

# PROTECTING CHILDREN IN CONFLICT: AN UNFINISHED LEGAL AND MORAL AGENDA

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*Perhaps no individuals suffer more from the effects of war than our children. This contribution briefly reviews how children have suffered in the past, focusing on those who have been forced to flee their homes and often their families. It does this by describing the international law we have put in place to protect our children fleeing from war. It specifically describes the most important provisions of the corpora of international refugee law, international human rights law, and international humanitarian law. These corpora of law contain the law that has been created to mitigate the suffering of children fleeing armed conflicts. Having described the law, brief attention is given to some of the supplementary instruments that are used to interpret the legal obligations of states. And finally, attention is given to selected shortcomings of the law and the international community's efforts to adequately protect children from the scourge of war. The concluding suggestions emphasize the need to refocus our efforts. We need to make sure that the gaps in the law are closed by agreeing to international law that protects all children forced to flee their homes because of armed conflict. And we need to make sure that we address the causes of war by not losing track of the aspirational goal of ending war forever.*

“It takes a village to raise a child.”  
African proverb

## **1. The state of refugee children in armed conflict**

Today there are as many as 16 million refugees in the world<sup>1</sup> and almost half of these are our children.<sup>2</sup> Children who are fleeing armed conflict in search of protection elsewhere are among the most vulnerable people on earth.

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<sup>1</sup> The office of the United Nations High Commissioner for Refugees estimates that there are 16 million refugees. UNHCR, *2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, 2008. See also, US Committee for Refugees and Immigrants, *World Refugee Survey 2008*, Virginia, USA, 2008, 31, estimating that there are 14,047,300 refugees and asylum-seekers. Since the determination of refugee status is based on the *de facto* qualification and because asylum-seekers claim to be qualified for international protection, this contribution and the *World Refugee Survey* consider both recognized refugees and those claiming this status – asylum-seekers – in arriving at the figure of refugees worldwide.

<sup>2</sup> UNHCR, *2007 Global Trends*, *op. cit.* 1, 12, estimating of the proportion of refugees that are children to be 44 per cent.

These children face threats of under-age recruitment into the armed force, domestic violence, infanticide, forced marriage, female genital mutilation, forced labour, prostitution, pornography, slavery, trafficking, exploitation in employment, etc.<sup>3</sup> Dennis McNamara, the former Director of UNHCR's Division of International Protection, has aptly described refugee children as being

among the most vulnerable children in the world. Not only have they suffered from war or other forms of persecution in their countries of origin which forced them to flee their homes, but many refugee children continue to suffer human rights abuses in countries of asylum. More than half of the world's refugee population are children, yet their rights and special protection needs as children are frequently neglected.<sup>4</sup>

Armed conflict, more popularly known as war, whether international or non-international, is the single most significant cause of refugees today.<sup>5</sup> The United States' illegal use of force against Iraq alone accounted for the largest displacement in recent times. An estimated 2.5 million Iraqis had fled their country by the end of 2006,<sup>6</sup> a number that increased at a rate of 40,000–50,000 a month throughout 2007.<sup>7</sup> This has constituted the fastest growing and most serious refugee crisis in the world in modern times and it was caused by the illegal use of force of just a single developed country and a few of its allies. The Iraqis who have fled their country can be described as refugees under international law because they have crossed an international border fleeing with a well-founded fear of persecution because of their belonging to a religious group or some other social status. Others have not been fortunate enough to escape from the war zone and are thus internally displaced persons (IDPs).<sup>8</sup> At least half of these victims of war are estimated to be children.

And despite the common held belief that Nelson Mandela eloquently expressed when he stated that “children are the rock on which our future will

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<sup>3</sup> See A. Edwards, “Age and gender dimensions in international refugee law”, in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations in International Protection*, Cambridge University Press, 2003, 46–84, 57

<sup>4</sup> D. McNamara, “Refugee children”, in *Promises Broken: Children Refugees*, Human Rights Watch, 1999.

