children under the age of 15 and their participation in hostilities should figure among the war crimes covered by the statutes of the future international criminal tribunal.

The adoption of a new legal standard is not in itself a sufficient response in a context where the existing rules are not applied in practice. For its part, the ICRC therefore strongly supports the view that effective measures should be taken, be they preventive or curative, to tackle the problem of child soldiers.

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Optional Protocol to the Convention on the Rights of the Child concerning involvement of children in armed conflicts

Position of the International Committee of the Red Cross

Geneva, 27 October 1997

1. The International Committee of the Red Cross (hereinafter "the ICRC") fully supports the adoption of an optional protocol to the United Nations Convention on the Rights of the Child aimed in particular at prohibiting the recruitment of children under 18 years of age into the armed forces and armed groups and their participation in hostilities.

2. As in previous years, the ICRC took an active part in the third session, held in January 1997, of the Working Group entrusted with the task of drawing up a draft optional protocol. On that occasion it stated its views, which had been developed over a number of years through studies conducted within the International Red Cross and Red Crescent Movement (hereinafter "the Movement"),[7] and particularly by the ICRC itself.

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[7] The Movement comprises all the National Red Cross and Red Crescent Societies, the ICRC and the International Federation of Red Cross and Red Crescent Societies.

3. The present document is an analytical summary of the main points to which the ICRC attaches special importance and which it has endeavoured to address in recent years, namely, minimum age of recruitment, minimum age of participation in hostilities, the notions of direct and indirect participation, the notions of armed conflict and hostilities, compulsory recruitment and voluntary enlistment, and armed groups.

I. Minimum age of recruitment

***Position of the ICRC**: Children under 18 years of age must not be recruited by the armed forces or armed groups.*

A. Legal arguments

4. The arguments in favour of fixing the age of recruitment at 18 years derive both from international humanitarian law and from human rights law.

a. International humanitarian law

5. At the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Brazil put forward a proposal to prohibit the recruitment of persons under 18 years of age into the armed forces.[8] However, this amendment was not accepted and it was a compromise solution that emerged in Article 77, para. 2, of Protocol I of 8 June 1977 additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter "Protocol I"). Under this article, the parties to the conflict, "in recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years (...) shall endeavour to give priority to those who are oldest". Though this provision might not appear particularly imperative, it was a sign that two decades ago States had already recognized the need to try to raise the age of recruitment to 18.

6. Moreover, still in the context of international armed conflicts, it is important to underline the fact that, by virtue of the Geneva Convention

[8] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts*, Geneva, 1974-1977, Federal Political Department, Bern, 1978 (hereinafter "*O. R.*"), III, p. 301.

of 12 August 1949 relative to the Protection of Civilian Persons in Time of War (hereinafter "the Fourth Convention") and of Protocol I, persons aged between 15 and 18 who are recruited into the armed forces are no longer entitled to protection against the effects of hostilities as members of the civilian population. Instead, they are considered as combatants within the meaning of Article 43 of Protocol I and, in consequence, may be the object of attack.

7. In the context of non-international armed conflicts, neither Article 3 common to the Geneva Conventions nor Protocol II of 8 June 1977 additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter "Protocol II") contains a provision similar to that of Article 77, para. 2, of Protocol I. Nevertheless, in the course of the debates it appeared that certain delegations were already in favour of an age limit of 18 for recruitment. Thus, the fixing of the minimum age at 15 was a decision made under the pressure of consensus and in no way reflected massive opposition to raising the age limit for recruitment.[9] This point is worthy of special emphasis, as children recruited between the ages of 15 and 18 in the course of non-international armed conflicts are very often called upon to take part in hostilities and this places them in an even more critical position in terms of their protection.[10]

b. Human rights

8. Apart from international humanitarian law, Article 1 of the United Nations Convention on the Rights of the Child, whose wording is repeated in the preamble to the draft optional protocol, stipulates: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". The only restriction placed on this principle in the Convention comes in Article 38 on recruitment and participation in hostilities. This restriction seems paradoxical, since recruitment and participation in hostilities entail grave risks for children.

9. Furthermore, there is a tendency within the international community to fix the age of majority at 18, so the derogation provided for in

[9] See Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (hereinafter *"Commentary on the Additional Protocols"*), ICRC, Geneva, 1986, p. 1377.

