

## **'Old enough to kill but too young to vote'**

**Draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts**

**“One of the most alarming trends in armed conflict is the participating of children as soldiers”**

**Ms Graça Machel<sup>1</sup>**

### **Children as combatants**

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<sup>1</sup>Impact of armed conflict on children, A/51/306, para 34. The UN Secretary-General appointed Ms Graça Machel as his expert to study the impact of armed conflict on children. In August 1997 the Secretary-General, in accordance with UN General Assembly resolution 51/77, appointed Olara Otunnu as his Special Representative to study the impact of armed conflict on children.

JO<sup>2</sup> was one of a group of children recruited by the Lords Resistance Army in Uganda who was made to kill soldiers shortly after his abduction. "Later on, the new recruits were asked to finish off all the wounded UPDF [Uganda Peoples' Defence Force] soldiers. One officer was stabbed with a bayonet...Two UPDF soldiers were captured. The army commander said, 'the new recruits can now feed themselves on these two soldiers'. Three of us were instructed to hit these two soldiers, twice each."<sup>3</sup> There are an estimated quarter of a million children and young people under the age of 18 years in government armed forces or armed opposition groups.<sup>4</sup> These young combatants are not only the victims of grave human rights abuses but are all too often the perpetrators of such abuses. Some children fight alongside adult soldiers, others are recruited into separate units. Many children are killed or maimed as a direct result of participating in armed conflicts, others suffer from psychological trauma or are captured and detained in 'prisoner of war camps'. Some children join armed forces voluntarily while others join in order to obtain food, clothing and shelter. There are also many situations where children have been forcibly recruited, with brutal methods used to ensure their subordination. Child soldiers are used not only for support activities such as carrying munitions or supplies and as lookouts but in many cases they are armed and ordered to engage in combat.<sup>5</sup> Many child soldiers are also sexually abused. It has been suggested that those in command prefer to send children into combat because their youth makes them less likely to appreciate the perils they face and more fearless.<sup>6</sup>

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<sup>2</sup>This child's name has been changed to protect him.

<sup>3</sup>*Uganda "Breaking God's commands": the destruction of childhood by the Lord's Resistance Army*, September 1997, AI Index: AFR 59/01/97.

<sup>4</sup>R. Brett and M. McCallin; *Children The Invisible Soldiers* (Rädda Barnen Swedish Save the Children, 1996) and Joint Statement by UNICEF and UNHCR to the Special Committee on Peacekeeping Operations, 11 April 1997.

<sup>5</sup>See for example *Uganda "Breaking God's commands": the destruction of childhood by the Lord's Resistance Army*, September 1997, AI Index: AFR 59/01/97.

<sup>6</sup>R. Brett and M. McCallin; *Children The Invisible Soldiers*. See in particular see Chapter 6 Military Attitudes to Child Soldiers.

Amnesty International has drawn attention to abuses in the context of child recruitment both by government and/or armed opposition groups in countries such as Colombia, Sierra Leone, Sri Lanka and Uganda. The involvement of children in armed forces, particularly in situations of armed conflict, has been shown to have devastating effects on their physical and mental integrity. There are frequently higher casualty rates among children due to their inexperience and lack of training. Because of their size and agility children may be sent on particularly hazardous assignments. Child recruits are often subjected to brutalizing treatment in order to subordinate them to authority. In conflicts around the world, the conscription of child soldiers has also involved the abduction of children, particularly young girls for use as soldiers and for sexual abuse. Invariably the use of children as soldiers will violate rights enshrined in the United Nations (UN) Convention on the Rights of the Child including: children should not be separated from their parents (Article 9), protection from physical or mental harm (Article 19), enjoyment of the highest attainable standard of health (Article 24), the right to education (Article 28), the right to rest and leisure (Article 31) and protection from economic exploitation and hazardous work (Article 32). The raising of the minimum age for recruitment (whether voluntary or compulsory) to 18 is therefore an important means for preventing these abuses from recurring.