<sup>5</sup> R. Lubbers, “Forward”, *International Review of the Red Cross*, No. 834, 2001, 577–9, available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JRE3> (last visited 9 Dec. 2008).

<sup>6</sup> UNHCR, “Briefing Notes: Iraq: UNHCR Director's Mission to Region to Underscore Refugee Protection Needs”, 9 Mar 2007. See also, UNHCR, “Number of Iraqi Displaced Tops 4.2 Million: Shanty Towns Mushroom”, Press Release, 9 Mar. 2007, available at: [www.unhcr.org](http://www.unhcr.org) (last visited 12 Aug. 2007).

<sup>7</sup> Refugees International, *Iraq: The World's Fastest Growing Refugee Crisis*, Washington, DC, USA, Refugees International, 4 Dec. 2006.

<sup>8</sup> IDPs who outnumber refugees around the world, are protected by the regular corpus of international law, including international human rights and humanitarian law. In addition, the international community has adopted some non-legally binding guidelines that reiterate that the existing rules of international human rights and humanitarian law apply to IDPs. See “Guiding Principles on Internal Displacement”, UN Doc. E/CN.4/1998/53/Add.2, 1998.

be built”,<sup>9</sup> we still do not adequately protect our children who are fleeing from war. Too often we fail to provide children the special protections they require when they are forced from their homes by war. International legal instruments often lack specific provisions protecting refugee children. And even when these laws exist, they often leave large groups of vulnerable children unprotected or under protected. This contribution describes the existing law and suggests how the lacunas in this law might be filled.

## **2. The international law protecting refugee children in armed conflict**

The international law protecting child refugees is a collage of at least three different corpora of international law. International refugee law, the *lex specialis* of refugees of all ages provides basic protections against being returned to a war zone, as well as protections in the country to which they have fled. Fleeing from war alone is not clearly a ground for protection under the instruments of widest applicability in this corpus of law. It is rather international human rights law that focuses on the protections that are to be accorded children in all circumstances, including when they are refugees or otherwise displaced. This corpus of law provides perhaps the best protections. Sometimes these legal norms are accompanied by mechanisms of implementation, although not in relation to the most important treaties protecting children. International humanitarian law protects the victims of armed conflicts, including child refugees caught up in an armed conflict. This law generally only applies during an armed conflict and on the territory of the parties to the armed conflict, including occupied territory. Each one of these corpora of law will be discussed in slightly more detail below.

### *2.1. International refugee law*

Child refugees are protected to some extent under the *lex specialis* of international refugee law. While these provisions should generally apply in war time as well as peace time, the provisions that apply specifically to refugee children are few. In general, child refugees are protected only to the same extent as adults under international refugee law.

The primary instrument protecting refugees is the 1951 UN Convention relating to the Status of Refugees<sup>10</sup> that specifically mentions children only in articles 4 (concerning religious education) and 17 (concerning wage-earning employment). Article 4 merely provides that refugee children have the same rights to religious education as nationals of the state in which they have found asylum and article 17 merely exempts refugees with children of the nationality of the country of residence from restrictive measures imposed on

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<sup>9</sup> Nelson Mandela, quoted on the website of his charity the “Nelson Mandela’s Children Fund”, available at: [www.mandela-children.ca](http://www.mandela-children.ca) (visited 10 Feb. 2008).

<sup>10</sup> 189 UNTS 150, entered into force 22 Apr. 1954.

aliens in relation to employment. The Final Act of the conference of plenipotentiaries drafting this treaty, perhaps to apologize for the omission, does encourage states "to take the necessary measures for the protection of the refugee's family, especially with a view to . . . [t]he protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption".<sup>11</sup>

According to the 1951 Convention a refugee is

[a] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it . . .<sup>12</sup>

No distinction is made between adults and children and this instrument is silent on war so that the conclusion may be drawn that it does not ordinarily protect refugees who are merely fleeing war when they do not satisfy the other more general criteria.