[10] See below: II. A. a.

Article 1 of the Convention on the Rights of the Child will eventually become obsolete. By way of example, in interpreting Article 10 of the International Covenant on Civil and Political Rights, the Human Rights Committee mentioned that the age of majority should be 18 as far as criminal matters are concerned.[11] Similarly, the experts meeting in Vienna from 30 October to 4 November 1994 to discuss the question of children and adolescents held in detention urged States to ensure "that legislation concerning the age of criminal responsibility, civil majority and consent does not have the effect of depriving any child of the full enjoyment of the rights recognized by the Convention on the Rights of the Child".[12]

10. The two most recent texts on children to be issued at the regional level both state that the age of majority is 18 years. These are the European Convention on the Exercise of Children's Rights,[13] adopted by the Council of Europe on 26 January 1996, and the 1990 African Charter on the Rights and Welfare of the Child, adopted by the Organization of African Unity.[14]

B. Arguments based on practice

11. For a number of years the ICRC has been voicing its concern to see the age of recruitment raised from 15 to 18 years, in particular within the framework of the Plan of Action for the International Red Cross and Red Crescent Movement on children affected by armed conflicts (hereinafter "the Plan of Action"). Thus, in its Resolution 2C, the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995) took note "of the efforts of the Movement to promote a principle of non-recruitment and non-participation in armed conflicts of children under the age of 18 years".[15] Similarly, the Council of Delegates (Geneva, 1995), in its Resolution 5, endorsed "the Plan of Action for the Red Cross and Red Crescent Movement (...) which aims to promote the principle of non-participation and non-recruitment of children below the age of 18 years in armed conflicts".[16]

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[11] Report of the Human Rights Committee of 9 October 1992, UN doc. A/47/40, para. 13.

[12] UN doc. E/CN.4/1995/100, para. 28(a) of the Recommendations.

[13] European Treaty Series, ETS No. 160. See Article 1, para. 1.

[14] OAU document CAB/LEG/24.9/49 (1990), Article 2.

[15] International Review of the Red Cross (IRRC), No. 310, January-February 1996, pp. 63-64.

[16] *Ibid.*, pp. 146-147. The Council of Delegates comprises representatives of the National Red Cross and Red Crescent Societies, the ICRC and the International Federation.

12. It is evident that a child who has been recruited by the armed forces or by an armed group before the age of 18 runs a greater risk of subsequently participating in hostilities should they break out before he has reached that age. He will have undergone military training and there will be the temptation to make use of his skills in the event of armed conflict. This is all the more likely if there is a shortage of troops. In such cases, mobilization is often broader-based and targets the young in particular.

13. Mention should also be made of the question of the recruitment of persons under the age of 18 in education or vocational training establishments operated by or under the control of the armed forces. This creates a potential problem at two levels. First of all, the students might be considered to be members of the armed forces because of their establishment's administrative dependence on the armed forces and may therefore come under attack. Secondly, there is the question of the type of education dispensed in such establishments. If it comprises an element of military training, there is every reason to fear that students who are not yet 18 will be required to take part in hostilities because they have received such training.

14. Finally, despite the fact that the age of recruitment is set at 15 years in the Additional Protocols (Article 77, para. 2, of Protocol I, Article 4, para. 3(c), of Protocol II), as well as in the United Nations Convention on the Rights of the Child (Article 38, para. 3), there is no lack of evidence that even younger children are recruited by the armed forces or armed groups. In cases where children do not possess birth certificates, it is easy for their superiors to pass them off as being older than they really are. However, if the age limit were fixed at 18 years, the recruitment of very young children could certainly be avoided, as their physical appearance would speak for itself.

15. An analysis of national legislation[17] shows that a large majority (about 70%) of the States included in the study have set the minimum age for compulsory recruitment at 18 years or older, a fact that must be taken into due account in the optional protocol.

II. Minimum Age for participation in hostilities

***Position of the ICRC**: Children under 18 years of age must not take part in hostilities.*

[17] See tables in G. Goodwin-Gill, I. Cohn, *Child soldiers: The role of children in armed conflicts*, Clarendon Press, Oxford, 1994, pp. 186-208; R. Brett, M. McCallin, *Children: The invisible soldiers*, Rädda Barnen (Swedish Save the Children), Stockholm, 1996, pp. 53-64.

