

## 'Children of the stones'

*Is existing international law sufficient to ensure the protection of Palestinian children against involvement in the armed conflict in the Occupied Palestinian Territories?*

**Danielle Roth\***

There are hundreds of thousands of children participating in a growing number of armed conflicts around the world. The need to protect these children has presented a considerable challenge to the international community. This paper will examine such challenges in the context of Palestinian children in the Occupied Palestinian Territories (OPT). Since 1967, hundreds of Palestinian children have been killed and injured as a result of their participation in the continued conflict between Israelis and Palestinians in the OPT. Participation of Palestinian children in these conflicts takes many forms, ranging from direct recruitment as child soldiers to more indirect use as collaborators by the Israeli Defence Force. Current international law efforts to protect these children are riddled with uncertainties, contingencies and political bias. The intention of this article is not to further a political agenda, but rather to consider the flaws in current efforts. An attempt to provide suggestions for reform is presented, with the underlying notion that Israel, the Palestinian Authority and the international community have a responsibility to address the plight of the Palestinian children as a matter of urgency.

### **Introduction**

Since Israel acquired areas of the West Bank and Gaza in 1967, there has been continued conflict between Israel and the Palestinians. During the course of the conflict, there have been hundreds of reports of Palestinian children being used to participate in the hostilities. This participation has taken many forms, and appears to be attributable to both sides in the conflict. The Palestinian military uses minors as frontline stone-throwers, human shields and suicide bombers. The Israeli Defence Force (IDF) recruits Palestinian children as collaborators, and acknowledges that Palestinian children may be killed or injured accidentally. This article will examine

---

\* Danielle Roth recently completed her law degree at the University of New South Wales.

international law efforts to protect children from participation in armed conflict, and illustrate how these efforts fail in the context of Palestinian children in the Occupied Palestinian Territories (OPT).

### **A brief contextualisation of the present conflict**

On 5 June 1967, the State of Israel launched a pre-emptive airborne strike on the combined armies of six Arab nations (Westwood 1984, 80). When a ceasefire was called six days later, Israel was in possession of the land known as the Palestinian Territories, being the West Bank (including East Jerusalem)<sup>1</sup> and the Gaza Strip.<sup>2</sup> In response to the land conquered in the fighting, UN Resolution 242<sup>3</sup> was passed. This required Israel to withdraw from 'territories acquired in the current conflict'. The resolution was ambiguous in its application, as it failed to specify 'all territories'. The vague wording appears to have been relied upon by Israel to support its actions in not ceding control of some territory. The combined friction caused by the occupation of these areas by Israel, and the Palestinian desire for an independent state, led to the eruption of the First Intifada<sup>4</sup> in 1987.

Subsequently, Israeli presence in the OPT increased until 1993, when the Oslo Peace Accords were signed on the White House lawn by Yitzchak Rabin and Yasser Arafat. The Accords incorporated a timetable for the creation of an independent Palestinian state, a key element of which was the undertaking of administrative and limited military control by the Palestinian Authority (PA). Despite the optimism generated by this agreement, its terms were never realised. The tension and frustration in the region climaxed in September 2000, when the Israeli Prime Minister Ariel Sharon toured the Temple Mount holy to Muslims and Jews. This act precipitated the Second Intifada, which is known as the Al-Aqsa Intifada. The Al-Aqsa Intifada has never officially ended, and it is reported that between its commencement and 1 May 2006, 670 Palestinians under the age of 18 were killed (Palestinian Centre for Human Rights 2006).

### **Involvement of Palestinian children in armed conflict in the OPT**

Labelled 'children of the stones',<sup>5</sup> Palestinian youths live in an environment of political instability, uncertainty and violence in the OPT. These children have played

1 Previously under the control of the Hashemite Kingdom of Jordan.

2 Previously under the control of Egypt.

3 Resolution 242 of the United Nations Security Council (22 November 1967).

4 *Intifada* comes from the Arabic word meaning 'to shake up'.

5 This label emerged after a speech delivered at a Fatah conference in Ramallah in 1998 by the late PA Chairman Yasir Arafat, where he referred to Palestinian children as the 'generals of the stones'.

a range of roles in Palestinian resistance since 1967, although many argue that it was the First Intifada which truly exposed the extent of their participation (Siraj Sait 2004, 211). An examination of the various uses of Palestinian children illustrates that both sides of the conflict bear responsibility.