Neither the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>13</sup> nor the non-legally binding 1984 Cartagena Declaration on Refugees<sup>14</sup> specifically mentions child refugees. In these instruments, like the UN Convention, children are protected in the same way as adults. There are no special protections.

The Convention Governing the Specific Aspects of Refugee Problems in Africa deserves some special attention because it does extend the definition of a refugee to

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>15</sup>

According to this provision, children, as well as adults, who are fleeing conflict are entitled to be protected as refugees. It is relevant to note that this provision applies to all African countries; from which the overwhelming majority of refugees come.

<sup>11</sup> See also, UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", UN Doc. HCR/IP/4/Eng/REV.1, 1992, paras 181–188, 213–219.

<sup>12</sup> Article 1(A)(2).

<sup>13</sup> 1001 UNTS 45, entered into force 20 Jun. 1974.

<sup>14</sup> Cartagena Declaration on Refugees, adopted 22 Nov. 1984 in the Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.66/doc.10, rev. 1, 1984–5, 190–193.

<sup>15</sup> Article 1(2) of the African Convention, *op. cit.* 13.

## 2.2. *International human rights law*

To find law specifically protecting children one needs to turn to the *lex generalis* – in relation to international refugee law – the law known as international human rights law. This corpus of law provides a comprehensive protection for children in both war time and peace time. It consists of a multitude of universal and regional instruments. Some have mechanisms attached to them to ensure that the law is respected, other do not. The focus of this corpus of international law is the protection of the child because of his or her special vulnerability as a minor.

Unfortunately, the most widely ratified of the international instruments protecting the human rights of children is one without a human rights mechanism that can make binding legal decisions or entertain individual petitions.

This principle instrument is the 1989 Convention on the Rights of the Child (CRC).<sup>16</sup> This treaty is one of the most widely ratified treaties in the world – only the United States and Somalia have not ratified it; however, the latter's President has indicated his country's willingness to do so when political stability make this possible. It is also one of the most comprehensive treaties in the world with forty articles providing for the human rights of children, including specific articles on refugee children. The CRC is a treaty from which there may be no derogations under any circumstances and no reservations by states when ratifying it.

Article 22 of the CRC obliges states to provide children who are recognized as refugees or who are asylum-seekers, whether they are accompanied by their parents or unaccompanied, all the rights included in this treaty's extensive list of civil, political, social, and economic rights.<sup>17</sup> The treaty also encourages cooperation with the efforts of other bodies assisting child refugees.<sup>18</sup> All of these obligations, however, are qualified by phrases such as “appropriate measures”, “in accordance with applicable international or domestic law”, and “as they consider appropriate”.<sup>19</sup> Numerous other provisions of the CRC also contribute the protection of child refugees,<sup>20</sup> and, of course, the treaty expressly requires consideration of the “best interest of the child” as the seminal standard for decision making.<sup>21</sup>

The CRC has been supplemented by two protocols that are of particular importance to protecting children who are the victims of war. The first of these

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<sup>16</sup> Convention on the Rights of the Child, 1577 UNTS 3 (1989).

<sup>17</sup> Article 22(1) of the CRC.

<sup>18</sup> Article 22(2) of the CRC.

<sup>19</sup> Article 22 of the CRC.

<sup>20</sup> See, especially, art. 2 (prohibition of discrimination, including distinctions between unaccompanied and accompanied children and any feature of their parents or guardians); art. 12 (special protections in all matters affecting the child, specifically in judicial or administrative proceedings); art. 19 (special protections for the child in relation to education); and art. 20 (special protections for children deprived of the family environment).

<sup>21</sup> Article 3 of the CRC.

optional protocols requires that state parties prohibit children from participating in armed conflicts as child soldiers.<sup>22</sup> Unfortunately, this protocol neither provides for means of redress against states who violate its provisions, nor does it enjoy the same widespread adherence as the CRC itself. The second of these optional protocols requires that state parties protect children from some of the worst forms of exploitation that are often precipitated by and associated with an armed conflict, namely the sale of children, child prostitution, and child pornography.<sup>23</sup>

In the regional context, the African Charter on the Rights and Welfare of the Child<sup>24</sup> also includes an article providing for the protection of refugee children. This article may apply more broadly than the CRC, because it must be applied in light of other African instruments,<sup>25</sup> including the Convention on the Specific Aspects of the Refugee Problem in Africa,<sup>26</sup> which broadens the definition of a refugee to include individuals fleeing from war. Neither the American nor the European human rights instruments contain provisions specifically providing for refugees' or child refugees' rights.

