



Faculty of Law

Lund University

Master In International Human Rights Law

**“Child soldiers” as members of a
“particular social group”: a bridge
between Human Rights and Refugee Law.**

Matteo Pasquali

Supervisor

Prof. Göran Melander

December 2002

*To my father,
for his unlimited commitment to Human Rights.*

Contents

Fel! Bokmärket är inte definierat.

Chapter I - Introduction

As Ms. Grac'a Machel, the United Nations Secretary General's Special Representative for Children in Armed Conflict, found in her landmark UN study on the impact of conflicts on children, *“war violates every right of a child – the right to life, the right to be with family and community, the right to health, the right to development of personality and the right to be nurtured and protected”*¹.

Despite the existence of a large group of international norms generally intended to regulate the practice of warfare and specifically oriented to the protection of children in armed conflict, in the past decade more than two million of children have been killed, one more million orphaned and *“six million of them have been seriously injured or permanently disabled”* as a result of the occurrence of armed combat.²

One of the most serious and alarming tendencies that has particularly and dramatically increased in the last years, is related to the direct participation of children in situations of armed conflict. The number of children and

¹ Impact of Armed Conflict on Children: Report of the United Nations Secretary General's Special Representative for Children in Armed Conflict, Ms. Grac'a Machel, submitted pursuant to General Assembly Resolution 48/157. UN Doc.A/51/306, 26 August 1996.

² Ibid.

young soldiers fighting around the world is currently estimated at approximately 300.000, whose age can range from 6 to 18 years old.

Notwithstanding the remarkable developments of the norms of International Law that have occurred in the last century, neither Humanitarian Law nor Human Rights Law have managed, as yet, to eliminate the suffering and involvement of children in armed conflict.

In particular, many former child soldiers do not have access to the educational programs, vocational training, family reunification, or even food and shelter that they need to successfully rejoin civilian society. As a result, many end up on the street and are drawn back into armed conflict.

This situation is unacceptable and States are thus required to adopt any possible measure to minimize children participation in armed conflicts. In order to achieve this goal, the provisions of International Refugee Law can be recognized as a turning point and it is the primary purpose of the present paper to demonstrate the existence of substantial links between three key concepts: international refugee protection, best interest of the child and prevention from under-age recruitment.

The first chapter will rely on the relevance and adequacy of the existing international and regional legal standards in relation to the protection of children in situations of “war”, while the second chapter will focus on the recruitment of children as soldiers and their participation of in armed conflicts.

The third chapter covers the refugee protection regime under international law and issues related to the determination procedure of refugee children. The fourth chapter provides an overview of the “*membership of a particular social group*” refugee ground, that, in the last chapter, is connected to the “child soldiers” issue.

Chapter II – Children and armed conflict under International Law

2.1 International Humanitarian Law

International Humanitarian Law (also known as the “*law of armed conflict*”) is the branch of International Law which governs the conduct of the hostilities and aims to mitigate the human suffering caused by international and non–international conflicts.

It is primarily composed of the four Geneva Conventions: the First grants protection to the wounded and sick on the field; the Second is related to the wounded and sick and shipwrecked at sea; the Third refers to the prisoners of war and the Fourth affords general protection to civilians (in the hands of the enemy) not taking part in the hostilities.

Traditionally, non–international armed conflicts (or to use an outdated terminology : *civil wars*) were considered as purely internal matters for States, in which none of the international law provisions applied.

This view was radically modified with the adoption of Art. 3 common to the four Geneva Conventions of 1949: in adopting Art.3 the society of States agreed on a set of minimal guarantees to be respected during non–international armed conflict³.

The provisions of the Geneva Conventions were improved in 1977 by two Additional Protocols, drafted to include provisions limiting the permissible means and methods of combat, strengthening the protection of civilian population and extending the applicability of International Humanitarian Law within State boundaries.

The First Protocol expanded the concept of international armed conflicts (including national liberation wars) and the Second was drafted to be applicable only in particular situations of internal confrontation.

A fundamental peculiarity of the entire core of the rules of International Humanitarian Law consists in the exclusion of its applicability in situations of internal violence and tensions, both of them not considered by the drafters to constitute an armed conflict.

³ Marco Sassòli and Antoine A. Bouvier, “*How does law protect in war?* ”, International Committee of the Red Cross Productions, Geneva, 1999.

2.2 Legalities of child participation:

2.2.a In international armed conflicts

No rule in the Geneva Conventions or Additional Protocol I provides that a child may never become a combatant in an international armed conflict, but limits are placed on the authorities that control the recruitment process.⁴

Generally speaking, the issue of the participation of children in armed conflict has only attracted legal attention relatively recently. In fact, the first reference to the problem appears with the entry into force of the 1977 Protocols to the Geneva Conventions themselves.

Until that time, the child population affected by armed conflict was only considered in the rules contained in the IV Geneva Convention, which just afforded general “*protection*”⁵ to children as civilians not taking part in hostilities.

The applicability of these rules, however, shows their inadequacy to assure the protection of children and the promotion of children’s rights: they fail to protect every child in his/her status as a child⁶, and they do not protect them from military operations as such.

In addition, very little attention was paid to children’s special needs, while they were barely recognized as a separate group and treated as only one segment of the vulnerable part of the civilian population⁷.

Unfortunately, notwithstanding the efforts to improve the protection of children against the effects of conflicts and, for the first time, the introduction of a new rule in Art. 77, paragraph 2, Additional Protocol I regarding their direct participation to the hostilities, the drafting committees of the Protocols failed in their intent. This can be illustrated by looking specifically at Art. 77, paragraph 2, Additional Protocol I, which establishes

⁴ Ilene Cohn and G. Goodwin-Gill, “ *Child Soldiers: the role of children in armed conflict* ”, Clarendon Press – Oxford, 1994.

⁵ Emphasis added in consideration of the fact that protection from the conduct of the hostilities is not the primary scope of the Convention.

⁶ It is important to keep in mind that there is no precise definition of child in International Humanitarian Law.

⁷ Carolyn Hamilton and Tabatha Abu El-Haj, “*Armed Conflict: the Protection of Children Under International Law* ”,

that “*the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.*”

A shortcoming immediately apparent in the text of this provision can be recognized in the absolute lack of any kind of definition of “childhood”, giving thus the opportunity for a narrow interpretation of its meaning.

Furthermore, notwithstanding that Art. 77 uses the term “*persons*”, rather than children, when referring to those between the ages of fifteen and eighteen, nothing should stop State Parties to the Protocol to interpret the word “children” as covering all those up to the age of eighteen.

Another drawback of Art. 77, paragraph 2, is that State Parties to the conflict are only required to “*take all the feasible measures*” to ensure that children under fifteen years of age do not take a direct part in the hostilities. The wording of this paragraph is less mandatory in meaning than the one proposed by the ICRC, which had suggested that State Parties should “*take all necessary measures*” to prevent participation.⁸

The term “*endeavour*”, moreover, included in the last part of the paragraph is even weaker than the earlier “*all feasible measures*” provision and the term “*participation*” is considered to be too vague. It clearly includes fighting but it is not clear whether a child gathering information, transmitting orders, transporting munitions or foodstuffs or committing acts of sabotage would be included.

The need for a compromise is implicit in the wording of Art. 77 Additional Protocol I, and once again this new instrument failed to consider children’s rights as they had to be understood in the late seventies.

<http://www.essex.ac.uk/armedcon/international/comment/Text/paper001.htm>

⁸ Maria Teresa Dutli, “*Captured Child Combatants*”, International Review of the Red Cross, Geneva, Vol. n. 278/1990, p. 421.

2.2.b In non - international armed conflicts

In the context of non-international armed conflict the age under which children do not have the right to participate in hostilities is laid down in Article 4, paragraph 3(c), 1977 Additional Protocol II, which establish that “*children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in the hostilities*”.

In general this article, despite its deficiencies, marks an important development in the law: all children, and not just specific categories, are being given fundamental guarantees in an attempt to assure that they are treated humanely.

Differently from Art. 77 Additional Protocol I, the provisions of Art. 4 (3) contain a stronger language by stating that protected children shall neither be recruited nor allowed to participate in hostilities. These words allow no expectations to the proscribed conduct, determining an absolute prohibition covering both direct and indirect involvement.

Finally, a peculiar difference relies on the extension of the recruitment restrictions to groups other than regular armed forces of a State Party.

As mentioned before, this provision is not immune from defects, some of which clearly undermine its positives aspects.

First of all, the same criticism mentioned in regard to the Geneva Conventions and Additional Protocol I can be expressed in respect of the limited definition of “child” of the present provision, which is not extended up to the age of eighteen but is still limited to fifteen.

In fact, there is no formal recommendation to refrain from recruiting children under eighteen years of age in situations of non – international armed conflict.

Furthermore, the more extensive protection of Additional Protocol II is not necessarily available in all cases of non–international strife, since its application must fullfil all the several distinct conditions set out in art 1(1)⁹.

⁹ Art. 1, paragraph 1, of the 1977 Additional Protocol II: “ *This Protocol, which develops and supplements Art. 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application shall apply to all armed conflicts that are not covered by Art. 1 of the Protocol Additional to the Geneva Conventions of 12 August*

Another issue is that Additional Protocol II, independently from the problem that too many states have not ratified it (the same being true for Additional Protocol I as well), does not apply to “*situations of internal disturbance and tensions, such as riots , isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.*”¹⁰

For a child caught up in such “circumstances” there should be, however, little distinction because the effects of war are not, and must not be limited by their classification under Humanitarian Law.¹¹

It is worth mentioning that in a situation of non-international armed conflict, where the provisions of Additional Protocol II do not apply or where their application is “contested”, Art. 3 common to the four Geneva Conventions of 1949 should apply.¹²

Nevertheless, the protection afforded in that occasion is quite limited: it places no limits on the recruitment or participation of children and then it has a threshold, presupposing a certain level of internal violence without which it does not apply¹³.

2.3 International Human Rights Law

2.3.a The Convention on the Right of the Child and the issue of recruitment

Since the beginning of the last century, with the adoption of the first declaration on the rights of the child by the League of Nations, the concepts of “protection” and “special care” for children were recognized by the international community as new guiding principles.

Unfortunately, though followed by a series of similar and related declarations, such as the 1959 UN Declaration on the Rights of the Child

1949, and relating to the Protection of Victims of International Armed Conflict and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

¹⁰ Art. 1, paragraph 2, of the 1977 Additional Protocol II.

¹¹ Supra, note 5.

¹² It is important to remember, in this context, that there is no determining body, standard or internationally accepted method for characterizing conflicts.

¹³ Supra, note 4.

and the 1974 UN Declaration on the Protection of Women and Children in Emergencies and Armed Conflicts, many decades had to pass before the very special status of children could be fully acknowledged on an international level.

In fact, it wasn't until 1989 that the UN General Assembly adopted the Convention on the Right of the Child, the most rapidly and widely adopted human right treaty in history: 191 States are Parties to the Convention and just two independent States still not bound by its provisions, the United States of America and Somalia.¹⁴

As mentioned in previous paragraphs, the first international regulations dealing with the issue of children in armed conflict were the 1977 Additional Protocols to the 1949 Geneva Conventions. However, under the circumstances that these instruments were not universally ratified, and their subsequent stringent application requirements and disparities in the levels of protection (particularly in the areas of recruitment of 15 to 18 years old, types of prohibited participation and application to non-governmental troops) has the effect of creating a serious lacuna.

Due to its less disputed subject-matter, the 1989 Convention on the Right of the Child appeared to be the ideal context within which States could declare their unqualified political will to raise those standards.

Furthermore, as specified in Machel's report, the 1989 Convention, an instrument to which no general derogation clauses may be applied "*contains (...) provisions specifically related to armed conflict*". In particular, Art. 38 is of majority significance because it brings together humanitarian law and human rights law, showing their complementarity.

Contrary to the expectations however, the wording of the article introduced to regulate the involvement and participation of children in armed conflict was not innovative and, from a child rights' view, extremely disappointing.