### ***Armed attacks and suicide bombings***

Throughout the resistance in the OPT, Palestinian children have been portrayed as active participants in the conflict. Professor William O'Brien of Georgetown University has noted that 'a substantial number, if not the majority, of troops of the intifadas are young people, including elementary schoolchildren' (O'Brien 1991, cited in Weiner 2002, 55). Children are often involved in violent demonstrations, and throw stones at the Israeli military both spontaneously and after encouragement by Palestinian adults (Veerman and Levine 2001, 73). Palestinian journalist Daoud Kuttab has worked in the OPT and observed firsthand how military tasks are assigned among youths:

The youngest category of children involved in demonstrations is the seven-to-ten age group. Most of the time these children may be seen rolling tires to the middle of the road, pouring gasoline on them, and then setting them afire ... The eleven-to-fourteen age group is assigned the task of placing large stones in the road to slow down or stop traffic. This group has been seen in many places using homemade slings and slingshots. The fifteen-to-nineteen group comprises the veteran stone throwers. Normally masked with *kufiyyahs* to hide their identity, this group can inflict the worst damage. [Kuttab 1998, 19.]

A documented example of participation by Palestinian children in armed conflict is the Netzarim incident in 2001, where children were assembled and used essentially as moving shields, throwing Molotov cocktails, gas canisters and stones at the IDF (Weiner 2002, 52).

A more recent concern is the phenomenon of Palestinian children as suicide bombers. There has been a number of documented suicide attacks involving minors since the Al-Aqsa Intifida began in 2000. On 11 January 2004, 17-year-old Nablus high school student Ayad Belal el-Masri blew himself up near Israeli soldiers. Ayad was alone and strapped with an explosive belt, and the Fatah/el-Aqsa Martyrs Brigade and the Islamic Jihad both claimed responsibility for the bombing (Israel Ministry of Foreign Affairs 2004). On 1 November 2004, a 16-year-old Palestinian from the West Bank detonated a suicide bomb in a Tel Aviv market, killing three Israelis. He was the youngest Palestinian to carry out such an attack (Amnesty International 2005). On 22 May 2005, a 15-year-old Palestinian child carrying explosives was arrested by the Israeli army at the Huwara military checkpoint (Amnesty International 2005). The

Fatah Tanzim claimed responsibility for sending the would-be bomber, whose explosive belt was removed by an IDF remote-controlled robot (Dudkevitch 2004). The incident was widely broadcast by the media.

According to the Coalition to Stop the Use of Child Soldiers, while there are numerous reports of children participating in hostilities in the OPT, there is no evidence of systematic recruitment by armed groups (Defence for Children International 2004, 8). This statement is highly questionable in light of the plethora of literature which discusses the various outlets utilised by the PA to incite Palestinian children to violence and encourage them to participate in hostilities against Israel. Hamas, which holds the majority of seats in the current Palestinian parliament, 'proclaims youth suicide bombers are martyrs and celebrates their actions in ways that win the family enormous respect' (Wessells 2005, 365). Military-style summer camps, where children are offered the opportunity to participate in mock attacks on Israeli soldiers and stage plays of suicide bombings in Israel, are popular among Palestinians (Veerman and Levine 2001, 79). A 2001 report by the Coalition to Stop the Use of Child Soldiers estimated that 50,000 Palestinian children were enrolled in such camps during the summer of 2000 (Veerman and Levine 2001, 79).

The Palestinian media is another highly influential vehicle used to incite violence and hatred. Palestine Media Watch has reported how programming on Palestinian television was altered months before the outbreak of the Second Intifada, with broadcasts of violence and hate reaching unprecedented levels (Weiner 2002, 65). 'Commercials on Palestinian TV asked children to drop their toys, pick up rocks and do battle with Israel' (Weiner 2002, 65). In March 2006, the Hamas website published the following short story for children:

Suad, the bright Palestinian girl, remembered what the Zionist criminals did when they killed her father and mother. One day while Suad was walking ... she saw a car with some Zionists and an idea popped into her mind ... She decided to cause the car to ride over the land-mines, so that all of the soldiers would die. Suad sat next to the driver, to direct him, and she led him to the land-mines. Then the [car] blew-up and all of the soldiers were killed. As for Suad, well she became a *Shahida* (Martyr for Allah) on the grass, while smiling, because she died as a *Shahida* for Palestine. [Militant Islam Monitor 2006.]

A public poll of Palestinians living in the West Bank in 2000 revealed that 74.1 per cent were opposed to the participation of children under 18 in the Al-Aqsa Intifada (Weiner 2002, 75). Grassroots resistance to the mobilisation of children has emerged in some areas. For example, the Palestinian Women's Union has in the past written a letter of protest, urging the PA to stop sending security cars to take children from the schools to the 'killing fields' (Weiner 2002, 75). There are still, however, over 25 per

cent of Palestinians who support the use of children in hostilities, as well as Palestinian parents who allow and in fact encourage their children to participate, and who express pride if their child becomes a martyr (Veerman and Levine 2001, 87).