A. Legal arguments

16. Here again, international humanitarian law and human rights law show that it is contrary to the best interests of the child to allow persons under the age of 18 to take part in hostilities.

a. International humanitarian law

17. Under international humanitarian law, the parties to an international armed conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities (Protocol I, Article 77, para. 2). Furthermore, in the context of non-international conflicts, children who have not attained the age of 15 shall not be allowed to take part in the hostilities (Protocol II, Article 4, para. 3(c)).[18]

18. Raising the age for participation in hostilities from 15 to 18 years would bring a number of advantages for the children concerned. In international armed conflicts, as indicated in the discussion on recruitment, it would guarantee such children the protection to which the civilian population is entitled. In non-international armed conflicts, such a step would constitute important progress in law. Under Article 4, para. 3(d), of Protocol II, children under the age of 15 who have taken a direct part in hostilities despite the prohibition stipulated in Article 4, para. 3(c), of the same Protocol and are captured remain entitled to the special protection provided to children by Article 4, para. 3. On the other hand, this special protection is not expressly stipulated for children between 15 and 18 years of age. However, it should be noted that the wording of the article does not rule out the possibility of granting this special protection for children over the age of 15 who have been deprived of their freedom.[19] Moreover, the child enjoys the protection granted to all persons who are not or who are no longer taking part in the hostilities.[20] Children in this age-group are also entitled to protection if they are wounded, sick or shipwrecked.[21] Finally, they continue to benefit from the provision prohibiting the passing

[18] For further information on the protection of child soldiers in international humanitarian law, see M. T. Dutli, "Captured child combatants", *IRRC*, No. 278, September-October 1990, pp. 421-434.

[19] *Commentary on the Additional Protocols,* p. 1378.

[20] Article 3 common to the Geneva Conventions.

[21] Part III of Protocol II.

of the death sentence on persons aged less than 18 years at the time the offence was committed.[22] Nevertheless, the whole set of provisions applicable in non-international armed conflicts do not guarantee very broad protection for children between the age of 15 and 18 years, and this is all the more worrying as the majority of present-day conflicts are non-international in nature.

b. Human rights

19. Under the United Nations Convention on the Rights of the Child, children are accorded special rights up to the age of 18 years, that is, the upper limit set by the Convention. However, the minimum age limit stipulated for the participation of children in hostilities is 15 years. It is clearly unsatisfactory that children should be entitled to a lower level of protection in situations of armed conflict which, by definition, place their rights in even greater danger.

20. The remarks relating to the tendency of the international community to fix the age of majority at 18 years are equally relevant to the issue of participation in hostilities.[23]

B. Arguments based on practice

21. It is an accepted fact that children who have taken part in hostilities suffer much more than adults, both psychologically and physically. Numerous reports show that persons under the age of 18 have not attained the physical and intellectual maturity which would enable them to cope with the harsh reality of armed conflict.

22. Because of the violence they have committed or witnessed, such children may well present serious psychological or emotional disorders, especially as adolescence is the period of life during which individuals absorb the norms and values of society. The physical suffering of children who have taken part in hostilities and are wounded is all the greater since they lack the care and assistance which a child has the right to expect. In many cases it has been observed that these children are drugged before going into battle so as to improve their military

[22] Article 6, para. 4, of Protocol II.

[23] See above: I. A. b.

performance.[24] In addition to all this, they have to endure indoctrination, coercion and threats.

23. Moreover, though this may be hard to comprehend, children are more ready to commit atrocities than adults. Lacking maturity, they are not always aware of the consequences of their acts and may unwittingly violate the rules of international humanitarian law.[25] This is all the more likely if they are under the influence of drugs. Hence they become a threat to the entire civilian population.

24. It should also be pointed out that the participation of children in hostilities places other children at great risk, since the parties to the conflict will have grounds for suspecting that these other children too are involved in the hostilities and may launch a pre-emptive attack against them.

25. The participation of children in hostilities can also have a deleterious effect on society in the long term. The rehabilitation of child soldiers and their reintegration into society are a long and difficult process and they often retain violent attitudes to which other people may fall victim. There are also indirect costs, as the financial and human resources required for the rehabilitation of these children have to be diverted away from other programmes needed after an armed conflict.

