

Children affected by armed conflict may be:

- Injured or killed;
- Uprooted from their homes and communities;
- Internally displaced or become refugees;
- Deprived of basic needs such as shelter, food and medical attention;
- Orphaned or separated from their parents and families;
- Subjected to sexual abuse and exploitation;
- Victims of trauma as a result of being exposed to violence;
- Deprived of education and recreation and positive development to become productive citizens.

In addition to the dangers to child civilians, concern is also expressed about child combatants. Surveys have shown that volunteers below the age of 18 years are accepted into government and rebel groups in at least 62 countries.⁹

Article 38 of the CRC makes an exception to the definition of childhood as under the age of 18 years, and makes 15 the minimum permissible age, but an Optional Protocol that, among other things, raises this age to 18 years, was adopted by the UN General Assembly in May 2000. It is also clear that many child soldiers do not volunteer but are forced to join military groups, using means that vary from abduction to offering basic shelter and food to destitute orphans.

Pressure from NGOs concerned about child soldiers persuaded the International Labour Conference in 1999 to add child soldiers who have been forcibly or under compulsion recruited to the definition of the 'worst forms' of child labour in ILO Convention 182.¹⁰

In addition to action and advocacy by NGOs, the United Nations system has responded to this crisis by setting up the Office of the Special Representative of the Secretary General for Children and Armed Conflict in 1997. This followed the ground-breaking report of Graça Machel, entitled *Impact of Armed Conflict on Children*, which was submitted to the General Assembly in 1996, providing the first comprehensive overview of the situation.¹¹ This report concluded that 'Whatever the causes of modern-day brutality towards children, the time has come to call a halt' and demanded that 'children simply have no part in warfare. The international community must proclaim this attack on children for what it is – intolerable and unacceptable.'¹²

1.5. The State of the Law: Rights of War-Affected Children

In addition to being the century in which children increasingly suffered as the result of armed conflict, the twentieth century was also characterised by the development of both humanitarian and human rights law. Moreover, the past hundred years has been characterised by new

perspectives on children and childhood. Ideas about the special rights of children to protection from harm have been combined with a growing understanding of children's contribution to society as actors and the need to take their views into consideration in decisions made on their behalf. The balance between protection and participation with respect to children is mediated by the duties and responsibilities of adults.

International humanitarian law is the body of international law that governs the conduct of armed conflict. It sets out the rules for what is permissible during hostilities and includes the Geneva Conventions of 1949 as well as the Additional Protocols of 1977. In so far as it applies to children, humanitarian law emphasises their vulnerability and the need to protect them from the harmful effects of armed conflict, yet it pays little attention to the special needs of children, who are included within the overall idea of the vulnerable civilian population. The age of children envisaged in the Geneva Conventions is implicitly somewhat younger than 18 years of age. Articles 77 and 78 of the Additional Protocols do focus specifically on the protection of children. They forbid recruitment of persons under the age of 15 years to take direct part in hostilities, as well as dealing with the arrest, detention, internment and evacuation of children in situations of armed conflict.

It is evident from the increasing toll of death, injury and suffering that humanitarian law is insufficient to protect children from the effects of armed conflict. Yet the provisions relating to armed conflict in Articles 38 and 39 of the CRC also appear to be inadequate, even if they were to be fully implemented. These Articles do not impose an absolute duty on states to ensure the care and protection of children during hostilities, nor do they raise the age for recruitment into armed forces or make any advance on the standards of protection afforded by humanitarian law.

The Committee on the Rights of the Child¹³ chose the topic of armed conflict for its first day of thematic discussion; following which, the Committee recommended the drafting of an Optional Protocol on the recruitment of children to armed forces (adopted by the UN General Assembly in May 2000). Nevertheless, most children caught up in hostilities are not combatants. The Committee did not make any firm recommendations for the protection of child civilians, but did propose that a UN study should be made of the topic. Following this, Graça Machel was appointed as the expert to lead the study¹⁴, which among other things resulted in the mandate for a UN Special Representative on the Protection of Children and Armed Conflict. Both the Machel Report and the mandate for the Special Representative make it clear that 'in relation to children humanitarian law and human rights law can no longer be seen as distinct bodies of law.'¹⁵ (For further details see Appendix E).

9. UNICEF, 1999, *The Progress of Nations*, p. 7.

10. ILO Convention 182, *supra* note 1.

11. Machel Report, *supra* note 8.

12. *Ibid.*, at 1 para 5.

13. Hereinafter the Committee

14. *Supra* note 8.

15. Geraldine Van Bueren, *supra* note 7 at 349.