### *Palestinian children and 'collateral damage'*

Harm to Palestinian children by the IDF has been a longstanding issue in the intifadas. It has been contended that Israel 'strikes at the [Palestinian] people through an entire generation of its young ... and that Palestinian children have been massively exposed to Israeli state violence, as direct targets and as witnesses' (Graff 1993, 42 and 52). According to an Amnesty International report, 'the overwhelming majority of Palestinian children have been killed in the OPT when members of the IDF responded to demonstrations and stone-throwing incidents with excessive and disproportionate use of force, and as a result of the IDF's reckless shooting, shelling and aerial bombardments of residential areas' (Amnesty International 2002).

The Israeli government, however, has always maintained that there is no deliberate Israeli policy to target children. IDF Rules of Engagement prohibit soldiers from opening fire unless they are fired upon or they are in a situation where, despite verbal warnings, there remains an immediate danger to their lives or the lives of civilians (Veerman and Levine 2001, 75). Israeli soldiers who violate the Rules of Engagement are subject to investigation, disciplinary trial and possibly court-martial (Weiner 2002, 63). The Israeli army supposedly operates by a concept of 'purity of arms', which requires soldiers to put their own lives at risk to avoid harming non-combatants, and an ethical code which requires every soldier to act 'out of a recognition of the supreme value of human life' (Dershowitz 2003, 145).

However, the absence of deliberate intent does not mitigate the significant number of Palestinian children who have been injured or killed in the intifadas. Rather, it highlights the need to look to international law for greater protection to ensure that Israel, while maintaining a right to defend its citizens and territory, must be held to greater accountability for the deaths of Palestinian minors.

### *Palestinian children as collaborators*

It is estimated that thousands of Palestinians have collaborated in some way with Israeli authorities since the beginning of the occupation (Palestinian Human Rights Monitor 2001). There is no single definition of a 'collaborator', and the Palestinians generally define the term more broadly than does Israel. However, in the OPT it is generally understood to refer to any Palestinian who cooperates with the Israeli security forces (Defence for Children International 2005, 6).

It is important to note that the subject of collaborators has always been highly sensitive and secretive; thus, it is very difficult to obtain accurate information on the matter. However, it is believed that Palestinian children are among those collaborators recruited by the Israel Security Agency, known as the Shabak or Shin-Bet (Defence for Children International 2004, 29–30). The Coalition to Stop the Use of Child Soldiers has reported that by late 2003 there were, on average, 40 attempts to recruit minors every month in Gaza alone (Defence for Children International 2005, 6). Children who are recruited as collaborators are generally used for intelligence, acting as informers who report on people and activities within their local area (Defence for Children International 2005, 8).

A serious concern in relation to this issue is the allegation that Shabak uses torture and coercion as a tactic for recruiting child collaborators (Givol, Rotem and Sandler 2004, 48).<sup>6</sup> One case study from the 2004 report of the Defence for Children International (DCI/PS) involves Raed, a 16-year-old Palestinian boy who became a collaborator for Israeli intelligence. Raed said:

I was arrested while I was crossing the Green Line into Israel to seek work ... I was detained for two months. I was under investigation for 10 days, for nearly five hours each day. I was beaten, tortured, threatened, cuffed and sworn at. After 10 days I was surprised by the good treatment from the investigators. They took off my handcuffs and started to talk to me in a gentle way. They told me that they knew about my family's bad economic situation and they were going to help me ... they only wanted me to help them in return. I instantly refused. They became very angry and started beating me. A female soldier then came ... and started to treat my wound. She was touching my body and later kissed me on my mouth ... The Shabak person came later to the room and started to show me a videotape of me and the female soldier. He threatened to send the videotape to my family ... so I agreed. [Defence for Children International 2004, 32–33.]

A related concern is the prosecution and punishment of alleged child collaborators. The official PA position is that child collaborators are tried by the Palestinian Preventive Security Force, and those who are found guilty are imprisoned in juvenile centres run by the Palestinian Ministry of Social Affairs (Defence for Children International 2005, 9). However, the Palestinian society generally has 'little mercy with collaborators' and Palestinian consensus seems to

---

<sup>6</sup> However, it should be noted that on 6 September 1999, the Supreme Court of Israel held that torture is absolutely prohibited, despite the fact that it may be used to elicit information that could prevent harm to civilians. This will be discussed later in this article.

be that alleged collaborators should be killed to restore the unity of the people (Defence for Children International 2005, 9). Children who are used as collaborators by the IDF are therefore clearly at risk of harsh judicial, and potentially extra-judicial, punishment.