For more than a decade non-governmental organizations (NGOs) have campaigned for 18 years to be the minimum age for recruitment into armed forces, whether voluntary or compulsory. As the world spins towards the 21st century the use of children as soldiers is a moral outrage. The involvement of children in armed forces is not inevitable. There is no excuse or acceptable argument for abusing and exploiting children as combatants. The recruitment and participation of children in armed conflicts is a decision made by governments or by leaders of armed opposition groups. It is unforgivable that children and young persons are encouraged to commit barbaric acts as well as being the victims of grave human rights abuses. It is time to exclude children from participating in war, and an optional protocol which raises to 18 years as the minimum age for participation in hostilities and recruitment into armed forces will be a significant contribution to this goal.

Article 1 of the Convention on the Rights of the Child defines a child as “*every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier*”. Increasingly international law uses the benchmark of 18 years as the age below which special protection should

be afforded.<sup>7</sup> The vast majority of states recognise 18 years as the age when individuals reach the necessary intellectual maturity to participate in the political process including voting in elections. The link between enfranchisement and conscription is important because it raises the question of whether unenfranchised individuals (children) should be asked to risk their lives as a result of decisions taken in a political process from which they are excluded.<sup>8</sup> Others have argued that the physical, emotional and social impact of armed conflict should also preclude persons under 18 years from involvement in hostilities.<sup>9</sup>

## **Towards an international consensus**

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<sup>7</sup>See for example non application of the death penalty in Article 37 (a) Convention on the Rights of the Child and Article 6(5) of the International Covenant on Civil and Political Rights, and ILO Convention No. 138 on Minimum Age 1973 which sets 18 years as “the minimum age for admission to employment or work which by its nature or circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons”. Furthermore, ‘voluntarism’ of execution or dangerous work is not considered an acceptable reason for reducing the age for either the death penalty or hazardous occupations.

<sup>8</sup>G. Goodwin-Gill and I. Cohn: *Child Soldiers* (Clarendon Press, Oxford, 1994), p 7.

<sup>9</sup>See Brett and McCallin: *Children: The Invisible Soldiers*

The Convention on the Rights of the Child enshrines the right of those under 18 to protection “from all forms of physical or mental violence, injury or abuse...”<sup>10</sup> although Article 38, which deals specifically with children in situations of armed conflict, established 15, not 18 years as the minimum age for recruitment into armed forces of states parties and participation in hostilities. International humanitarian law, however, goes further than Article 38 by prohibiting the recruitment of children under 15 into the armed forces of governments *and* armed political groups.<sup>11</sup> Furthermore the African Charter on the Rights and Welfare of the Child defines a child as “every human being below the age of 18 years”<sup>12</sup> and prohibits the recruitment of children.<sup>13</sup> The age of recruitment remained highly controversial throughout the drafting of the Convention on the Rights of the Child.

Although the majority of states argued for higher minimum age a minority of states consistently blocked any consensus to raise the age from 15 years and on 20 November 1989 the Convention on the Rights of the Child was adopted unanimously by the UN General Assembly.

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<sup>10</sup>Article 19, Convention on the Rights of the Child.

<sup>11</sup>Article 4(3)(c)Additional Protocol II to the 1949 Geneva Conventions.

<sup>12</sup>Article 2, Definition of a child. This convention has not yet been ratified by the required 15 states to enter into force.

<sup>13</sup>Article 2 Definition

An increased international awareness about the involvement of children in situations of armed conflict and the intense debate about the minimum age in Article 38 did ensure that the concern for child soldiers was placed firmly on the international agenda. In October 1992 the Committee on the Rights of the Child, which oversees implementation of the Convention, held a discussion on children in situations of armed conflict. NGOs and representatives of UN agencies were invited to discuss with members of the Committee and make recommendations. The Committee adopted a number of recommendations but in particular it recommended a study on the impact of armed conflict on children and the drafting of an optional protocol to the Convention which would raise the age for the recruitment and participation of children in hostilities to 18.<sup>14</sup> The 1993 World Conference on Human Rights (Vienna Declaration and Programme of Action) strongly supported the Committee's proposal to initiate a study and the question of raising the minimum age of recruitment into armed forces.<sup>15</sup> Later that year the UN's General Assembly authorised a study into the "Impact of armed conflict on children".<sup>16</sup> The two-year investigation was undertaken by Ms Graça Machel, former Minister of Education of Mozambique, on behalf of the UN Secretary-General and overwhelmingly endorsed by the General Assembly in 1996. The comprehensive study proposes an agenda for action for children in situations of armed conflict and in particular it recommends that: "[s]tates should ensure the early and successful conclusion of the drafting of the optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, raising the age of recruitment and participation in the armed forces to 18 years".<sup>17</sup> In 1997 the UN General Assembly gave its support to a resolution expressing grave concern about the use of children as combatants.<sup>18</sup>

