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**A Critical Evaluation of the Failure of International Law to Protect Children**  
**in Armed Conflicts and the resultant Humanitarian Crises that typically follow**

This paper is an example of a dissertation that provides a critical evaluation of the failure of international law to protect children in armed conflicts in particular along with the resultant humanitarian crises that typically follow in practice. To achieve this, it is necessary to look to utilise a combination of primary and secondary materials with a view to providing a thorough analysis of the issues to have been raised in relation to the subject matter under consideration. On this basis, it is then possible to make recommendations with regard to how the application of the law could be improved upon before drawing conclusions with regard to the title set for evaluation.

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## **Abstract**

This dissertation provides a critical evaluation of the failure of international law to protect children in armed conflicts along with the resultant humanitarian crises that typically follow. The reason for this is that contemporaneous armed conflicts have effectively directed international attention to the vulnerability of children during armed conflicts and the resultant humanitarian crises which usually arise thereafter. Practically, the reason for this is that the international laws dealing with human rights generally and those of children more specifically arguably fail to effectively attach a special status to them in those geographical and political areas affected by armed conflicts.

Consequently, there appears to be a significant policy gap between international laws objectives and their actual application and implementation which threatens children's welfare in these areas during the course of armed conflicts and in any resultant humanitarian crises. The reason for this is that it is debatable if the systemic mechanisms in place protect children's rights in the context of armed conflicts and the resultant humanitarian crises along with whether these primary laws should be supplemented to more effectively unite the international community to protect children's rights in this regard. With this in mind, this dissertation also makes a series of recommendations for the purpose of improving the protection of children under human rights and humanitarian law internationally during the course of armed conflict and resultant humanitarian crises. Finally, this dissertation concludes with a summary of the key points to have been derived from this dissertation with regard to the fact that international law fails to effectively recognise children's rights in conflict zones and resultant humanitarian crises due to individual States failure to implement, comply with and enforce the laws in this area.

## Chapter One - Introduction

### *1.1 Background*

From the beginning of the twentieth century to date, children have increasingly become both the direct and indirect victims of armed conflicts and the resultant humanitarian crises that typically arise in countries throughout the world to have been blighted by such problems.<sup>1</sup> By way of illustration, there is a need to note the fact that more than two million children were killed in or as a result of armed conflicts around the world in the past decade alone.<sup>2</sup> However, as if the deaths of so many children were not bad enough as a consequence of the armed conflicts to have arisen all too frequently internationally in the aforementioned period of time, they have also experienced many other problems as a result of the fallout of such situations.<sup>3</sup> This view is supported by the fact that arguably even more children have experienced problems in and around armed conflict areas as a result of the direct and indirect consequences of the armed conflicts themselves.<sup>4</sup> These problems to have been experienced by children during armed conflicts and resultant humanitarian crises are recognised as including emotional, physical and psychological injuries as well as significant problems in their everyday lives both financially and socially.<sup>5</sup>

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<sup>1</sup> United Nations Children's Emergency Fund (UNICEF), 'State of the World's Children' (UNICEF, New York, USA 2007)

<sup>2</sup> M Rieder and I Choonara, 'Armed Conflict and Child Health' (2012) 97(1) Archives of Disease and Childhood 59

<sup>3</sup> United Nations Children's Emergency Fund (UNICEF), 'Machel study 10-year strategic review: Children and conflict in a changing world' (UNICEF, New York, USA 2009)

<sup>4</sup> Ibid

<sup>5</sup> Ibid

Nevertheless, despite the recognition of such significant problems for children emanating from armed conflicts and resulting humanitarian crises, the recognition of the rights of children to protection in armed conflicts has remained the same as it was since they were encoded in the UNCRC.<sup>6</sup> Therefore, despite the sheer number of children to have been detrimentally impacted upon by armed conflicts around the world, the application of the UNCRC, along with international humanitarian law in the form of the Fourth Geneva Conventions of 1949 and its Additional Protocols I and II, has arguably done far too little to effectively advance children's protection in this regard.<sup>7</sup>

## *1.2 Research Questions*

In view of the fact that the focus of this dissertation is upon the failure of international law to protect children during the course of armed conflicts and resultant humanitarian crises that typically arise, it is necessary to look to answer the following questions -

- (1) How has the international community looked to actively apply international law to protect children in armed conflicts and resultant humanitarian crises?
- (2) Why have States failed to adhere to international human rights laws when it comes to the protection of children in armed conflicts and resultant humanitarian crises?
- (3) Why have States failed to adhere to international humanitarian laws when it comes to the protection of children in armed conflicts and resultant humanitarian crises?

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<sup>6</sup> E Baimu, 'Children, International Protection' (Max Planck Foundation for International Peace and the Rule of Law 2013)

<sup>7</sup> Ibid

- (4) How can the implementation of international law to protect children in armed conflicts and resultant humanitarian crises be improved upon in the States that failed to adhere to the provisions to have been put in place in this area?

### ***1.3 Research Methods***

With a view to completing the research required for this dissertation there is a need to undertake a combination of library and Internet-based research for the purpose of collecting primary and secondary materials pertaining to the protection of children in armed conflicts and resultant humanitarian crises. The primary materials collected for the purpose of completing this dissertation were recognised as ostensibly consisting of provisions of relevant international legislative instruments. As for the secondary materials collected for completing this dissertation, a combination of journal articles, subject specific textbooks, government publications, reports by international organizations including the UN and reports by miscellaneous research groups including the Amnesty International have proved to be particularly relevant. Finally, it is also to be noted that, in view of the fact that there were not any human subjects involved in a clinical trial, there was no relevant research ethics that were involved in this study to be accounted for in this regard.

Then, with a view to analysing the data to have been derived from the primary and secondary materials used, it was considered that there was a need to use the liberal theory of international law so as to effectively illuminate the protection of children during an

armed conflict in practice.<sup>8</sup> This is because, for the purpose of answering the research questions to have been set out for consideration in the preceding subsection, there is a need to use the liberal theory that presumes that States are bound by the law laid down in international law instruments.<sup>9</sup> The reason for this is because of the fact that these international law instruments were agreed upon through a combination of comity and consensus derived from the behaviour of the States themselves that is observed through a combination of the application of domestic laws, regulations and policies.<sup>10</sup>

Such a view is arguably effectively supported by the work of Slaughter and Alvarez who found that *“the liberal theory of International law assumes that the international order is made from the bottom-up”*.<sup>11</sup> The reason for this is that this theory *“identifies multiple bodies of rules, norms and processes that contribute to the international order, beginning with voluntary codes of conduct adopted by the individual and corporate actors operating in a transnational society, and working up through transnational and transgovernmental law to traditional public international law”*.<sup>12</sup> On this basis, it was recognised that along with *“integrating the different levels of law in a unified framework, the liberal approach reorders their relative priority”* for then developing a clearer understanding in a particular area of consideration like in this dissertation.<sup>13</sup>

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<sup>8</sup> A Mills and T Stephens, ‘Challenging the Role of Judges in Slaughter’s Liberal Theory of International Law’ (2005) 18(1) *Leiden Journal of International Law* 1

<sup>9</sup> *Ibid*

<sup>10</sup> See, by way of illustration, A M Slaughter and J Alvarez, ‘A Liberal Theory of International Law’ (2008) 254 *American Society of International Law* 240 and A M Slaughter, ‘International Law in a World of Liberal States’ (1993) 6 *European Journal of International Law* 503

<sup>11</sup> A M Slaughter and J Alvarez, ‘A Liberal Theory of International Law’ (2008) 254 *American Society of International Law* 240

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

At the same time, however, there is a need to recognise that the remit of liberal theory contends that it is actually individuals' rights within individual States that dictate what both domestic and international laws should include.<sup>14</sup> This is because essentially the nature and scope of liberal theory of international law as it was developed by Slaughter served to postulate a combination of domestic laws and courts, through consensus and corresponding practice, are informed by the needs and wishes of the general population to form international law.<sup>15</sup> The reason for this is that the remit of the liberal theory of international law is considered to have a more persuasive framework for the purpose of analysing the adequacy of international law when it comes to protecting children during armed conflicts and resultant humanitarian crises.<sup>16</sup>

Nevertheless, as has already been recognised at the start of this chapter and will be covered in greater detail further on in the course of this dissertation, despite the enactment of international laws in this area, children remain extremely vulnerable to the violation of their rights in armed conflict and resultant humanitarian crises. However, the liberal theory remains relevant in this regard because it is arguable that the realism theory cannot explain such a discrepancy in view of the fact that the recognition of 'realism' assumes domestic laws are informed by international law.<sup>17</sup> The reason for this is that it is believed that if international law actually had such a significant influence upon the development of domestic laws and policies in a given State, then the protection of children throughout the

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<sup>14</sup> A Mills and T Stephens, 'Challenging the role of judges in slaughter's liberal theory of international law' (2005) 18(1) *Leiden Journal of International Law* 1

<sup>15</sup> A M Slaughter and J Alvarez, 'A Liberal Theory of International Law' (2008) 254 *American Society of International Law* 240

<sup>16</sup> *Ibid*

<sup>17</sup> A M Slaughter 'International Law in a World of Liberal States' (1996) 6 *European Journal of International Law* 408

world at all times and not just during armed conflicts and resultant humanitarian crises would be far more efficient which has clearly not proved to be the case.<sup>18</sup>

#### *1.4 Dissertation Structure*

Primarily, this dissertation provides for an investigation of the systemic failure of international law to provide for the protection of children in armed conflicts and resultant humanitarian crises. To achieve this, this dissertation's introduction outlines the background to this study in terms of both its significance and scope before then providing a number of research questions that the research carried out during the course of this analysis will seek to answer related to the subject matter and specific title chosen. It is then also necessary for this dissertation to consider the research methods to have been utilised for the purpose of completing the necessary analysis before then providing this outline of the structure to be utilised to complete the work that was required.

In the second chapter of this dissertation, the relationship between international human rights law and the protection of children in armed conflicts and resultant humanitarian crises is considered. As part of this process, this dissertation will consider what a child is to contextualise this discussion for the purpose of providing them with protection during armed conflicts and resultant humanitarian crises under the United Nations Convention on the Rights of the Child 1989 to give this study more of a focus. On this basis, it is then also necessary for this dissertation to consider the common problems in armed conflicts with

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<sup>18</sup> A M Slaughter and J Alvarez, 'A Liberal Theory of International Law' (2008) 254 *American Society of International Law* 240

regard to the application of the aforementioned Convention for the purpose of then effectively protecting children.

In the third chapter of this dissertation there was also a need to evaluate the relationship between the Fourth Geneva Convention (along with its Additional Protocols I and II) and the protection of children in armed conflicts and resultant humanitarian crises. Therefore, in particular, it was necessary to consider the relationship between the Fourth Geneva Convention (along with its Additional Protocols I and II) and the protection of children in armed conflicts. Moreover, this chapter also looks to evaluate the remit of the Fourth Geneva Convention from the perspective of the recognition of children's rights. This chapter then moves on to consider Additional Protocols I and II respectively in the context of the protection of children in relation to armed conflicts before then moving on to analyse the Protocol from the perspective of the recognition of children's rights.

Chapter Four of this dissertation then proceeds to consider why there have been such significant problems with children's protection during armed conflicts under the United Nations Convention on the Rights of the Child 1989 in this area to date. As part of this process, there was a need to evaluate the division between 'rhetoric' and 'reality' when it comes to the United Nations Convention on the Rights of the Child 1989 to provide for the protection of children in armed conflicts. In addition, it was also necessary for this chapter to consider the derogation from the United Nations Convention on the Rights of the Child 1989 that is deemed to be permissible in the context of the protection of children in armed conflicts. Furthermore, there was also a need to analyse the jurisdictional problems to have

arisen with the protection of children in armed conflicts under the United Nations Convention on the Rights of the Child 1989 in this area.