To the advantage of the protection of children in armed conflicts there exists in the CRC a bridge from international human rights law to international humanitarian law that obliges states "to respect and ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child".<sup>27</sup>

### 2.3. *International humanitarian law*

The law applying to armed conflicts contains some specific provisions relating to both children and to refugees. The Fourth Geneva Convention,<sup>28</sup> for example, obliges states to make children the special object of respect;<sup>29</sup> to provide them the care and aid they require in civil wars;<sup>30</sup> to allow the passage of all consignments of essential food, clothing, and medicine destined for children;<sup>31</sup>

<sup>22</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, GA Res. 54/263, annex I, 54 UN GAOR Supp. (No. 49) at 7, UN Doc. A/54/49, Vol. III (2000), entered into force 12 Feb. 2002.

<sup>23</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, GA Res. 54/263, annex II, 54 UN GAOR Supp. (No. 49) at 6, UN Doc. A/54/49, Vol. III (2000), entered into force 18 Jan. 2002.

<sup>24</sup> OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>25</sup> *Ibid.*, art. 46.

<sup>26</sup> *Op. cit.* 14 and accompanying text.

<sup>27</sup> Article 38 of the CRC.

<sup>28</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 Aug. 1949, 75 UNTS 287-417 (1950).

<sup>29</sup> Article 77(1) of the 1977 Geneva Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3-608 (1979).

<sup>30</sup> Article 4(3) of the 1977 Geneva Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609-699 (1979).

<sup>31</sup> *Op. cit.* 28, art. 23(1).

to provide special protection to unaccompanied children;<sup>32</sup> to provide preferential treatment to children who are enemy nationals,<sup>33</sup> and to provide preferential treatment regarding the distribution of food, medical care, and general protections against the effects of war in occupied territory.<sup>34</sup> In all cases, children are defined as those individuals who are under 15 years of age.

A general focus of the Geneva Conventions is the reunification of families.<sup>35</sup> This is especially important for unaccompanied child refugees who may have been separated from their families. The tracing role of the International Committee of the Red Cross (ICRC), including its centralized database of separated families, is of essential importance to reunification.

The First Protocol (1977) also makes it clear that refugees “under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or the State of residence”<sup>36</sup> are also protected persons under the Fourth Geneva Convention.

The above instruments of international humanitarian law provide legal obligations for most states, but they do not provide for mechanisms with the jurisdiction to enforce their provisions. Such enforcement is left to states and to the ingenuity of actors from civil society who can sometimes use the mere existence of legal obligations to pressure states to in fact protect children who have fled their countries in search of a childhood not marred by the scourge of war.

#### 2.4. *Lege ferenda*

The legally binding provisions of law are neither the only, nor the last, word on the law. A myriad of non-binding but authoritative materials to assist in interpretation also exist. This voluminous material is too extensive to be discussed in detail in this contribution, but it is valuable to look at some important examples.

Most of the documents mentioned below encourage states to provide special protections to child refugees. They do so because they have been agreed upon by respected international authorities and usually reflect an international consensus on this issue. The fact that these documents have not been reflected in the treaties which states ratify, however, raises questions about their legal authority and makes it arguable that many of their provisions may not reflect established customary international law, but rather *de lege ferenda*, the law as one would like it to be.

<sup>32</sup> *Ibid.*, art. 24(1).

<sup>33</sup> *Ibid.*, art. 38(5).

<sup>34</sup> *Ibid.*, art. 50. See also art. 70(1) of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3-608 (1979).