In practice, the 1989 Convention on the Rights of the Child by establishing an obligation in Art. 38, paragraph 1,¹⁵ for State Parties to respect the rules

¹⁴ As of 14th October 2002

¹⁵ Art. 38 of the 1989 Convention of the Rights of the Child:

"States Parties undertake to respect and to ensure respect for rules of International Humanitarian Law applicable to them in armed conflicts which are relevant to the child.

of International Humanitarian Law and affirming in Art. 41¹⁶ that nothing in its provisions should be construed so as to override the rules of International Humanitarian Law that are more conducive in the protection of children's rights, rendered applicable the higher standards of the 1977 Additional Protocol II.¹⁷

Article 38 of the Convention was also considered to constitute a waking in the International Humanitarian Law related to children in armed conflict in two material aspects:

- i) in its application to non-international conflicts, it requires States Parties only to take "*feasible measures*" to ensure that under the age of 15 nobody is recruited;
- ii) it precludes only "*direct*" participation in hostilities (differently, it must be recalled that 1977 Additional Protocol II establishes a total ban on recruitment and on all forms of participation).

Undoubtedly, there were attempts to raise the level of protection beyond that provided by Humanitarian Law, but this prime opportunity to increase the level of protection and respect for children during armed conflict was, once again, lost to the need to achieve consensus: while the other rights set out in the Convention are guaranteed to children (defined in Art. 1 as being "*every human below the age of eighteen unless, under the law applicable to the child, majority is attained earlier*"), the concrete measures outlined in paragraphs 2) and 3) of Art. 38 apply only with respect to children up to the age of fifteen.

States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in the hostilities.

States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

In accordance with their obligations, under International Humanitarian Law to protect the civilian population in armed conflict, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict".

¹⁶ Art. 41 of the 1989 Convention of the Rights of the Child:

"Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

- a) *the law of a State Party; or*
- b) *International law in force for that State.*

¹⁷ Ann Shepard, "*Child Soldiers: is the Optional Protocol evidence of an emerging 'straight - 18' consensus?*", *The International Journal of Children's Rights*, Kluwert Law International, 8: 37-70, 2000.

Thus, the provisions in Art. 38 can be considered as representing a lowest common denominator¹⁸.

2.3.b The Optional Protocol to the Convention on the Rights of the Child: a step forward in the protection of children in armed conflict

The principal aim of the Optional Protocol is to protect children from a number of concerns that have surfaced in recent years and to promote general welfare relating to their involvement in war and armed conflict.

For several reasons this agreement is a significant advancement over the existing international standard concerning the protection and participation of children in armed conflict which permits them, as those old as fifteen, to be legally recruited and sent into war and sends a clear message that any use of children in war is unacceptable.

Generally speaking, a positive aspect of the Optional Protocol is that, as with the 1989 Convention on the Rights of the Child, it will apply to all levels of conflict, in contrast with the provisions of International Humanitarian Law, which only apply when the conflict has reached a specified level.

In particular, the provisions of the Optional Protocol represent a significant increase, over the provisions of the 1989 Convention of the Rights of the Child, since it raises to eighteen years (from fifteen) the minimum ages for:

- i) compulsory recruitment by government forces;¹⁹
- ii) all forms of recruitment by non-government forces;²⁰ and,
- iii) direct participation in armed conflicts.²¹

¹⁸ Supra, note 5.

¹⁹ Art. 2 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: “*States Parties shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into armed forces*”.

²⁰ Art. 4, paragraph 1, of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: “*Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under age of eighteen years*”.

²¹ Art. 1 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: “*State Parties shall take all feasible measures*

Notwithstanding that the adoption of the Optional Protocol determines a significant step forward in the international community's journey towards the implementation of a policy that would see the cessation of all forms of recruitment and participation of children under eighteen years in armed conflict, the necessity to achieve a broad consensus determined the adoption of a weakened text. The Working Group competent to draft the Protocol was thus faced with the task of balancing the interest of children, i.e., setting acceptable standards relating to their participation in war and armed conflict, and on the other hand agreeing a that treaty would be ratified and indeed, complied with, by the vast majority of nations throughout the world²².

As a result, the following can be highlighted as some of its greatest weaknesses and shortcomings:

- i) as in the Convention on the Rights of the Child, governments only agreed to take "*all feasible measures*" to ensure non-participation of children, so avoiding the advocacy lobbied by who supported the strongest possible language in order to impose on States an obligation to "*ensure*" that children do not take part in hostilities. A different kind of obligation imposed on States, which could have been of result rather than of conduct, would have provided children with better protection.
- ii) it does not specify a minimum age for indirect involvement in hostilities: circumstance extremely dangerous because it does not consider and underestimates the risks and dangers connected to that form of participation. This provision is definitely weaker than the corresponding clause in the 1977 Additional Protocol II, which precludes any participation by stipulating that children shall not be allowed to "*take part in hostilities*";

to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities".

²² Jonathan Black-Branch, "*The use of children in war: the International Protocol on the Involvement of Children in Armed Conflict*", *Mediterranean Journal of Human Rights*, Vol. 4 (Double Issue), 2000.

iii) exempts military schools from complying with the minimum age requirement;²³

iv) does not set a uniform minimum age for voluntary recruitment, although States would be required to raise their respective ages from the current minimum of fifteen and to maintain and report on voluntariness safeguards. This provision might be considered difficult to apply in practice, especially in countries where the requirement to provide “*reliable proof of age*” could be hardly satisfied.

In conclusion, trying to evaluate the present instrument under a more optimistic view, the reference in its Preamble to the fact that the 1989 Convention defines a child as being, for all its purposes, a person below the age of eighteen²⁴ and to the recommendation of the ICRC that “*Parties to the conflict take every feasible step to ensure that children under the age of eighteen years do not take direct part in hostilities*”²⁵ suggests that the subtext of the Optional Protocol is that the protection it outlines is intended, one day, to be available to all children.²⁶

It is to be hoped, therefore, that the Committee on the Rights of the Child will compensate for some of the shortcomings of the text by making a strict interpretation of it. It is promising in this respect that the Committee seems to be of the opinion that the Convention on the Rights of the Child applies as a whole to all children, so that for instance the best interest of the child, the right to life and the right to respect for family life will also apply to children who are at risk of being recruited or participating in hostilities, or have been in that plight.²⁷

²³ Art. 3, paragraph 5, of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: “*The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the State Parties, in keeping with article 28 and 29 of the Convention on the Rights of the Child*”.

²⁴ Preamble, Clause 7, of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

²⁵ Preamble, Clause 9, of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

²⁶ *Supra*, note 16.

²⁷ Daniel Helle, “*Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child*”, *International Review of the Red Cross*, Geneva, Vol. 839/2000, p. 797.

Chapter III – Child soldiers

3.1 Participation of children in armed conflicts

*“More and more of the world is being sucked into desolate moral vacuum. This is 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”.*²⁸ As a result of a two-year research and consultation undertaken by Ms Grac’a Machel, her report revealed the full extent of children’s involvement in forty or more armed conflicts raging around the world.

The factors that give rise to the participation of children in armed conflicts are complex. No single model can explain all these factors, nor can it outline a uniform procedure that will prevent child recruitment, and enable producers for the demobilisation and social reintegration of children who have participated in conflicts.

At the beginning of the last century, wars were fought primarily on a defined battlefield between men of governmental armed forces, but today the great majority of wars are within, not between, States and in many cases religious and ethnic affiliations are being manipulated to heighten feelings of hatred or aggression against children.²⁹

These kind of conflicts is as likely to be fought in villages and suburban streets as anywhere else: in this case, the enemy camp is all around, and distinctions between combatant and non-combatant melt away in the suspicions and confusions of daily strife.

Children have become increasingly involved in these wars as combatants: armed forces and paramilitary groups predominantly use boys, but it is necessary to realize that the term “child soldiers” includes girls too.

²⁸ Supra, note 1.

²⁹ “*to kill the big rats you have to kill the little rats*”: this comment was broadcast over Radio Mille Collines in Rwanda, as many as 300,000 children were killed in the massacres in that country in 1994.

Children commonly start out in support positions: boys can serve as porters or as messengers and spies. Girls may prepare food or attend to the wounded, but they also may be forced to provide sexual services or be “married off” to other soldiers.

Often, however, these children are subjected to life threatening risks beyond the normal dangers of war and they end up on the front lines of combat, planting or detecting landmines or participating in first-wave assaults, situations in which their youth and inexperience leave them particularly vulnerable, being in most of the cases unaware of the real dangers they face. In a number of cases, children have been deliberately exposed to horrific scenes to harden them to violence and many times, plied with drugs and given promises of food, shelter, and security, child soldiers are at time forced to commit atrocities against other armed groups and civilian populations, including sometimes their own families and communities, as a way of severing all ties with both of them.

In other words, this is likely aimed at preventing them returning to their normal lives and at developing a “need” for a new community, i.e. the armed group. Situations, which I would like to encompass under the term “*socialization into violence*”.

Yet, in spite of Machel’s, and other reports, related to the issue of child soldiers, this problem is still largely an invisible one. A recent study by the Swedish group Rädde Barnen (Save the Children) concluded in this way because those who employ children as soldiers deny their existence.³⁰

No record is kept of their numbers or ages, and ages are frequently falsified. Many are not part of the formally claimed strength of the forces or groups to which they are attached but are unacknowledged members.

They are invisible because most of them spend their time in remote conflict zones away from both the public view and the media scrutiny. They are invisible, moreover, because they simply vanish: they never return from the battlefield because they are killed or, having been injured, are tragically

³⁰ Rachel Brett and Margaret McCallin, “*Children: The Invisible Soldiers*”, 2nd edition, Stockholm, Rädde Barnen, 1998.

abandoned. Lastly, they are invisible because they are children, and in a larger sense, this is the greatest tragedy.

Under a “human rights” perspective most, if not all, of children’s rights protected by the international instruments are violated in situations of armed conflict.

3.2 Reasons for the recruitment of children as soldiers

As already mentioned in the above section, the reasons and factors that may give rise to the participation of children in armed conflicts are complex.

In many situations poverty, social disruption and destruction stemming from these wars may all undoubtedly become determinant reasons, together with “shortage of adult soldiers” and “class discrimination”, for child recruitment. In many cases, a military unit can be seen as a refuge – having a role of a surrogate family, and in other occasions joining an army may also be the only way to survive.

In long–drawn–out conflicts children have become a valued resource. Many current disputes have lasted a generation or more, and children who have grown up surrounded by violence see it as a permanent way of life: alone, orphaned, frightened, bored and frustrated, they will often choose to fight.

A unique reason which determines the direct involvement of children in an armed conflict relies on their “specific vulnerability” as human beings, a condition which has to be interpreted and understood in its broader meaning, including all possible physical and psychological features.

In fact, children are easily used in battles and are still seen as expendable commodities. They can be deployed for military purposes, being trained as human minesweepers or used in human attacks across minefields. In these situations, they can be often misled into thinking they are invulnerable.

The comparative agility of children, their smaller size and the ease with which they can be physically and psychologically controlled, are regarded as an advantage by military commanders.

Furthermore, whether fighting on the front lines or deployed as spies, messengers, servants and sex slaves, children can undoubtedly constitute the most readily brutalized participants in modern warfare: they are easier to

condition into fearless killings and unthinking obedience. Many reports particularly underline that child soldiers frequently pose a moral challenge for enemies.

They do not compete for the leadership role and they are also less likely to run away, as adults may. They can be cheap, not only from the point of view of maintenance but also because they do not demand salaries.

Another fundamental factor relies on the proliferation of light weapons. In the past, children were not particularly effective as front-line fighters since most of the lethal hardware was too heavy and cumbersome for them to manipulate. A child might have been able to wield a sword or a machete but was no match for a similarly armed adult.

However, a child with a modern assault rifle, which in almost all the countries struggled by a conflict can be bought with a very little amount of money, is a fearsome match for anyone. These weapons are simple to use and can be stripped and assembled even by a child of ten years.