26. Finally, attention must be drawn once again to the resolutions of the Council of Delegates and of the 26th International Conference of the Red Cross and Red Crescent, whereby the ICRC, as part of the Movement, has declared itself in favour of setting the minimum age limit for participation in hostilities at 18 years.

III. Direct/indirect participation in hostilities

***Position of the ICRC**: It is direct and indirect participation in hostilities that must be prohibited. Children must not be involved in hostilities in any capacity whatsoever.*

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[24] Examples of these physical and psychological traumas may be found in the following works: Goodwin-Gill/Cohn, *op. cit.* (note 11), pp. 105-112; K. Hedlund Thulin (ed.), *Children in armed conflict: Background document to the Plan of Action concerning children in armed conflict*, Henry Dunant Institute, Geneva, 1995, pp. 35-41; UN doc. A/51/306: *The impact of armed conflict on children: Report of the Expert of the Secretary-General, Ms Graça Machel* (hereinafter "Machel report"), paras 162-165; Brett/McCallin, *op. cit.* (note 11), pp. 171-181; Human Rights Watch/Africa, Human Rights Watch Children's Rights Project, *Easy prey: Child soldiers in Liberia*, Human Rights Watch, New York/Washington/Los Angeles/London/Brussels, 1994, pp. 35-38.

[25] See, for example, *Easy prey: Child soldiers in Liberia, op. cit.* (note 18), pp. 31-33.

A. Legal arguments

27. In international humanitarian law, a distinction must be drawn once again between international and non-international armed conflicts. In the former, it is direct participation in hostilities by children under the age of 15 which is covered, whereas the provisions relating to the latter speak of participation in hostilities by children without further specification.[26] The ICRC suggested that the word "direct" should be removed from Protocol I during the Diplomatic Conference of 1974-1977. Unfortunately, that proposal was not accepted.[27]

28. In the same way, Article 38, para. 2, of the Convention on the Rights of the Child gave rise to much discussion, especially with regard to the prohibition of the participation in hostilities of children under the age of 15. Although the ICRC and many delegations were in favour of applying this prohibition to any and all participation in hostilities, in the end the article specified only direct participation.[28] Moreover, the adoption of Article 38 took place amidst great confusion.[29] The ICRC had repeated over and over again that the article represented a step backward in the protection of children under the age of 15 in relation to existing international humanitarian law.[30]

29. The fact is that the reference to "direct participation" considerably weakens the protection conferred on children, because it is not participation in hostilities in general which is covered but just a certain type of participation. This means that the notion of "direct participation" has to be defined. The same term is used in various places in international humanitarian law.[31] According to the Commentary on the Additional Protocols, "direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy

[26] Article 77, para. 2, of Protocol I and Article 4, para. 3(c), of Protocol II.

[27] *O. R.* XV, pp. 63-75, CDDH/III/SR.45.

[28] UN doc. E/CN.4/1988/28, paras 72-74.

[29] UN doc. E/CN.4/1989/48, paras 611-616.

[30] F. Krill, "United Nations Convention on the rights of the child: A controversial article on children in armed conflicts", *Dissemination,* No. 12, August 1989, pp. 11-12; M.-T. Dutli, *op. cit.* (note 12), p. 426; F. Krill, "The protection of children in armed conflicts", in M. Freeman, P. Veerman (eds.), *The ideologies of children's rights,* Martinus Nijhoff Publishers, Dordrecht, 1992, p. 353.

[31] Articles 43, para. 2, and 51, para. 3, of Protocol I.

at the time and the place where the activity takes place." In other words, it means "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces".[32] Similarly, "[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees".[33] It has to be emphasized that direct participation does not include acts such as gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc.[34] However, it is these very tasks which are often entrusted to children, who are less conspicuous because of their size and so more effective than adults. It is therefore important that such activities, which are forms of participation in hostilities, also be prohibited if this provision is to play its full role, especially as the activities in question are often just as dangerous as combat itself.

B. Arguments based on practice

30. In practice, it very quickly becomes evident that the subtle distinction between direct and indirect participation poses serious problems. During the discussions of the Conference of government experts on the drafting of the Additional Protocols, this distinction already gave rise to divergences of interpretation. One expert, speaking in the context of another article, declared that it would be a good idea to cite specific examples after the reference to "direct participation", and suggested spying, recruitment, propaganda and the transport of arms and of military personnel.[35] This stance clearly illustrates the difficulties that arise in trying to delimit the various types of participation. Accordingly, it is easy to conceive that armed forces or armed groups might be tempted to adopt different definitions of direct participation, and this would divest the article of all meaning.