<sup>35</sup> See arts 3 and 24 of the Fourth Geneva Convention, *op. cit.* 28, and arts. 74, 77, and 78 of the 1977 Geneva Protocol I, *op. cit.* 29.

<sup>36</sup> Article 73 of the 1977 Geneva Protocol I, *op. cit.* 29.

For example, to encourage states to interpret the provisions of international refugee law to provide special protection to refugee children, UNHCR has promulgated several non-legally binding guidelines or policy directives. One of the most comprehensive of these is UNHCR's Guidelines on Protection and Care<sup>37</sup> that contains almost 200 pages of recommendations for the special treatment and protection of refugee children. These Guidelines are primarily intended to be used by UNHCR's own staff who are working in refugee camps or otherwise with refugees. They do, however, also provide good guidance to state officials who are the persons usually dealing with refugees, including refugee children. The Executive Committee of UNHCR has also promulgated several policy decisions that encourage the special protection of child refugees.<sup>38</sup>

The Committee on the Rights of the Child, created by the CRC, has also promulgated a General Comment on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin,<sup>39</sup> which explains that extra protection should be given to child refugees. Other United Nations human rights mechanisms and even the UN Security Council<sup>40</sup> have dealt with the protection of children in armed conflict, concluding that child refugees deserve special protection. An important point was reached in the mid-1990s when the Expert of the Secretary General on Children in Armed Conflict, Mrs Graça Machel, issued a groundbreaking *UN Study on the impact of armed conflict on children*.<sup>41</sup>

Several other important non-legally binding documents, however, do not say much that encourages the special protection of children. The final substantive paragraphs of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* mention unaccompanied minors, for example, but only to advise governments, in vague words, that "problems may arise due to the difficulty of applying the criteria of 'well-founded fear'", and that the status of a child refugee should be "determined in the first instance according to the degree of his mental development and maturity". Professor Guy Goodwin-Gill and Professor Jane McAdam have expressed concern about this provision

<sup>37</sup> UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994.

<sup>38</sup> See, for example, UNHCR Executive Committee Conclusions on International Protection No. 47 (XXXVIII) (1987) and No. 59 (XL) (1989) both on the issue of refugee children and UNHCR, "Note on Refugee Children", UN Doc. EC/SCP/46, 9 Jul. 1987. See also, UNHCR, *Guidelines on Best Interests Determination* (2008, updating the 2006 Guidelines), available at: [www.unhcr.org](http://www.unhcr.org) (last visited 8 Oct. 2008) and the *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, 2004, available at: [www.unhcr.org](http://www.unhcr.org) (last visited 8 Oct 2008). Also see, for example, UNICEF, *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, 2007, 14–16 reproduced in the Documents Section of this issue of the Refugee Survey Quarterly; and UNICEF, *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*, 1997.

<sup>39</sup> Committee on the Rights of the Child, "General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin", UN Doc. CRC/GC/2005/6, 2005 reproduced in the Documents Section of this issue of the Refugee Survey Quarterly.

<sup>40</sup> See, for example, "Statement by the President of the Security Council on Children in Armed Conflict", UN Doc. No. S/PRST/2008/6, 12 Feb. 2008.

<sup>41</sup> UN Doc. A/51/306, 1995.



characterizing it as incorrectly invoking the criteria of “mental development and maturity” for determining a well-founded fear of persecution.<sup>42</sup> They fear that “[t]o channel children in flight into refugee status procedures” may be detrimental to the well-being of some children; but, as they themselves point out. All decisions concerning children’s rights must be made taking into account the “best interests of the child”.<sup>43</sup> The UNHCR’s Guidelines on Gender-Related Persecution do not deal specifically with the “girl child”, but include her together with all women.<sup>44</sup>

The goals of the all these corpora of international law and *de lege ferenda* are to protect children from the direct and indirect effects of war; to help them to develop into adulthood; and to ensure that families are kept together.

### 3. Redirecting our energy to really protect children

To develop the protection of child refugees it is necessary to assess our current focus and to adjust it to close some of the gaps currently plaguing the law and practice. Below the current focus is briefly summarized and then suggestions are made for moving forward.

