

## PROHIBITION OF RECRUITING CHILD SOLDIERS AND/OR ACHIEVABLE OBLIGATIONS?

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**Abstract:** The aim of this paper is to contribute to the discussion on the scope and effectiveness of the norms of International Humanitarian Law (IHL) and human rights norms which deal with the situation of child soldiers in international and non-international armed conflicts. The question must be asked and answered in a context where the nature of armed conflicts has undergone profound changes since the Geneva Conventions (1949) and Geneva Protocols (1977) were drafted.

**Resumé:** Cílem tohoto příspěvku je zapojit se do diskuze o mezinárodněprávní úpravě a efektivitě norem mezinárodního humanitárního práva (MHP) a mezinárodní ochrany lidských práv, které se zabývají situací dětských vojáků v mezinárodních a vnitrostátních ozbrojených konfliktech. Tato otázka je zkoumána v kontextu vývoje a změn povahy ozbrojených konfliktů, jímž prošly od přijetí Ženevských úmluv (1949) a jejich Protokolů (1977).

**Key words:** child soldiers, protection of human rights, International Humanitarian Law (IHL), Article 38 of the Convention on the Rights of the Child, Committee on the Rights of the Child.

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*“They gave me training. They gave me a gun. I took drugs. I killed civilians. Lots.  
It was just war, what I did then. I only took orders.  
I knew it was bad. It was not my wish.”*

– A child soldier in Sierra Leone

*“Two sons and a daughter were forced to accompany  
the rebels. When one brother collapsed exhausted,  
he was executed as he lay on the ground.  
His younger brother was gunned down as he tried  
to escape. The daughter was repeatedly gang raped...”*

– Victims of child soldiers

## I.

Modern armed conflicts, both international and non-international, are conducted in ways that have a profound devastating impact on children. According to a 2001 UNICEF Report, in the last decade 2 million children were killed by conflict, 2 million children were made homeless, 6 million have been injured or disabled. More than 300 000 children are actively involved in armed conflicts, serving as child soldiers around the world. Many are less than 10 years old. Many girl soldiers are forced into different forms of sexual slavery. Children in 87 countries live among mines, 300 million small arms and light weapons, widely regarded as facilitating the use of child soldiers, are in circulation.<sup>1</sup>

As this clearly political issue has been in vogue of late in the world community, new legal instruments have been created: the UN Convention on the Rights of the Child (CRC) is the most important legal framework for the protection of children. The Convention is the only international human rights instrument, including its Articles 38 and 39, having provisions that traditionally belong within IHL.<sup>2</sup> To further strengthen the implementation of rights recognized in the CRC and to increase the protection of children from involvement in armed conflict, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict was adopted.<sup>3</sup> Calling for continuous improvement of the situation of children and for the elimination of the worst forms of their exploitation, ILO Convention No 182 on the Worst Forms of Child Labour,<sup>4</sup> and 182 ILO Recommendation 190 accompanying the Convention were adopted.<sup>5</sup> The issue was also introduced in the 1998 Rome Statute of the International Criminal Court,<sup>6</sup> establishing criminal responsibility of recruiters and users of children in armed conflicts.

On the regional level, the only binding instrument, the African Charter on the Rights and Welfare of the Child, was adopted and has progressive provisions on child recruitment and use in armed conflicts.<sup>7</sup> At the European level (EU), the European Parliament adopted a Resolution on a Charter of Rights,<sup>8</sup> addressing certain problems related to children in the EU. The proposed Charter largely affirms the provisions

<sup>1</sup> See United Nations Children's Fund (hereafter UNICEF), *The State of the World's Children 2001*, New York, UNICEF, 2001, p. 36.

<sup>2</sup> Convention on the Rights of the Child, GA RES/44/25, Annex 44, UN GAOR Supp. (No 49) at 167, UN Doc A/44/49 (1989), entered into force on 2 September 1990.

<sup>3</sup> A/RES/54/263 of 25th May 2000, entered into force on 12 February 2002.

<sup>4</sup> Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182), 38 I.L.M. 1207 (1999), entered into force on 19 November 2000.

<sup>5</sup> ILO, Recommendation concerning the prohibition and immediate action for the elimination of the worst forms of child labour, Geneva, 17 June 1999.

<sup>6</sup> The Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (1998), entered into force on 1 July 2002.

<sup>7</sup> African Children's Charter on the Rights and Welfare of the Child, AAU Doc. CAB/Le/24.9/49 (1990).