On 23 June 2005, the Israeli Supreme Court, sitting as the High Court of Justice in the case of *Adalah et al v IDF (Adalah)*, held that any practice of using local Palestinian residents as part of the war effort of the Israeli army contradicts international law and should be immediately ceased by the IDF. In his judgment, Judge Aaron Barak, President of the High Court, ruled that the 'civilian population is not to be used for the military needs of the occupying army ... and is not to be volunteered for cooperation with the army' (*Adalah* at [24]). One should hope that the decision signals an end to the use of children as collaborators by the IDF. If it does not, we must look to the provisions of international law.

### **International law efforts to protect children from armed conflict**

In the last several decades, children have been adversely affected by armed conflicts around the world in unprecedented numbers. Between 1990 and 2000 alone, the number of child casualties resulting from wars and conflicts reached two million (Defence for Children International 2004, 7). Furthermore, it is believed that more than 500,000 children have been recruited into state and non-state armed groups in over 85 countries around the world (Defence for Children International 2004, 7). The increasing number of armed conflicts worldwide and the corresponding increase in the involvement of children pose a significant challenge for international law. The following section examines the response of international law to the involvement of children in armed conflicts, and attempts to apply the relevant international law to the situation in the OPT.

### ***Introduction to international law***

A myriad of sources shape and define international law. An authoritative reference to these sources can be found in Art 38(1) of the Statute of the International Court of Justice. That provision lists the sources of international law as (a) international conventions establishing rules expressly recognised by the states; (b) international customs being general practices accepted as law; (c) general principles of law recognised by civilised nations; and (d) judicial decisions and teachings of highly qualified publicists of the various nations as subsidiary means for the determination of international legal principles. Each international law jurisdiction, and its effect in protecting Palestinian children in the OPT, will be examined in turn.

### *International conventions*

International conventions that deal with the protection of children from the effects of armed conflicts can be broken down into international human rights law and international humanitarian law. International humanitarian law applies only in situations of war or armed conflict, but it is important to note that it is supplementary to international human rights law. This means that children in situations of armed conflict or warfare do not lose their human rights protection, but rather gain the extra protection of humanitarian law.

International humanitarian law, previously referred to as the 'laws of war', aims to reduce the suffering of individuals in times of armed conflict, and to circumscribe the limits within which armed conflict is permissible (Starke 1989, 553). The most significant international humanitarian law instruments are contained in the Geneva Conventions of 1949.

#### *The Fourth Geneva Convention*

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, commonly referred to as the Fourth Geneva Convention, was adopted following World War II with the realisation that children had been victimised to a greater extent than ever before (Mann 1987, 34).

Israel ratified the Fourth Geneva Convention in 1951, but has since disputed its application to the OPT. Under Art 2(2), the Convention applies to an 'occupation of the territory of a High Contracting Party'. Israel disputes the application of the Convention to the West Bank and Gaza on the basis that it would imply recognition of the sovereignty of the former administration. Furthermore, Israel argues that the territories are not in fact occupied, but rather 'administered'. However, these arguments have been refuted by the international community as a hyperbolic effort by Israel to avoid honouring its commitments under the Convention (Anderson 1999, 38). In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, the International Court of Justice (ICJ) held that Israel has the status of an occupying power throughout the territories (ICJ Advisory Opinion of 9 July 2004 at [78]). As expressed by Israeli Attorney General Menachem Mazuz, 'the ICJ decision creates a legal reality for Israel' (BBC 2004).

The Articles of the Convention aim to provide protection for civilians who find themselves in the power of a party to an armed conflict of which they are not nationals — especially those in occupied territories (Art 4). While Art 50 imposes a special burden on the occupying power to protect children from the effects of war,



the Convention does not directly address the issue of children participating in armed conflicts.

Under Art 51, Israel may not compel protected persons to work in its army. *Prima facie*, this provision would appear to prevent Israel from using Palestinian children as collaborators, who in essence would be carrying out work for the IDF. Yet the protection afforded is not absolute. The Convention is designed to protect civilians 'who are taking no part in the hostilities and whose weakness makes them incapable of contributing to the war potential of their country' (Pictet 1958, cited in Mann 1987, 35). Does a Palestinian child involved in stone-throwing or in planning a suicide bombing lose his or her status as a protected person under the Convention? This is difficult to determine on a practical level, due to the absence of a military uniform or clear command structure (Veerman and Levine 2001, 71). However, on a strict legal interpretation of the Convention, these children are in fact taking a part in the hostilities, and therefore would appear to lose their protection.

