lines to be used here are, to say the least, unclear, and it is likely that the precise meaning of this term would vary with each specific situation. The term "recruiting" may also only be definable in terms of the context to which it is applied. The net result is that the draft article as presently worded would almost certainly allow children under 15 to volunteer for the armed forces, even where they are nominally protected from recruitment. In addition, the provision as written may well not cover entirely all situations where children are not directly used, but rather used in auxiliary capacities, such as transportation of military information and arms or sabotage. Even if the provision does not go far enough to allow this kind of use of children, there is definitely room here for the development of a concept of "indirect participation" in war. Such a development would lower the standards under which protection would be guaranteed, and could increase the vulnerability, for example, if a child is used to work on a legitimate military target site.

Finally, there are three additional protections which were discussed in the context of the Protocols, some of which were adopted, that have not been included here: a prohibition against voluntary enrollment of those under the age of 15; protection for children used outside of the regular armed forces; and protection for children under the age of 15 used in violation of this article. A prohibition on the acceptance of the voluntary enrollment of children under the age of 15 was included in the original ICRC proposals for the draft Protocols.⁵² Further, Article 77(3) of Protocol I provides special protection for children who actually participate in

51. Mann, *supra* note 14, at 40-45.

52. Mann, *supra* note 14, at 40.

hostilities in violation of the Protocol, as does Article 4(3)(d) of Protocol II.⁵³ Protection for children used outside of the regular armed forces is involved in the notion discussed earlier of prohibiting children from taking "any part in hostilities." Again, it does not seem that any of these extensions of the present legal protections have been considered, although each of them would be fully in keeping with the spirit and goals of the draft Convention.

IV. CONCLUSION

As the world community has recognized by calling for a Convention on the Rights of the Child, it is extremely important that this Convention reflect the full importance to the future of mankind that is represented by the world's children. In keeping with the importance of this goal to the lives of millions of children in need of "the best [mankind] has to give,"⁵⁴ all of the provisions of this Convention must attempt not only to codify the present state of the international law in relation to the child, but also to reach forward in an attempt to reflect the ideal that we can truly achieve in a world forum to ensure that the basic human rights and fundamental freedoms of the child are truly protected to the extent necessary and possible in today's world and tomorrow's.

Where could this concern be more truly apparent or necessary than with regard to the rights of the child to full protection in time of war? Does not Article 38 of the draft Convention on the Rights of the Child richly deserve a statement of protection to the fullest extent possible without any qualification?

53. PROTOCOL I, *supra* note 14, at 55; PROTOCOL II, *supra* note 18, at 7.

54. Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959) (preamble).

The suggested wording for such an Article 38 would read as follows:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all *necessary* measures to ensure that *children aged under fifteen years shall not take any part in hostilities and all feasible measures to ensure that no child shall take a direct part in hostilities.*

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces *or accepting their voluntary enrollment.* In recruiting *and in accepting the voluntary enrollment of* those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, *and in keeping with the spirit of this article,* States Parties to this Convention shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

5. *If, despite the provisions of this article, children who have not attained the age of fifteen years take part in hostilities or if persons who have attained the age of fifteen years but who have not yet attained the age of eighteen years take a direct part*

in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article and international humanitarian law, whether or not they are prisoners of war.

This would truly extend full protection to children under international humanitarian law and more resoundingly meet this challenge in keeping with the heightened concern of the world community and the irreplaceable value of adequate protection of the world's children to the continuance of the human race. If the Convention cannot clearly add to the present state of the law in this respect, it would be safer to delete this clause or to incorporate the present international humanitarian law by keeping only subsection 1 of the present draft. Causing a greater lack of clarity might well have irremediable results as this Article of the Convention clearly stands out as dealing with life or death issues for many of the world's children, both now and in future generations.