<sup>8</sup> European Parliament Resolution on a European Charter of Rights of the Child of 8th July 1992, Official Journal, C 241, 21st September 1992, p. 67.

in the CRC, but Article 38 of the CRC has been omitted. Non-binding documents consist of the European Parliament Resolution on Child Soldiers<sup>9</sup> and EU Guidelines on Children and Armed Conflict, issued by the Council of the EU,<sup>10</sup> in which the Council of the EU declares that the EU's objective is "[T]o influence third countries and non-state actors to implement international human rights norms and standards and humanitarian law, as well as regional human rights instruments and to take effective measures to protect children from the effects of armed conflict, to end the use of children in armies and armed groups and to end impunity" (para. 6). This wording corresponds with Article 38 of the CRC.

The approach that is relevant to the protection of children in situations of modern armed conflict is an expansive approach to the meaning of armed conflict. The ICTY Appeals Chamber ruled that: „[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State.“<sup>11</sup> It is open to debate whether all states accept such a broad definition of armed conflict. However, the ICTY's support for an expansive approach to the meaning of armed conflict is important as it narrowed the difference between international and non-international armed conflicts and it is also relevant to a new problem, that of children taking part in hostilities. This is one of the consequences of the evolution in the nature of conflicts, namely the fact that civilians and combatants are often intermingled. The involvement of children in hostilities can range from innocently helping combatants to actually taking part in fighting or being enlisted in an armed conflict and this should be considered within the context of the issue.<sup>12</sup>

Moreover, UN resolutions and recommendations discuss the issue, report and extensively outline the disastrous effects of armed conflicts on children. Within the UN Security Council, five Resolutions were adopted on child soldiers. Although not legally binding on States themselves, these Resolutions provide a framework of standards that contribute to the protection of children in armed conflicts and introduce an additional monitoring mechanism for obligations relating to child soldiers. Additionally, UN pressure could be an effective instrument for implicit implementation and monitoring of CRC and the Optional Protocol.<sup>13</sup>

In its Resolution 1261 (1999), the Security Council, *inter alia*, “strongly condemns” the recruitment and use of children in armed conflicts and calls on all concerned States-Parties to put an end to such practices.<sup>14</sup> Resolution 1314 (2000) urges member states, *inter alia*, to sign and ratify the Optional Protocol to the

<sup>9</sup> Resolution B4-1078, 17 December 1998.

<sup>10</sup> Council of the European Union, 4th December 2003.

<sup>11</sup> The Prosecutor v. Dusko Tadic, case No. IT-94-1-ART/2, Appeals Chamber, 2 October 1995, para. 70.

<sup>12</sup> See C. Greenwood, *The Development of International Humanitarian Law by the International Criminal Tribunal for former Yugoslavia*, Max Planck Yearbook of United Nations Law (1998), p. 115.

<sup>13</sup> T. Vandewiele, *Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts*, Martinus Nijhoff Publishers, 2006, p. 12.

<sup>14</sup> UN Security Council Resolution S/RES/1261 (1999), 30 August 2000.

CRC.<sup>15</sup> Resolution 1379 (2001) innovates the monitoring process and authorises the Secretary General to submit a report on the implementation of the Resolutions and attach a list of parties to armed conflict that recruit or use children in violation of their international obligations.<sup>16</sup> This list was submitted for the first time in January 2003 as an annex to the report of the Secretary General on children in armed conflict. Parties to an armed conflict that recruit and use children in armed conflict had never before been subjected to such open critique and denunciation.<sup>17</sup>

## II.

New legal and political activities express the broadly accepted conviction that children caught up in armed conflicts constitute a group particularly vulnerable to human rights violations. This could explain the inclusion into CRC of Article 38 which deals with the situation of children in armed conflicts and brings together two branches of public international law; human rights law and IHL.<sup>18</sup>

Article 38 has a hybrid character; materially it is structured according to IHL and covers IHL substance, but formally it is part of a human rights instrument.<sup>19</sup> As such, Article 38 is interpreted and monitored by a human rights body – the Committee on the Rights of the Child.<sup>20</sup>

The structure of Article 38 corresponds with the IHL scheme. The first paragraph contains a general provision on the applicability of IHL. The second and third paragraphs deal with the protection of children from participation in hostilities and/or recruitment in the armed forces. The fourth paragraph reminds States to protect the civilian population and to take all feasible measures to ensure the protection and care of children affected by armed conflict. The Committee can examine State compliance with IHL obligations. In doing so, the CRC Committee has adopted a combatant-civilian transcending approach and “speaks about armed conflict in terms of human rights.”<sup>21</sup> Being a moral and political authority, the Committee could contribute towards bringing both branches of international law closer by incorporating the terminology and substance of IHL into the human rights framework. The relationship between human rights and IHL is quite complex and cannot be explored in depth here. It must be emphasized, however, that fundamental rights norms serve as a minimum standard, or safety net, one that is applicable in all circumstances. Therefore, they

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<sup>15</sup> UN Security Council Resolution S/RES/1314 (2000), 11 August 2000.