Even if a Palestinian child is classified as a protected person, the rights granted to protected persons under the Convention may be curtailed to the extent that 'absolute military security so requires'<sup>7</sup> and they are subject to 'measures of control and security ... as may be necessary as a result of the war'.<sup>8</sup> Thus, Israel could justify undermining the protected person classification on the basis of security concerns. 'Ever since its birth in 1948, it has been beset by hostile, typically violent, acts at the hands of Palestinians and other Arabs throughout the Middle East, against not only its people and territory, but as well its very claim to lawful existence' (Playfair 1992, 137–38). Collaborators would provide Israel with vital intelligence used to thwart potential attacks on its civilians and soldiers, and therefore the recruitment of Palestinians, including children, as collaborators would likely satisfy the exception under the Convention. However, it should be noted that the exception employs the words 'absolute' and 'necessary', and thus implies some measure of proportionality required by Israel.

### *Protocol I*

The level of protection afforded to children was increased in 1977 with the introduction of the two Additional Protocols to the Geneva Conventions. Protocol I relates to the protection of victims of international armed conflict, whereas Protocol II applies to non-international armed conflicts. Is the conflict in the OPT classified as

---

7 Article 5(2) of the Fourth Geneva Convention.

8 Article 27 of the Fourth Geneva Convention.

international or as non-international armed conflict? An international armed conflict usually takes place between two states, and the PA is not a state. On the other hand, the intifadas would not be internal armed conflict, because the PA is not a unit of the state of Israel (Benvenisti 2002). The intifadas would appear to be what Stewart terms an 'internationalized armed conflict', describing internal hostilities that are rendered international (Stewart 2003).

International law overcomes this dichotomy through the inclusion of Art 1(4) of Additional Protocol I, which states that '... armed conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' qualify as international armed conflicts. Therefore, on the basis that Israel has occupied the OPT since 1967, Protocol I is relevant.

Article 77(2) of Protocol I states:

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.

The introduction of this provision, together with Art 4(3)(c) of Additional Protocol II of 1977, which provides an unequivocal and total prohibition on recruitment and participation of under-15-year-olds in armed conflict, represented the first international effort to address the specific issue of child participation in armed conflict (Defence for Children International 2004, 10).

Israel has not ratified Additional Protocol I; therefore, unless the Protocol codifies existing customary international law, it is not binding on Israel. However, it is interesting for present analysis to examine the limited impact of Protocol I on preventing Palestinian children from participating in the armed conflict, assuming Israel had in fact ratified it.

First, Art 77(2) obliges Israel to prevent children under 15 from *directly* taking part in hostilities. Using Palestinian children as collaborators for the purposes of obtaining intelligence would constitute indirect, as opposed to direct, participation. Second, there appears to be some uncertainty as to the precise meaning of 'recruitment'. Does Israel's use of children as collaborators constitute recruiting them into their armed forces? It is arguable that recruitment does not necessarily imply direct participation (Baker and Ben-Ari 2000). However, the provision is clearly open to interpretation. Third, in relation to Palestinian children being killed by IDF ammunition, there is strong evidence to suggest that the death of children occurs as 'collateral damage'.

The IDF Rules of Engagement illustrate Israel's attempt to minimise civilian casualties, and therefore would satisfy the requirement that Israel take 'feasible measures' to ensure that Palestinian children do not take a direct part in hostilities. Thus, on a strict legal interpretation of Art 77(2), Israel's actions could be argued not to breach Protocol I.

Perhaps the most concerning limitation of the Protocol is that, unless it represents customary international law, the PA, as a non-state party, is incapable of ratifying it and is therefore not bound by its provisions. Despite this:

... on 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter informing that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine decided on 4 May 1989 to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto.' [International Review of the Red Cross 1998.]

In spite of this asserted intention to be bound, Palestinian militant groups continue to recruit Palestinian children. However, this is not seen as a contravention of the Protocol in the eyes of the UN. A 2002 UN Commission of Inquiry stated that 'stone throwing by youths at heavily protected military posts hardly seems to involve participation in hostilities' (Defence for Children International 2004, 29). It is exceptionally troubling that, even if the PA was legally bound by Protocol I, active recruitment of children to participate in demonstrations is not prohibited, as stone-throwing is not seen to constitute direct participation in hostilities.

### *UN Convention on the Rights of the Child (CRC)*

The CRC, opened for signature on 20 November 1989 and entered into force in 1990, is an international convention setting out the civil, political, economic, social and cultural rights of children. It is monitored by the United Nations Committee on the Rights of the Child, which is composed of members from countries around the world.

The CRC is the most commonly ratified human rights treaty in history, with the US and Somalia being the only two 'states' that have failed to ratify it. On a theoretical level, ratification commits the states parties to protecting and ensuring children's rights and agreeing to hold themselves accountable for this commitment before the international community. States parties to the CRC are obliged to develop and undertake all actions and policies in the light of the best interests of the child. Israel signed the CRC in 1990 and ratified it without reservation on 3 October 1991 (Office of the High Commissioner for Human Rights 2006).