#### 3.1. Our current focus on humanitarian assistance in practice

The protection of the child refugee today focuses on providing humanitarian assistance. This is an appropriate focus, but it is not enough and it is certainly not sufficient to protect children from displacement.

International refugee law tells us how to treat child refugees when they have already fled their homes and crossed an international border. This law is, however, silent about children forced from their homes but still in their country of habitual residence. International human rights law provides special rules for the protection of children, but practice has shown that these rules are often not applied to children who have been displaced by an armed conflict. In fact, the majority of children displaced by armed conflicts today is not accorded special protections and usually cannot rely on the existing human rights provisions to provide them protection. And finally, while international humanitarian law provides special protections to children and to refugees during an armed conflict these protections are of the most basic nature and there is no body that meaningfully enforces them.

<sup>42</sup> G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, Oxford University Press, 2007, 130–1. These authors criticize this approach because they believe there is no relation between an individual’s level of maturity and the existence of a well-founded fear, children can fear just like adults, a child’s maturity is irrelevant to whether they may be persecuted, and the best interests of the child require that decisions be made taking into account to totality of a child’s environment.

<sup>43</sup> *Ibid.*, 131.

<sup>44</sup> UNHCR, “Guidelines on International Protection: Gender-Related Persecution with the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees”, HCR/GIP/02/01, 2002, para. 8.

The current focus on humanitarian assistance reflects the hard work that has been done by states, UNHCR, the ICRC, and other humanitarian organizations of both a state and non-state nature over many decades. It also indicates the shortcomings of our current approach that are reflected in the fact that a much greater percentage of children are the victims of wars today in either the 1860s when Henri Dunant initiated the Red Cross Movement after being shocked by the horrors of the injured on the battlefield or even in the 1920s when Eglantine Webb initiated the Save the Children movement after becoming aware of the suffering of German children because of wartime and post-war sanctions imposed by her own country, the United Kingdom, among others. The fact that so many children still continue to suffer from the man-made aggression requires that we reassess and improve our efforts to protect children fleeing from war.

### 3.2. *Refocusing on the causes of displacement*

This concluding section makes several suggestions that could improve the protection of children fleeing from the horrors of war.<sup>45</sup>

#### 3.2.1. *Taking law seriously*

This means in first instance that we use law to protect children who are forced to flee their homes because of war. Currently the laws protecting these children have significant gaps. The largest of these *lacunae* is the lack of provision for children who have been displaced within their own country. Although the above descriptions of the child victims of armed conflict and their protection has focused on children who have fled abroad, a much greater proportion of children are unable to flee violence in their countries of habitual residence. These children, who are IDPs, suffer from many of the same disadvantages as refugee children. UNHCR estimates that there are 24.5 million IDPs in the world as compared with fewer than 16 million refugees.<sup>46</sup> Despite the large number of IDPs in the world, there is no legally binding instrument specifically protecting IDPs, nor a dedicated organization responsible for ensuring their most basic humanitarian needs. There are non-binding guidelines that are only viewed by states as aspiration and not as requiring their adherence and respect.<sup>47</sup> They are not enough.

More importantly, perhaps, are the *lacunae* in the law. One of the most striking is the absence of a dedicated international regime for the protection of IDPs. Perhaps the most detrimental consequence of this is the lack of an international body, UN or otherwise, to assist IDPs who cannot, or are not, assisted

<sup>45</sup> See also generally, C. Watters, *Refugee Children: Towards the Next Horizon*, London, UK, Routledge, 2008, and UNHCR, "Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, 58<sup>th</sup> Session, (15 October 2007)", GAOR 62nd Sess., Supp. No. 12A, UN Doc. A/62/12/Add.1 in "Conclusions and Decisions of the Executive Committee", 7–11.

<sup>46</sup> *Op. cit.* 1.