<sup>16</sup> UN Security Council Resolution S/RES/1379 (2001) 20 November 2001.

<sup>17</sup> See UNICEF and Coalition to Stop the Use of Child Soldiers, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*, New York 2003, p. 9, <http://www.unicef.org>.

<sup>18</sup> See Ang, *F. Article 38 Children in Armed Conflicts. A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, 2005, p. 13.

<sup>19</sup> *Ibid.*

<sup>20</sup> See M. Verheide and G. Goedertier, *Article 43-45 The UN Committee on the Rights of the Child, A Commentary on the United Nations Convention on the Rights of the Child*.

<sup>21</sup> F. Ang, *Article 38 Children in Armed Conflicts*, o.c. p.13.

cannot be derogated from in circumstances of conflict such as borderline situations of civil strife where the applicable legal regime is unclear.<sup>22</sup>

According to Article 38 (1) juncto Article 1 of the CRC, States Parties are bound by all rules of IHL relevant to the category of children under 18 years.<sup>23</sup> As an overall valid definition, the Convention does not copy the concept of IHL, making an age-related distinction within the category of children. In IHL, the term “child” can refer to newly born babies and very small children, children under 5 years of age, young children, adolescent children and children between the ages of 15 and 18. Each age leads to a different treatment or status, covered by special provisions for protection against the effects of hostilities.<sup>24</sup>

Therefore, the key issue is whether all above mentioned killings of children during armed conflicts constitute a violation of life under CRC Article 6 juncto Article 38.<sup>25</sup> As regards general international human rights law applicable to all persons, both adult and child, the right to life is of primary importance, including in conflict situations. This right can be precisely described as the right not to be “arbitrarily deprived of life.”

Deprivation of life is lawful in some situations, including armed conflicts. However, even in a situation of armed conflict, both international and non-international arbitrary deprivation of life is prohibited. This prohibition may be expressed differently in IHL, e.g. in wording that examines whether the deprivation of life was “proportionate.”<sup>26</sup> While IHL distinguishes between combatants and persons taking no active part in the hostilities (civilians, prisoners of war, wounded and sick soldiers and combatants who laid down arms and other members of the armed forces who are placed hors de combat) by explicitly permitting intentional killing only in relation to combatants, international human rights law, which applies both in times of peace and war, does not make such a distinction. The killing of soldiers therefore constitutes a violation of the right to life unless it can be justified by explicit limitation and a derogation clause. The CRC does not contain any derogation clause and the derogation clause in Article 4 (2) of

<sup>22</sup> For further discussion see: e.g. R. Prevost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 1996, T. Meron, *The humanization of Humanitarian Law*, 94:2 AJIL, 2000, pp. 239 – 278. See also *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic*, ICTY Case No. IT-96-23-T and IT-96-23/1-T, Trial Chamber, 22 February 2001, par. 467.

<sup>23</sup> Article 1 states that: „[F]or the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.”

<sup>24</sup> E.g. newborn babies are assimilated into the “wounded” for the purposes of GP I (Article 8/a) and young girls may be particularly vulnerable to forced prostitution, rape and other forms of sexual abuse as described in the Fourth Geneva Convention (Article 27), GP I (Article 76/2/b) and GP III (Article 4/2/e), see e.g. J. Kuper, *Military Training and Children in Armed Conflict*, Martinus Nijhoff Publishers, 2005, pp. 250-253, Pilloud, CDe., J. Preux, Y. Sandoz, at al., *Commentaire des protocoles additionnels du juin 1977 aux Conventions de Genève du août 1949*, The Hague/Geneva, Nijhoff/Comité International de la Croix-Rouge 1986, p. 923.

<sup>25</sup> Article 6 of CRC: (1) States Parties recognize that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.