Article 38 of the CRC provides that:

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 hostilities; and to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.

This provision mirrors Art 77(2) of Protocol I and, therefore, the same considerations would apply as those discussed above.

Under the CRC, the state parties are obliged to submit a compliance report to the UN Committee on the Rights of the Child within two years of ratification, and thereafter every five years (Art 44). It is somewhat alarming that the Israeli report completely ignores the situation of Palestinian children living in the West Bank and Gaza. There is no discussion in the Israeli report of Palestinian children in these areas, despite the fact that these territories have been occupied by Israel since 1967 (Defence for Children International 2002, 2). Israel attempted to justify not including the OPT in its report by arguing that it had transferred power and responsibilities for the Palestinian population, in matters covered by the Convention, to the PA (UN Committee on the Rights of the Child 2002). The UN Committee rejected this argument and noted that 'while there was no denying that the PA had responsibilities, the Committee could only address the State party itself' (Defence for Children International 2002, 2).

This comment by the UN Committee fails to recognise the importance of *all* parties to the conflict taking responsibility for the plight of the Palestinian children in the OPT. It fails to consider that there are other means by which the UN can try to ensure that the PA commits itself to its share of responsibility. One such avenue is through the UN Secretary-General for Children and Armed Conflict, who in recent years has sought and obtained commitments from groups who, due to their non-state status, are unable to ratify conventions. Examples are the commitments to protect children from use in armed conflict which have been obtained from the Special Representative from Revolutionary United Front in Sierra Leone, the Liberation Tigers of Tamil Eelam in Sri Lanka and the Revolutionary Armed Forces of Columbia (see Alston 2005, 8). A similar commitment should be sought from the Hamas-led PA.

#### *Optional Protocol to the CRC on the involvement of children in armed conflict*

This Optional Protocol was adopted by the UN General Assembly on 25 May 2000. It provides that states parties shall 'take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct

part in hostilities'<sup>9</sup> and 'ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces'.<sup>10</sup>

Israel signed the Optional Protocol on 14 November 2001 and ratified it on 18 July 2005 with reservations.<sup>11</sup> However, unlike Art 38 of the CRC, the relevant provision of the Optional Protocol includes the word 'compulsorily', and therefore provides narrower protection. In relation to children, it is submitted that the issue of whether participation is compulsory or in fact voluntary should be disregarded. A child should not be regarded as capable of voluntarily consenting to participate in armed conflict, in light of the power imbalance and the threats which are allegedly made against the potential collaborator.

Article 4 imposes a positive obligation on states parties to prevent armed groups that are distinct from the armed forces of a state recruiting or using persons under the age of 18 in hostilities. Israel is therefore potentially in breach of this provision by failing to prevent Palestinian militant groups from using children to participate in the intifada. This obligation on Israel is unrealistic, considering that the PA and associated militant groups, while not yet recognised by the UN as forming a state, are clearly not under the control of Israel.

Article 4 provides that 'armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years'. Some commentators argue that this provision clearly pertains to non-state entities as well as states parties (Veerman and Levine 2001, 78). However, the problem remains that 'as long as non-state actors have no mechanism to sign and ratify the Optional Protocol and the Convention, and to report to the UN Committee on the Rights of the Child in Geneva, the PA can hardly be bound by this Optional Protocol' (Veerman and Levine 2001, 78). Thus again we are faced with the situation that unless the Optional Protocol embodies customary international law, the PA evades any obligations.

### ***International criminal law***

In 1998, the ICC was established as the first ever permanent, treaty-based, international criminal court. The jurisdiction and operation of the ICC is governed by

---

9 Article 1.

10 Article 2.

11 Note that Israel's reservations relate to it allowing voluntary recruitment into its armed forces at 17 years of age.

the Rome Statute, which entered into force on 1 July 2002 after ratification by 60 states. The ICC was intended to remedy the absence of enforcement of customary international law (Kittichaisaree 2001, 187).

Article 8(2)(b)(xxvi) of the Rome Statute defines a war crime as, *inter alia*, 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities'. To constitute a criminal act under this provision, the perpetrator must have conscripted or enlisted one or more persons under 15 into the national armed forces or used one or more persons to participate actively in hostilities, and they must, or should, have known that such person or persons were under 15 years (Kittichaisaree 2001, 188).