3.3 Ways of recruitment

3.3.a Compulsory recruitment

“Conscription”, which by its nature is a governmental prerogative, is the legal obligation of citizens in specified categories to serve in the military forces.

In some countries conscription of persons less than eighteen years is legally permitted, but in most of the countries compulsory service is required of males (and sometimes females) that have already attained the 18 years of age or more.

All compulsory recruitment of people under eighteen years of age for use in armed conflict is prohibited by the n. 182 ILO Convention on the Worst Forms of Child Labour³¹ and the Optional Protocol to the Convention on the Rights of the Child³² that calls on States to ensure that persons under the age of eighteen are not compulsory recruited into their armed forces.

³¹ Art. 1 – 2 – 3 of the n. 182/1999 ILO Convention on the Worst Forms of Child Labour.

³² Art. 2 of the 2000 Optional Protocol to the Convention on the Rights of the Child.

Unfortunately, the law is not necessarily a safeguard for those who are underage. Countries with weak administrative systems do not conscript systematically from a register. Often those who are forcibly recruited or volunteering are encouraged or forced to state that they are eighteen years old in order to ensure apparent conformity with national legislation or international norms.

This may happen because most of the times people are simply unaware of their rights or, alternatively, the lack of adequate safeguards and the absence of mechanisms of appeal do not allow people to enforce their rights.

3.3.b Forced recruitment

Forced recruitment, entailing the threat or actual violation of the physical integrity of children or someone close to his or her, is practiced by both national armed forces and armed opposition groups³³. According to Machel's study, inducted abductions are one of the most common element in a larger campaign to intimidate communities. It is vital to realise that in order to seal off the possible avenues of resistance from the children's communities or the return of the children in their communities, recruiters deliberately destroy the bonds of trust between the child and his or her community.

According to several reports, both governmental and militia, or guerilla armies, forcibly detained minors to be soldiers in their forces and have done so in an arbitrary manner, according to no set procedure.

Both because potential recruits often try to avoid forcible recruitment choosing to sleep outside rather than at home, and because recruitment can be increasingly quick in public places, soldiers apply the so-called '*press ganging*', the most common form of forced recruitment.

"Press ganging" is when an armed militia group or police roam the streets and public gathering places (refugee camps are definitely not immune from that practice), including school gates, to round up all the children who come across.

³³ Supra, note 4.

Another method is to surround an area and force every child to sit or stand together while the eligible recruits are selected and taken away.

Forced recruitment may also be accomplished through intimidation to make it appear voluntary.

Recruits have no say in whether or not they agree to join the armed forces, nor are they given any advance warning conscription, any indication of how long they will be forced to serve, any idea of where they will be taken for training or for combat, nor any indication of whom they will be required to fight against.

3.3.c Voluntary recruitment

Despite what has been mentioned before, some children do make a “positive” choice to join, or are “encouraged” to volunteer by force of circumstances, or even because family members make a choice on the child’s behalf. The causes for voluntary recruitment are varied, and a number of different factors may operate simultaneously to influence the child’s decision to volunteer.

Many times there are “cultural” reasons that may induce the child to retain that participation in military or warlike activities is very often glorified. Some children may be persuaded to join the army by peer pressure or motivated by a cultural tradition of blood revenge, or even by an obligation to replace a relative who has been killed in action.

In some other cases children may join governmental forces or opposition armed groups in order “to protect” themselves from harassment.

Furthermore, some children volunteer for armed groups because they “believe” in what they are fighting for: a holy war, religious freedom, ethnic or political liberty, or simply a general desire for political justice.

In these cases, the children’s commitment to the opposition cause may have been instilled in them throughout their upbringing and reinforced by the idealisation of a culture of violence.

Another factor that determines a motivation for volunteering may be the search for a means of survival or support, in particular where the alternative to enlistment is unemployment. In these situations the family can play a

fundamental role, influencing the child's recruitment because of needs for the income (as in some cases the child's wages are paid to the family).

Girls, differently from boys, may join an armed group to escape early or imminent marriage, or conversely may be encouraged by the family in order to avoid poor marriage prospects.

Independently from which of the above mentioned motivations may play the most determinant role to induce a child to join the governmental forces or any other armed group, it is important to keep in mind that it could be totally misleading to consider this "voluntary". Children, in fact, remain subject to subtle manipulations and pressures that are more difficult to eliminate than forced recruitment. Their social milieu and developmental processes influence children's subjective understanding of reality.

Too easily it is forgotten that the capacity of most children (and in particular of children in situations of armed conflicts) to judge what is in their interest is still largely unformed and uninformed, and any "decision", as such, to join an armed group that appeals to such dubious criteria as a child's "right" of freedom of association or freedom of movement should be rejected as a mere pretence by those who use children for their own gain.³⁴

3.4 Categories of children who are more vulnerable to under-age recruitment

As already mentioned before, today there are dozens of wars which are mostly within, rather than between, States, and many of these conflicts have their roots in poverty, together with economic and social injustice.

These factors have determined the rise on the participation of children in the hostilities and the longer the conflict continues, the more likely it is that children will be recruited, and in increasing numbers.

Although there are distinct recruitment categories, in reality the areas of overlap are more striking than the differences and in this context it is extremely difficult to imagine which child could, *a priori*, be considered immune from that practice.

³⁴ David Isenberg, " *The invisible soldier: child combatants* ", The Defence Monitor, Centre for Defence Information – Washington D.C., Vol. XXVI, Number 4, 1997.

In any situation, due to economic, social, political, or cultural circumstances, certain children will be more vulnerable to under-age recruitment. Research has shown that the overwhelming majority of child soldiers, in almost every conflict, are drawn from the poorest, least educated and most marginalised sections of the society. There is a consistent pattern, in fact, that the more influential classes in society and particularly the wealthier parts of urban areas can be immune from both compulsory or forced recruitment.

In many cases, it has been demonstrated that within a country, corruption may be more or less institutionalised as a means of avoiding conscription, thus permitting children from the more prosperous and privileged classes to suffer far less risk of recruitment.³⁵

This reality appears to be even more true as far as forced recruitment is concerned: it is usually accomplished through recruiting raids which target gatherings of the poor and disadvantaged children, which are considered by the recruiters as those who can mount the least effective resistance or challenge. Together with the general category of poor and marginalised children, it is possible to distinguish other categories of minors which are more likely to be recruited. Among them, the following can be included:

- i) former child soldiers;
- ii) children from particular ethnic, racial or religious groups;
- iii) children from unstable or disrupted backgrounds;
- iv) unaccompanied children;
- v) children separated from their families and without the protection that the family can provide in order to prevent recruitment; and,
- vi) children living in conflict areas.

Among the categories listed above, no child is considered as vulnerable as children separated from their families for whatever reason.

There will inevitably be, of course, a high proportion of such children within conflict areas and without the family to assist and guide them, they can be an easy target for forcible recruitment or, being unable to conceive a

³⁵ Supra, note 28.

life outside the conflict that may have characterised all their experience, they can become a prey to militarist cultures and peer pressure.

Furthermore, a particular sub-category of disadvantaged children, which can undoubtedly become a fruitful source of child soldiers, are the inhabitants of camps for refugees or internal displaced persons.

3.5 Physical and psychological consequences of participation

Child soldiers suffer many of the same physical and psychological effects that war brings to non-combatant children. They are separated from their parents and relatives, and they lose their houses. They are exposed to destructive violence, witness death and atrocities (several times being even forced to commit them), and are often permanently disabled if not killed.

Health care for wounded child soldiers is often problematic and physical injuries usually carry additional emotional, psychological, economic and social disadvantages.

The most severe long-term consequence of children serving as soldiers is, perhaps, on their moral development. When fighting ends and children try return to their society, it is very difficult to place them in the more sedate surroundings of school or families. Their moral system is dominated by fear of violence from whoever is superior in the hierarchy.

Child soldiers find it very difficult to disengage from the idea that violence is a legitimate means of achieving one's aims, and find the final transition to a non-violent lifestyle extremely difficult. They are often scared and shocked by their role during a conflict.

Often, there is a tremendous amount of guilty for what one has done. This is typically accompanied by high levels of fear and anxiety over what will happen in the future. In addition, there are traumas and exposure to experiences that can produce flashbacks, sleep disturbances, withdrawal, and isolation or highly aggressive behaviour.

So, for these reasons, psycho-social assistance is vital for helping out former child soldiers in their transition back to normal life.

Under the Convention on the Rights of the Child, every child is entitled to receive “*such protection and care for his or her well-being*”³⁶ and States are obliged to “*ensure to the maximum extent possible the survival and development of the child*”³⁷, to protect the child from all forms of mental violence or abuse,³⁸ and to strive to ensure that victims of armed conflict have access to rehabilitation care.³⁹

For these purposes, Ms. Machel⁴⁰ recommended that all phases of emergency and reconstruction assistance programs include psycho-social considerations. Programs should support healing processes and re-establish a sense of normality through the daily routine of family and community life. If children who were soldiers are not reintegrated into a post-conflict society, they may well contribute to future conflicts. In this sense protection of children is not just a humanitarian issue but a security one as well.

Chapter IV - The refugee protection regime under International Law

4.1 International Humanitarian Law

³⁶ Art. 3, paragraph 2, of the 1989 Convention on the Rights of the Child: “*States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians and, or other individuals legally responsible for him or her, and, to his end, shall take all appropriate legislative and administrative measures*”.

³⁷ Art. 6, paragraph 2, of the 1989 Convention on the Rights of the Child.

³⁸ Art. 19, paragraph 1, of the 1989 Convention on the Rights of the Child: “*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement*”.

³⁹ Art. 39 of the 1989 Convention on the Rights of the Child: “*States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child*”.

⁴⁰ *Supra*, note 1.

International Humanitarian Law grants protection to refugees, as civilians affected by the hostilities, but its provisions are limited to those who are under the control of a party to an international armed conflict.⁴¹

It does not apply to refugees who are citizens of a belligerent State and flee to a State that is not party to the conflict they seek to escape. Furthermore, it does not specifically address the plight of those who escape internal armed conflicts by fleeing abroad.

Under the provisions of the 1949 Geneva Convention IV, nationals of a belligerent State who seek refuge in the territory of an enemy State are protected as aliens in the territory of the party to the conflict. In particular, if such persons no longer enjoy the protection of their home country, it is prohibited to treat them as enemy aliens solely because of their national origins.⁴²

The principle of non-refoulement, which undoubtedly can be considered as the cornerstone of the refugee protection, is addressed in Art. 45, paragraph 4, of the 1949 Geneva Convention IV, stipulating that: “*In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinion or religious beliefs*”.

The refugee protection under International Humanitarian Law was increased in Art. 73 of the 1977 Additional Protocol I, on ‘*Refugees and stateless persons*’, which provides that “*persons who, before the beginning of the hostilities, were considered as stateless persons or refugees*” under relevant rules of international or domestic law “*shall be protected persons within the meaning of Parts I and III of the Fourth Geneva Convention, in all circumstances and without any adverse distinction*”.

The purpose of this provision is to ensure that, if the territory where these persons are living is occupied by the party to the conflict from whose territory they fled or whose nationality they were deprived of before the outbreak of the hostilities, that party will grant them the guarantees and protection to which they are entitled as “protected persons”, regardless of

⁴¹ Art. 4, paragraph 2, art. 35 to 46, art. 70 paragraph 2 of the 1949 Geneva Convention IV.

⁴² Art. 44 of the 1949 Geneva Convention IV.

the fact that the individuals in question had previously fled from that party's territory.

In conclusion, apart from the prohibition of non-refoulement, International Humanitarian Law does not contain special guarantees for refugees but makes sure that, as protected persons, they are treated like other civilians.

4.2 International Human Rights Law

The term refugee is a "*term of art*" and, in ordinary usage, it has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable.⁴³

For the first time in 1948, deeply influenced by the atrocities of World War II, the international community granted to the individual the right to seek and enjoy asylum from persecution, codifying this rule in Article 14 of the Universal Declaration of Human Rights.⁴⁴ According to its wording, the mentioned provision granted the individual refugee the right to enter another territory and to obtain asylum.