This dissertation then proceeds to make recommendations for as to how the protection of children can be improved upon in armed conflicts under both the United Nations Convention on the Rights of the Child 1989 and the Fourth Geneva Convention (along with its Additional Protocols I and II) that is broken down into its respective parts. Therefore, this meant there was a need to first make recommendations for as to how the protection of children can be improved upon in armed conflicts under the United Nations Convention on the Rights of the Child 1989. Finally, this chapter then makes recommendations for as to how the protection of children can be improved in armed conflicts and resultant humanitarian crises under the Fourth Geneva Convention (along with its Additional Protocols I and II). On this basis, this dissertation then proceeds to conclude with a summary of the key points to have been derived from this analysis with regard to the failure of the United Nations Convention on the Rights of the Child 1989 and the Fourth Geneva Convention (along with its Additional Protocols I and II) to be able to effectively protect children in armed conflicts and resultant humanitarian crises

***Chapter Two – International Human Rights Law in the form of the United Nations Convention on the Rights of the Child 1989 and the Protection of Children in Armed Conflicts and Resultant Humanitarian Crises***

This chapter considers the extent to which international human rights law has been recognised within the international community in practice when it comes to the matter of the protection of children during armed conflicts and resultant humanitarian crises. The reason for this is that the protection of children during armed conflicts and humanitarian crises is to be achieved through a combination of international declarations and covenants on human rights so as to safeguard children's rights. By way of illustration, as will be recognised during the course of this chapter, the United Nations Convention on the Rights of the Child of 1989 (henceforth, the UNCRC) is recognised as placing a duty upon all States to look to safeguard the life and development of each individual child.<sup>19</sup> Furthermore, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (henceforth, the Optional Protocol) was adopted by the General Assembly on 25th May 2000 and entered into force on 12th February 2002 specifically to protect children from recruitment and use in hostilities.<sup>20</sup>

***2.1 What is a child for the purpose of providing for their protection during armed conflicts and resultant humanitarian crises under the United Nations Convention on the Rights of the Child 1989?***

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<sup>19</sup> United Nations Convention on the Rights of the Child 1989, Article 6

<sup>20</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted by the General Assembly on 25th May 2000)

With regard to the matter of who a ‘child’ is for the purpose of providing for their protection in armed conflicts and resultant humanitarian crises under the UNCRC, the Convention recognises “*the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding*”.<sup>21</sup> In addition, it is also to be noted that the remit of the Convention specifically provides that “*the child, by reason of [their] physical and mental immaturity, needs special safeguards and care*”.<sup>22</sup> Allied to this, the remit of the aforementioned Optional Protocol raises the minimum age for direct participation in hostilities to 18 years of age.<sup>23</sup> In addition, the Protocol prohibits the compulsory recruitment of anyone that is under 18 years of age by government forces.<sup>24</sup> Furthermore, the Protocol also calls on State Parties to look to increase the minimum age to over 15 years of age for voluntary recruitment.<sup>25</sup> Finally, in the case of non-state armed groups, the Protocol also serves to prohibit both the voluntary and compulsory recruitment of those persons that were recognised as being under 18 years of age.<sup>26</sup>

On this basis, it would seem from the terms of the Optional Protocol that are considered in the preceding paragraph that international laws and declarations have looked to emphasise the special status of children when it comes to the matter of their protection in armed

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<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted by the General Assembly on 25th May 2000), Article 1

<sup>24</sup> Ibid, Article 2

<sup>25</sup> Ibid, Article 3

<sup>26</sup> Ibid, Article 4

conflicts and resultant humanitarian crises.<sup>27</sup> By way of illustration, the UNCRC generally defines a child as being anyone that is under 18 years of age except where the law applicable to children in a given jurisdiction means that the age of majority is attained earlier.<sup>28</sup> Consequently, the recognition of what is clearly a significant loophole under this framework of law may arguably contribute to inconsistencies arising in the laws application going forward.<sup>29</sup> As a result, efforts to create a universally accepted and understood definition of the term ‘children’ are thwarted by leaving it to the discretion of individual states to define and decide the scope of the term ‘childhood’ how they see fit.<sup>30</sup> Therefore, it would seem there has been a consistent and systemic attempt made through the enactment and implementation of international legal instruments to provide for the protection of children’s rights in conflict areas and resultant humanitarian crises.<sup>31</sup>

With this in mind, in view of the fact that the end of childhood is signalled at different ages in different States, a narrow rule defining the scope of childhood under the UNCRC is considered to be an inefficient solution in this regard for providing them with satisfactory protection in armed conflicts.<sup>32</sup> This is because, by way of illustration, the age of majority is recognised as varying distinctly from 15 years of age in countries including Iran to 21 years of age in countries including Russia.<sup>33</sup> Therefore, this apparent gap in the legal framework has been cleverly manoeuvred by the military in many States to their advantage to deliberately recruit children to train as soldiers in view of the ease with which they can

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<sup>27</sup> R Provost, *International Human Rights and Humanitarian Law*. Series: Cambridge Studies in International and Comparative Law No. 22. (Cambridge University Press, 2002)

<sup>28</sup> United Nations Convention on the Rights of the Child 1989, Article 1

<sup>29</sup> Ibid

<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

<sup>33</sup> N Abiad and F Z Mansoor, *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective* (British Institute of International and Comparative Law 2010)

be moulded to serve a particular agenda.<sup>34</sup> That this has proved to be the case in practice is despite the fact that it is also to be noted that Article 38 of the UNCRC prescribes the lower age of 15 as the minimum for recruitment and participation in an armed conflict.<sup>35</sup> In addition, this Article of the Convention requires State parties to look to prevent anyone under the age of 15 from directly participating in any hostilities in armed conflicts.<sup>36</sup>

The reality is that, despite the enactment and implementation of international laws in this area, armed conflicts and humanitarian crises throughout the world have persistently exposed children to a wide range of dangers.<sup>37</sup> Such a view is founded upon the fact that, during the course of an armed conflict, many of the safeguards international laws like the UNCRC and its Optional Protocol are meant to provide are either suspended or unavailable at the discretion of the parties involved in a particular case.<sup>38</sup> By way of illustration, from the start of the civil conflict in Syria in 2011 to date, millions of children have been the subject of numerous abuses of their rights including being summarily massacred; illegally detained; sexually abused; used in combat; abducted and tortured, and denied schooling and access to humanitarian aid.<sup>39</sup> That this proved to be the case is despite the fact it was the tragic experiences of human rights violations during the World War II that actually motivated international organizations like the United Nations so as to protect human rights generally with a special emphasis on children's rights.<sup>40</sup>

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<sup>34</sup> Ibid

<sup>35</sup> United Nations Convention on the Rights of the Child 1989, Article 38

<sup>36</sup> Ibid

<sup>37</sup> E Mottershaw, 'Economic, social and cultural rights in armed conflict: International human rights law and international humanitarian law' (2008) 12(3) *The International Journal of Human Rights* 449

<sup>38</sup> S Lobatos, 'The Future of Syria: Refugee Children in Crisis' (2015) 59(2) *Comparative Education Review* 381

<sup>39</sup> Ibid

<sup>40</sup> K Hanson, 'International Children's Rights and Armed Conflict' (2011) 5 *Human Rights and International Legal Discourse* 40

## ***2.2. Common Problems with regard to the Application of the United Nations Convention on the Rights of the Child 1989 when it comes to the Protection of Children in Armed Conflicts***

This subsection considers the common issues to have been recognised with regard to the application of the UNCRC when it comes to the protection of children in armed conflicts. The reason for this is that, in the armed conflicts to have arisen in recent history like that to have arisen in Syria since 2011, children have proved particular vulnerable to issues including physical injury, mental harm, separation from their families, abductions, exploitation, emotional, physical and even sexual abuse along with their deaths.<sup>41</sup> Therefore, as will be shown during the remainder of this chapter, there is a clear need to improve the current position of children under international law in this area when it comes to the recognition of their rights regarding some of the key issues to have been identified.<sup>42</sup>

### ***2.2.1 The Right to Life and the Right to Survival***

With regard to the matter of the right to life and the right to survival, this is covered by the UNCRC at Article 6. Specifically, Article 6(1) of the Convention provides that “*States Parties recognize that every child has the inherent right to life*” whilst Article 6(2) of the UNCRC states that “*States Parties shall ensure to the maximum extent possible the survival and development of the child*”.<sup>43</sup> This is the most difficult challenge to rise up to

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<sup>41</sup> See, by way of illustration, S Lobatos, ‘The Future of Syria: Refugee Children in Crisis’ (2015) 59(2) *Comparative Education Review* 381 and K Peltonen and R-I Punamäki, 'Preventive interventions among children exposed to trauma of armed conflict: A literature review' (2009) 36(2) *Aggressive Behavior* 95

<sup>42</sup> E Mottershaw, 'Economic, social and cultural rights in armed conflict: International human rights law and international humanitarian law' (2008) 12(3) *The International Journal of Human Rights* 449-470

<sup>43</sup> United Nations Convention on the Rights of the Child 1989, Articles 6(1) and (2)

so as to then mitigate children's suffering in armed conflicts so as to guarantee their survival.<sup>44</sup> The reason for this is because, as was recognised in the introduction to this dissertation, over 2 million children have been killed in or as a result of armed conflicts around the world in the last decade alone.<sup>45</sup> Then, as if so many children dying were not considered to be bad enough, they have also experienced many other problems as a result of the fallout of such situations in the resultant humanitarian crises that often follow.<sup>46</sup> This is because arguably even more children have experienced problems in and around conflict areas.<sup>47</sup> The reason for this is largely due to the direct and indirect consequences of the armed conflicts themselves including emotional, physical and psychological injuries as well as both the financial and social issues to have arisen.<sup>48</sup>

That so many children are dying in armed conflicts and the resultant humanitarian crises is ostensibly marked by a number of significant negative trends. Firstly, in the majority of wars to have arisen in the past decade there has been an almost absolute abandonment of compliance with even humanitarian law's most basic provision in the form of the prohibition with regard to those attacks that take place indiscriminately.<sup>49</sup> Secondly, in recent history it has been recognised that the majority of armed conflicts have proved to be civil wars of one kind or another as opposed to conflicts between two or more nations.<sup>50</sup> Allied to this, it has also proved to be the case that the majority of recent armed conflicts have proved to be somewhat complex as they are fought in populated villages and cities

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<sup>44</sup> United Nations Children's Emergency Fund (UNICEF), 'State of the World's Children' (UNICEF, New York, USA 2007)

<sup>45</sup> Ibid

<sup>46</sup> United Nations Children's Emergency Fund (UNICEF), 'Machel study 10-year strategic review: Children and conflict in a changing world' (UNICEF, New York, USA 2009)

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>50</sup> Ibid

where combatants, children and other civilians intermingle and the distinction between them is ignored to the detriment of the rights of the most vulnerable people in society.<sup>51</sup>

This last point is of particular significance because it is the parties to a conflict's failure to effectively draw a distinction between combatants and civilians with the tendency on the part of most military parties to, for example, treat whole neighbourhoods as military objectives leading to significantly more child casualties.<sup>52</sup> In addition, the 1990's, in particular, saw a significant increase in the level of 'ethnic cleansing' in conflicts including those involving Bosnia and Rwanda which were especially important when it came to the number of child deaths that resulted because they were targeted directly as the enemy's future.<sup>53</sup> Therefore, it would seem that a fundamental problem for children in armed conflicts is the need for them to be able to survive despite the recognition under international law in the form of Article 6 of the UNCRC of the rights to life and survival.<sup>54</sup>

However, although many of the children that die during the course of an armed conflict do so because of the hostilities specifically themselves, there are also a considerable number of children that are indirect victims.<sup>55</sup> This is because many all too often fall prey to resultant issues emanating from a conflict like disease, malnutrition or even starvation in the immediate aftermath as part of the resultant humanitarian crisis.<sup>56</sup> By way of illustration, a study undertaken in 1980 in a Ugandan warzone found that only 2% of all of the child deaths in the country were attributable to violence whilst 20% were as a result of

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<sup>51</sup> Ibid

<sup>52</sup> S P Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 Global Responsibility to Protect 442

<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> J S Barbara, 'Impact of War on Children and Imperative to End War' (2006) 47(6) Croatian Medical Journal 891

<sup>56</sup> Ibid

disease and 78% were due to hunger which arguably came about as a consequence of the armed conflict in the area.<sup>57</sup> Similarly, in the Somalian warzone in 1992 it was found that more than 50% of all the children under the age of five at the start of January that year were dead by that same year's end with around 90% of them having perished due to a combination of malnutrition and disease as a result of the ongoing armed conflicts there.<sup>58</sup>

Matters in this regard are then not helped any further by the fact that any humanitarian relief that is provided either does not arrive where it is needed or is not let in to the countries affected by the conflict.<sup>59</sup> By way of example, during the course of the 1980s in Somalia only 12% of all food and related humanitarian shipments actually ever reached the people in need to their severe detriment when it came to their ongoing survival at a time of great upheaval.<sup>60</sup> Finally, it has also been recognised that other children have passed in view of the fact that both individual countries governments and armed groups make the possibility of the people growing their own food all but virtually impossible.<sup>61</sup>

### ***2.2.2 Health and Community Infrastructures Breakdown***

Another serious problem for the protection of children during armed conflicts is the breakdown of health and community infrastructures in the individual States impacted upon

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<sup>57</sup> A Delavande and R M Cordeiro, 'Violent Conflicts and Risky Sexual Behavior' MICROCON Research Working Paper 60 (2012)

<sup>58</sup> M Merson, R Black and A J Mills, *International Public Health: Diseases, Programs, Systems and Policies* (2 Edition, Jones and Bartlett Publishers 2006)

<sup>59</sup> S P Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to Protect* 442

<sup>60</sup> M Merson, R Black and A J Mills, *International Public Health: Diseases, Programs, Systems and Policies* (2 Edition, Jones and Bartlett Publishers 2006)

<sup>61</sup> *Ibid*

which may also impact the number of deaths of children that transpire.<sup>62</sup> That this has proved to be the case in practice is despite the fact that the UNCRC at Article 24 provides “*States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and the rehabilitation of health*”.<sup>63</sup> This Article of the Convention then also goes on to recognise that “*States Parties shall strive to ensure that no child is deprived of [their] right of access to such health or care services*”.<sup>64</sup>