There are major limitations on the ICC's ability to adequately protect children in the OPT. First, the ICC only has jurisdiction to prosecute if the state where the crime occurred, or the state of which the accused is a national, is a signatory to the Rome Statute. As yet, while Israel has signed the Rome Statute, it has not yet ratified it, and therefore any actions within the OPT are outside the jurisdiction of the ICC. In addition, in order to prosecute an individual before an international criminal tribunal, sovereign states must consent. States, including Israel, are likely to be reluctant to do this as it undermines the notion of sovereign power to prosecute perpetrators of crimes committed within their territories (Kittichaisaree 2001, 10).

### *Customary international law*

The arguments in relation to whether Israel and the PA are in fact bound by the above-mentioned conventions, protocols and statutes become immaterial if it is accepted that the inherent principles are a codification of existing customary international law. The formation of customary law requires both state practice and a sense of pre-existing obligation, known as *opinio juris* (Swaine 2002, 567–68).

The question of whether child recruitment forms part of customary international law came before the Special Court for Sierra Leone in the case of *Prosecutor v Sam Hinga Norman* (Case No SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004). In this case, the defence attempted to argue that the court lacked jurisdiction to try the accused, since the action relevant to the indictment — namely, recruiting children to participate in armed conflict — occurred in 1996, before the enactment of the 1998 Rome Statute of the ICC which criminalised child recruitment. The prosecution argued that the Geneva Conventions established the protection of children under 15 as an undisputed norm of international law, and that the ICC statute merely codified existing customary international law. In upholding this argument, the court stated:

As regards state practice, the list of states having legislation concerning recruitment or voluntary enlistment clearly shows that almost all states prohibit (and have done so for some time) the recruitment of children under the age of 15. Since 185 states were parties to the Geneva Convention prior to 1996, it follows that the provisions of those conventions were widely recognised as customary international law. Similarly 133 states, including Sierra Leone, ratified Additional Protocol II ... one can conclude that many of the provisions of Additional Protocol II, including fundamental guarantees, were widely accepted as customary international law by 1996. Even though Additional Protocol II addresses internal conflicts, the ICTY Appeals Chamber held in *Prosecutor v Tadic* that 'it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict'.<sup>12</sup> This means that children are protected by the fundamental guarantees, regardless of whether there is an international or internal conflict taking place ... Furthermore, all but six states had ratified the Convention on the Rights of the Child by 1996. This huge acceptance clearly shows that the provisions of the CRC became international customary law at the time of the entry into force of the Convention. [*Prosecutor v Sam Hinga Norman* at 18 and 19.]

It is clear that the prohibition on using children under the age of 15 to participate in armed conflict is customary international law.<sup>13</sup>

Unlike the international instruments outlined above, customary international law binds the PA as well as Israel.<sup>14</sup> This reflects the understanding that to truly protect the Palestinian children, the obligations cannot be left to Israel alone. However unfortunately, customary international law lacks the means of enforcement necessary to really give effect to its provisions.

### The problem of enforcement

The mechanisms of enforcement of international law are beyond the scope of this article. For the present purpose, it is sufficient to raise the common concern that international law has traditionally lacked 'the enforcement powers necessary to give its "decisions" teeth' (Clarke 2003). The entry into force of the Rome Statute of the ICC in 2002 represented a significant opportunity to overcome this problem; however, as discussed above, the OPT is outside the jurisdiction.

12 *Prosecutor v Duski Tadic*, Case No IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at [94].

13 It is unclear whether the Optional Protocol to the CRC, which raised the minimum age for participation and recruitment to 18, can be regarded as customary international law.

14 The court in *Prosecutor v Sam Hinga Norman* also reaffirmed the principle that customary international law binds even non-state entities and armed groups hostile to a particular government (at [22]).

International law can be upheld by the UN through resolutions of the General Assembly or Security Council, or through advisory opinions of the ICJ (Playfair 1992, 468). Both lack true enforcement potential. UN resolutions 'condemn', 'recommend', 'urge' and 'deplore', but often have no binding effect. It has also been argued that the potential of UN resolutions, particularly in relation to Israel and the Palestinian Territories, 'has been undermined by political partiality and intellectual inconsistency' (Playfair 1992, 82).

Advisory opinions of the ICJ, although they have the potential to be highly influential among nations and in the court of public opinion, are also non-binding in nature. This is evident in the context of the 2004 advisory opinion to the UN General Assembly on the legality of Israel's security fence. Furthermore, many argue that even the 'shaming' effect of an advisory opinion implicating Israel would be limited, since Israel is generally able to rely on Western states, and particularly the United States, for support (Playfair 1992, 471).