The next steps in the protection of refugees were taken, respectively, in 1950 when the UN General Assembly established the Office of the UN High Commissioner for Refugees and in 1951 with the adoption of the Convention relating to the Status of Refugees (lately modified on a geographical and temporal level by the 1967 Protocol), which gave substance to Art. 14 of the Universal Declaration of Human Rights, introducing a general definition of the term "refugee" and formulating standards for the treatment of refugees by State Parties.

The 1951 Convention was created to respond to the needs of the refugees as a particular vulnerable category of aliens, by granting them a special status

⁴³ Guy S. Goodwin-Gill, "*The Refugee in International Law*", 2nd ed., Oxford Press University, 1996.

⁴⁴ Art. 14 of the 1948 Universal Declaration of Human Rights:
"*Everyone has the right to seek and enjoying other countries asylum from persecution. This right may not be invoked in the case of persecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations*".

that not only protects them against discrimination and forcible return to the country of persecution, but also to provide them with a series of guarantees necessary to start a meaningful new life in the host country. While in some domains, such as property rights, right of association, housing, the 1951 Convention requires State Parties to ensure that refugees, lawfully in the country of asylum, receive the same treatment at least equal to that which is granted to aliens generally in the same circumstances, in others, as social security and elementary education, refugees have the right to be treated in the same way as nationals.⁴⁵

The privileged special status, however, is not accorded to all persons who have fled abroad, but only to those who are refugees as defined by Art. 1A, paragraph 2, of the 1951 Refugee Convention⁴⁶. The rather complex requirements enlisted in that provision shows that not everyone fleeing abroad in search for subsidiary protection will be regarded as a refugee in the sense of the 1951 Refugee Convention.

Under a regional level, it is important to mention two Human Rights Instruments, namely the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Declaration of Cartagena on Refugees, both of which provided an expansion of the refugee definition, including those compelled to leave their country of origin on account of generalized violence, external aggression, occupation, foreign domination, massive violations of human rights or other circumstances seriously disturbing public order.⁴⁷

Chapter V - Who is a refugee child?

⁴⁵ Walter Kalin, “*Flight in times of war*”, International Review of the Red Cross, Geneva, Vol. n. 843/2001.

⁴⁶ Art1A, paragraph 2, of the 1951 Convention relating to the Status of Refugees: “*For the purposes of the Convention, the term refugee shall apply to any person who (...) owing to 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, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it*”.

5.1 The “protection” and “care” of refugee children in International Law

As dramatically acknowledged since 1987, when the High Commissioner for Refugees announced that approximately one-half of the world’s refugee population are minors, refugee children are considered among the most vulnerable children in the world: they have experienced the war or other forms of persecution in their countries of origin which forced them to flee their home, and many times also suffered human rights abuses in countries of asylum.

These kind of abuses that drive children to flight are only the first chapter of hardship for many refugee children: even travelling across an international border to seek refuge, they remain vulnerable to hazardous forms of exploitation, militarization of refugee camps and recruitment as child soldiers.

Refugee children may become child soldiers in different ways: some are conscripted, others are press-ganged, and yet others join as a way to protect their families from victimization. In some situations, the proximity of refugee camps to conflict zones exposes children to forcible recruitment, either by State or non-State entities. On several occasions the Executive Committee condemned forced recruitment and the exposure of refugee children to physical violence and other violations of basic human rights and recognized that, among the members of this vulnerable group, separated children face a greater risk of military recruitment.

Both on an international and regional level, there is currently no universally accepted definition of the term “refugee children”: under this expression may be included refugees, asylum seekers and displaced persons of concern of the UNHCR, up to the age of eighteen (unless under applicable national law, the age of majority is less) or, as indicated in art. 22 of the Convention on the Rights of the Child, a child *‘who is seeking refugee status or who is considered a refugee in accordance with applicable international or*

⁴⁷ Supra, note n. 39.

domestic law and procedures (....), whether unaccompanied or accompanied by his or her parents or by any other person”.

The 1951 Refugee Convention, however, makes no distinction between adults and children, and the only actual references to children are those concerned with:

- i) the refugee parents’ right to freedom regarding the religious education of their children;⁴⁸
- ii) the effect of having children who are nationals of the country of residence on the refugee’s right to employment;⁴⁹
- iii) the necessity of applying to refugees the national standards for the minimum age for employment and young persons’ work.⁵⁰

Interestingly, Art. 22 of the 1951 Refugee Convention, on public education, completely omits any reference to childhood or age⁵¹.

Conversely, the situation of refugee children was specifically included in Art. 22 of the 1989 Convention on the Rights of the Child, which requires that State Parties ensure that a refugee child, whether accompanied or unaccompanied, receive “*appropriate protection and humanitarian assistance in the enjoyment of the applicable rights*” set forth in the Convention and other international human rights and humanitarian instruments. Furthermore, Article 22 provides that States Parties should cooperate in any efforts with the United Nations or other competent organizations or NGOs to protect and assist refugee children.

From a “theoretical” point of view, the effect of the Convention on the Rights of the Child on the lives of refugee children can be considerable.

First, the Convention minimizes the significance of the child’s status as a refugee, since the status cannot be used as a basis for any form of discrimination against the child. Second, the Convention sets up standards which must be guaranteed to the refugee child, as well as to all other children.

⁴⁸ Art. 4 of the 1951 Convention relating to the Status of Refugees.

⁴⁹ Art. 17, paragraph 2, sub c), of the 1951 Convention relating to the Status of Refugees.

⁵⁰ Art. 24, paragraph 1, sub a), of the 1951 Convention relating to the Status of Refugees.

⁵¹ C. Price Cohen, “ *The United Nations Convention on the Rights of the Child: implications for change in the care and protection of refugee children* ”, International Journal of Refugee Law, Oxford Press University, Vol. 3 n. 4, 1992.

But unfortunately, from a “practical” point of view, the idea that a refugee child should be able to fully exercise the Convention’s civil and political rights might appear quite absurd, considering that in most refugee situations, the mere guarantee of survival can hardly be reached.⁵²

5.2 The guiding principles in the child’s refugee status determination

As mentioned above, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees define a refugee regardless of age and make no special provision for the status of the refugee children.

In particular, however, these instruments do not specify the requirements for refugee status determination procedures, the idea being that State Parties to the 1951 Convention would establish appropriate procedures having regard to the particular legal traditions and constitutional and administrative arrangements in the respective country.⁵³

Furthermore, minor refugees share the fate of adults, but because of their special characteristic of being children, they have special rights and needs, which become even more important when becoming refugees.

For these reasons, and in order to try to achieve a common understanding and interpretation of the key aspects related to refugee status determination procedure, the examination of a child’s application should be inspired by the principles on which the 1989 Convention on the Rights of the Child is based, respectively the non-discrimination principle, the “best interest of the child” and the participation of the child in decisions regarding his or her welfare.⁵⁴

In the refugee context, non-discrimination implies that refugee children and children seeking asylum have access to fair and efficient determination procedures and implementation of protection measures: a refugee child

⁵² Ibid.

⁵³ B. Gorlick, “*Common Burdens and Standards: Legal Elements in Assessing Claims to refugee Status*”, Report from the Nordic Refugee Seminar, Lund, Sweden, 28-29 August, Raoul Wallenberg Institute, Report n. 33, Lund 2002.

⁵⁴ B. Gorlick, “*Human Rights and refugee: enhancing protection through international human rights law*”, UNHCR Working Paper n. 30, October 2000, <http://www.unhcr.ch/refworld/pubs/pubon.htm>

possesses the same social, economic, cultural, civil and political rights as any other resident or national child living within the host State's jurisdiction.

The "best interest of the child", contained in Art. 3 of the Convention on the Rights of the Child, is a leading principle which runs through national and international children's rights documents, and it must also be given primary consideration in any decision made concerning the refugee child, and in relation to the 1989 Convention as a whole.

In a refugee child perspective, this principle should inform the entire determination procedure and to ensure that it is taken into account. States are usually required to designate a legal representative to help and assist the child through the determination procedure, in order to guarantee that the interests of the child applicant for refugee status are fully safeguarded.

The principle of "best interest of the child" should also override all other consideration of a political or financial nature and it requires that the developmental needs of the child should be at the forefront of the decision makers' minds, in particular when evaluating possibilities for repatriation or family reunification.

In addition, the 1989 Convention, in its Art. 12, requires that children who are capable of forming their own views have the right to express them freely, and that they must be afforded the opportunity to be heard, either directly or through a representative, in any proceedings affecting them. These fundamental principles were specifically incorporated into the UNHCR's protection policies and strategies for refugee children, when the 1994 "*Refugee Children: Guidelines in Protection and Care*" and the 1997 "*Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*" were published.

The above mentioned principles have deeply influenced State practice and their relevance on the procedural side is nowadays universally recognized. A decision-maker is formally required to fully implement them when,

assessing a child's claim to refugee status, has to consider elements as "well founded fear" and "persecution", or to elicit and assess the evidence.⁵⁵

5.3 The "well - founded fear" requirement

The interpretation of the "well founded fear" element, considered as the key phrase of the refugee definition, has always determined debates among scholars and experts.

In some cases, it has been assumed that since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee, but this frame of mind must be supported by an objective situation: fear has to be "well founded".⁵⁶

On the other hand, some authors retain that "well founded fear" has nothing to do with the state of mind of the applicant for refugee status, except insofar as the claimant's testimony may provide some evidence of the state of affairs in his or her home country.

Under this approach, the concept of "well founded fear" is considered rather inherently objective, intended to restrict the scope of protection to persons who can demonstrate a present or prospective risk of persecution, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past.⁵⁷

These interpretative problems were considered by the drafters of the 1994 UNHCR Guidelines and while affirming that a child seeking asylum may be granted refugee status for having a "*well founded fear of being persecuted*", acknowledged the difficulties and the special attention required in the evaluation of a refugee status application concerning a child.

In particular, it has been recognized that the application of the criteria of "well founded fear" to children does not normally give rise to any problem when, as in the majority of the cases, they are accompanied by their parents. It is generally agreed, on the basis of the principle of family unity, that when

⁵⁵ The concept of "persecution" will be analysed more in detail in Chapter IV, paragraph 1.

⁵⁶ UHNCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, 1979.

⁵⁷ James C. Hathaway, "*The Law of refugee Status*", Butterworths Canada Ltd., 1991.

the head of the family meets the criteria of the definition, his or her dependants are also granted refugee status.⁵⁸

On the contrary, determining the refugee status of an unaccompanied child is clearly more difficult and requires special attention. Primarily, the degree of maturity of the child has to be assessed, due to the circumstance that the same meaning to the impressions and sensation of a minor as to those of an adult cannot be attached *a priori*.

Where it is decided that the child is mature enough to have and to express a “well founded fear of persecution”, the case may be treated in a manner similar to that of an adult. But when this degree of maturity does not exist, it is necessary to examine more in detail objective factors, as the characteristics of the group that the child left, the situation prevailing in the country of origin and the circumstances of family members, inside or outside the country.⁵⁹

Unfortunately, the approach to refugee status in terms of maturity, as appears in particular in the UHNCR’s “*Handbook on Procedures and Criteria for Determining Refugee Status*”, is misguided for several reasons.

First, there is no necessary connection between any particular level of maturity and the existence of a well-founded fear of persecution. In addition, children are as capable as adults of feeling fear; their maturity may affect merely their capacity to understand the events or conditions which are the basis of that fear. Also, a child’s maturity is irrelevant to the question whether he or she may be persecuted. Last, but not least, the “best interest of the child” principle requires that decisions on behalf of minors should be taken on the consideration of all the circumstances. The welfare of the child, and the special protection and assistance which are “*due in accordance with international standards, prevail over the narrow concerns of refugee status.*”⁶⁰

5.4 The question of “burden of proof ” and “credibility”

⁵⁸ UNHCR, *Note on Refugee Children*, UN doc. EC/SCP/46 (1987).