The fact that so many children can be impacted upon as a result of the breakdown of health and community infrastructures is supported by events that transpired in Mozambique during the conflict between 1982 and 1986.<sup>65</sup> This is because it was during this period that more than 40% of all of the country’s health centres were destroyed during the course of the conflict to the detriment of its people.<sup>66</sup> Similarly, during the course of Russia’s Second War with Chechnya between 1999 and 2009 there was significant damage caused to the hospitals in the area leaving only extremely poor facilities remaining to cater for the needs of the people living in the area.<sup>67</sup> In both cases, matters were not helped by the fact that it is often the case that, in times of conflict, most skilled professionals like medical personnel flee first leading to consequent staffing issues when the needs of patients are likely to increase considerably in practice.<sup>68</sup>

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<sup>62</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>63</sup> United Nations Convention on the Rights of the Child 1989, Article 24

<sup>64</sup> Ibid

<sup>65</sup> E Pavignani and J R Durão, ‘Aid, Change and Second Thoughts: Managing external resources in the health sector in Mozambique’ (Ministry of Health, Mozambique 1997)

<sup>66</sup> Ibid

<sup>67</sup> C E Baxter, ‘The Wolf Attacks: A History of the Russo-Chechen Conflict’ Electronic Theses and Dissertations. Paper 2460 (2014)

<sup>68</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

It has also been recognised that armed conflicts have the potential to effectively disrupt those infrastructures that serve to support the achievement of community health and well-being within a particular jurisdiction to the detriment of whole populations including children.<sup>69</sup> This is because the fallout of armed conflicts typically leads to housing being lost, poor sanitation and power shortages leading to significant health risks to the detriment of civilian populations and, more specifically, the most vulnerable within a society like children.<sup>70</sup> By way of illustration, it has also been recognised that armed conflicts may bring with them contamination of vital water supplies and consequent water shortages whilst power shortages may lead to hypothermia in vulnerable members of a society like children along with the potential for more accidents.<sup>71</sup>

### ***2.2.3 Economic Crisis***

It is also possible that armed conflicts could result in economic crises that detrimentally impact upon the children of the parties involved contrary to the remit of the UNCRC at Article 27. The reason for this is that this Article of the Convention specifically provides that *“The States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”*.<sup>72</sup> That this may prove to be a significant problem for children is because economic crises typically accompany armed conflicts leading to the dislocation of services, more problems

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<sup>69</sup> B Devkota and E R van Teijlingen, ‘Understanding effects of armed conflict on health outcomes: the case of Nepal’ (2010) 4(20) Conflict and Health 1

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> United Nations Convention on the Rights of the Child 1989, Article 27

maintaining access to areas that are impacted upon by the particular conflict for service delivery, greater national debt and more impoverishment of families.<sup>73</sup>

Children are also likely to experience problems as a result of armed conflicts impact upon the finances of their individual families which may lead to other problems for them including the others referred to in this subsection of this chapter.<sup>74</sup> This is because their financial status is likely to be significantly impacted upon by the male members of the family being called away to participate in the conflict itself so that the women and children are then left to carry the burden.<sup>75</sup> As a result, seemingly simple tasks like obtaining food and keeping warm can suddenly prove much more complicated both physically and emotionally for those children that are left behind.<sup>76</sup> On this basis, this means that the remaining family members fall into poverty with a particularly disproportionate effect upon children from poorer families impacting upon both their potential survival and development going forward.<sup>77</sup>

#### ***2.2.4 Loss of Education***

Armed conflicts could also pose significant problems for children's ongoing education contrary to the UNCRC at Article 28(1) which provides that individual States are meant to "*recognize the right of the child to education*".<sup>78</sup> This is because armed conflicts could bring about the consequent destruction and/or closure of different educational

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<sup>73</sup> S P Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 Global Responsibility to Protect 442

<sup>74</sup> K Peltonen and R-I Punamäki, 'Preventive interventions among children exposed to trauma of armed conflict: A literature review' (2009) 36(2) Aggressive Behavior 95

<sup>75</sup> Ibid

<sup>76</sup> Ibid

<sup>77</sup> Ibid

<sup>78</sup> United Nations Convention on the Rights of the Child 1989, Article 28(1)

establishments like schools and universities.<sup>79</sup> In addition, armed conflicts may result in a population's displacement and, in view of the fact they are part of a given country's professional classes, teachers are typically some of the first to vacate conflict areas leading to children losing out on schooling and, consequently, loss of life opportunities.<sup>80</sup> For example, during Russia's Second War with Chechnya between 1999 and 2009, in Chechnya no more than 50% of all schools in the region remained operation meaning that they were often overcrowded, insanitary and insecure which, as has already been recognised, is a fairly typical result of an armed conflict.<sup>81</sup> Therefore, the sad reality is that the consequent loss of schooling from the impact of an armed conflict is considered to be very hard to remedy.<sup>82</sup> This is because along with the fact that, as has already been recognised, children will have their opportunities later in life significantly reduced, the State will also ultimately lose due to the resultant scarcity of the skilled labour that was required for reconstruction in the aftermath of the conflict.<sup>83</sup>

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<sup>79</sup> T N Manuehr, 'Education Right of Children during War and Armed Conflicts' (2011) 15 *Procedia Social and Behavioral Sciences* 302

<sup>80</sup> *Ibid*

<sup>81</sup> C E Baxter, 'The Wolf Attacks: A History of the Russo-Chechen Conflict' (2014). *Electronic Theses and Dissertations*. Paper 2460

<sup>82</sup> T N Manuehr, 'Education Right of Children during War and Armed Conflicts' (2011) 15 *Procedia Social and Behavioral Sciences* 302

<sup>83</sup> *Ibid*

***Chapter Three – Humanitarian Law in the form of the Fourth Geneva Convention along with its Additional Protocols I and II and the Protection of Children in Armed Conflicts and Resultant Humanitarian Crises***

This chapter considers the extent to which international humanitarian law has been recognised in States when it comes to the matter of the protection of children during armed conflicts and consequent humanitarian crises. The reason for this is that humanitarian law in the form of the Fourth Geneva Convention and its Additional Protocols I and II has always been recognised as a compromise between objectives of a humanitarian and military nature so there is some debate about whether the law in this can protect children.<sup>84</sup> By way of illustration, ‘Protection’ in the context of children’s rights under the UNCRC includes protection from hostilities conduct including physical disability, emotional distress or death along with other associated adversities including starvation, displacement, poverty and the disruption of education.<sup>85</sup>

With this in mind, one of the key arguments in favour of international humanitarian law protecting children in armed conflicts would be that it is practical and thus significantly more likely to be implemented than idealistic instruments that will all too easily be

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<sup>84</sup> D Fleck, *The Handbook of International Humanitarian Law* (2nd Edition, Oxford University Press 2008)

<sup>85</sup> E Baimu, ‘Children, International Protection’ (Max Planck Foundation for International Peace and the Rule of Law 2013)

disregarded.<sup>86</sup> However, to be able to effectively evaluate if international humanitarian law provides the kind of protection that children required in armed conflicts, both the Fourth Geneva Convention and its Additional Protocols I and II need to be assessed.

### ***3.1 The Fourth Geneva Convention and the Protection of Children in Armed Conflicts***

Whilst the Fourth Geneva Convention looks to provide those deemed to be ‘victims’ because of their ‘vulnerability’ with protection, this notion was originally defined somewhat narrowly as including only wounded, shipwrecked or ill combatants. Nevertheless, it is the Fourth Geneva Convention’s introduction that served to extend this understanding to include only a specific group of civilians despite the fact one may argue all civilians are vulnerable because they are unarmed and thus cannot defend themselves.<sup>87</sup> At the same time, however, there is a need to recognise the Fourth Geneva Convention’s main function is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to military operations themselves.<sup>88</sup> Therefore, it would seem to be true to say protection from the conduct of hostilities themselves is actually beyond the Fourth Geneva Convention’s scope.

This view is supported by the fact that even Part II of this Convention provides general safeguards “*against certain consequences of war*” for the civilian population from operations of a military nature operations.<sup>89</sup> That this has proved to be the case in practice is despite the fact that it is the Fourth Geneva Convention’s only section that equally

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<sup>86</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>87</sup> D Fleck, *The Handbook of International Humanitarian Law* (2nd Edition, Oxford University Press 2008)

<sup>88</sup> Ibid

<sup>89</sup> S P Rosenberg, ‘Responsibility to Protect: A Framework for Prevention’ (2009) 1 *Global Responsibility to Protect* 442

applies to a Party's own civilian population even though the general safeguards available in this area are somewhat limited.<sup>90</sup> This understanding is supported by the fact that Article 15 of the Convention provides "*Any Party to the conflict may . . . propose to the adverse Party to establish . . . neutralized zones*".<sup>91</sup> In addition, Article 25 states that "*All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families*".<sup>92</sup> Finally, Article 26 of the same Convention provides that "*Each Party to the conflict shall facilitate enquires made by members of families dispersed owing to the war*".<sup>93</sup>

More specifically, this Part of the Fourth Geneva Convention also includes a number of Articles specifically related to the protection of children despite the fact they are somewhat limited in their scope.<sup>94</sup> By way of illustration, Article 14 of the Convention provides that "*Parties [to a conflict] may establish . . . hospital and safety zones and localities so organized as to protect from the effects of war . . . children under [the age of] fifteen*".<sup>95</sup> Furthermore, it is also to be noted that Article 17 states "*Parties [to a conflict] shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . children and maternity cases*".<sup>96</sup> Moreover, Article 23 of the same Convention recognises "*Each ... Party [to a conflict] shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under*

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<sup>90</sup> Ibid

<sup>91</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 15

<sup>92</sup> Ibid, Article 25

<sup>93</sup> Ibid, Article 26

<sup>94</sup> S P Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 Global Responsibility to Protect 442

<sup>95</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 14

<sup>96</sup> Ibid, Article 17

*fifteen, expectant mothers and maternity cases”*.<sup>97</sup> Finally, there is also a need to recognise the fact that Article 24 provides “*The Parties [to a conflict] shall take the necessary measures to ensure that children under [the age of] fifteen, who are orphaned or are separated from their families as a result of war, are not left to their own resources*”.<sup>98</sup>

Interestingly, of the Articles of the Fourth Geneva Convention referred to in the preceding paragraph, only Article 24 specifically singles out children on a somewhat limited basis whilst all of the other Articles protect all of those people deemed to need ‘special protection’.<sup>99</sup> Such a view is supported by the fact that Part III, section I of this Convention offers a certain amount of significant protection to the civilian population on a more general basis which children will clearly fall within.<sup>100</sup> Nevertheless, it is still also to be noted that Part III of the Fourth Geneva Convention is somewhat limited in view of the fact that it only serves to safeguard the interests of those people that are deemed to be ‘protected persons’ in the circumstances of a given case (i.e. the general civilian population in the hands of the enemy but **NOT** a Party’s own population).<sup>101</sup>

As has already been recognised earlier in this chapter, the concept of ‘protection’ is not considered to be inclusive of protection regarding the way in which hostilities are conducted.<sup>102</sup> However, there is also a need to recognise the fact the Fourth Geneva Convention is primarily applicable to international armed conflicts as the Convention itself

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<sup>97</sup> Ibid, Article 23

<sup>98</sup> Ibid, Article 24

<sup>99</sup> R Arnold and N Quéniwet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008)

<sup>100</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Part II, section 1

<sup>101</sup> Ibid, Part III

<sup>102</sup> S P Rosenberg, ‘Responsibility to Protect: A Framework for Prevention’ (2009) 1 *Global Responsibility to Protect* 442

defines them.<sup>103</sup> Nonetheless, whilst ‘Common Article 3’ is included in the Fourth Geneva Convention and is also applicable in the case of non-international conflicts, the whole of the Convention also applies in a restricted sense in non-international conflicts so the enforcement mechanism may regulate non-international conflicts.<sup>104</sup>

### ***3.2 The Fourth Geneva Convention from the Perspective of the Recognition of Children’s Rights***

The Fourth Geneva Convention has proved somewhat inadequate in guaranteeing children’s protection and the promotion of their rights under the UNCRC.<sup>105</sup> This is because the Convention fails to protect every child as the child that they are with too little attention paid to their special needs due to their inherent vulnerability when compared to adults.<sup>106</sup> Moreover, since protection from hostilities is beyond the Fourth Geneva Convention scope, children are not technically protected from military operations.<sup>107</sup> The reason for this is that children are not really part of the Convention’s focus since they are actually only treated as a one aspect of the civilian population’s most vulnerable part.<sup>108</sup> As a result, this has served to have significant consequences for those children that become caught up in armed conflicts since the need to provide for their protection and the promotion of their rights is then significantly devalued in practice.<sup>109</sup>

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<sup>103</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 2

<sup>104</sup> R P Bainbridge, *The Liberal Way of War: Legal Perspectives* (Routledge 2016)

<sup>105</sup> G B I Najjar, ‘The Protection Of Children in Armed Conflicts under the Rules of International Law: Does International Humanitarian Law grant children special protection in situations of attack?’ (University of Oslo, Faculty of Law 2011)