<sup>26</sup> See e.g. J. Kuper, (2005) p. 26.

the International Covenant on Civil and Political Rights (1966) and Article 27 (2) of the American Convention on Human Rights (1969) do not allow any derogation clauses from the right to life even in a time of public emergency which threatens the life of the nation, such as an armed conflict. On the other hand, Article 15 (2) of the European Convention on Human Rights (ECHR) makes an explicit exception to the non-derogability of the right to life “in respect of deaths resulting from lawful acts of war”. In the opinion of one outstanding scholar, this wording means that the killing of combatants in accordance with IHL must also be interpreted as being in conformity with Article 2 of ECHR (right to life) under the condition that the “respective State has made a respective derogation in accordance with Article 15 of the ECHR”, and one must conclude that “a similar interpretation should also apply to the term “arbitrarily” in Article 6 (1) of the ICCPR and Article 4 (1) of the ACHR (Right to Life).<sup>27</sup>

In this context the intentional killing of soldiers which does not violate IHL shall not be interpreted as an arbitrary deprivation of life and constitutes interference with the right to life that can be justified as not arbitrary with reference to IHL.<sup>28</sup> This interpretation shall be applied to Article 6 of the CRC as well as to Article 38 of the CRC, although the Convention contains neither the word “arbitrarily” nor a derogation clause for times of war and emergency. Consequently, it is questionable whether the killing of children in armed conflict can be regarded as deaths resulting from “lawful acts of war”. As the exception from the protection of the right to life is applicable only to combatants, the decisive question is whether children can be lawful combatants.

### III.

The fundamental IHL rules regarding child soldiers as combatants include the following principle:

- *Children under 15 should never participate in armed conflict*<sup>29</sup>

GP I, relating to the international conflicts in the first paragraph of Article 77 (2), states that parties to the conflicts shall take all feasible measures in order that children under the age of 15 years do not take a direct part in hostilities. Article 4/3/c of GP II, which applies for non-governmental conflicts, contains a stricter prohibition of children under the age of 15 years taking part in hostilities, thereby excluding both direct and indirect participation. Examples of “indirect participation” mentioned in the relevant literature are e.g. transport of arms and ammunition along the front lines of a battle, the search for and transmission of military information and acts of sabotage.

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<sup>27</sup> Nowak, M., *Article 6 The Right to Life, Survival and Development. A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, 2005. pp. 21-23.

<sup>28</sup> Ibid.

<sup>29</sup> Article 77 (2), 1977 GP I, Article 4/3/c, 1977 GP II, and Article 38 (2) 1989, CRC.

It is therefore unfortunate that Article 38 (2) of CRC, using the same wording as Article 77 (2) of GP I, explicitly prohibits only “direct participation” and allows children under the age of 15 years to participate in activities that are just as dangerous as “direct participation”<sup>30</sup> and therefore applies a standard which is even lower than that of Article 4/3/c of Protocol II to the Geneva Conventions.<sup>31</sup>

On the other hand, it is worth noting that under the wording of Article 38 (2) CRC, states are obliged to take “feasible measures” to prevent direct participation of all children under 15 in their jurisdiction, thus including those in non-governmental forces as well as those in their own armed forces.

The 2000 Optional Protocol on Child Soldiers, drafted, *inter alia*, to establish 18 as the minimum age for participation in hostilities, is to some extent inconsistent, implicitly allowing indirect participation in international armed conflicts to members of States Parties’ armed forces who have not attained the age of 18 years (Article 1), while prohibiting them any participation in non-international armed conflicts if they belong to armed groups that are distinct from the armed forces of a State (Article 4). A combined reading of Articles 1 and 4 may lead to the conclusion that in practice it would be a great problem “to induce non-state actors to respect the rules that are being imposed on them in an entirely top-down mode and treat them in a less favorable way compared to the official armed forces.”<sup>32</sup>

The African Charter on the Rights of and Welfare of the Child, adopted one year after the CRC, prohibits only the direct participation of children in hostilities,<sup>33</sup> regardless of the fact that the African continent has the greatest number of children taking part in hostilities of all types. Not much attention is paid to the fact that there are also many girls who are used in hostilities as combatants or have a significant role in “supporting activities” such as cooking, cleaning, carrying goods, which fall under the category of “indirect participation in hostilities.”<sup>34</sup>

A very important instrument dealing with the participation of children in hostilities is the Rome Statute of the International Criminal Court (ICC). The Statute criminalizes the use of children under the age of 15 years to participate actively in hostilities, in both international and non-international armed conflicts.<sup>35</sup> According to the view adopted by the ICTR in the Akayesu case, the term “active” means the same as “direct participation.”<sup>36</sup>

<sup>30</sup> See F. Ang, Article 38, o.c. pp. 36-37.