⁵⁹ UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva, 1994.

⁶⁰ *Supra*, note n. 39.

The issues connected to the “burden of proof” and “credibility”, which essentially raise problems on the procedural side, are great in every refugee status determination procedure, in particular because there is presently an absence of consensus among States on common standards for assessing evidence.

In principle, it is the claimant who usually holds the burden to prove his or her allegations. He or she is under the duty to tell the truth to the authorities, presenting evidence to support the claim and trying to make a genuine effort to substantiate his or her story. However, the requirement of evidence should not be too strictly applied in the view of the difficulty of the proof inherent in the situation in which the applicant for refugee status finds himself.

On several occasions, in fact, due to the particular conditions which characterized the move of the individual from the country of origin, the applicant may find it extremely difficult or even impossible to prove the verity of facts with papers, documents or other elements.

For these reasons the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.

Despite independent research carried out by the examiner, some statements may still remain unproved. In these situations, if the decision-maker regards that the allegations produced by the claimant appear to be credible, the benefit of the doubt should be granted.

The same kind of approach was brought by the drafters in the 1994 UNHCR *Refugee Children Guidelines*, in which it was established that “*the decision on a child’s refugee status calls for a liberal application of the principle of the benefit of the doubt. This means that should there be some hesitation regarding the credibility of the child’s story, the burden is not on the child to provide proof, but the child should be given the benefit of the doubt.*”

Being that, procedural and evidentiary issues are inherently linked in the case of applications for refugee status submitted by children, several factors shall be considered while assessing the evidence. Among them are included the age and the mental development of the child both at the time of the hearing and at the time of the events about which they might have

information; the capacity of the child to recall the past events and the time that has elapsed since them, as well as the capacity to communicate his or her experiences and the understanding of the importance to tell the truth.

In hearing and weighing the evidence of children, the panel needs to exercise sensitivity, always taking into consideration the limitations under which a child may be testifying. A refugee claimant who is a child may have difficulties recounting the events that have led him or her to flee their country. As a result, when testifying during an interview, the child claimant may appear to be vague and uninformed about important events which have led up to acts of persecution. Before a trier of facts concludes that a child claimant is not credible, the child's sources of knowledge, his or her maturity, and intelligence must be assessed. The severity of the persecution alleged and whether past events have traumatized the child and hindered his or her ability to recount details must both be considered.⁶¹

Chapter VI - “Membership of a particular social group” within the 1951 Refugee Convention

6.1 *Travaux préparatoires* and the development of the “social group” concept

The fourth element of the 1951 Refugee Convention can undoubtedly be considered as the ground that has determined more debates regarding its interpretation, in particular due to the generic broadness to its definition.

The text of the 1951 Convention and the *travaux préparatoires* are both uninformative and particularly unhelpful as guides of interpretation, especially because they shed little light on who the drafters intended to benefit when they included persecution “*for reasons of (...) membership of a particular social group*” as a ground of protection.

⁶¹ CCRD V92 – 00501, Burdett, Brisco, April 1, 1993.

The term was adopted without discussion by the preparatory committee, by fourteen votes in favour to none against, and eight abstentions, at the suggestion of the Swedish delegate Mr. Petren, who stated that “(...) *experience has shown that certain refugees had been persecuted because they belonged to particular social groups. The Draft Convention made no provision for such cases, and one designed to cover them should accordingly be included.*”⁶²

It was argued that the drafters would have been certainly aware of the plight of certain groups in the early post-war period whose particular social origins or conditions were resulting in their persecution, but the range of possible beneficiaries of this provision they had in mind cannot be precisely estimated. However, although it has been noted that the lack of substantive debate on the issue suggests that contemporary examples of such persecution may have been in the minds of the drafters, such as the one of “restructuring” society undertaken in socialist States, with special attention being reserved for landowners, capitalist class members, independent business people, the middle class and their families.⁶³

The origins of the term, therefore, provide minimal clues to its meaning, circumstance which permits to retain that the drafters of the Convention, in introducing this vague term, intentionally made no attempt to limit or define its scope. Despite the use of the word “particular”, they may have envisaged the concept of “particular social group” as certainly not being limited, at least, to small groups.

The meaning of this term was, perhaps, intended to remain indefinite in order to allow for situations that have been “overlooked” and to retain flexibility in dealing with future exigencies.

It is important to carry an evolutionary approach to international agreements of the kind of the 1951 Refugee Convention. This determines that changes in the society and different circumstances which may not have been obvious

⁶² Statements of Mr. Petren of Sweden, UN General Assembly Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Third Meeting held at Geneva, 3 July 1951, A/Conf 2/SR3 at 14.

⁶³ *Supra*, note n. 44.

to the delegates when the treaty was drafted, may still be considered in its current application.

Therefore, there is in principle no reason for the “membership of a particular social group” ground, like the other ones, not to receive an actualistic interpretation and to be progressively developed.

6.2 The UNHCR approach

The term “social group” has been broadly construed by the Office of the United Nations High Commissioner for Refugees, which the 1967 New York Protocol granted authority to coordinate compliance with its provisions.⁶⁴

Pursuant to its mandate, the UNHCR primarily codified its viewpoint related to the fourth ground of the refugee definition in the 1979 Handbook of Procedures and Criteria for Determining the Status of Refugees Under the 1951 Geneva Convention and the 1967 Protocol Relating to the Status of Refugees and recently in the 2002 Guidelines on International Protection.

The 1979 Handbook has been considered to offer a generous definition of “social group”, comprising “*persons of similar background, habits or social status (.....) membership of such a particular social group, furthermore, may be at the root of persecution because there is no confidence in the group’s loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government’s policies.*”⁶⁵

This kind of interpretation has been recognized general and rather brief, almost boundless. Its vagueness could permit a large number of individuals to be recognized as members of a “particular social group” simply because they have a “similar background” in common.

The only reason which may, perhaps, justify this kind of approach can be found in the circumstance that the UNHCR considered the “social group” category as a broad and flexible concept.

⁶⁴ Art. 2, paragraph 1, to the 1967 Protocol Relating to the Status of Refugees.

⁶⁵ *Ibid.*, at 78.

The UNHCR, aware of the “limits” of its approach, developed a more specific position, affirming in principle that *“there is no “closed list” of what groups may constitute a “particular social group” within the meaning of Art. 1A(2) of the 1951 Refugee Convention.*

*The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”*⁶⁶

Furthermore, it established a more detailed and less comprehensive definition compared to the one included in the 1979 Handbook.

This new interpretation was based on the two approaches which have dominated the decision-making procedures in the common law jurisdictions (see below in paragraph 1.4.a) and considering more appropriate to adopt a single standard inclusive of both of them, it stated that *“a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”*⁶⁷

As corollary to this principle the UNCHR, assumed that a persecutory action toward a group of people may be relevant for its recognition in the society as a “particular social group”, affirmed that a *“particular social group cannot be defined exclusively by the persecution that members of the group suffer by a common fear of being persecuted.”*⁶⁸

In conclusion, taking into account the kind of approach to the “social group” ground in the 1979 Handbook and its evolved interpretation provided in the 2002 Guidelines on International Protection, a certain divergence, almost a contradiction, can be noticed in the wording of the UNHCR. This

⁶⁶ UNHCR Guidelines on International Protection: “ Membership of a particular social group ” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Geneva, 2002, at 3.

⁶⁷ Ibid., at 11.

circumstance may be justified only if the new guidelines were drafted with an intention to amend the previous approach.

6.3 The scholars' interpretation

As mentioned before, the 1951 Refugee Convention ground of “membership of a particular social group” has been the most difficult to define and its interpretation has always caused controversy among scholars and experts, whose views can be separated into two main categories.

The first category comprehends authors as Foighel, Tuitt and Helton, and is characterized by the idea that the “membership of a particular social group” definition was essentially an all-embracing ‘*safety net*’⁶⁹, introduced as a mean of including non-traditional refugees and non-traditional forms or circumstances of persecution alongside the other four traditional definitions.

In particular, Helton affirmed that *“the intent of the framers of the Refugee Convention was not to redress prior persecution of social groups, but rather to save individuals from future injustice”* and continued affirming that this ground had to be considered as *“a “catch all” category, which could include all the bases for and types of persecution that an imaginative despot might conjure up.”*⁷⁰

The notion of a social group obtained with a more liberal interpretation, is also shared by authors as Grahal-Madsen and Goodwin-Gill.

The latter, in particular, retains that *“the notion of social group possesses an element of open-endedness potentially capable of expansion in favour of a variety of different classes susceptible of persecution”*, and being aware that a fully comprehensive definition is impracticable, if not impossible, he stated that *“the essential element in any description would be the factor of shared interests, values, or background – a combination of matters of choice with*

⁶⁸ Ibid., at 14.

⁶⁹ I. Foighel, “ *Legal Status of the Boat People* ”, Nordisk Tidsskrift for International Relations, Vol. 48/217, 1979.

⁷⁰ Arthur C. Helton, “ *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status* ”, Columbia Human Rights Law Review, Vol. 15:39, 1983.

*other matters over which members of the group have no control. In determining whether a particular group of people constitutes a “social group” within the meaning of the Convention, attention should therefore be given to the presence of linking and uniting factors such as ethnic, cultural, linguistic origin; education; family background; economic activity, shared values, outlook, and aspirations . Also relevant are the attitude to the putative group of other groups in the same society and, in particular, the treatment accorded to it by the state authorities. The importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others, particularly the authorities and the State.”*⁷¹

The second category, lead by Hathaway, dismisses such humanitarian perspectives of the social group definition as being an all-encompassing residual category.

According to Hathaway, the purpose of the drafters was “*anything but the creation of a regime to address new, future injustices*”, being the Convention “*designed simply as a mean of identifying and protecting refugees from known forms of harm, not anticipating future, distinct types of state abuse.*”⁷²

The definition of “social group” created by this scholar is based on the application of the *ejusdem generis* principle as provided by the United States Board of Immigration Appeals in its decision in *Matter of Acosta* (see below in paragraph 1.4.a), and includes:

- i) groups defined by innate, unalterable characteristics;
- ii) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and,
- iii) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it.

Excluded, therefore, are groups defined by a characteristic which is changeable or from which dissociation is possible, as long as neither option requires renunciation of basic human rights. However, at the same time, the

⁷¹ Supra, note 44.

⁷² Supra, note 58.

mentioned principle was considered to be “*sufficiently open-ended to allow for evolution in much the same way as occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claim to international protection.*”⁷³

6.4 State Jurisprudence

Although the jurisprudence related to the term “membership of a particular social group” has considerably developed in the past two decades, no decision has so far produced a coherent, cogent definition or approach valid for all times and places. In fact, jurists have frequently adopted, even within the same jurisdiction, conflicting approaches to the 1951 Refugee Convention and domestic law.

Despite these differences, it is possible to highlight some of the approaches applied in decision-making procedures, especially in common law jurisdictions, which can be divided in three main categories, namely the “protected characteristic”, “social perception” and “cohesiveness” approaches.

These standards, although having been mentioned, are generally less well developed in civil law jurisdictions, due to the fact that more emphasis is usually placed on whether or not a risk of persecution exists rather than on the standard of defining a particular social group.⁷⁴

6.4.a The “protected characteristic” approach

This kind of approach can undoubtedly be considered as the dominant standard in the “membership of a particular social group” category, and was identified for the first time by the United States Board of Immigration Appeals, in its judgement of the *Matter of Acosta* case.

⁷³ Ibid.

⁷⁴ Supra, note 69.

The Court, while attempting to define the Convention “social group” status, established an important intersection between International Refugee Law and Human Rights Law:⁷⁵

“We find the well-established doctrine of “ejusdem generis”, meaning literally, “of the same kind”, to be the most helpful in construing the phrase “membership of a particular social group”. That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words (....). The other grounds of persecution listed in association with “membership of a particular social group” are persecution on account of “race”, “religion”, “nationality” and “political opinion”. Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience to that it ought not to be required to be changed (....). Thus, the other four grounds of persecution enumerated (....) restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution. Applying the doctrine of “ejusdem generis”, we interpret the phrase “persecution on account of membership of a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.”⁷⁶

In identifying the scope of expression a “particular social group”, the *Acosta* decision of the United States BIA has been extremely influential.