<sup>106</sup> Ibid

<sup>107</sup> Ibid

<sup>108</sup> Ibid

<sup>109</sup> Ibid

However, whilst it is arguable there were no such things as the recognition of children's rights as we know them today when all of the Geneva Conventions were first drafted, it is still to be noted that the recognition of children's rights did not begin with the UNCRC.<sup>110</sup> Instead, it is arguable children's rights had actually been a subject of significant concern for both regional and international drafting bodies since World War I's conclusion in 1918 supported by an array of instruments generally aimed at children as well as those specifically involved in armed conflicts.<sup>111</sup> By way of illustration, one of the most well-known and widely applicable legislative instruments in this area is the Declaration of the Rights of the Child of 1924 (also known as the Declaration of Geneva) which recognises children's needs extend beyond mere protection in the physical sense.<sup>112</sup> This view is then only further supported by the Children's Charter for the Post-war World of 1942 which provides that every child has the right *"to proper food, clothing and shelter [as] a first charge on the resources of the nation; [f]or every child there shall be available medical attention and treatment [and that t]here shall be full-time schooling for every child"*.<sup>113</sup>

Nevertheless, there are still a number of significant issues with the Fourth Geneva Convention from the perspective of the recognition of children's rights. This is because, as has already been recognised earlier in the course of this chapter, the protection the

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<sup>110</sup> E Baimu, 'Children, International Protection' (Max Planck Foundation for International Peace and the Rule of Law 2013)

<sup>111</sup> See, by way of illustration, the International Convention for the Suppression of the White Slave Traffic of 1910, the ILO Conventions Fixing the Minimum Age For Admission of Children to Industrial Employment of 1919, the ILO Convention Concerning the Night Work of Young Persons Employed in Industry of 1919, the International Convention for the Suppression of the Traffic in Women and Children of 1922, the Children's Charter of the International Council of Women of 1922, the Declaration of Geneva of 1924, the Children's Charter of President Hoover's White House Conference on Child Health and Protection of 1930, the Bill of Rights for the Handicapped Child of 1930, the Children's Charter in Wartime of 1942, the Children's Charter for the Post-War World of 1942, and the Declaration of Opportunities for Children of 1942

<sup>112</sup> T Buck, *International Child Law* (Routledge 2014)

<sup>113</sup> G Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998)

Convention provides to the civilian population as a whole is somewhat limited.<sup>114</sup> A further problem has also arisen with the definition of what a ‘child’ is. This is because whilst the majority of international instruments pertaining to children’s rights treat anyone up to 18 years of age as a child, the Fourth Geneva Convention does not extend specific protections to those children that are over fifteen years of age.<sup>115</sup> A further age reference in the Convention is also made to the fact that all children that are under the age of seven have been recognised as having a further right to be with their mothers.<sup>116</sup> In addition, it is not possible for an occupying power to compel a child that is under 18 years of age to work or pronounce the death penalty against them where they have committed a relevant offence at this time.<sup>117</sup> Moreover, it is also to be noted that, with regard to detention conditions in occupied territories, a provision that acknowledges “*the special treatment due to minors*” is negated somewhat by the fact the concept of what a minor is has not been defined.<sup>118</sup>

### ***3.3 Additional Protocol I and the Protection of Children in Armed Conflicts***

The Geneva Convention’s Additional Protocols of 1977 were meant to enhance humanitarian law as a result of the events that transpired during the war in Vietnam, new weapons use and civilians’ extensive suffering in armed conflicts at this time.<sup>119</sup> Therefore, Protocol I arguably marks some significant progress in the law related to the protection of

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<sup>114</sup> S P Rosenberg, ‘Responsibility to Protect: A Framework for Prevention’ (2009) 1 *Global Responsibility to Protect* 442

<sup>115</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 24

<sup>116</sup> *Ibid*, Article 14

<sup>117</sup> *Ibid*, Articles 51 and 68 respectively

<sup>118</sup> *Ibid* Article 76

<sup>119</sup> M Bothe, K J Partsch and W A Solf, *New rules for victims of armed conflicts, Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982)

children in armed conflicts development.<sup>120</sup> This is because this Protocol was recognised as the first significant move toward protecting civilians from the realities of armed conflicts that did not previously exist at the time of the drafting of the Fourth Geneva Convention itself.<sup>121</sup> Moreover, it is also to be noted that Protocol I protects civilian populations where they do not partake in hostilities in contrast to the Fourth Geneva Convention where ‘extreme vulnerability’ served to qualify protection.<sup>122</sup>

The focal point of the protection of civilians that is provided for under Protocol I centres upon the fact that the parties directly involved in a conflict need to distinguish between combatants and civilians and military and civilian objectives to ensure civilians and civilian objectives are not the aim of any military attack.<sup>123</sup> However, one of the key issues with this configuration is that the definition of a ‘military objective’ is considered to provide a particular object could be a lawful objective in this regard whilst still also retaining a character that is civilian in nature that does not detract from its military status.<sup>124</sup> Second, although there are many benefits to this understanding, it is a fluid definition so this effectively means that things that were previously illegitimate military objectives could eventually become legitimate during the course of a given conflict.<sup>125</sup>

Nevertheless, it is arguable there is not sufficient attention given to how the points raised in the preceding paragraph fit with the customary principle of proportionality when it comes

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<sup>120</sup> A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

<sup>121</sup> Ibid

<sup>122</sup> Ibid

<sup>123</sup> M Sassòli, ‘Legitimate Targets of Attacks under International Humanitarian Law’ Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law (27-29 January 2003)

<sup>124</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>125</sup> Ibid

to the protection of civilians under Protocol I.<sup>126</sup> Therefore, this effectively means that readers of this dissertation will arguably not be left with a completely accurate understanding of what is considered to be illegal in this regard.<sup>127</sup> This is because, in the context of armed conflicts, the proportionality principle provides civilian casualties should be proportionate to the military benefits that may be gained as a result of an attack.<sup>128</sup> In summary, this effectively means that the military must look to use whatever strategy they can to bring about the fewest losses of civilian life in looking to fulfil their own specific military objectives.<sup>129</sup> By way of illustration, there is also a need to understand that Article 51(4) of Protocol I of the Fourth Geneva Convention provides for the prohibition of indiscriminate attacks that “*may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated*”.<sup>130</sup>

On this basis, although civilians (including children) are arguably more protected under Protocol I of the Fourth Geneva Convention, it would seem to be true to say that protection still falls in the context of military considerations.<sup>131</sup> At the same time, however, there is still also a need to recognise the fact that it is in no way considered to be feasible to provide for the imposition of a total prohibition on civilians being injured or killed during the course of armed conflicts.<sup>132</sup> This understanding is supported by the fact that the aforementioned Protocol I only really provides for civilians protection from their being a

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<sup>126</sup> A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

<sup>127</sup> Ibid

<sup>128</sup> Ibid

<sup>129</sup> Ibid

<sup>130</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 51(4)

<sup>131</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

<sup>132</sup> A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

given attack's direct and intended target.<sup>133</sup> Therefore, for children to be specifically protected under Protocol I there is a need to consider Articles 77 (regarding the protection of children) and 78 (regarding the evacuation of children) in particular which have been taken to apply to all civilians and thus also children.<sup>134</sup> The reason for this is that these special provisions relating to children under Protocol I are ostensibly concerned with children's participation in armed conflicts; their arrest, their detention or internment; their criminal sentencing; and their evacuation as an object of special respect.<sup>135</sup>

### ***3.4 Additional Protocol I from a Child Right's Perspective***

When it comes to the matter of the 'protection' of children's rights under Protocol I of the Fourth Geneva Convention, this was effectively a compromise between ideals of a humanitarian nature and what was considered to be a necessity on a military basis.<sup>136</sup> Any provision of law that permits civilian life to be lost, so long as the loss is not excessive when set against the anticipated military benefits, is fundamentally incompatible with the UNCRC's provisions regarding the right to life.<sup>137</sup> Therefore, it has been implied that the recognition of the right to life on the part of individual civilians is considered to have the nature of what may be referred to as a norm that is not reflected in Protocol I of the Fourth Geneva Convention's understanding of what 'protection' is.<sup>138</sup>

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<sup>133</sup> Ibid

<sup>134</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Articles 77-78

<sup>135</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

<sup>136</sup> A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

<sup>137</sup> United Nations Convention on the Rights of the Child 1989, Article 6

<sup>138</sup> A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

Clearly, a certain amount of consideration of children was given during Protocol I's drafting and amendments were set out for drafting committees to consider which would have better protected children but were largely ignored for the purpose of achieving a consensus.<sup>139</sup> That this proved to be the case is despite the fact that, as has already been alluded to, some significant efforts were undertaken to improve the recognition of the rights of children such as that which was found in the Declaration on the Rights of the Child of 1959.<sup>140</sup> Therefore, it would seem that there is not any sign the Protocol I (and indeed Protocol II) looks to provide for the upholding of the idea that the whole of humanity 'owes' its children in some way for what they may potentially achieve at some distant point in the future.<sup>141</sup> Nevertheless, although armed conflicts are considered to be obstructive to children's 'best interests' since they bring with them the possibility of injury or death, disruption of life and the curtailment of freedom and dignity, Protocol I (and Protocol II) only provided minimal levels of protection for children going forward.<sup>142</sup>

Whilst it may seem that Article 77 of Protocol I served to increase the amount of protection available for children, this Article is likely to achieve very little in practice to the benefit of children in view of its practical generality.<sup>143</sup> In addition, Article 77 failed to define the age of childhood whilst there is also nothing to prevent parties interpreting the word 'children' in Protocol I at Articles 77(2) and (3) as including everyone up to 18 years of age which the Fourth Geneva Convention agrees upon.<sup>144</sup> Furthermore, Article 77(2) of the Protocol utilises the concept of 'persons' as opposed to 'child' when looking to refer to those that

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<sup>139</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>140</sup> *Ibid*

<sup>141</sup> *Ibid*

<sup>142</sup> K Hanson, 'International Children's Rights and Armed Conflict' (2011) 5 *Human Rights and International Legal Discourse* 40

<sup>143</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) *Refugee Survey Quarterly* 83

<sup>144</sup> *Ibid*

are considered to fall between fifteen and eighteen years of age which means that the scope of the Article is somewhat limited on the face of it.<sup>145</sup> Therefore, from the perspective of children's rights, it is arguable that Protocol I provides most of the failings to have been recognised in the Fourth Geneva Convention.<sup>146</sup> This is because of the fact that the remit of this Protocol does not include children's rights as they were understood in 1977 (let alone today) so as to not provide the protection that children need in armed conflicts.<sup>147</sup>

### ***3.5 Additional Protocol II and the Protection of Children in Armed Conflicts***

As with Protocol I, there is a need to recognise the fact that Protocol II, that is considered to be applicable in non-international armed conflicts, provides civilians (as well as children consequently) with some significant protection from events that are considered to have been derived from armed conflicts.<sup>148</sup> Nonetheless, there are three key points to note in this regard that serve to impact upon the level of protection children may receive during non-international armed conflicts – (a) both civilians and combatants are not defined as a consequence of sensitivity about the principle of sovereignty; (b) there is not any express obligation to reduce losses of civilian life despite the fact that some protections against the impact of armed conflicts exist; and, finally, (c) there is a lack of a specific prohibition of reprisals being taken against civilians.<sup>149</sup>

However, it is also necessary to understand the fact that the significance of the points raised in the preceding paragraph have been somewhat mitigated through customary

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<sup>145</sup> Ibid

<sup>146</sup> Ibid

<sup>147</sup> Ibid

<sup>148</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

<sup>149</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) Refugee Survey Quarterly 83-95

international law's development regarding internal conflicts even though its content is debatable.<sup>150</sup> By way of illustration, in the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 decision in *Prosecutor v. Tadić*<sup>151</sup> several provisions regarding civilians' protection actually ended up becoming customary law. Specifically, it has been recognised that these provisions of customary law in this area have been identified as follows – (1) civilians being intentionally attacked was prohibited; (2) attacks on non-military objects being prohibited and the need for a distinction between military and civilian objectives which should not be attacked; (3) precautions are to be taken in attacking military objectives to limit civilian casualties; (4) aerial attacks are only to be initiated against military objectives that are recognised as identifiable; (5) reprisals against the civilian population are to be prohibited; and (6) human rights recognised in international instruments are to be fully applicable in armed conflicts without exception.<sup>152</sup>

With this in mind, it is arguable that Protocol II of the Fourth Geneva Convention has been effectively recognised as a lesser version of Protocol I to the same Convention when it comes to the protection of children's rights in armed conflicts.<sup>153</sup> The reason for this is that traditionally international law viewed a State's affairs of a domestic nature as being beyond the remit of its jurisdiction.<sup>154</sup> In particular, this is because it has been recognised that civil wars are a somewhat sensitive matter of concern since all States consider the restraint of

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<sup>150</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>151</sup> *Prosecutor v. Tadić*, Case IT-94-1-AR72, Appeal on Jurisdiction (2nd October 1995)

<sup>152</sup> *Ibid*, 55-56 and 61

<sup>153</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>154</sup> United Nations Charter 1945, Article 2(7)

those that oppose its influence to be a legitimate right.<sup>155</sup> However, in view of the need to account for the matter of State sovereignty, it is arguably hardly surprising that Protocol II is not considered to be anywhere near as exhaustive in its nature as Protocol I when it comes to providing protection to children in armed conflicts.<sup>156</sup>