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[32] *Commentary on the Additional Protocols,* pp. 516 and 619.

[33] *Commentary on the Additional Protocols,* p. 619. The war effort has been defined as "all national activities which by their nature or purpose would contribute to the military defeat of the adversary" (*O. R.* XIV, p. 14, CDDH/III/SR.2, para. 8).

[34] *Commentary on the Additional Protocols,* p. 901.

[35] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the work of the Conference*, Vol. I, ICRC, Geneva, 1972, p. 143.

31. Furthermore, we know from experience that children who participate in hostilities are very often exploited by military personnel. In particular, they may be subjected to sexual exploitation or forced labour.

32. It has also been noted that in practice a child who is a member of the armed forces or of an armed group and who takes an indirect part in hostilities is very difficult to distinguish from the other members of the forces or group. The child is thus not protected from an enemy attack and runs the same risks as any other child (or adult) participating directly in the hostilities. Finally, children who have been assigned only subordinate tasks very soon find themselves fully involved in the hostilities proper.

IV. Armed conflicts/hostilities

***Position of the ICRC**: The participation of children in "hostilities" must be prohibited.*

33. Taking the existing texts into account, and to avoid any risk of confusion as to the interpretation of the provisions of the optional protocol, it is participation in "hostilities" and not in "armed conflicts" that must be specified.

34. In international humanitarian law, there are numerous references to the concept of "participation in hostilities" or to "direct participation in hostilities" but not to that of "participation in armed conflicts".[36] To explain the difference between the terms and understand why it is participation in hostilities that must be prohibited, we must first of all define what an armed conflict is.

35. International humanitarian law applies to situations of armed conflict, but neither the Geneva Conventions nor their Additional Protocols define this concept.[37] It is worth noting that many studies have sought to define the international or internal nature of a conflict but hardly ever address the armed aspect of the conflict. As the ICRC sees it, "armed conflict" is not a legal term but rather a *de facto* situation.[38]

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[36] For example, see Article 3 common to the 1949 Geneva Conventions, Articles 43, para. 2, 45, 47, para. 2, 51, para. 3, 67, para. 1, and 77, paras 2 and 3, of Protocol I and Articles 4, para. 3, and 13, para. 3, of Protocol II.

[37] H. Haug, *Humanity for all: The International Red Cross and Red Crescent Movement*, Henry Dunant Institute, Geneva/Paul Haupt, Bern, 1993, pp. 510-511.

[38] J.S. Pictet (general editor), *Commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War* (hereinafter *"Commentary on the Fourth Geneva Convention"*), ICRC, Geneva, 1956, pp. 20-21.

36. It would appear that the notion of armed conflict is not the same when it is applied to an international armed conflict as when it is applied to a non-international armed conflict. In the former case, according to Article 2 common to the Geneva Conventions, a conflict is any dispute which arises between two or more States and involves action by the armed forces. It makes no difference how long the conflict lasts or how deadly it is.[39] Even a minor border incident qualifies as an armed conflict.[40]

37. In the case of non-international armed conflict, the notion is different and more complex. Article 3 common to the Geneva Conventions has a field of application which is independent of Protocol II, which serves however to complement it. In common Article 3 the notion of conflict is not defined, even though certain criteria emerged while it was being drafted.[41] The ICRC is in favour of giving Article 3 as wide a scope as possible, as the rules it contains were "recognized as essential in all civilized countries, and embodied in the municipal law of the States in question, long before the Geneva Conventions were signed".[42] The article may therefore be applied to low-intensity armed conflicts.

38. Under Article 1 of Protocol II, however, different conditions have to be fulfilled before a situation can be described as an armed conflict.[43] The following criteria have to be met:

— the existence of real confrontation between government armed forces and insurgents;

— the existence of a responsible command within the insurgent armed group or dissident armed forces;

— their control over a part of the territory;

— the sustained and concerted character of military operations;

— the ability of the insurgents to implement Protocol II.

39. It is expressly stated in Article 1, para. 2, of Protocol II that "situations of internal disturbances and tensions, such as riots, isolated and

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[39] *Commentary on the Fourth Geneva Convention,* p. 20.