<sup>47</sup> "Guiding Principles on Internal Displacement", *op. cit.* 8, especially Principles 4, 11, 13, 17, and 23.

by the states in which they are found. Although the ordinary international human rights law obligations of states apply to protect IDPs, the problems of IDPs arise because states do not apply these protections. This is often because a state is embroiled in a civil war or under foreign occupation and thus fighting for its own existence and therefore unable or unwilling to protect some of its citizens. In such cases, there is a dire need for an international legal regime and an organization to protect IDPs. The latter problem is the most significant. Under current circumstances an array of international actors squabble over who should take responsibility for IDPs in each instance. Often UNHCR has stepped into the void,<sup>48</sup> but sometimes no one does. The absence of IDP protection, even of their most basic humanitarian needs, is troubling and needs to be remedied if children fleeing the violence of war are to be given minimally adequate protection.

### *3.2.2. Ending war forever*

Ending wars forever is an undeniably laudable goal and one that requires a multifaceted approach. In taking this approach, it is, however, essential to keep in mind that we must consciously strive to achieve this goal through concrete action. There is much precedent for such a view.

As visionaries like Henri Dunant and Eglantine Webb developed humanitarian movements to, respectively, protect victims of war and children, they were both peace activists. It is natural that concerns with the protection of the victims of war and children would want to end war for all time.

The UNHCR, UNICEF, ICRC, and the other members of the Red Cross and Red Crescent Movement, as well as a wide variety of international human rights mechanisms, today shy away from anti-war activities. They claim that by confining themselves to humanitarian activities, they maintain the neutrality needed to do their work. The consequence, however, is that wars continue with even a greater frequency than did a hundred years ago and with innocent children today more often the victims than even the soldiers who start the war. This is unacceptable.

The activity that will protect children from wars the most is to end war forever. It is a goal that deserves the full backing of the international humanitarian community. Concerns about neutrality are not valid reasons for abstinence from the important responsibility of ending war for all times. As recent conflicts have shown, states involved in armed conflicts need others to provide humanitarian assistance to the victims of war more for economic and political reasons rather than because of their neutrality. Moreover, existing international law does

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<sup>48</sup> A striking example of the illogicality of this squabbling is the situation of IDPs in Sudan. In the early 1970s UNHCR, as a programme of the UN and thus answerable to the principal organs of the UN, was instructed to protect IDPs in Sudan by the Economic and Social Council and did so admirably. See ECOSOC Res. 1705(LIII), 27 Jul. 1972. In the late 1990s, when Sudan was home to the largest IDP population in the world, UNHCR and all other UN programmes or specialized agencies declined to take responsibility for the IDP population. The author witnessed this while working for UNICEF in Sudan and later as the legal representative of an estimated 2.5 million IDPs in Sudan's Khartoum State.

not discourage peace activists from providing humanitarian assistance to the victims of war.

When Henri Dunant founded the ICRC he did so with the goal of outlawing war, not merely mitigating its inhumanity. The spirit that drove the foresighted recipient of the first Nobel Peace Prize must be rekindled to drive the human spirit towards this lofty goal once again. Until this is done, we all will continue to be disgraced by children who are victims of war on our watch.

Part and parcel of ending war forever, are the steps taken to label war as an inhumane activity to be avoided at all costs. Our television screens, our theatre screens, our books, and magazine talk about war heroes. We glorify the gladiators who kill for a living and respect troops engaged in illegal wars that kill more millions of civilians.

War is not a glorious event. It is not something of which to be proud. It is, as Mrs Graça Machel described it, “a space devoid of the most basic human values; a space in which children are slaughtered, raped and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality . . . there are few further depths to which humanity can sink”.<sup>49</sup> We all need to work against the glorification of war. At the forefront of this work must be the bodies that work for the victims of war, such as the UNHCR and the ICRC. If they lead the way others will follow, if they refuse to take on this responsibility, others who are not as well positioned will likely fail.