Of course, to say that Protocol II has no redeeming features when it comes to the protection of children in armed conflicts would be a misnomer because of the fact that it marked a significant development in the law in this area.<sup>157</sup> The reason for this is that, until 1977, non-international armed conflicts provided no safeguards aside from under the Geneva Conventions at Common Article 3.<sup>158</sup> Therefore, this effectively meant that those children that were unlucky enough to find themselves in an internal war would be left with a lack of any real protection at law.<sup>159</sup> However, it is to be noted that Protocol II serves to supplement Common Article 3 of the Geneva Conventions with principles of humanitarian law that came to be looked upon as too general and incomplete in nature to sufficiently guide non-international armed conflicts conduct.<sup>160</sup>

Nonetheless, it is arguable Protocol II's key feature is that it adds to humanitarian law a provision regarding the importance of recognising all children as the children that they are when it comes to providing them with greater protection during armed conflicts.<sup>161</sup> By way

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<sup>155</sup> A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

<sup>156</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

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S Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22(1)

European Journal of International Law 219

<sup>158</sup> *Ibid*

<sup>159</sup> *Ibid*

<sup>160</sup> M N Schmitt and C H B Garraway, 'The Manual on the Law of Non-International Armed Conflict with Commentary' (International Institute of Humanitarian Law 2006)

<sup>161</sup> S Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22(1) European Journal of International Law 219

of illustration, this Protocol looks to guarantee that all children are being treated humanely by providing that they – (a) have the care and aid they need regarding the education their parents or those responsible for their care wanted for them; (b) have the support to facilitate their reunions with their families where they have been temporarily separated; (c) that are yet to reach fifteen years of age will not be recruited to take part in the armed conflicts themselves; (d) that are the subject of the special protection provided under this Article at point (c) shall still have this protection apply to them if they directly participate in an armed conflict and are captured; and (e) will be temporarily removed from where an armed conflict takes place to a safer area accompanied by someone responsible for their well-being with their parents or carers consent.<sup>162</sup>

### ***3.6 Additional Protocol II from a Children's Rights Perspective***

Much like with Protocol I of the Fourth Geneva Convention, moves were made during the drafting of Protocol II so as to increase the protection that is available to children in armed conflicts.<sup>163</sup> However, Protocol II did not even include the somewhat weak rights in the Declaration on the Rights of the Child of 1959 and provide any more protection than what was provided for under the Fourth Geneva Convention.<sup>164</sup> Consequently, it is arguable that the only real development to have transpired with regard to the law in this area relates to protection during armed conflicts generalisation to have been recognised in Protocol II.<sup>165</sup> Nevertheless, as has already been alluded to earlier in the course of this chapter, it is not

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<sup>162</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 4(3)

<sup>163</sup> S Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22(1) *European Journal of International Law* 219

<sup>164</sup> D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 *Harvard Human Rights Journal* 115

<sup>165</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 4(3)

possible to attribute the lack of sufficient protection for children in armed conflicts to any general ignorance of the importance of the recognition of children's rights in this regard.<sup>166</sup>

In addition, along with the same criticisms to have been identified with regard to the limited understanding of what a 'child' is in the Fourth Geneva Convention and Protocol I that are also applicable in Protocol II, some significant problems have arisen with Protocol II's applicability.<sup>167</sup> This is because of the fact that this Protocol only actually applies where – (1) there is an armed conflict that Protocol I at Article I does not cover; (2) the armed conflict arises in a High Contracting Party's territory; (3) those that are involved in the conflict are a High Contracting Party, dissident or other organised armed groups' armed force; (4) there is a responsible command of dissident armed forces or other organised armed groups; (5) the aforementioned armed forces or organised groups control part of the High Contracting Party's territory to allow them to complete military operations that are both sustained and concerted along with providing for Protocol II's implementation; and (6) there is not a tension or an internal disturbance, a riot or an isolated and sporadic act or acts of violence or other acts that are considered to be similar in nature.<sup>168</sup>

On this basis, it would seem to be true to say that the application of Protocol II of the Fourth Geneva Convention is somewhat limited in its applicability.<sup>169</sup> This is because it has been recognised that the non-State armed force or group needs to have progressed significantly to fulfil the need for controls of a territorial nature.<sup>170</sup> Similarly, a significant

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<sup>166</sup> D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 Harvard Human Rights Journal 115

<sup>167</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) Refugee Survey Quarterly 83-95

<sup>168</sup> Ibid

<sup>169</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>170</sup> Ibid

problem has arisen with regard to both Protocols application in view of the fact that the ratification process completed by independent States in this regard has been piecemeal at best.<sup>171</sup> Matters in this regard are also not helped by the fact that, in view of their interests in maintaining the recognition of their sovereignty, the majority of national governments are not likely to willingly concede a situation in their territory is an armed conflict within the remit of Protocol II.<sup>172</sup> Furthermore, there is also a need to recognise the fact that Protocol II of the Fourth Geneva Convention is not considered in any way applicable to “*situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts*”.<sup>173</sup>

However, it is also to be noted that it is not only acts of violence that are associated with the protection of children during the course of armed conflicts.<sup>174</sup> This is because, as has already been recognised earlier in the course of this dissertation, many children have also experienced a variety of other problems aside from physical injuries and even death during the resultant fallout that may follow the outbreak of an armed conflict.<sup>175</sup> These problems have been recognised as including severe cold and hunger, anxiety at the absence of male family members and having to work and thus also mature significantly earlier than they would otherwise have been expected to as a consequence of armed conflicts.<sup>176</sup>

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<sup>171</sup> F Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* (Rowman and Littlefields Publishers 2007)

<sup>172</sup> Ibid

<sup>173</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 1(2)

<sup>174</sup> D Devakumar, M Birch, D Osrin, E Sondorp and J C K Wells, ‘The Intergenerational Effects of the War on the Health of Children’ (2014) 12 BMC Medicine 57

<sup>175</sup> Ibid

<sup>176</sup> Ibid

In the event that Protocol II of the Fourth Geneva Convention is not found to be applicable or in the event that its application is contested, it has been found that Common Article 3 should apply instead even though the protection this Article provides is actually quite limited in practice.<sup>177</sup> This is because this Common Article 3 was considered to be a significant innovation in view of the fact that it was the first provision to cover non-international armed conflicts.<sup>178</sup> These conflicts have been found to include traditional civil wars, internal armed conflicts that spill over into other States and internal conflicts where there is some form of third State or multinational force intervention in proceedings.<sup>179</sup>

However, the rules that are established under Common Article 3 of the Geneva Conventions do not allow for any form of derogation and it is effectively like a microcosm of the Conventions that apply to non-international conflicts when it comes to the protection that it provides.<sup>180</sup> By way of illustration, the points covered include – (a) all Prisoners of War are to be treated humanely without distinction whilst specifically prohibiting murder, mutilation, torture, cruel, humiliating and degrading treatment, hostage taking and unfair trials; (b) wounded, sick and shipwrecked are to be collected and taken care of; (c) the International Committee of the Red Cross is to be able to offer its services to the particular parties involved in the specific conflict; (d) the particular parties involved in a conflict are to bring all or parts of the Geneva Conventions into force; (d) these rules application in practice is not to impact upon the parties to a given conflict's legal status; and, (e) in view

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<sup>177</sup> S P Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to Protect* 442

<sup>178</sup> *Ibid*

<sup>179</sup> *Ibid*

<sup>180</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

of the fact most armed conflicts are non-international, this Article's full respect is considered to be an absolute necessity.<sup>181</sup>

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<sup>181</sup> Ibid

***Chapter Four – Why have there been such significant problems with children’s protection during armed conflicts under the United Nations Convention on the Rights of the Child 1989 to date?***

Having identified some of the most significant problems with the protection of children during armed conflicts under the UNCRC, this chapter actively considers why this has proved to be the case in practice. To achieve this, it is considered to be necessary for this chapter to analyse three specific issues. In the first subsection of this chapter the division between ‘rhetoric’ and ‘reality’ is considered when it comes to the protection of children in armed conflicts for the purpose of then better understanding the problems with the development of the law in this area. Following on from this, the level of derogation that is permissible (or not) from the application of the UNCRC in practice in the context of armed conflicts is then considered. Finally, this chapter analyses the jurisdictional problems to have arisen with the protection of children under the UNCRC in armed conflicts in view of the approaches taken by different legal systems to the resolution of issues in this regard.

***4.1 The Division between ‘Rhetoric’ and ‘Reality’ when it comes to the application of the United Nations Convention on the Rights of the Child 1989 to provide for the Protection of Children in Armed Conflicts***

When it comes to the division between rhetoric and reality when it comes to the UNCRC to protect children in armed conflicts, it was argued in the preceding chapter the current understanding of humanitarian law under the Fourth Geneva Convention and its Additional

Protocols is insufficient for protecting children from armed conflicts.<sup>182</sup> The problems in this regard were actually recognised as far back as the New York World Summit for Children in 1990. This is because this Summit not only identified the need for humanitarian law to be improved but also encouraged the “*acceptance and observation*” of the UNCRC as part of the need for “*special protection for children in times of war*”.<sup>183</sup>

Nevertheless, despite the World Summit’s recognition in this regard over twenty-five years ago, there still remains an all too obvious division between ‘rhetoric’ and ‘reality’ when it comes to the protection of children in armed conflicts.<sup>184</sup> With regard to the rhetoric, this has been recognised as referring to the virtual acceptance internationally and the promotion of the rights of children via the UNCRC.<sup>185</sup> At the same time, however, the reality remains that the rights of children under the UNCRC have not been effectively applied so that children are still sadly consistently subjected to all of the negative consequences of armed conflicts and the resultant impact this may have upon them.<sup>186</sup>

On this basis, there is a need to consider as to how the protection of children might be improved upon in armed conflicts.<sup>187</sup> Therefore, there is a need to consider how humanitarian law may be advanced upon along with alternative means to effectively address children’s needs for protection in armed conflict.<sup>188</sup> Nonetheless, in view of the

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<sup>182</sup> C F J Doebbler, ‘Protecting Children in Conflict: An Unfinished Legal and Moral Agenda’ (2008) 27(4) *Refugee Survey Quarterly* 83-95

<sup>183</sup> World Declaration on the Survival, Protection and Development of Children (New York World Summit for Children 1990)

<sup>184</sup> M R Macomber, ‘Child Soldiers: Rhetoric and Realities: An examination of human rights organisational discourse on the issue of ‘agency’ and its implications on the best interests of the child’ (Roehampton University, University of Gothenburg and University of Tromso 2011)

<sup>185</sup> *Ibid*

<sup>186</sup> *Ibid*

<sup>187</sup> C F J Doebbler, ‘Protecting Children in Conflict: An Unfinished Legal and Moral Agenda’ (2008) 27(4) *Refugee Survey Quarterly* 83-95

<sup>188</sup> *Ibid*

UNCRC's broad ratification, it is believed the Convention presents clear scope for reform since it includes its own specific provisions that relate to armed conflicts relevant to children.<sup>189</sup> By way of illustration, Article 38(1) of the Convention provides that States are to “*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*”.<sup>190</sup> In addition, the UNCRC at Article 38(4) states that, in keeping 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*”.<sup>191</sup> As for Article 39 of the Convention, it is provided that States will “*take all appropriate measures to promote physical and psychological recovery and social re-integration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts*”.<sup>192</sup> This Article also states that this kind of “*recovery and re-integration [in the aftermath of an armed conflict will] take place in an environment which fosters the health, self-respect and dignity of the child*”.<sup>193</sup>

As can be seen from the wording of Article 38 of the UNCRC, the rights that are referred to therein are not all that innovative and also more than a little disappointing when it comes to the protection of children.<sup>194</sup> Such a view is supported by the fact that the remit of Article 38(4) of the aforementioned Convention only needs for individual States to have to take “*all feasible*” measures as opposed to having to fulfil a clear duty.<sup>195</sup> Nevertheless,

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<sup>189</sup> United Nations Convention on the Rights of the Child 1989, Articles 38-39

<sup>190</sup> Ibid, Article 38(1)

<sup>191</sup> Ibid, Article 38(4)

<sup>192</sup> Ibid, Article 39

<sup>193</sup> Ibid

<sup>194</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

<sup>195</sup> Ibid

whilst some significant efforts have been undertaken to increase the amount of protection provided for children beyond that which humanitarian law currently provides through the Fourth Geneva Convention and its Additional Protocols, they have yet to really come to fruition.<sup>196</sup> Instead, what should have been a clear opportunity to actually increase the amount of protection for children during armed conflicts was lost to the apparent necessity to bring about the achievement of a consensus along with the fact that many States consider the UNCRC to be ineffective for the purpose of reforming humanitarian law.<sup>197</sup>

The disappointment at the apparent failure to bring about the resolution of the complicated question of providing for the improvement of the level of protection for children internationally in armed conflicts is supported by the Committee on the Rights of the Child work.<sup>198</sup> This is because, in recognising the wording of Article 38 of the UNCRC's inadequacy, the problem of 'armed conflict' was chosen by the Committee for their opening day of discussion.<sup>199</sup> However, whilst the Committee on the Rights of the Child's discussion may have focused upon the insufficient protection available for civilian children along with child soldiers' recruitment and use in a given armed conflict, it was only actually the latter matter the Committee chose to take forward.<sup>200</sup> Consequently, a text was formulated for consideration at the 1993 Vienna World Conference on Human Rights