[40] D. Schindler, "The different types of armed conflicts according to the Geneva Conventions and Protocols", *Recueil des cours de l'Académie de droit international,* 1979, Vol. 163, p. 131.

[41] *Commentary on the Fourth Geneva Convention,* pp. 35-36.

[42] *Ibid.,* p. 36.

[43] *Commentary on the Additional Protocols,* pp. 1351-1353.

sporadic acts of violence and other acts of a similar nature" are not armed conflicts.

40. The term "hostilities" was defined during the Diplomatic Conference of 1974-1977 as "acts of war that by their nature or purpose [strike] at the personnel and *matériel* of enemy armed forces".[44] Certain delegations considered that the term "hostilities" also covered preparations for combat and return from combat.[45] During discussions on persons having taken part in the hostilities[46] it was underlined that the word "hostilities" covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.[47] Article 118 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War (hereinafter "the Third Convention") refers to "active hostilities". It appears that this term must be understood in the same sense as the word "hostilities" used in Article 133 of the Fourth Convention on the same subject.[48]

41. Finally, Article 38, para. 2, of the Convention on the Rights of the Child refers to direct participation in hostilities and not in armed conflicts.

42. From these definitions, it is evident that it is "participation in hostilities" which must be prohibited, without any intention to signify thereby in non-legal terms that children may participate in armed conflicts. Indeed, taking the example of international armed conflicts, such conflicts do not necessarily give rise to extensive hostilities, as was the case between France and Germany in 1939-1940. An armed conflict is usually a situation during which there are periods of hostilities interspersed with periods of truce. It is clear that it is the fact of taking part in acts of war that traumatizes a child. However, the arguments put forward above must not be interpreted in any way as signifying approval for the participation of children in armed conflicts in general.

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[44] *O. R.* XIV, p. 14, CDDH/III/SR.2, para. 8.

[45] *O. R.* XV, p. 330, CDDH/III/224.

[46] Article 45 of Protocol I.

[47] *Commentary on the Additional Protocols,* pp. 618-619.

[48] *Commentary on the Fourth Geneva Convention,* pp. 514-515.

V. Compulsory recruitment/voluntary enlistment

***Position of the ICRC**: Both compulsory recruitment[49] and voluntary enlistment of children under the age of 18 must be prohibited.*

A. Legal arguments

43. Article 77, para. 2, of Protocol I prohibits the recruitment of children under the age of 15, without stating whether this applies to forced enrolment or voluntary enlistment. During the debates on this article, the reference to voluntary enlistment was dropped and, according to the Rapporteur, paragraph 2 is a compromise in which the absolute prohibition on recruiting children under the age of 15 is accompanied by a more flexible restriction in the case of voluntary service. It appeared that "sometimes, particularly in occupied territories and in wars of national liberation, a total prohibition on the voluntary participation of children under fifteen years of age would be unrealistic".[50] The ICRC has always been opposed to this possibility of seeing children under the age of 15 enlisting voluntarily, and indeed its draft article referred to a prohibition on voluntary enrolment for such children.[51] Accordingly, the ICRC has upheld the interpretation of Article 77, para. 2, of Protocol I whereby voluntary enlistment was included in the prohibition stipulated in this provision.[52]

44. During the discussions relating to Article 38 of the Convention on the Rights of the Child, this question of voluntary recruitment was again raised by the ICRC, which maintained that the word "recruit" included both compulsory recruitment and voluntary enlistment. This can be easily understood from the fact that, despite the voluntary nature of the enlistment, the formal act of recruitment and then incorporation by the armed forces or groups remains necessary and it is precisely this act which is prohibited by international humanitarian law.

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[49] "Recruitment" should be understood as encompassing not only formal recruitment but also any *de facto* recruitment involving no formalities. The relevant point is that the child is physically integrated into the armed forces or an armed group.

[50] *O. R.* XV, p. 465, CDDH/407/Rev. 1, para. 61.

[51] *O.R.* I, Part Three, p. 22.

[52] See M.-T. Dutli, *op. cit.* (note 12), pp. 423-424, and *Commentary on the Additional Protocols,* p. 901.