Disarmament, both on the grand scale of nations and in relation to small arms can also contribute to the goal of ending war forever by removing the weapons of war from as many hands as possible. Currently, the worldwide trade in arms makes a crucial contribution to the waging of war. This we have known for some time. Already in 1960, in his oft-cited farewell address, United States President and General Dwight D. Eisenhower warned his constituents about the dangers of allowing the military-industrial complex to control civilian life.<sup>50</sup> His fears have become reality as the United States spent almost more on its military in 2005 than all the other countries in the world combined.<sup>51</sup>

Finally, the contribution that international criminal law can make to ending war has been severely hamstrung. While significant strides have been made

<sup>49</sup> *Op. cit.* 42, para. 3.

<sup>50</sup> D. D. Eisenhower, “Military industrial complex speech”, in *Public Papers of the Presidents, Dwight D. Eisenhower*, Washington, DC, USA, US Government Printing Office 1960, 1035–40.

<sup>51</sup> The Stockholm International Peace Research Institute (SPIRI) reports that 2.5 per cent of world’s gross domestic product amounting to US\$1,118 billion (fifty times the UN’s total annual budget) was spent on military equipment and armaments in 2005, an increase of 3.4 per cent since 2004, and of 34 per cent over the decade from 1996 to 2005. See SPIRI, *2006 Yearbook: Armaments, Disarmament and International Security*, Oxford University Press, 2006, ch. 8. The United States spends almost tens times as much as its next closest competitor in the arms race. The United States also exports US\$14,008 million dollars of military armaments each year. Opposition to such trade must become a part of the effort to protect children from the effects of war. If it does not, humanitarian efforts are akin to feeding children to prepare them to be slaughtered. See US Congressional Research Service, *Conventional Arms Transfers to Developing Nations 1999-2006*, Washington, DC, USA, US Government Printing Office, 26 Sept. 2007.

towards the punishment of war criminals, the International Criminal Court (ICC) remains unable to punish individuals who commit the crime of aggression. This is because the state parties to the Statute of the ICC have not yet agreed to define the crime of aggression for the ICC. This is despite the fact that this crime has not only been defined several times in the past, but is one for which international criminals have been convicted in Nuremberg. Instead, its Statute timidly states that the ICC will have jurisdiction over this crime once it is defined in the future. Not only is this a substantial step backwards for international law, it is a striking example of bad faith by the same countries who shown the proven propensity to use force. It is also a significant obstacle to protecting our children from crimes carried out against them in war time.

Ending war is a lofty hope, but it can also be something towards which concrete steps are made if there is a will to oppose war coming from the humanitarian community. It may also be the most significant act this community can do to protect children from war.

We must never forget that war destroys children's lives. And we must be guided by Reverend Trevor Huddleston's words that a "state which is prepared to use it military and paramilitary might to destroy children is a state which must be outlawed totally from the world community".<sup>52</sup>

#### 4. Conclusion

The international community has achieved much concerning the protection of children, the protection of refugees, and the protections of victims of war. These achievements must be brought together to protect some of the most vulnerable of these victims, our children who are fleeing from the violence of war. Achieving this requires greater effort on issues that transcend the specific protections in each of the three corpora of law. It also requires the courage to address the causes of the problems facing children fleeing from war. This task is weighty, but our failure to shoulder it will create an even heavier burden for our children. We must finally begin to realize the promises we made to our children without reservation because, in the words of the 1924 Geneva Declaration on the Rights of the Child, humankind "owes to the child the best it has to give".<sup>53</sup>

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<sup>52</sup> A. T. Huddleston, "Foreword", in V. Brittain, and A. S. Mint (eds), *Children of Resistance: Statements from the Harare Conference on Children, Repression and the Law in Apartheid South Africa*, London, Kluwer Books, 1988.

<sup>53</sup> Preamble of the 1924 Geneva Declaration of the Rights of the Child, adopted 26 Sept. 1924, *League of Nations, OJ Special Supp.* 21, 1924, 43. See also the article by L. Bolzman in this issue of the Refugee Survey Quarterly entitled "The Advent of Child Rights on the International Scene and the Role of the Save the Children International Union 1920-1945".