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<sup>196</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) *Refugee Survey Quarterly* 83-95

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K A Polonko, L X Lombardo and I M Bolling, 'Law Reform, Child Maltreatment and the UN Convention on the Rights of the Child' (2016) 24(1) *The International Journal of Children's Rights* 29

<sup>198</sup> Annex V of the Committee on the Rights of the Child (UN Doc. CRC/C/16, 1993)

<sup>199</sup> *Ibid*

<sup>200</sup> *Ibid*

along with a preliminary draft Optional Protocol regarding children's involvement in armed conflicts set before the General Assembly of the United Nations.<sup>201</sup>

***4.2 The Derogation from the United Nations Convention on the Rights of the Child 1989 permissible in the context of the Protection of Children in Armed Conflicts and resultant Humanitarian Crises that typically follow***

It is also to be noted that the UNCRC includes the recognition of children's general rights in the form of those rights that include matters pertaining to protection, provision and participation in the context of armed conflicts.<sup>202</sup> On this basis, it is arguable that if these kinds of rights were fully implemented so as to apply during armed conflicts then this would potentially serve to provide children with far greater protection of their rights.<sup>203</sup> However, the reality is that it continues to remain somewhat unclear what the UNCRC's status is once an armed conflict begins.<sup>204</sup> That this has proved to be the case in practice is despite the fact that there would not appear to be any real reason as to why those States that have provided for the Convention's ratification should not still be bound by it with regard to all of the children within the confines of their jurisdiction.<sup>205</sup>

Nevertheless, whilst there is not any provision in the UNCRC for derogation by those States that provided for the Convention's ratification, it is also to be noted that a number of

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<sup>201</sup> Annex VI of the Committee on the Rights of the Child (UN Doc. CRC/C/16, 1993)

<sup>202</sup> S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999)

<sup>203</sup> Ibid

<sup>204</sup> A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

<sup>205</sup> Ibid

Articles of the Convention's application could be limited in specific circumstances.<sup>206</sup> Specifically, the Articles of the UNCRC that may be limited in their application are the rights to - (a) leave the country;<sup>207</sup> (b) freedom of expression;<sup>208</sup> (c) freedom of religion,<sup>209</sup> (d) freedom of association and peaceful assembly.<sup>210</sup> In practice, this is much like with other human rights instruments that can be limited based upon matters of national security, public order, public health, morals or the rights and freedoms of others protection.<sup>211</sup>

On this basis, it is arguable that all of the provisions of the CRC aside from those that may be expressly restricted are considered to remain in force at the times of an armed conflict on the face of it.<sup>212</sup> However, the reality has actually proved to be somewhat different.<sup>213</sup> This is because, during the course of the process of drafting in particular, some State delegations concluded, in reliance upon the application of the UNCRC at Article 38(4), that only Article 38 of the Convention was applicable at times of war.<sup>214</sup> Therefore, this analysis effectively means that, once an armed conflict has started, the States involved in that particular instance will no longer be obliged to provide for the other UNCRC provisions implementation.<sup>215</sup> The reason for this is that it has been found that if all of the Articles under the Convention regarding children's protection and care are uniformly

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<sup>206</sup> S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999)

<sup>207</sup> United Nations Convention on the Rights of the Child 1989, Article 10(2)

<sup>208</sup> Ibid, Article 13(2)

<sup>209</sup> Ibid, Article 14(3)

<sup>210</sup> Ibid, Article 15(2)

<sup>211</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

<sup>212</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>213</sup> S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999)

<sup>214</sup> Ibid

<sup>215</sup> Ibid

applicable then the need for the application of Article 38(4) of the UNCRC could be subject to doubt in the circumstances.<sup>216</sup>

Consequently, it would seem that it is not unreasonable to argue the UNCRC's drafters expected that the text of the Convention itself would be subject to some form of derogation in a given armed conflict.<sup>217</sup> However, the Committee on the Rights of the Child would seem to take a somewhat differing view, holding that the whole Convention continues to apply in times of armed conflict or emergency.<sup>218</sup> By way of illustration, a member of the Committee on the Rights of the Child, one Thomas Hammarberg, expressly stated that whilst "*Article 38 of the [UNCRC] specifically addresses the situation of children in armed conflicts,*" it has still been recognised that "*all other articles of the Convention are relevant*".<sup>219</sup> The reason for this is that it was Hammarberg's view that there is actually "*no derogation clause in this Convention*" so it would be true to say that the UNCRC is applicable at "*times of war or emergency*".<sup>220</sup> Therefore, it was Hammarberg's understanding that every child has the "*right to a family environment, to go to school, to play, to get health care and adequate nutrition*" at all times and that "*[t]he principles of the Convention are valid as well [so] that all children without discrimination should enjoy their rights*".<sup>221</sup> Consequently, the best interests of the child should be the primary consideration in decisions that are reached in this regard so that "*the right to life, survival and development [can] be protected*" effectively.<sup>222</sup>

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<sup>216</sup> Ibid

<sup>217</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>218</sup> D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 *Harvard Human Rights Journal* 115

<sup>219</sup> T Hammarberg, 'Keynote Speech: Children as a Zone of Peace: What needs to be done?', in G H Aldrich and Th A Van Baarda, *The Rights of Children in Armed Conflict* (International Dialogues Foundation 1994)

<sup>220</sup> Ibid

<sup>221</sup> Ibid

<sup>222</sup> Ibid

### **4.3 Jurisdictional Problems with the Protection of Children in Armed Conflicts under the United Nations Convention on the Rights of the Child 1989**

When it comes to the matter of the jurisdictional problems with the protection of children in armed conflicts under the UNCRC, there is a need to recognise the fact that several different practical issues need to be dealt with in this regard.<sup>223</sup> This understanding is founded upon the fact that, in many internal armed conflicts, a given State may only exist in a muted form whilst still technically retaining control over its territory, its infrastructure and organisation may have all but vanished whilst the ability to provide for the UNCRC's implementation may be non-existent.<sup>224</sup> As a result, in these kinds of cases only humanitarian law such as that which has been discussed in the preceding Chapter under the Fourth Geneva Convention and its Additional Protocols I and II would seem to exist for the purpose of then filling the void in the level of protection to have developed in this area.<sup>225</sup> This is because the reality of the situation would seem to be that, if its provisions are fully implemented, humanitarian law serves as the only practical kind of protection which can best cover the interests of children in these kinds of cases.<sup>226</sup>

A further jurisdictional issue has been recognised as being associated with non-state entities when it comes to the application of the law in this area to provide for the protection of children.<sup>227</sup> This is because of the fact that this it has often proved to be the case in many

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<sup>223</sup> J Cerone, 'International Enforcement in Non-International Armed Conflict: Searching for Synergy among Legal Regimes in the Case of Libya' (2011) 88 *International Law Studies* 369

<sup>224</sup> *Ibid*

<sup>225</sup> *Ibid*

<sup>226</sup> *Ibid*

<sup>227</sup> C Hofmann, 'Engaging Non-State Armed Groups in Humanitarian Action: State Actor and Non Governmental Approaches' (German Development Institute 2004)

internal conflicts that it is possible that the specific State could potentially lose control over a specific area of its territory to a given armed group.<sup>228</sup> Such a development is particularly important since the armed group in control of the territory will not be bound by the provisions of the UNCRC in view of the fact that it only refers to ‘State Parties’ meaning only formally recognised governments can agree with the content of the Convention.<sup>229</sup>

However, the reality is that this need not be as much of a problem as it would first appear in the circumstances.<sup>230</sup> This is because it is arguable that this issue could be remedied by having the Committee on the Rights of the Child consider adopting mechanisms that permit non-state entities in *de facto* control of a State territory to make a declaration they consider themselves bound by the UNCRC.<sup>231</sup> Effectively, this would, therefore, be similar to non-state entities that are party to a conflict stating they intend to both accept and apply principles of humanitarian law.<sup>232</sup> Moreover, it is also to be noted that the fact that the Committee on the Rights of the Child are willing to provide for the acknowledgement of the commitment of non-state entities to the UNCRC supported by the way they in which they recognised the 1995 ratification of the Palestinian Authority.<sup>233</sup> Nevertheless, there is also a need to recognise the fact that, to give effect to these kinds of ratifications and Declarations by non-state entities, there is still a clear need for suitable machinery in this regard to be implemented and applied at the international level in practice.<sup>234</sup>

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<sup>228</sup> Ibid

<sup>229</sup> Ibid

<sup>230</sup> D Weissbrodt, J C Hansen and N H Nesbitt, ‘The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law’ (2011) 24 Harvard Human Rights Journal 115

<sup>231</sup> Ibid

<sup>232</sup> Ibid

<sup>233</sup> State of Palestine, ‘The Status of the Rights of Palestinian Children 2013’ (State of Palestine 2013)

<sup>234</sup> A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

Of course, there are many that could argue the UNCRC does not have any place in armed conflicts even though it has been recognised that an individual child does not stop having basic rights from the start of a given armed conflict.<sup>235</sup> In addition, it is also understood that human rights laws will still be applicable even where derogations are actually allowed in the circumstances of a particular case.<sup>236</sup> At same time, however, arguably more significantly it has been found to be the case that the two bodies of law have somewhat differing areas of application so as to be considered to be complementary in nature.<sup>237</sup> Nonetheless, it is also to be appreciated that it has not been unknown for international humanitarian law to include concepts of human rights with a view to providing the safeguards that are required during and after a given armed conflict.<sup>238</sup> Consequently, it would seem somewhat complicated to determine how it would be possible for anyone to argue in all seriousness that the rights to have been recognised in the UNCRC no longer apply from the outset of a specific armed conflict.<sup>239</sup>

On this basis, it would seem to be a subject of some significant regret that States failed to take the chance during the UNCRC's actual drafting to provide for the remedying of the problems to have been recognised with regard to children's protection in armed conflicts.<sup>240</sup> The reason for this is that the number of children that were dying at this time was not considered to be as great and the drafting of the Additional Protocols I and II to the

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<sup>235</sup> S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999)

<sup>236</sup> Ibid

<sup>237</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

<sup>238</sup> See, by way of illustration, Common Article 3 of the Geneva Conventions 1949, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 75 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 4(2)

<sup>239</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

<sup>240</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

Fourth Geneva Convention had only recently been concluded just over a decade beforehand.<sup>241</sup> Nonetheless, it remains arguable that the remit of the UNCRC has provided for the advancement of respect for humanitarian law at least to some small degree.<sup>242</sup> This is because it has found to be the case that, even if a given State has not acceded to or provided for the ratification of the Fourth Geneva Convention or its Additional Protocols, a State could still have to observe the provisions of humanitarian law under the UNCRC.<sup>243</sup>

At the same time, however, there is still a need to recognise the fact that Article 38(4) of the UNCRC provides that all States “*undertake to respect and ensure respect for rules of international humanitarian law applicable to them in times of armed conflict*”.<sup>244</sup> This is important because the opinion was expressed during the course of the UNCRC’s drafting that the phrase “*applicable to them*” could be taken to include only those States that undertook to comply with humanitarian law as it currently stand.<sup>245</sup> Nonetheless, the United Nations Children's Emergency Fund (henceforth, UNICEF) argued during the course of the technical review that such an understanding could not be considered to be anything other than an incorrect interpretation.<sup>246</sup> The reason for this is that UNICEF put forward their view that the language used was clearly applicable in the same way to all individual States customary obligations which was considered to be clear from the *Travaux Préparatoires* (i.e. the preparatory works / the official record of a negotiation).<sup>247</sup>

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<sup>241</sup> Ibid

<sup>242</sup> C F J Doebbler, ‘Protecting Children in Conflict: An Unfinished Legal and Moral Agenda’ (2008) 27(4) Refugee Survey Quarterly 83-95

<sup>243</sup> United Nations Convention on the Rights of the Child 1989, Article 38

<sup>244</sup> Ibid, Article 38(4)

<sup>245</sup> UN Doc. E/CN.4/1989/WG.1/CRP.1

<sup>246</sup> Ibid

<sup>247</sup> Ibid

## **Chapter Five – Recommendations for as to how the Protection of Children can be improved upon in Armed Conflicts and resultant Humanitarian Crises under the United Nations Convention on the Rights of the Child 1989 and the Fourth Geneva Convention and its Additional Protocols I and II**

In view of the problems with the current understanding of the law in this area recognised in the preceding two chapters of this dissertation, this chapter provides recommendations for as to how the protection of children can be improved upon in armed conflicts and resultant humanitarian crises under both the UNCRC and humanitarian law respectively. This is because there are a number of ways that the current understanding of international human rights and humanitarian law can be improved upon to provide greater protection of children in armed conflicts based on the problems to have been identified.