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<sup>14</sup>For further information see UN documents CRC/C/SR.38, CRC/C/SR.39 and CRC/C/19.

<sup>15</sup>Para 50, Part II World Conference on Human Rights: The Vienna Declaration and Programme of Action, June 1993.

<sup>16</sup>General Assembly resolution 48/157 of 20 December 1993.

<sup>17</sup>*Impact of armed conflict on children*, UN document A/51/306, 26 August 1996, para 62(d).

<sup>18</sup>The rights of the child, A/Res/52/107

The US delegation proposed amendments to the paragraphs concerning child soldiers but the proposed changes were not acceptable to the 114 co-sponsors of the resolution. Rather than call for a vote the delegate of the USA withdrew the draft amendment.

Other bodies have also taken a position on the age of recruitment. Both the United Nations Children's Fund (UNICEF) and the United High Commission for Refugees (UNHCR) advocate 18 years as the minimum age for recruitment and participation in armed conflicts. In a joint statement to the United Nations Special Committee on Peacekeeping Operations these two organizations stated "*[i]t is a matter of priority that States conclude the drafting process of a new optional protocol to the Convention on the Rights of the Child to prohibit the recruitment and participation of children below the age of 18 in armed conflicts, applying the same principle to voluntary enlistment*".<sup>19</sup>

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<sup>19</sup>Joint Statement by UNICEF and UNHCR to the Special Committee on Peacekeeping Operations by Nigel Fisher Director, Office of Emergency Programmes, UNICEF, 11 April 1997.

In December 1995 the Council of Delegates of the Red Cross and Red Crescent Movement adopted a “Plan of Action Concerning Children in Armed Conflict”. This action plan includes, *inter alia*, the commitment “[t]o promote the principle of non-recruitment and non-participation in armed conflicts of children under the age of 18 years”. In particular there is a commitment to “promote national and international standards (such as an optional protocol to the Convention on the Rights of the Child) prohibiting the military recruitment and use of persons younger than 18 years of age, and also the recognition and enforcement of such standards by all armed groups (governmental and non-governmental)”. In addition to the Plan of Action the 26th International Conference of the Red Cross and Red Crescent adopted by consensus a resolution which, *inter alia*, supports the drafting of an optional protocol to the Convention on the Rights of the Child “to increase the protection of children involved in armed conflicts”.<sup>20</sup> While such resolutions are not legally binding, they are nevertheless very significant because they are adopted at meetings open to all states parties to the 1949 Geneva Conventions and 1977 Additional Protocols as well as representatives from national Red Cross and Red Crescent societies.

Similarly in 1997 the Labour and Social Affairs Commission of the Organization of African Unity adopted the Arusha Recommendations which, *inter alia*, “[c]ondemn recruitment and conscription of children under the age of 18 years in the armed forces or armed groups...”.<sup>21</sup>

### **Drafting the protocol: consensus and veto**

In response to growing international pressure to prevent the involvement of children in armed conflicts the UN Commission on Human Rights decided in 1994 to establish a Working Group to draft an optional protocol on the involvement of children in armed conflicts.<sup>22</sup> Key issues under discussion are whether the

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<sup>20</sup>Geneva, December 1995.

<sup>21</sup>Report of the Secretary-General on the Twentieth Session of the Labour and Social Affairs Commission, CM/2014 (LXVI), para 84.