B. Arguments based on practice

45. Experience shows that voluntary enlistment is rarely based solely on the will of the child but tends to be conditioned by factors beyond his control.[53] Indeed, children enlist in the armed forces or armed groups for various reasons:

— *Economic reasons:* the child may choose to enlist in order to enjoy better living conditions. He is often encouraged to do so by his parents, who may not have sufficient resources to support the whole family. In addition, the child is encouraged to enlist by being told about the financial advantages he may obtain. Enlistment may also be considered by the child as a career opportunity and a way of earning a living. Such a situation is all the easier to understand where the child has no other means of survival.

— *Reasons connected with physical safety:* many reports show that the desire for revenge is rarely given by a child as a reason to explain voluntary enlistment, whereas the idea of obtaining protection is much more prevalent. Children who have witnessed murders or massacres are more inclined to join up with the armed forces or armed groups, believing that they will enjoy a greater degree of security in face of the dangers surrounding them.

— *Reasons connected with culture and environment*: children may enlist because, in their country, the military life is considered to be a way of achieving a higher social standing and obtaining a measure of glory. In some societies, it is also a way of proving one's manhood. In addition, children may come under pressure from peers who have already been recruited.

— *Reasons connected with beliefs or convictions:* in this case, the enlistment of the child may be considered genuinely voluntary. The convictions in question may be of a political, religious or social nature. Nevertheless, it is necessary to draw a distinction between such cases and those in which the child has been influenced, manipulated or indoctrinated by adults.

[53] See, for example, K. Hedlund Thulin, "Child soldiers: The role of the Red Cross and Red Crescent Movement", in *Humanitäres Völkerrecht,* No. 3, 1992, p. 143; Machel report, *op. cit.* (note 18), paras 38-43; Brett/McCallin, *op. cit.* (note 111), pp. 91-102.

VI. Armed groups

Position of the ICRC: *Every party to a conflict is required to apply the provisions of Articles 1 and 2 of the optional protocol. The application of these provisions has no effect on the legal status of the parties to the conflict.*

A. Legal arguments

46. Above all, it is important to emphasize that the obligations which stem from the optional protocol must be the same for all the parties to the conflict. This means, for example, that the obligations imposed on armed groups must not be greater than those imposed on the armed forces. It is a rule of international humanitarian law that the parties to a conflict must be treated on an equal footing. This equality between the parties must be respected even in the absence of reciprocity in the application of international humanitarian law. Accordingly, one party to a conflict cannot refuse to apply international humanitarian law on the grounds that the adverse party has failed to comply with it.[54] One of the direct consequences of this principle is the fact that the application of international humanitarian law has no effect on the legal status of parties to a conflict.

a. Definition of an armed group

47. First of all, it is important to define what is meant by a "party to the conflict". To do so, a distinction must be drawn between international and non-international armed conflicts.

48. In the case of international armed conflicts, the parties to the conflict are principally the "High Contracting Parties" within the meaning of the Geneva Conventions and their Additional Protocols.[55] The armed forces of these parties are defined in various provisions of international humanitarian law which deal with the armed forces themselves, prisoners of war and combatants.[56] In addition, Protocol I extends the concept of

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[54] J.S. Pictet (general editor), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 25; see also Article 60, para. 5, of the Vienna Convention on the Law of Treaties of 23 May 1969, *United Nations Treaty Series*, Vol. 1155, p. 331.

[55] The term "party" should be understood within the meaning of Article 2, para. 1(g) of the Vienna Convention on the Law of Treaties, namely as "a State which has consented to be bound by the treaty and for which the treaty is in force".

[56] Article 2 common to the Geneva Conventions, Article 4A, paras 1-3, of the Third Convention, Article 43, paras 1 and 3, of Protocol I.

"party to the conflict" to cover peoples fighting against colonial domination, foreign occupation or racist regimes in the exercise of their right of self-determination.[57] In general, the parties to an international armed conflict must be States and the combatants members of formations organically dependent on a State.[58]

49. In the context of non-international armed conflicts, not all the "parties to the conflict" are subjects of international law. Article 3 common to the Geneva Conventions refers to such parties, but without further explanation. This implies that the article is applicable even in cases where no government armed force is a party to the conflict, that is, in a situation involving several warring factions.[59] Protocol II, which applies in non-international conflicts, is more precise. Non-international armed conflicts take place between the armed forces of a High Contracting Party and dissident armed forces or organized armed groups.[60] In the definition of an armed conflict,[61] reference is made to the various conditions that have to be met for a situation to qualify as a non-international armed conflict; these conditions must be borne in mind and developed to arrive at a definition of "dissident armed forces" and "armed groups".