### **5.1 Recommendations for how the Protection of Children can be improved in Armed Conflicts under the United Nations Convention on the Rights of the Child 1989**

When it comes to the recommendations for as to how the protection of children can be improved in armed conflicts under the UNCRC, a number of potential recommendations may be put forward to provide for an improvement of the level of protection in response to the problems to have been identified earlier in the course of this dissertation as follows –

(a) It is arguable that the Committee on the Rights of the Child needs to take the chance to clearly state unequivocally that the UNCRC is to apply to all children in the jurisdiction of a particular State at all times and in all circumstances that may arise.<sup>248</sup> With this in mind, there is also a need to make it clear no derogations from the application of the provisions of the Convention are allowed other than those provided for in the Convention itself.<sup>249</sup>

(b) There is also a need for the Committee on the Rights of the Child to provide for the clarification of Articles 38(2) and (4) of the UNCRC's meaning.<sup>250</sup> As part of this process, there is also arguably a need for the Committee to provide for a re-examination of the content of Article 38(4) of the Convention and then declare what States are actually expected to do in this context.<sup>251</sup> Allied to this, it may also be necessary for the Committee on the Rights of the Child to look to reconsider 'feasible' within the content of the Article itself so as to then develop a significantly more precise (and thus also stronger) term.<sup>252</sup>

(c) It is also necessary to provide for the implementation of 'machinery' to then permit any non-state entities that are in *de facto* control of a territory to state that they intend for the UNCRC to be binding upon them going forward.<sup>253</sup> Therefore, the Committee on the

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<sup>248</sup> D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 Harvard Human Rights Journal 115

<sup>249</sup> Ibid

<sup>250</sup> Ibid

<sup>251</sup> Ibid

<sup>252</sup> Ibid

<sup>253</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) Refugee Survey Quarterly 83

Rights of the Child needs to actively undertake an examination of the extent to which a non-state entity's compliance with the Convention can be the same as a specific State.<sup>254</sup>

(d) Allied to this, there is also an ongoing necessity for greater education of State governments and their populations with the Convention so that they have a better understanding of its content and its application.<sup>255</sup> Interestingly, this point is actually already one of the requirements recognised under the UNCRC at Article 42 it is just that it also needs the Committee on the Rights of the Child to provide for reinforcement in this regard in the way in which they scrutinise each country's report.<sup>256</sup> Moreover, in the event that it is considered the information that is available about the UNCRC is unsatisfactory and that there is a lack of sufficient resources for more training, it is arguable that the UN's specialist agencies need to provide significantly more help and finance in this regard.<sup>257</sup> This is because it is only arguably where there is ongoing education that the Convention's values are likely to be effectively absorbed by individual States' wider populations.<sup>258</sup>

On this basis, it is arguable that there is a need for children to receive a significantly enhanced education about the UNCRC's values from primary school onwards whilst their parents need to receive information about the content of the Convention from the time when they first become pregnant through the medical services they are provided.<sup>259</sup> It is also arguable that a more proactive effort also needs to be undertaken to educate the

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<sup>254</sup> D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 *Harvard Human Rights Journal* 115

<sup>255</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) *Refugee Survey Quarterly* 83

<sup>256</sup> D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 *Harvard Human Rights Journal* 115

<sup>257</sup> C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

<sup>258</sup> *Ibid*

<sup>259</sup> A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

military with regard to the way in which the UNCRC's provisions are to be interpreted.<sup>260</sup> Therefore, this may be more effectively achieved where States are actively encouraged to provide for the Convention's incorporation in its entirety into their own systems of law.<sup>261</sup>

(e) It is also to be noted that, as has already been implied in these recommendations, there is a need for the Committee on the Rights of the Child's role to become significantly more proactive in providing for the protection of children in armed conflicts if the remit of the UNCRC is to have any real meaning in practice.<sup>262</sup> The reason for this is that it is believed that if the Committee were to take a more proactive role in the protection of children in armed conflicts then this would allow them to actively receive information from, for example, non-government organizations (henceforth, NGOs) and national governments that there was a serious emergency that needed resolving.<sup>263</sup> On this basis, it would then be possible for the Committee to bring the details of a given emergency to other bodies within the auspices of the United Nations that have field level responsibilities as and where necessary.<sup>264</sup> Consequently, serving to permit the Committee to provide for the initiation of early action is then likely to guarantee the rights of children are given the respect they are due under the UNCRC by the parties involved in a particular armed conflict.<sup>265</sup>

(f) A further recommendation derived from the research and analysis undertaken for the completion of this dissertation is that there is a need for NGOs to be given greater encouragement to provide more information regarding the status of children in the context

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<sup>260</sup> Ibid

<sup>261</sup> Ibid

<sup>262</sup> D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 Harvard Human Rights Journal 115

<sup>263</sup> Ibid

<sup>264</sup> Ibid

<sup>265</sup> Ibid

of specific armed conflicts to the Committee on the Rights of the Child.<sup>266</sup> Arguably, this could be most effectively achieved through the establishment of either a UNCRC NGO group or the work of an NGO that is already in place specifically for NGO.<sup>267</sup> Although this would mean the NGO in question would need considerable development along with the appointment of suitably responsible officers, they should receive sufficient funding for the purpose of fulfilling the organisation's obligations from the United Nations.<sup>268</sup>

(g) Finally, it has also been recognised that it is necessary for an independent body to provide for the monitoring of the recognition of rights of children as they are provided for under the UNCRC in armed conflicts.<sup>269</sup> The reason for this is that it has been found that wars typically tend to last for an ongoing period and there is also a necessity for monitoring to be in the conflict area for a significant period of time that includes the matter of post-conflict.<sup>270</sup> It is arguable that the independent body that could provide for the monitoring of the recognition of rights of children as they are provided for under the UNCRC in armed conflicts may either be filled by the International Committee of the Red Cross or an international children's NGO that is newly created or already in existence.<sup>271</sup> This is because it has been found to be the case that it is possible that local NGOs could serve to feed information into this independent international body that permits the wide coverage of armed conflicts effect upon children.<sup>272</sup> Moreover, it is also arguable an independent body's establishment could also allow children to be represented where there are to be any

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<sup>266</sup> Ibid

<sup>267</sup> R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

<sup>268</sup> Ibid

<sup>269</sup> R Arnold and N Quéniwet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008)

<sup>270</sup> Ibid

<sup>271</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) *Refugee Survey Quarterly* 83

<sup>272</sup> Ibid

further developments with regard to the nature and scope of humanitarian law when it comes to the matter of the protection of children in armed conflicts.<sup>273</sup>

## **5.2 Recommendations for how the Protection of Children can be improved in Armed Conflicts under the Fourth Geneva Convention and its Additional Protocols I and II**

As for recommendations for as to how the protection of children can be improved upon in under the Fourth Geneva Convention and its Additional Protocols I and II, there is a need to appreciate that the concept of ‘protection’ in the context of humanitarian law itself will typically be looked upon as being a kind of art.<sup>274</sup> This is because it has been recognised that ‘protection’ in the context of humanitarian law will never serve to amount to the same kind of protection that is provided for children under the UNCRC.<sup>275</sup> At the same time, however, it is also to be noted that humanitarian law is considered to be representative of some form of compromise practically between considerations of a humanitarian and military nature and is thus considered to have value.<sup>276</sup>

The reason for this is because it is not possible for the military to be able to effectively provide for the rationalisation of any disregard for the remit of humanitarian law by the claim it is linked to unreasonable demands and were not in any way developed with wars realities in this regard.<sup>277</sup> Interestingly, it has been recognised that this is an argument that may be levied against instruments of a human rights nature generally along with the

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<sup>273</sup> Ibid

<sup>274</sup> S Sivakumaran, ‘Re-envisaging the International Law of Internal Armed Conflict’ (2011) 22(1) *European Journal of International Law* 219

<sup>275</sup> Ibid

<sup>276</sup> K Hanson, ‘International Children’s Rights and Armed Conflict’ (2011) 5 *Human Rights and International Legal Discourse* 40

<sup>277</sup> Ibid

UNCRC more specifically.<sup>278</sup> That this proved to be the case in practice is because it was found that not only was humanitarian law developed with armed conflict's associated brutality as the focus, but was also used to provide for the accommodation of necessity of a military nature even at considerations of a humanitarian nature's expense with a view to pursuing the matter of 'feasibility'.<sup>279</sup>

On this basis, with a view to providing children with greater protection in armed conflicts there is a need to find more effective means to achieve the enhancement of humanitarian law in its own terms whilst also seeking more unconditional pledges to this effect from States through legislative instruments including the UNCRC.<sup>280</sup> Although children are clearly recognised as some of the most significant members of their particular communities, it is considered to be vital to their development they still remain so.<sup>281</sup> On this basis, it is arguable considerably more would be achieved for the protection of children if the civilian population was given more protection from armed conflicts consequent effects under humanitarian law such as Protocol I of the Fourth Geneva Convention.<sup>282</sup>

With this in mind, it is arguable that the most effective means of providing for the improvement of children's protection under humanitarian law is to bring about the enhancement of compliance with the provisions put into place in this regard under the

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<sup>278</sup> S P Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to Protect* 442

<sup>279</sup> *Ibid*

<sup>280</sup> D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 *Harvard Human Rights Journal* 115

<sup>281</sup> E Baimu, 'Children, International Protection' (Max Planck Foundation for International Peace and the Rule of Law 2013)

<sup>282</sup> *Ibid*

Fourth Geneva Convention and its Additional Protocols.<sup>283</sup> Consequently, it would seem that the applicability of humanitarian law needs to be simplified, expanded and opened up to adjudication whilst there is also a need to bring about the strengthening of mechanisms of enforcement.<sup>284</sup> Therefore, it is arguable that there are a few variations specifically related to children that would serve to have a considerable impact upon the improvement of their protection in armed conflicts and any resultant humanitarian crises as follows –

(a) First, as to how specific laws application is determined needs to be re-thought out with a view to providing for the encouragement of application that is significantly more widespread.<sup>285</sup> More specifically, there is a need for variations to be made so as to bring an end to current practice whereby individual States serve to consistently contest humanitarian law's applicability.<sup>286</sup> On this basis, it would seem that there is a need for some provision to be made for an armed conflict's classification via the United Nations Security Council or the jurisdiction of a yet to be designated international court.<sup>287</sup>

(b) In the event that the best interests of children are the subject of consideration in a given case, clearly they require the greatest amount of protection that is recognised as being possible within the remit of humanitarian law internationally.<sup>288</sup> This effectively means that if the law in this area is considered in its current state from the best interests of the child, the division recognised between the protection that is offered in international and internal

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<sup>283</sup> G B I Najjar, 'The Protection Of Children in Armed Conflicts under the Rules of International Law: Does International Humanitarian Law grant children special protection in situations of attack?' (University of Oslo, Faculty of Law 2011)

<sup>284</sup> Ibid

<sup>285</sup> K M Larsen, C G G Cooper and G Nystuen, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2013)

<sup>286</sup> Ibid

<sup>287</sup> Ibid

<sup>288</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) *Refugee Survey Quarterly* 83

conflicts is deemed to be unjustifiable in the circumstances.<sup>289</sup> As a result, it has been found to be the case that the binding provisions of law with regard to the position of children and in all of the situations of armed conflict to have been considered earlier in the course of this dissertation's analysis needs to be recognised.<sup>290</sup> For example, whilst it is possible to see how State sovereignty considerations could provide for the justification of the lack of 'Prisoner of War' designation for rebels, it is unclear how it would be possible to provide for the justification of the inconsistency between the protection children are afforded in international armed conflicts and internal armed conflicts respectively.<sup>291</sup>

(c) As a result of the fact that any amendments that are made to the current understanding of humanitarian law will need to be effectively ratified by States prior to them becoming binding, it is considered to be vital for the law regarding armed conflicts to be both explicated and reaffirmed by the international community at large.<sup>292</sup>

(d) There is also a need for a permanent international court to be provided with the jurisdiction that they need to be able to effectively deal with the most significant alleged breaches of humanitarian law in armed conflicts on both an international and non-international basis.<sup>293</sup> More specifically, it is arguable that NGOs need to be given sufficient standing at law so as to bring proceedings where necessary against the parties that are involved in a particular armed conflict.<sup>294</sup> In addition, there is also a need for the

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<sup>289</sup> Ibid

<sup>290</sup> Ibid

<sup>291</sup> Ibid

<sup>292</sup> K M Larsen, C G G Cooper and G Nystuen, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2013)

<sup>293</sup> Ibid

<sup>294</sup> Ibid

aforementioned permanent international court to have the authority to be able to adjudicate in relation to a given armed conflict's classification in practice.<sup>295</sup>

(e) There is also a need for those States that have not done so already to be actively encouraged to provide for the ratification of the Additional Protocols to the Geneva Conventions.<sup>296</sup> This is because it is believed that such an approach will then serve to aid the application of humanitarian law internationally so as to then advance the protection of children in armed conflicts.<sup>297</sup>

(f) It is also suggested that it is necessary for all States to fulfil their obligations to have been recognised “*to respect and to ensure respect*” for both the remit of the Fourth Geneva Convention and its Additional Protocols moving forward to enhance the protection of children during armed conflicts.<sup>298</sup> This is because, with regard to international conflicts, there is a need for individual States to actively provide greater respect for their Fourth Geneva Convention “*obligation to search for persons alleged to have committed, or to have ordered to have committed, such grave breaches,*” and to “*bring such persons . . . before its own courts*”.<sup>299</sup> Therefore, the obligation to have been recognised as being associated with compulsory universal jurisdiction regarding the most severe breaches of