<sup>22</sup>Commission on Human Rights, resolution 1994/91 entitled “Implementation of the Convention on the Rights of the Child”.

prohibition on participation in hostilities should be limited to taking a “direct part in hostilities”<sup>23</sup> or should include taking “any part” in hostilities and the minimum age for voluntary recruitment into government armed forces. Article 38 of the Convention on the Rights of the Child prohibits children under 15 from taking a ‘direct part’ in hostilities while Additional Protocol II to the 1949 Geneva Convention applicable to internal armed conflict situations, does not include this qualification, stating that children should not be “allowed to take part in hostilities”.

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<sup>23</sup>The term “direct participation in hostilities” is open to debate but is understood to mean taking a direct part in the fighting. Thus soldiers providing support to front line troops such as moving supplies or intelligence gathering could be interpreted as “indirect participation in hostilities”.

The issue, however, which is causing most controversy is whether the age specified in the text should be 18 years or a lower age. At the Working Group's third session in January 1997 the USA refused to accept a consensus on a minimum age of 18 years for participation in hostilities.<sup>24</sup> While the USA was not alone in preferring the age of 17 years, no other state was prepared to block the position of the overwhelming majority of states from all regions of the world. The USA position is somewhat ironic given that the protocol is **optional** and can only be ratified by states which are parties to the Convention on the Rights of the Child. The USA is one of only two states in the world which has yet to ratify this Convention, the other being the collapsed state of Somalia<sup>25</sup>.

*The practice of drafting standards by consensus has given any government the opportunity to block action to defend and protect human rights. Drafting groups can become hostage to a few states and are all too often faced with the stark choice of accepting the lowest common denominator or abandoning the drafting exercise. But this need not be the case. Drafting by consensus is a relatively recent development. Provisions of the International Covenant on Civil and Political Rights (ICCPR), for example, were voted upon by the drafters. Consensus decision-making should no longer be used unquestioningly as the working method for standard-setting initiatives. It is true that a balance has to be struck between drafting a text that enough states will ratify and maintaining the highest standard of human rights protection. New treaties, however, are meant to provide greater protection, not merely reflect the status quo. The balance*

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<sup>24</sup>For a full report of the Working Groups third session see UN document E/CN.4/1997/96.

<sup>25</sup>191 states have now ratified or acceded to the Convention which means the Convention has achieved almost universal recognition.

has to be struck between sufficient international support for a standard and the strongest possible text. The majority of states in favour of a strong text should make every effort to persuade the few states obstructing adoption of a consensus text to reconsider their position. Yet one state, or a small minority of states, should not be allowed to undermine a broad international consensus on a strong text. Ultimately, in order to avoid the lowest common denominator approach, voting on the text may be necessary.

### **Amnesty International's recommendations**

Amnesty International is committed to a higher standard of protection in international law for children at risk of participating in hostilities and recruitment into armed forces. To this end Amnesty International is campaigning for the adoption of a draft optional protocol which includes the following provisions:

1. Prohibit persons below 18 years of age from participating in hostilities.  
The prohibition should not be limited to direct participation. This is the position taken by most states.

2. Prohibit the compulsory or voluntary recruitment of persons below 18 years of age into government armed forces.

Some of the debate on the recruitment of persons below the age of 18 years into armed forces has centred on the feasibility of excluding young persons from a fighting force. Having trained with a unit it may prove impractical if not impossible to withdraw young recruits before hostilities begin, for example where under 18s are serving on board naval ships. There is a division in the Working Group over the issue of whether prohibition of voluntary recruitment should include admission of under 18s into military schools. Amnesty International is concerned that making an exception for institutions, which are formally part of the armed forces, could, in situations of armed conflict, result in children being seen as legitimate targets for attack.

3. Prohibit the recruitment of persons below the age of 18 years into armed opposition groups.

The current draft optional protocol obliges states to take measures to prevent recruitment of under 18s by armed opposition groups. Amnesty International considers the text should contain explicit prohibition of recruitment of under 18s by armed opposition groups, particularly as the use of child soldiers by armed political groups in situations of armed conflict is increasingly widespread and, arguably, the most pressing reason for strengthening the protection offered by international standards. Although armed opposition groups cannot become a party to the draft optional protocol they should nevertheless be invited to declare their adherence to its provisions.