<sup>31</sup> Ibid.

<sup>32</sup> See F. Ang, Article 38, o.c., p. 39, Stohl, R., *Children in conflict: assessing the Optional Protocol*, Conflict, Security and Development 2, No 2, 2002, p. 138.

<sup>33</sup> Article 22 (2)2 of the African Children’s Charter.

<sup>34</sup> F. Grunfield, Child Soldiers, in: J. C. M. Williams, (ed). *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities*, Antwerp/Oxford/New York, Intersentia, 2002, p. 275.

<sup>35</sup> Article 8/2/b/xxvi and Article 8/2/e/vii of the ICC Statute.

<sup>36</sup> ICTR, Prosecutor v. Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, para. 629.

Also, from the very beginning the CRC Committee expressed the opinion that the CRC, taken as a whole, requires the protection of all children under 18 from direct or indirect involvement in hostilities. In fact, the CRC Committee adopted a “straight – 18” position for all situations in which a child can become a member of armed forces and for all forms of participation in hostilities.<sup>37</sup> The Committee was also the most important supporter and driving force behind the drafting of the Optional Protocol to the CRC on the involvement of children in armed conflict adopted in May 2000.<sup>38</sup> In its concluding observations, the CRC Committee also emphasized the full responsibility of a State actor for the acts of non-state actors such as rebellious groups and private companies.<sup>39</sup>

- *Children under 15 should never be recruited as combatants and this includes voluntary*

recruitment.<sup>40</sup> Voluntary recruitment of those over 15 is permitted, subject to national legislation. When recruiting among persons between the ages of 15 and 18, priority should be given to those who are oldest. 1977 GP II, relating to non-international armed conflicts, does not contain any analogous provision, but again adherence to the higher standard in 1977 GP I and 1989 CRC is to be preferred.

When drafting Article 38 of 1989 CRC, many of those involved in the Working Group wished to raise existing standards so as to prohibit anyone under the age of 18 from participating in armed conflict. However, it was not possible to agree on this and persons who are considered to be children under Article 1 of the CRC can still be legitimately recruited into the armed forces of a State, as of the age of 15 years. It is the same standard as the one set in Article 77 (2) of 1977 GP I and Article 4/3/c of 1977 GP II and coincides with the relevant provisions of the ICC Statute. The controversy continued for many years, but agreement on the 2000 Optional Protocol on Child Soldiers, which strengthens the prohibition on use of child soldiers within ratifying states, was finally reached in 2000, after six years of negotiations.<sup>41</sup> Due to the reluctance of some states, 18 years has not been set as a minimum threshold for all recruitment and deployment practices. There is no strict prohibition against recruiting individuals under the age of 18 and States-Parties are still allowed to recruit under 18s when the latter voluntarily join the armed forces, but what is prohibited is the compulsory recruitment of persons under 18 (Article 2). Unlike the CRC, the Optional Protocol also requires governments to raise the minimum age beyond the current minimum of 15, and to make a binding declaration stating the minimum

<sup>37</sup> E.g. CRC Committee, Concluding Observations: Burundi (UN Doc. CRC/C/15/Add.133, 2000), para. 71.

<sup>38</sup> See T. Vandewiele, *Optional Protocol The Involvement of Children in Armed Conflicts*, o.c.p. 19.

<sup>39</sup> CRC Committee, Concluding Observations: Burundi (UN Doc. CRC/C/15/Add.133,2000), paras. 71-72.

<sup>40</sup> Article 77 (2), 1977 GP I, Article 4 (3) (C), 1977 GP II and Article 38 (3), 1989 CRC.

<sup>41</sup> The Optional Protocol to the CRC became legally binding on 12 February 2002, having received the requisite 10 ratifications (see its Article 10) by November 2001.



age they will respect [Article 3 (1) and (2)]. States-Parties must ensure that safeguards are in place for the proper regulation of voluntary recruitment [Article 3 (3)]. In relation to non-governmental armed forces, the Optional Protocol goes further and prohibits any recruitment or use in hostilities of children under 18, requiring states to criminalize such practices (Article 4).