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<sup>295</sup> Ibid

<sup>296</sup> C F J Doebbler, ‘Protecting Children in Conflict: An Unfinished Legal and Moral Agenda’ (2008) 27(4) Refugee Survey Quarterly 83

<sup>297</sup> Ibid

<sup>298</sup> E Baimu, ‘Children, International Protection’ (Max Planck Foundation for International Peace and the Rule of Law 2013)

<sup>299</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 146

humanitarian law need to become a reality as it relates to armed conflicts regarding the protection of civilians and, more specifically in this instance, children.<sup>300</sup>

(h) Furthermore, there is also a need for all States to provide for the inclusion of dilemmas with regard to the protection of civilians and, in view of the focus of this dissertation's analysis, children in their military exercises with a view to preparing for what may transpire during actual armed conflicts.<sup>301</sup> This is because it is believed that high ranking military personnel will then become significantly more familiar with the kinds of decisions that they may need to make along with their legality in the context of humanitarian law that should be open to review on an ongoing basis.<sup>302</sup>

(i) It is also believed that it is necessary for all States to be obliged on a legal basis to accept the provision of impartial humanitarian aid that is considered to be aimed at the civilian population whatever the specific situation's classification in practice.<sup>303</sup> This is because whilst it has been recognised in practice that humanitarian aid and aid workers entry into a given State could be subject to the parties involved in a given conflict's consent, it is arguable that legally it should not require the consent of the parties involved.<sup>304</sup> In addition, it has been found to be the case that if humanitarian organisations had a legal right to help those people likely to have been affected by an armed conflict in a given territory may then face significantly less resistance in trying to fulfil their aims.<sup>305</sup>

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<sup>300</sup> E Baimu, 'Children, International Protection' (Max Planck Foundation for International Peace and the Rule of Law 2013)

<sup>301</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) Refugee Survey Quarterly 83

<sup>302</sup> Ibid

<sup>303</sup> K M Larsen, C G G Cooper and G Nystuen, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2013)

<sup>304</sup> Ibid

<sup>305</sup> Ibid

(j) Finally, with regard to the protection of children in armed conflicts it is arguable that there is a need for all States to accept the provision of any humanitarian aid that is offered to them impartially with a view to then helping children in particular along with other vulnerable members of any given society.<sup>306</sup> Therefore, in the event that there is a need for convoys to be searched, this process should be completed by a neutral third party that does not have any interest in serving to slow down the process of providing humanitarian aid.<sup>307</sup> Moreover, it is also arguable that all States should not be permitted to bring about the closure of schools for reasons of security in armed conflicts.<sup>308</sup> This is because of the fact that it has been found to be the case that all of the parties that are involved in a particular conflict need to be reminded that they are obliged to allow children to receive the education that they are entitled to.<sup>309</sup> With this in mind, it would seem to be true to say that the parties that are involved in a given conflict should serve to respect schools as neutral zones instead of being biased in ones sides favour or the other.<sup>310</sup> Consequently, it is arguably true to say that the only reason that is considered to be justifiable for bringing about a school's closure is in those situations where its students are considered to be in danger directly in view of the fact that, for example, the particular school is right in the middle of the territory involved in the conflict.<sup>311</sup>

Allied to this, in view of their youth and the somewhat ambiguous way in which child-soldiers are typically recruited to participate in armed conflicts, the provisions of

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<sup>306</sup> C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) *Refugee Survey Quarterly* 83

<sup>307</sup> *Ibid*

<sup>308</sup> *Ibid*

<sup>309</sup> *Ibid*

<sup>310</sup> *Ibid*

<sup>311</sup> *Ibid*

humanitarian law that are relevant in this regard under the Fourth Geneva Convention and its Additional Protocols need to be amended to provide children with greater protection.<sup>312</sup>

In this regard, it is believed that it would be beneficial for the enhancement of the protection of children if in all armed conflicts in the future all soldiers that are found to be under 18 years of age are to be provided with the designation of 'Prisoner of War' irrespective of the party's status they are fighting for.<sup>313</sup> In the meantime, there is also a need for the parties that are involved in conflicts throughout the world to be proactive in this regard and make Declarations to this effect regardless of the humanitarian law that is considered to be applicable in the circumstances.<sup>314</sup>

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<sup>312</sup> K M Larsen, C G G Cooper and G Nystuen, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2013)

<sup>313</sup> Ibid

<sup>314</sup> Ibid

## *Chapter 6 – Conclusion*

Having provided a critical evaluation of the failure of international law to protect children in armed conflicts in particular, along with the resultant humanitarian crises that all too typically follow, it is clear a number of problems have arisen with the application of the international human rights law (in the form of the UNCRC) and humanitarian law (in the form of the Fourth Geneva Convention and its Additional Protocols) in this area. Principally, these problems centre upon the fact that the recognition of the law in this area is seemingly set aside when armed conflicts arise to the detriment of the civilian population and, more specifically, in view of the subject of this dissertation, children in the areas that are affected by the particular conflict in question. That this has proved to be the case is despite the fact that, as was recognised earlier in the course of this dissertation, more than 2 million children were killed in or as a result of armed conflicts around the world in the past decade alone among many other problems as a result of such situations falling out.

Therefore, it would seem that there is a clear need to look to improve upon the application of the law in this area internationally by not only encouraging its ratifying States to adhere to the remit of that law but also looking to somehow penalise those States that do not apply the law in a way that will make them think twice about not acting. With this in mind, a

number of recommendations have been made in the preceding chapter with a view to improving upon the adherence to the law in this area internationally among different States. This is because of the fact that it has been argued that there is not really a need to provide for the reform of the law itself that is provided for via the UNCRC and the Fourth Geneva Convention along with its Additional Protocols as the focus of this dissertation's analysis.

However, it would seem that, in view of how long it has been recognised that there is a prevailing failure on the part of individual States to adhere to the law as it has developed to date, it is unlikely that these kinds of recommendations will be implemented any time soon to the detriment of the protection of children in affected States going forward. Therefore, it is arguable that these recommendations value is somewhat negated by the lack of a sufficient mechanism to provide for the enforcement of both these changes and the application of the UNCRC and the Fourth Geneva Convention (as well as its Additional Protocols) as and where appropriate in the circumstances of a given case. Were such a mechanism to develop, or more individual States to recognise the importance of protecting the rights and interests of children during armed conflicts and in the resultant humanitarian conflicts that typically arise, then it is arguable that the number of children that are left to suffer unnecessarily would then be significantly reduced in the future.

## **Bibliography**

### *Primary Sources*

#### *Legislation*

Bill of Rights for the Handicapped Child of 1930

Children's Charter in Wartime of 1942

Children's Charter for the Post-War World of 1942

Children's Charter of President Hoover's White House Conference on Child Health and Protection of 1930

Children's Charter of the International Council of Women of 1922

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949

Declaration of Geneva of 1924

Declaration of Opportunities for Children of 1942

ILO Convention Concerning the Night Work of Young Persons Employed in Industry of  
1919

ILO Conventions Fixing the Minimum Age For Admission of Children to Industrial  
Employment of 1919

International Convention for the Suppression of the Traffic in Women and Children of  
1922

International Convention for the Suppression of the White Slave Traffic of 1910

Optional Protocol to the Convention on the Rights of the Child on the Involvement of  
Children in Armed Conflict (adopted by the General Assembly on 25th May 2000)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the  
Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the  
Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

United Nations Charter 1945

United Nations Convention on the Rights of the Child 1989

### ***Case Law***

*Prosecutor v. Tadić*, Case IT-94-1-AR72, Appeal on Jurisdiction (2nd October 1995)

### ***Official Documents***

E Pavignani and J R Durão, 'Aid, Change and Second Thoughts: Managing external resources in the health sector in Mozambique' (Ministry of Health, Mozambique 1997)

State of Palestine, 'The Status of the Rights of Palestinian Children 2013' (State of Palestine 2013)

UN Doc. CRC/C/16, 1993

United Nations Children's Emergency Fund (UNICEF), 'State of the World's Children' (UNICEF, New York, USA 2007)

United Nations Children's Emergency Fund (UNICEF), 'Machel study 10-year strategic review: Children and conflict in a changing world' (UNICEF, New York, USA 2009)

World Declaration on the Survival, Protection and Development of Children (New York World Summit for Children 1990)

### ***Secondary Sources***

#### ***Text Books***

N Abiad and F Z Mansoor, *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective* (British Institute of International and Comparative Law 2010)

R Arnold and N Quéniwet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008)

R P Bainbridge, *The Liberal Way of War: Legal Perspectives* (Routledge 2016)

M Bothe, K J Partsch and W A Solf, *New rules for victims of armed conflicts, Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982)

F Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* (Rowman and Littlefields Publishers 2007)

T Buck, *International Child Law* (Routledge 2014)

S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999)

D Fleck, *The Handbook of International Humanitarian Law* (2nd Edition, Oxford University Press 2008)

T Hammarberg, 'Keynote Speech: Children as a Zone of Peace: What needs to be done?', in G H Aldrich and Th A Van Baarda, *The Rights of Children in Armed Conflict* (International Dialogues Foundation 1994)

K M Larsen, C G G Cooper and G Nystuen, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2013)

R Livoja and T McCormack, *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

M Merson, R Black and A J Mills, *International Public Health: Diseases, Programs, Systems and Policies* (2 Edition, Jones and Bartlett Publishers 2006)

A-C Nilsson, *Children and Youth in Armed Conflict* (Martinus Nijhoff Publishers 2013)

C Poulatova, *Children and Armed Conflict* (Cambridge Scholars Publishing 2013)

R Provost, *International Human Rights and Humanitarian Law*. Series: Cambridge Studies in International and Comparative Law No. 22. (Cambridge University Press, 2002)

G Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998)

### ***Journal Articles***

J S Barbara, 'Impact of War on Children and Imperative to End War' (2006) 47(6) Croatian Medical Journal 891

J Cerone, 'International Enforcement in Non-International Armed Conflict: Searching for Synergy among Legal Regimes in the Case of Libya' (2011) 88 International Law Studies 369

D Devakumar, M Birch, D Osrin, E Sondorp and J C K Wells, 'The Intergenerational Effects of the War on the Health of Children' (2014) 12 BMC Medicine 57

B Devkota and E R van Teijlingen, 'Understanding effects of armed conflict on health outcomes: the case of Nepal' (2010) 4(20) Conflict and Health 1

C F J Doebbler, 'Protecting Children in Conflict: An Unfinished Legal and Moral Agenda' (2008) 27(4) Refugee Survey Quarterly 83

K Hanson, 'International Children's Rights and Armed Conflict' (2011) 5 Human Rights and International Legal Discourse 40

S Lobatos, 'The Future of Syria: Refugee Children in Crisis' (2015) 59(2) Comparative Education Review 381

T N Manuchehr, 'Education Right of Children during War and Armed Conflicts' (2011) 15 Procedia Social and Behavioral Sciences 302

A Mills and T Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18(1) Leiden Journal of International Law 1

E Mottershaw, 'Economic, social and cultural rights in armed conflict: International human rights law and international humanitarian law' (2008) 12(3) The International Journal of Human Rights 449

K A Polonko, L X Lombardo and I M Bolling, 'Law Reform, Child Maltreatment and the UN Convention on the Rights of the Child' (2016) 24(1) The International Journal of Children's Rights 29

K Peltonen and R-I Punamäki, 'Preventive interventions among children exposed to trauma of armed conflict: A literature review' (2009) 36(2) Aggressive Behavior 95

M Rieder and I Choonara, 'Armed Conflict and Child Health' (2012) 97(1) Archives of Disease and Childhood 59

S P Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 Global Responsibility to Protect 442

M Sassòli, 'Legitimate Targets of Attacks under International Humanitarian Law' Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law (27-29 January 2003)

S Sivakumaran, 'Re-envisioning the International Law of Internal Armed Conflict' (2011) 22(1) European Journal of International Law 219

A M Slaughter, 'International Law in a World of Liberal States' (1993) 6 European Journal of International Law 503

A M Slaughter and J Alvarez, 'A Liberal Theory of International Law' (2008) 254 American Society of International Law 240

D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 Harvard Human Rights Journal 115

### ***Working Papers***

E Baimu, 'Children, International Protection' (Max Planck Foundation for International Peace and the Rule of Law 2013)

A Delavande and R M Cordeiro, 'Violent Conflicts and Risky Sexual Behavior' MICROCON Research Working Paper 60 (2012)

C Hofmann, 'Engaging Non-State Armed Groups in Humanitarian Action: State Actor and Non Governmental Approaches' (German Development Institute 2004)

M R Macomber, 'Child Soldiers: Rhetoric and Realities: An examination of human rights organisational discourse on the issue of 'agency' and its implications on the best interests of the child' (Roehampton University, University of Gothenburg and University of Tromso 2011)

G B I Najjar, 'The Protection Of Children in Armed Conflicts under the Rules of International Law: Does International Humanitarian Law grant children special protection in situations of attack?' (University of Oslo, Faculty of Law 2011)

M N Schmitt and C H B Garraway, 'The Manual on the Law of Non-International Armed Conflict with Commentary' (International Institute of Humanitarian Law 2006)

*Theses*

C E Baxter, 'The Wolf Attacks: A History of the Russo-Chechen Conflict' Electronic Theses and Dissertations. Paper 2460 (2014)