In fact, its approach was lately adopted and developed by the Supreme Court of Canada in *Ward v. Attorney General*⁷⁷, which also recognized that

⁷⁵ Derek Mc Ghee, “ *Persecution and Social Group Status: Homosexual Refugees in the 1990’s* ”, *Journal of Refugee Studies*, Vol. 14 n.1, 2001.

⁷⁶ *Matter of Acosta*, United States Board of Immigration Appeals, Interim Decision 2986, 1 March 1985.

⁷⁷ *Canada (Attorney General) v. Ward*, Supreme Court of Canada, file no. 21937, 30 June 1993

the process on interpreting “particular social group” should reflect certain themes, namely, human rights and anti-discrimination.

La Forest, one of the judges of the Court, while rejecting the argument that this category is a safety-net intended as catch-all for all the basis of persecution not included in the other four grounds of the refugee definition, identified three possible types of sub-categories which he thought came within the category of a “particular social group”:

- i) groups defined by an innate or unchangeable characteristic as, for example, individuals fearing persecution by reason of gender, linguistic background and sexual orientation;
- ii) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association, for example human rights activists;
- iii) groups associated by a former voluntary status, unalterable due to its historical permanence.

However, notwithstanding the importance of these decisions, this kind of approach was not immune from critics. Some authors considered that the *ejusdem generis* principle was not correctly applied, considered that there is nothing generic about the categories of “race”, “religion”, “nationality” or “political opinion”. This is a situation in which there is a list of reasons of persecution which are both exclusive and illustrative, all of them provided for the same general or specific value.

Furthermore, immutability is not a characteristic common to all four: “race” and “nationality” may be immutable, but “religion”, however, is sometimes mutable and “political opinion” is at most times mutable.

But the strongest critic relies on the circumstance that the *ejusdem generis* doctrine defies logical applications when used in relation to social groups whose only immutable characteristic is either based on a civil or political status, thus inappropriately precluding protection to persons in groups widely recognized in society. In fact, the “protected characteristic” approach, extended by the *Ward* case beyond the *Acosta*’s “immutable characteristic” test, signals that the analysis primarily looks at “internal” factors – that is, group definition will be based on innate characteristics

shared by a group of persons, not on how the group is perceived in society.⁷⁸

These critics were strongly rejected by Hathaway, who considered the importance of the *ejusdem generis* principle for two main reasons:

- i) its application is respectful of both the intention of the drafters of the 1951 Refugee Convention, who intended to ensure protection to those persecuted because of their social origins, and the more general commitment to grounding refugee claims in civil and political status;
- ii) it provides a limiting principle for interpretation of “particular social group” that resonates with a human right perspective.

Furthermore, Hathaway considers that, due to the clearly illustrative character of the list included in the *Ward* decision, the “protected characteristic” approach has followed for an incremental and responsible evolution of the refugee definition (at least in some jurisdictions) to embrace groups defined by e.g. sex, sexual orientation, age, caste, profession, trade union membership, and family, but not so vague as to admit persons without a serious basis for claim to international protection.

6.4.b The “social perception” approach

This concept of “external perception” was created by the High Court of Australia in its decision in the *Applicant A* case.⁷⁹ According to the judgement, what will in essence distinguish members of a “particular social group” from other individuals and groups in their country is a common binding attribute other than persecution and a societal perception the “particular social group”, that means the group have to stand apart from the society at large.

In the present case, The Court was concerned to ensure that the definition was not cyclic in its interpretation and, in defining the “social group” category, the majority required that:

⁷⁸ T. Alexander Aleinikoff, “*Protected Characteristics and Social Perceptions: an analysis of the meaning of membership of a particular social group*”, UNHCR’s Global Consultations on International Protection, Sanremo (Italy), 2001.

⁷⁹ *Applicant A & Another v. Minister for Immigration and Ethnic Affairs & Another*, High Court of Australia, 190 CLR 225; 142 ALR 331; 1997.

i) while the persecution or the fear of it cannot be a defining feature of the “particular social group”, the group itself must have a common unifying element, but is not required the need for that characteristic to be immutable;

In any case, by affirming that the group must exist *dehors* the persecution is not to say that persecution may not help define a group: as Judge McHugh explained in the *Applicant A* decision, “(...) while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group.”⁸⁰

ii) implicit in the notion of “membership of a particular social group” is the idea that people in the relevant country perceive the individuals as a social group. The common element or characteristic that unites a group of individuals must therefore also distinguish them from the rest of the society to an extent that they become a cognisable group within the society.

This kind of approach, differently from the “protected characteristic” standard, which is based expressly on an analogy to discrimination principles, is more sociological. That is, it looks to external factors – namely, whether the group is perceived as distinct in society – rather than identifying some protected characteristics that define the group (or a characteristic that group members should not be asked to change).⁸¹

The same reasoning was expressly mentioned by Lord Hope of Craighead in the *Islam and Shah* case: “ *In general terms, a social group may be said to exist when a group of people with a particular characteristic is recognized as a distinct group by society (...). As social customs and social attitudes differ from one country to another, the context for this inquiry is*

⁸⁰ Ibid.

⁸¹ Supra, note 81.

the country of the person's nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognized."⁸²

Also with regard to the present standard, scholars showed divergent opinions: some of them defended that, in most if not all cases, the existence of a "particular social group" will depend ultimately on external perceptions of the group, in the sense that the group has a reality which is apparent and meaningful to others in that society. There will be times where groups do not in fact possess a common element or characteristic, but are widely perceived to, and are persecuted for that reason.

For these reasons, those who support the above mentioned "protected characteristic" approach considered that the present construction seems to be a more sophisticated version of the (universally rejected, in Hathaway's opinion) "catch-all" theory defining the "social group" category.

Perhaps, the most correct and coherent interpretation related to the present issue was provided by Goodwin-Gill, who stated that *'beyond the ideas of individuals associated, allied or combined, characterized by mutual intercourse, united by some common tie, stand those who, in simple sociological terms, are groups in the society, in the ordinary, everyday sense which describes the constitution of the community at large.'*⁸³

In fact, nothing in the refugee definition excludes the possibility for the adoption of an approach qualifying individuals apparently unconnected and unallied as refugees: what is simply required to grant protection is the fulfilment of the "well-founded fear of persecution" element related to the ground of "membership of a particular social group", which existence might depend on various factors, such as the perceptions of the group shared by other groups or State authorities, policies and practices vis-à-vis the group, and the risk, if any, of treatment amounting to persecution.

⁸² *Islam v. Secretary of State for the Home Department and R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah*, UK House of Lords, (1999) 2 WLR 1015; INLR 144.

⁸³ *Supra*, note 44.

6.4.c The “cohesivness” approach

This test for cognizability of the “social group” category was developed by the United States Court of Appeals for the Ninth Circuit in the *Sanchez-Trujillo* case, in which the applicants claimed a relief from deportation on account of their membership in a purportedly persecuted social group of young, working class males who have not served in the military of El Salvador.

The Court, which rejected the claim, developed a particular definition of “social group”, considering that it implies *‘a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.’*⁸⁴

This kind of model can be restated as four identifiable characteristics:

- i) close affiliation;
- ii) a “common impulse or interest” upon which this affiliation is based;
- iii) voluntary association; and,
- iv) the existence of a common trait by which group members are distinguishable from the general population.

This “cohesiveness” approach was undoubtedly created in order to prevent a seemingly unlimited social group ground for the recognition of refugee status, but the definition provided by the US Ninth Circuit court was explicitly criticised and rejected by other jurisdictions and scholars.

The UNHCR demonstrated the same criticism in its 2002 Guidelines on International Protection, by stating that it is widely accepted in State practice that an applicant need not to show that the members of a particular social group know each other or associate with each other as a group. That is, there is no requirement for the group to be “cohesive”, while the relevant inquiry is whether there is a common element that the group shares.

Chapter VII - “Child soldiers” as “particular social group”

7.1 The definition of persecution and the issue of “non-State” actors

A fundamental question in any refugee status determination procedure is whether the harm that the applicant has suffered or fears amounts to persecution.

As a matter of fact, this term has not been defined by the drafters of the 1951 Refugee Convention, and this was probably deliberate: it seems, in fact, as if they have wanted to introduce a flexible concept which could be applied to circumstances as they might arise⁸⁵ or simply because they realized the impossibility of enumerating in advance all of the forms of maltreatment which might legitimately entitle individuals to benefit from the protection of a foreign State.

Unfortunately, the element of persecution as an open-ended concept, connected to the wide margin of appreciation granted to States in interpreting its meaning, has determined no coherent and consistent practice in States’ jurisprudence.

For these reasons, while recognizing that defining persecution by regulation could be problematic and confusing, decision-makers should consider the standards provided for in international human rights instruments, or in any other international source of law, to determine what is persecution. As stated by Goodwin-Gill, “*specific decisions by national authorities are some evidence of the content of the concept, as understood by States, but comprehensive analysis requires the general notion of persecution to be related to developments within the broad field of human rights.*”⁸⁶

While in principle serious violations of a particular human right, as for instance deprivation of life or physical liberty, have always been considered

⁸⁴ *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Circuit), 1986.

⁸⁵ A. Grahal-Madsen, “*The Status of Refugees in International Law*,” Leyden Sijthoff, Vol. I, 1966.

as determining persecution within the meaning of the refugee definition⁸⁷, in some other situations it has been required to evaluate different and complex factors in order to establish if a violation of a human right could amount to persecution.

Two main considerations are at stake here:

- i) the kind of freedom threatened; and
- ii) the nature of the harm imposed.

With regard to these points, persecution has been generally considered to comprehend measures, imposed for one or more of the designated reasons of the refugee definition, which threatens rights considered essential to the maintenance of the integrity and inherent human dignity of the individual.

A typical issue related to the present concept concerns the source of the persecution feared by the refugee. While persecution, in fact, has traditionally been State driven, perpetrated through State organs, on occasion individuals have been harmed by organizations, movements and entities or even individuals, which have no ties to the State.

Due to the fact that both the 1951 Refugee Convention and the *travaux préparatoires* are silent on the matter, problems arose whether acts committed by non-State entities could constitute persecution for the purposes of the Convention.

Contemporary national and international jurisprudence on the issue revealed two schools of thought: one accepts only “State-inspired”, and the other accepts both “State-inspired” and “State-imputed” forms of persecution. Under the former, persecution exists only if organs or institutions for which the State is directly responsible commit it. Under the latter, a persecutory behaviour committed by third parties is also imputed to the State, where it is unwilling or unable to effectively prevent it.

In order to provide a common standard of interpretation, the UNHCR stated that “*under the Convention a person must have a well founded fear of being persecuted and that fear of being persecuted must be based on one (or more) of the Convention grounds. There is no requirement that the*

⁸⁶ Supra, note 44.

⁸⁷ Supra, note 57.

*persecutor be a State actor. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”*⁸⁸

In accordance with the above mentioned considerations, any measure which may originate a possible under-age recruitment of children, independently from the ways of its accomplishment or from the type of group in which children are enlisted (governmental armed forces, guerrilla or irregular group), and even apart from the duties and responsibilities requested to be performed by the minor, should be considered as persecution under the 1951 Refugee Convention.

In the last years, several international instruments, resolutions and declarations have formally condemned under-age forced recruitment and conscription, and some of them have recognized this practice as a child-specific form of persecution.

On an international level, the 182 ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour states in Art. 3 that *“for the purposes of the convention, the term “ the worst forms of child labour ” comprises: a) all forms of slavery or practices similar to slavery, such as (...) forced or compulsory recruitment of children for use in armed conflict”*. On a regional level, moreover, legal reference to child specific forms of persecution can be found in the 2001 European Commission’s “Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 Protocol, or as persons who otherwise need international protection”, which in its Art. 7, paragraph d), expressly recognizes *“the existence of child specific forms of persecution, such as recruitment of children into armies.”*

A further justification can also be found in Grac’a Machel’s report, which states that *“war violates every right of a child – the right to life, the right to be with family and community, the right to health, the right to development*

⁸⁸ Supra, note 57.