The ICC Statute, prior to the ratification of the 2000 Optional Protocol on Child Soldiers, specifically considers as a war crime the following: conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities for international armed conflicts<sup>42</sup> and conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities for non-international conflicts.<sup>43</sup>

In international criminal law, the age-threshold is thus 15 years; the Optional Protocol is more protective in that respect. The Statute of the mixed Special Court for Sierra Leone has the same above mentioned provision as the Rome Statute and contains a provision that can be applied to the demobilisation and reintegration of child soldiers.<sup>44</sup>

Moreover, ILO Convention No. 182, concerning the prohibition and elimination of the worst forms of child labour, included a prohibition of “all forms of slavery or practices similar to slavery such as forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict” (Article 3/a). Under this Convention, children are defined as those under 18 (Article 2).<sup>45</sup>

#### IV.

To summarize, as regards the development since the 1989 CRC, the Statute of ICC (1998) makes participation in armed conflict of children under 15 a war crime, the 1999 ILO Convention No. 182 prohibits forced recruitment of children under 18 and the 2000 Optional Protocol on Child Soldiers, *inter alia*, establishes 18 as the minimum age for conscription and direct participation in armed conflict. Therefore, it seems that the world community aspires towards a comprehensive ban on the

<sup>42</sup> Article 8/2/b/xxvi.

<sup>43</sup> The elements of a crime (UN Doc. PCNICC/2001/1/Add.2 (2000) are the following: 1) The perpetrator conscripted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities. 2) Such persons were under the age of 15 years. 3) The perpetrator knew or should have known that such person or persons were under the age of 15 years. 4) The conduct took place in the context of and was associated with an international conflict. 5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

<sup>44</sup> The appeal panel of the Special Court for Sierra Leone recently ruled that the recruitment or use of children under the age of 15 in hostilities is a war crime under customary law (Prosecutor v. Sam Hinga Norman, Case Number SCSL-2003-14-AR 72(E)).

<sup>45</sup> Convention No. 182 therefore incorporates a ban on forced recruitment of children under 18, although it fails to comprehensively ban either the participation in combat of persons under the age of 18 years or their voluntary recruitment.

participation in armed conflict of child soldiers under the age of 18, although this has not been achieved as yet.

Moreover, 1989 CRC Article 38 can be interpreted as an encouraging attempt to minimise the impact that a war conflict could have on children via their unlawful participation in hostilities or via their recruitment [Articles (2) and (3)]. The child combatant does not benefit very much from the protection of IHL rules when he or she is already fighting or is a member of armed forces. Realistically it must be acknowledged that officers and soldiers confronting child soldiers in an opposing force can act in self-defence and in furtherance of the military mission. Therefore, as regards children being used as combatants, there is a strong argument for States-Parties to accept the obligation to demobilise such child combatants. It is also a strong argument for a strict prohibition against recruiting and using in hostilities children under 18 years of age.

Although the situation of child soldiers on the battlefield does not explicitly fall under IHL regulation, unless they are captured,<sup>46</sup> of relevance is the fact that the CRC as a whole is applicable to all children. Being a part of the human rights system, the CRC does not differentiate between combatants and civilians as IHL does. Child combatants are therefore entitled to the rights included in the CRC.

In conclusion, taking all of the new trends in international law against the recruitment and use of child soldiers into consideration, as well as the need to interpret the CRC in a systematic manner, it seems wrong to take the position that the intentional killing of child soldiers in a combat situation could be qualified as a death “resulting from lawful act of war” in accordance with Article 15 of the EHCR. As Manfred Nowak pointed out: “[T]he recruitment of child soldiers, their direct or indirect participation in armed conflicts and at least the intentional killing of child soldiers during combat must therefore be considered as an arbitrary deprivation of their right to life in Article 6 of the ICCPR and violation of the right of every child to life, survival and development under Article 6 of the CRC.”<sup>47</sup> This view coincides with the first ever prosecution for the recruitment of child soldiers of the Special Court for Sierra Leone in the case *Prosecutor v. Sam Hinga Norman*.<sup>48</sup>

<sup>46</sup> Under IHL, captured child combatants are entitled to take the extensive and strong protection granted to prisoners of war (Article 77 of GP I). This protection includes important guarantees such as the right to humane treatment (Third Geneva Convention). Child war criminals also receive a specific treatment with a view to their young age (e.g. Article 7 of the Statute of the Special Court for Sierra Leone).

<sup>47</sup> M. Nowak, *Article 6, The Right to Life, Survival and Development*, o.c.p. 23.

<sup>48</sup> Case number SCSL-2003-14-AR 72 (E).