50. Dissident armed forces are armed forces which have risen up against those remaining loyal to the government. Armed groups — usually insurgents — must satisfy various objective criteria listed in Protocol II,[62] in the same way as dissident forces.

— *Responsible command:* This implies a certain degree of organization of the armed group or dissident forces. Without being similar to the hierarchy of the regular armed forces, this degree of organization has to be sufficient to enable the group or forces to conduct sustained and concerted military operations and to impose discipline.

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[57] Articles 1, para. 4, and 96, para. 3, of Protocol I.

[58] K. Ipsen, "Kombattanten und Kriegsgefangene", in H. Schöttler, B. Hoffmann (eds), *Die Genfer Zusatzprotokolle: Kommentare und Analysen,* Osang Verlag, Bonn, 1993, p. 156.

[59] *Commentary on the Additional Protocols,* pp. 1349-1350.

[60] Article 1, para. 1, of Protocol II. The term "armed forces of a High Contracting Party" should be deemed to mean "*all* the armed forces — including those which under some national systems might not be called regular forces — constituted in accordance with national legislation" *(O. R.* X, p. 94, CDDH/I/238/Rev. 1).

[61] See above: IV.

[62] Article 1, para. 1, of Protocol II.

— *Control over a part of the territory:* "Control" is understood to mean domination of a part of the territory, but what part of the territory should be controlled is not specified. However, this criterion must be linked with the preceding one, since such control must be sufficient to enable the armed group or dissident forces to conduct sustained and concerted military operations and to implement the Protocol.

— *The sustained and concerted character of military operations:* This is an objective criterion which takes no account of the duration or intensity of the operations. On the other hand, it should be understood that such operations must not be sporadic and that they are planned or prepared by organized armed groups capable of taking concerted action.

— *Ability to implement the Protocol:* This is a fundamental criterion which justifies the other elements of the definition. It sets a threshold for application which may seem high, but it is no more than should be expected of groups which meet the previous conditions.[63]

b. Legal status

51. International humanitarian law makes it clear that its application by the various parties to a conflict has no effect on their legal status. This provision, it is true, was laid down in the Geneva Conventions only with reference to non-international armed conflicts.[64] However, during the negotiations leading up to the Additional Protocols, the provision was expressly applied to international armed conflicts.[65] Thus the application of international humanitarian law in no way changes the legal status — whether or not contested by the adverse party — that a party had when the conflict broke out, and neither establishes nor consolidates an attribute which did not previously exist.

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[63] For further details of these criteria, see *Commentary on the Additional Protocols*, pp. 1351-1353.

[64] Article 3, para. 2, common to the Geneva Conventions.

[65] Article 4 of Protocol I. This provision is not expressly restated in Protocol II, but it is implied, inasmuch as Article 1 specifies: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application...".

B. Arguments based on practice

52. It must be stressed that most of today's armed conflicts are of a non-international nature. Consequently, it is very important to include a provision which is binding on armed groups.

53. It was rightly pointed out by the United Nations Committee on the Rights of the Child that, in the 28 conflicts in progress in January 1997, "persons below the age of 18 were being used heavily by non-governmental groups in hostilities, both directly and indirectly. It was, therefore, most important that the optional protocol should address the issue, obliging States parties to take all possible steps to prevent the recruitment of children by such insurgent groups in their territory. It was also recommended that the terminology of the optional protocol should not go beyond that contained in the Protocol II Additional to the 1949 Geneva Conventions".[66]

54. The refusal to include armed groups is often based on the fact that it is impossible to apply provisions relating to groups which by definition cannot formally be contracting parties to treaties of international law. However, it has repeatedly been shown in practice that governments and international or non-governmental organizations can exert influence on such groups and persuade them to acknowledge that they have to respect certain obligations of a humanitarian nature so as to safeguard and protect the population under their control.[67] The ICRC has been actively endeavouring for many years to exert such influence with regard to the rules of international humanitarian law.

International Committee of the Red Cross

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[66] UN doc. E/CN.4/1997/96, para. 45.

[67] Examples may be found in the Machel report, *loc. cit.* (note 18), para. 61.