*of the personality and the right to be nurtured and protected.*⁸⁹ This reality is even truer with regard to children who are deliberately conscripted or forced to become soldiers.

Notwithstanding the holistic approach of the 1989 Convention on the Rights of the Child (which means that the rights are indivisible and interrelated, and that all articles are equally important), among children's rights some are more likely to be violated by this form of persecution.

As already mentioned, the most important is the right to life, universally recognized as a peremptory norm of general international law, regulated in Art. 6 of the 1989 Convention on the Rights of the Child⁹⁰: listed as a priority before other rights of the child, it was considered by the UN Committee on the Rights of the Child as a general principle of the Convention, whose innovative language expressly imposed an obligation to State Parties also to ensure, to the maximum extent possible, the child's survival and development.⁹¹

Furthermore, several reports have highlighted that typical living conditions of children recruited in both regular or irregular armies soldiers, may lead to the following abuses:

- i) exploitation of children for recruitment in armies represents a breach of both Art. 23 and 24 of the 1966 International Covenant of Civil and Political Rights. To preserve the "unity of the family" is one of the fundamental principles of international human rights law;
- ii) with regard to the age, recruitment of children under-fifteen years causes a violation of Art 38 of the 1989 Convention of the Rights of the Child (see *infra* in Chapter I, paragraph 3.a);
- iii) the treatment of child soldiers, regardless of their age, is often cruel and inhuman, in total divergence with the provisions included in Art. 37,

⁸⁹ *Supra*, note 1

⁹⁰ Art. 6 of the 1989 Convention on the Rights of the Child:

"State Parties recognize that every child has the inherent right to life. State Parties shall ensure to the maximum extent possible the survival and development of the child."

⁹¹ Sharon Dietrick, *"A Commentary on the United Nations Convention on the Right of the Child"*, Martinus Nijhoff Publishers, Kluwer Law International, 1999.

paragraph a), of the 1989 Convention of the Rights of the Child⁹², which relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim, and Art. 35 of the 1989 Convention of the Rights of the Child⁹³ (in particular, read in connection with the above mentioned Art. 3 of the 182 ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour), which imposes obligations on State Parties in order to prevent and protect children from exploitation for purposes of recruitment;

iv) child soldiers usually live in an unhealthy environment, circumstance specifically condemned in Art. 24 of the 1989 Convention of the Rights of the Child (which guarantees to children the enjoyment of the highest attainable standard of health), Art 27 of the 1989 Convention of the Rights of the Child (which refers to the right of every child to an adequate standard of living), Art. 28 of the 1989 Convention of the Rights of the Child (related to the right of education) and Art 31 of the 1989 Convention of the Rights of the Child (connected to the right to rest and leisure, to engage and play in recreational activities and, in general, to participate freely in cultural life);

iv) finally, abduction for military purposes may violate Art. 15 of the 1989 Convention of the Rights of the Child,⁹⁴ which can also be interpreted in a way to grant children their freedom “not” to associate.

7.2 Internal Flight Alternative

The “internal flight alternative” inquiry, also referred to as “internal relocation”, is directly connected with the concept of “persecution”. It was developed during the 1980s by Western asylum countries that, due to an

⁹² Art. 37, paragraph a), of the 1989 Convention of the Rights of the Child: “ *State Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.* ”

⁹³ Art. 35 of the 1989 Convention of the Rights of the Child: “ *States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or the trafficking in children for any purpose or in any form.* ”

⁹⁴ Art. 15 of the 1989 Convention of the Rights of the Child: “ *State Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.* ”

increasing number of refugees, decided to establish a new legal means to avoid the convention obligation to resettle refugees in their territories.⁹⁵

This concept allows a host State to deny asylum when it determines that the asylum seeker did not exhaust all possibilities of reaching safety in an area within his or her own country before seeking international protection.

This “new” rule is not specifically defined in the 1951 Refugee Convention and cannot be considered as amounting to a “principle” of International Refugee Law: rather, it is a factor or possibility to be analysed during a status determination procedure in some individual cases.

In any case, due to the lack of official international guidelines in order to ensure uniform application, caution has to be exercised when the “internal flight alternative” notion is involved, not least because of its potential incompatibility with the right to seek and enjoy asylum from persecution.

Under a legal perspective, the practice to take into account of regionalized variations of risk within countries of origin evolved through decision makers’ liberal interpretation of the last part of paragraph 91 of the 1979 Handbook on Procedures and Criteria for Determining Refugee Status,⁹⁶ and essentially implies two main considerations:

- i) the relevance of the “internal flight alternative” in order to assess the “well-founded fear” faced by the individual in his or her country of origin; and
- ii) the reasonableness of the relocation of the asylum seeker concerned.

The former requires an objective assessment of the situation in the part or parts of the country proposed as alternative or safe locations, and evidence must show that the risk giving rise to the individual’s fear of persecution does not extend to that part of the territory.

⁹⁵ James Hathaway, “ *The emerging politics of non-entrée* ”, 91 *Refugees* 40-41, 1992.

⁹⁶ 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 91: “ the fear of being persecuted need not always extend to the whole territory of the refugee’s country or nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.”

Relevant factors in assessing this inquiry may be, among others, the absence of risk of persecution in some part of the State of origin, the stability within the area, the likelihood that safety will be durable and the accessibility and habitability of the area.

State practice has shown two particular tendencies in the application or exclusion of an “internal flight alternative”:

- i) in the first case, the decision maker should be satisfied, on a “balance of probabilities” that there is no serious possibility for the applicant of being persecuted in the area that is alleged to afford an “internal flight alternative”⁹⁷;
- ii) in the other case, has been recognized to consider that there exists a strong presumption against finding an “internal protection alternative” where the agent or the author of the original risk of persecution is, or it sponsored by, the national government.

Conversely, the “reasonableness” of the relocation may be identified, for instance, through the evaluation of the claimant’s personal profile (which include, among others, age, sex, vulnerability) and the country’s particular political, ethnic, religious system.⁹⁸

At any rate, the burden of proof (which usually rests on the subject that asserts an allegation) to establish the existence of an “internal flight alternative” should in all cases be on the government of the putative asylum State.⁹⁹

As already mentioned above (see *infra* Chapter III, paragraph 2.2), all actions taken on behalf of refugee children must be guided by the principle of the “best interest of the child”.

In other words, this means that child’s welfare must be recognized as a priority and what is best for the refugee child must come before any political, social or other considerations.

⁹⁷ *Rasaratnam v. Canada (Minister of Employment and Immigration)*, 1 FC 706, 710, 1992.

⁹⁸ UNHCR Position on Relocating Internally as Reasonable Alternative to Seeking or Receiving Asylum, Geneva, 1999

⁹⁹ James Hathaway, “ *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative* ”, University of Michigan Law School, 1999, <http://www.refugeecaselaw.org/Refugee/guidelines/htm>.

Therefore, a strict application of this principle in the appreciation of a child's claim should overrule any inquiry intended to recognize a possible "internal relocation" of the minor in his or her country of origin.

In general, the "reasonableness" test (translated by the Canadian Federal Court into the "*without undue hardship*" test)¹⁰⁰ is extremely dangerous if applied to a child applicant: not only because this standard is prone to arbitrariness, even among decision makers of the same jurisdiction, but it involves also an unfocused and open-ended inquiry which is not anchored in the language or object of the 1951 Refugee Convention.¹⁰¹

Furthermore, under which circumstances could it be considered "reasonable" to require minors (who escape from their countries of origin because of a "well-founded fear" of being recruited in armed forces) to search for a site of internal protection capable to afford him or her "*a meaningful "antidote" to the identified risk of persecution*"?¹⁰²

Experience has shown, moreover, that recruitment of children in either governmental or irregular armed forces especially increases during civil wars, or even just in occasion of a less violent strife. In these circumstances their particular vulnerability may be explored in different ways: they are exposed to danger and insecurity while fleeing from the conflict area and, after being brutally uprooted, they usually do not receive an appropriate protection. Moreover, also refugee camps are several times easy and fruitful targets for recruiters.

It is therefore absurd to require children to search for an area within in their home country where, on a "balance of probabilities", there is no serious possibility of being persecuted.

In conclusion, it can be affirmed that a State that could offer protection to refugee children but resorts to restrictive measures, as the "internal flight alternative", to keep them out of its territory, certainly violates their most fundamental rights.

¹⁰⁰ *Ahmed v. Canada (Minister of Employment and Immigration)*, FCA, no. A-89-92, 1993.

¹⁰¹ James Hathaway and Michelle Foster, "*Internal Protection/Relocation/Flight Alternative as an Aspect of the Refugee Status Determination*", University of Michigan Law School, 2001.

7.3 The “child soldiers” category under the “protected characteristic” and the “sociological” standards

The aim of the present section is to demonstrate that the category of “child soldiers”, understood as including “*any person under eighteen years of age who is part of any regular or irregular armed force or armed group in any capacity other than purely as a family member*”, can be included in the notion of “particular social group”.

In order to justify this statement, the “child soldiers” group needs to be analysed under the previously mentioned “protected characteristic” and “sociological” approaches.

The former standard holds the following categories as capable of being included in the “particular social group” concept:

- i) groups defined by innate, unalterable characteristics;
- ii) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and,
- iii) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it.

With regard to the first point, scholars and experts have agreed not to give a strict and dictionary meaning of the term “immutable” or “unchangeable” (as invariable, never changing or varying, not capable or susceptible to change). These requirements have to be considered as meaning that those within a legitimate social group are neither unable, or should not be required, to change.

The “child soldiers” group, therefore, can undoubtedly be considered as a “social group” under both point i) and ii) of the mentioned approach.

Under these considerations, the “age” of the child *per se* is a determinant element in the “membership of a particular social group” recognition, being both “immutable” and “unchangeable”. During the refugee status determination procedure, the decision maker should not consider the “age” of a child in its abstract meaning, as referring exclusively to the period of

¹⁰² Ibid.

time that a person has lived.¹⁰³ This concept has to be linked to the special and inherent characteristics that, notwithstanding the differences of social customs and social attitudes from one country to another, are common to all children. In fact, they are vulnerable, dependent and still developing, both on the physical and physiological level.

Therefore, a question arises: how is it possible to require children to forsake or to alter an intrinsic feature as, for instance, vulnerability? The answer is very simple: it is not feasible from a child's perspective, because these characteristics are beyond the power of the minor to change.

Another reason consistent with the "protected characteristic" approach lies in the circumstance that past experience, as included in point ii), could define "child soldiers" as a "particular social group".

However, instead of accepting that a social group can always be based on past experience, since historical reality is by definition immutable, some jurisdictions limit it to situations where the past experience is one that "*at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.*"¹⁰⁴

This restrictive approach, which meant to exclude *ex ante* criminals and terrorists from the definition of "particular social group", cannot be applied. The decision maker, therefore, should not retain that a child is not a member of the particular social group "child soldiers" simply because he or she was a volunteer and allegedly committed, for instance, a war crime or a crime against humanity. In these circumstances, it should be more appropriate to apply the specific rules concerning the exclusion of the refugee status on individual basis, than create an unnecessary judicial narrowing of the "social group" definition.

The circumstance that "child soldiers" are a "particular social group" may be also recognised under the "sociological" standard, which simply requires

¹⁰³ The Collins Dictionary of the English Language, 2nd edition, Collins Sons & Co. Ltd, Glasgow (GB), 1990.

¹⁰⁴ United States Department of Justice, Immigration and Naturalization service, "Proposed Rules on Asylum and Withholding definitions", Fed. Reg. 76598, Vol. 65 no. 236, 2000.

that a common unifying element must distinguish them as a cognisable group within the society.

Some of these “common” elements were identified by the High Court of Australia in the *Applicant A & Anor v. MIEA & Anor* decision: “(...) a group is a collection of persons, (...) the word social may be defined to mean “pertaining, relating or due to society as a natural or ordinary condition of human life. “ Social ” may also be defined as “capable of being associated or united to others or “associated, allied, combined.” In accordance with this decision, there are no difficulties in affirming that “children” are a “social group” that stands within the society.

At the same time, they are set “*apart from the society at large.*”¹⁰⁵ Childhood, in fact, which for the purposes of the present dissertation is considered as the period of time that lasts from the birth to the achievement of the eighteenth year of age, has been usually defined within the generational order as “inferior” to adulthood.

Sociologists, therefore, divide the social order into two separate groups, children and adults, and while some of them simply consider minors as “non-adults”, others define children as a minority social group, affected by theories and practices that derive exclusively from adult perspectives.

In these case, the central feature that traditionally marks minority as a legal status is that adults have a generalized legal power (exercisable either by parents or legal authorities) to impose a course of action on minors on the basis of their assessment of the minors’ best interest.

Final remarks

International Refugee Law is in a period of transition. The regime that has been in place for half a century is now gradually giving way to legal and political approaches that take into account the new world order. Some of these approaches, however, threaten to diminish the role of legal protection in the treatment of refugees.

This situation is particularly highlighted in refugee claims related to the “membership of a particular social group” category. It was appreciated that international guidelines and state jurisprudence attempted to clarify and encourage social group recognition but, at the same time, adjudicators used pragmatic immigration policies without regard to the underlying purposes of International Refugee Law or the fair and just treatment of asylum seekers.

For these reasons, it is required that refugee law moves in the direction of protecting those who are unable to protect themselves, in order to strengthen the fundamental connection between refugee law and human rights norms, and it is hoped that the refugee category will be soon “redefined” in order to take into account new problems facing the world today, as those related to child soldiers.

In this context, international instruments and human rights norms can provide helpful guidance in determining substantive eligibility under the refugee definition and appropriate procedures for child asylum seekers should be implemented in order to guarantee special protection and assistance. Unfortunately, many countries that receive refugees neither recognize these rights nor implement special procedures for children or give minor asylum seekers access to welfare. Some countries even detain refugee children with convicted criminals.

It must be kept in mind that children are everyone responsibility and rely on the help of the international community to respect their rights as asylum seekers and to offer them a safe refuge until they can go home.

With regard to the category of “child soldiers”, Governments should commit themselves to accord them the highest standard of international protection and refrain from erecting additional obstacles for the grant of refugee status.

A different approach would undoubtedly constitute a violation of International Law and undermine the recognition of human rights abuses against this group.

¹⁰⁵ Supra, note 82.

Bibliography

Books

Alfredsson, G. & Eide, A., *The Universal Declaration of Human Rights, A Common Standard of Achievement*, Martinus Nijhoff Publishers, 1999.

Brett, R. & McCallin, M., *Children: The Invisible Soldiers*, 2nd edition, Stockholm, Rädda Barnen, 1998.

Carlier, J.Y., Vanheule D., Hullmann K. and Galiano C.P., *Who is a Refugee? A Comparative Case Law Study*, Kluwer Law International, 1997;

Cohn, I. & Goodwin-Gill, G.S., *Child Soldiers: the role of children in armed conflict*, Clarendon Press – Oxford, 1994.

The Collins Dictionary of the English Language, 2nd edition, Collins Sons & Co. Ltd, Glasgow (GB), 1990.

Dietrick, S., *A Commentary on the United Nations Convention on the Right of the Child*, Martinus Nijhoff Publishers, Kluwer Law International, 1999.

Erikson, E., *Childhood and Society*, The Hogarth Press, 1965.

Estvan, F. J. & Estvan, E. W., *The Child's World: His Social Perception*, G. P. Putnam's Sons, New York, 1959.

Fionda, J., *Legal concepts of childhood*, Oxford Portland Oregon, 2001.

Goodwin – Gill, G.S., *The refugee in international law*, Clarendon Press Oxford, 2nd edition, 1996;

Grahl – Madsen, A., *The status of refugee in international law*, vols. 1 and 2
Sijthoff, Leyden 1966, 1972;

Hathaway, J., *The law of refugee status*, Butterworths, Toronto, 1991;
_____, *Reconceiving International Refugee Law*, Martinus Nijhoff
Publishers, 1997;

International Committee of the Red Cross, *Handbook of the International
Red Cross and Red Crescent Movement*, 13th edition, Geneva, 1994.

Jenks, C., *Childhood*, Routledge, New York, 1996.

Kalshoven, F. & Zegveld, L., *Constraints on the Waging of War*,
International Committee of the Red Cross, Geneva, 2001.

Mayall, B., *Towards a sociology for childhood*, Open University Press,
2002.

The Raoul Wallenberg Institute Compilation of Human Rights Instruments,
Kluwer Law International, 1997.

Weis, P., *The Refugee Convention, 1951, The Travaux Préparatoires
Analysed with a Commentary (...)*, Cambridge University Press, 1995.

Sassòli, M. & Bouvier, A., *How does law protect in war?*, International
Committee of the Red Cross Productions, Geneva, 1999.

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee
Status under the 1951 Convention on the Status of Refugees*, Reedited
January 1992.

Articles & Reports

Aleinikoff, T. A., *Protected Characteristics and Social Perceptions: an analysis of the meaning of membership of a particular social group*, UNHCR's Global Consultations on International Protection, Sanremo (Italy), 2001.

_____, *The meaning of persecution in United States Asylum Law*, International Journal of Refugee Law, Oxford Press University, Vol. 3 n. 1, 1991.

Bagambiire, D. B. N., *Terrorism and Convention Refugee Status in Canadian Immigration Law: the social group category according to Ward v. Canada*, International Journal of Refugee Law, Oxford Press University, Vol. 5 n. 2, 1993.

Black-Branch, J., *The use of children in war: the International Protocol on the Involvement of Children in Armed Conflict*, Mediterranean Journal of Human Rights, Vol. 4 (Double Issue), 2000.

Cohen, C. P., *The United Nations Convention on the Rights of the Child: implications for change in the care and protection of refugee children*, International Journal of Refugee Law, Oxford Press University, Vol. 3 n. 4, 1992.

Cohn, I., *The Convention on the Rights of the Child: what it means for children in war*, International Journal of Refugee Law, Oxford Press University, Vol. 3 n. 1, 1991.

Daley, K. & Kelley, N., *Particular Social Group: a Human Rights based approach in Canadian jurisprudence*, International Journal of Refugee Law, Oxford Press University, Vol. 12 n. 2, 2000.

Davis, K., *The Child and the Social Structure*, Journal of Educational Sociology, Vol. 14, Issue 4, 1940.

Department of Immigration & Multicultural & Indigenous Affairs, Australia, *Particular Social Group: an Australian perspective*, 2001.

Dutli, M.T., *Captured Child Combatants*, International Review of the Red Cross, Geneva, Vol. n. 278/1990, p. 421.

Foighel, I., *Legal Status of the Boat People*, Nordisk Tidsskrift for International Relations, Vol. 48/217, 1979.

Gorlick, B., *Common Burdens and Standards: Legal Elements in Assessing Claims to refugee Status*, Report from the Nordic Refugee Seminar, Lund, Sweden, 28-29 August, Raoul Wallenberg Institute, Report n. 33, Lund 2002.

_____, *Human Rights and refugee: enhancing protection through international human rights law*, UNHCR Working Paper n. 30, October 2000, <http://www.unhcr.ch/refworld/pubs/pubon.htm>.

Hamilton, C. & Tabatha Abu El-Haj, *Armed Conflict: the Protection of Children Under International Law*, <http://www.essex.ac.uk/armedcon/international/comment/Text/paper001.htm>.

Hampson, F. J., *Legal Protection afforded to children under International Humanitarian Law*, Report for the Study on the impact of armed conflict on children, University of Essex, UK, 1996.

Harrel-Bond, B., *Are refugee camps good for children?*, UNHCR Working Paper n. 29, August 2000, <http://www.unhcr.ch/refworld/pubs/pubon.htm>.

Hathaway, J., *The emerging politics of non-entrée*, 91 *Refugees* 40-41, 1992.

_____, “ *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative* ”, University of Michigan Law School, 1999, <http://www.refugeecaselaw.org/Refugee/guidelines/htm>.

Hathaway, J. & Foster, M., *Internal Protection/Relocation/Flight Alternative as an Aspect of the Refugee Status Determination*, University of Michigan Law School, 2001.

Helle, D., *Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child*, *International Review of the Red Cross*, Geneva, Vol. 839/2000.

Helton, A. C., *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, *Columbia Human Rights Law Review*, Vol. 15:39, 1983.

Insenberg, D., *The invisible soldier: child combatants*, *The Defence Monitor*, Centre for Defence Information – Washington D.C., Vol. XXVI, Number 4, 1997.

International Association of Refugee Law Judges, *Interim Report on Membership of a Particular Social Group*, Ottawa Conference, 1998.

Kalin, W., *Flight in times of war*, *International Review of the Red Cross*, Geneva, Vol. n. 843/2001.

Machel, G., *Impact of Armed Conflict on Children: Report of the United Nations Secretary General’s Special Representative for Children in Armed Conflict*, UN Doc.A/51/306, 26 August 1996.

Mackiln, A., *Canada (Attorney-General) v. Ward: a review essay*, International Journal of Refugee Law, Oxford Press University, Vol. 6 n. 3, 1994.

Mc Ghee, D., *Persecution and Social Group Status: Homosexual Refugees in the 1990's*, Journal of Refugee Studies, Vol. 14 n.1, 2001.

Musalo, K. & Knight, S., *Steps forward and steps back: uneven progress in the Law of social group and gender-based claims in the United States*, International Journal of Refugee Law, Oxford Press University, Vol. 13 n. 1/2, 2001.

Parish, T. D., *Membership in a particular social group under the Refugee Act of 1980: social identity and the legal concept of the refugee*, Columbia Law Review, Vol. 92, 1992.

Qvortrup, J., *Social Perspectives on Childhood*, in Understanding Children's Rights, Eugeen Verhellen, 1998.

Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Report No. 33, *Asylum in Europe: Strategies, Problems and Solutions*, Lund, August 2001;

Singer, S., *The protection of children during armed conflict situations*, International Review of the Red Cross, Geneva, Vol. n. 252, 1986

Shepard, A., *Child Soldiers: is the Optional Protocol evidence of an emerging "straight – 18 " consensus?*, The International Journal of Children's Rights, Kluvert Law International, 8: 37-70, 2000.

UN General Assembly Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Third Meeting held at Geneva, 3 July 1951, UN docs. A/Conf 2/SR3.

UN General Assembly, *Protection and Assistance to Unaccompanied and Separated Refugee Children*, UN docs. A/56/333, 2001.

UNHCR, *Global Consultations on International Protection, Refugee Children*, UN doc. EC/GC/02/9, 2002.

UNHCR Guidelines on International Protection: “ *Membership of a particular social group* ” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Geneva, 2002.

UNHCR, *Note on Refugee Children*, UN doc. EC/SCP/46 (1987).

UNHCR, *Policy on Refugee Children*, UN doc. EC/SCP/82 (1993).

UNHCR *Position on Relocating Internally as Reasonable Alternative to Seeking or Receiving Asylum*, Geneva, 1999

UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva, 1994.

United States Department of Justice, Immigration and Naturalization service, “*Proposed Rules on Asylum and Withholding definitions*”, Fed. Reg. 76598, Vol. 65 no. 236, 2000.

Selected web sites

<http://www.un.org>

<http://www.unicef.org>

<http://www.osce.org>

<http://www.icrc.org>

<http://www.unhcr.ch>

<http://www.ecre.org>

<http://www.amnesty.org>

<http://www.savethechildren.org>

<http://www.rb.se>

<http://www.child-soldiers.org>

<http://www.hrw.org>

<http://www.terredeshommes.org>

<http://www.childrenandarmedconflict.org>