### **Conclusion and recommendations**

It is clear that international law in its current form is insufficient to ensure the protection of Palestinian children against involvement in the armed conflict within the OPT. The well-documented effects of their participation, both physically and psychologically, highlight the need to address this issue as a matter of urgency. Ultimately, the protection of Palestinian children is intrinsically linked to the peace process and the eventual co-existence of the Israeli and Palestinian people. However, while politics runs its course, Israel, the PA and the international community have a responsibility to ensure that children in the OPT are able to live free from harm, exploitation and violence.

This article has identified various potential areas for reform and development. Key recommendations are as follows.

- The circumstances under which a child loses his or her status as a protected person under the Geneva Conventions should be clarified. There should be a recognition that children as a special and vulnerable class of persons should not be labelled combatants and lose their protection as readily as adults.
- The protection of Palestinian children between 15 and 18 years of age should be expanded by raising the minimum age of legal participation in armed conflict to 18 in all international treaties and conventions. This should also be recognised as a principle of customary international law.
- The word 'direct' should be removed from Protocol I, the CRC and the Optional Protocol to the CRC, so that children are protected from indirect, as well as



direct, participation in hostilities. This will create greater consistency and address the issue of children being used as collaborators.

- Israel should accept responsibility as an occupier in the OPT and ensure compliance by its military in respect of the rights of Palestinian children. Future reports to the UN Committee on the Rights of the Child should include a discussion of the situation of the Palestinian children in the OPT. Furthermore, Israel should ensure that IDF policy is in line with the decisions of the Israeli High Court of Justice and adheres to the principles of international humanitarian and human rights law.
- There should be an interim mechanism whereby the PA can sign and ratify international law instruments, until such time as the Palestinians are formally granted statehood by the UN. This will not overcome many of the problems in international law in relation to the issue of child participation in armed conflict in the OPT; however, at the very least it will represent a symbolic acknowledgment that the PA, as well as Israel, has an obligation to protect Palestinian children. This is increasingly important as Israel continues its unilateral disengagement plan,<sup>15</sup> and more powers and responsibilities in the OPT are transferred to the Palestinian government.
- The PA must maintain greater consistency in relation to its position on the use of children in Palestinian resistance. The practices of recruiting children to participate in hostilities and inciting violence through military summer camps and the media should be unequivocally denounced.
- The UN Secretary-General for Children and Armed Conflict should seek a commitment from the PA not to use children to participate in hostilities. UN Child Protection Advisors should be deployed to the OPT to ensure that child rights are addressed.<sup>16</sup>
- Israel, the PA and the international community should work collaboratively to raise awareness about the extent of child participation in armed conflict in the OPT. In addition, the Palestinian Education Ministry should commit to peace education within schools in the OPT. ●

---

15 A proposal to eventually remove all permanent Israeli presence from the OPT. Disengagement from Gaza and the northern West Bank was completed in September 2005.

16 Child Protection Advisors are civilian specialists in child protection and human rights.

## References

### ***International Court of Justice advisory opinion***

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ No 131 (9 July 2004)

### ***Israeli case***

*Adalah et al v IDF* (HCJ 3799/02, 23 June 2005)

### ***Special Court for Sierra Leone (Appeals Chamber) case***

*Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Prosecutor v Sam Hinga Norman* SCSL-2004-14-AR72(E) (31 May 2004)

### ***International legal materials***

*Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3; 28 ILM 1456 (1989)

*Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 6 UST 3516; 75 UNTS 287

*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3

*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609; 26 ILM 568 (1987); S Treaty Doc No 100-2 (1987)

*Rome Statute of the International Criminal Court*, 2187 UNTS 90; 37 ILM 1002 (1998)

### ***Other references***

Alston P (2005) *Non-State Actors and Human Rights* Oxford University Press

Amnesty International (2002) *Killing the Future: Children in the Line of Fire* (20 September) [Online] Available: <<http://web.amnesty.org/library/Index/ENGMD E020052002>> [2006, March 29]

Amnesty International (2005) *Israel/Occupied Territories: Palestinian Armed Groups Must Not Use Children* (23 May) [Online] Available: <<http://web.amnesty.org/library/Index/ENGMDE150332005>> [2006, April 3]

Anderson K (1999) 'Israel's views on the application of international humanitarian law to the West Bank and the Gaza Strip' in R Gutman and D Rieff (eds) *Crimes of War: What the Public Should Know* WW Norton & Co p 38

Baker A and Ben-Ari A (2000) 'The use of children in armed conflict' 26 *Justice* p 7

BBC (2002) 'IDF seizes PA weapons ship' 4 January

BBC (2004) 'Israel court orders barrier reply' 20 August

Benvenisti E (2002) *Israel and the Palestinians: What Laws Were Broken?* (8 May) [Online] Available: <[www.crimesofwar.org/print/expert/me-Benvenisti-print.html](http://www.crimesofwar.org/print/expert/me-Benvenisti-print.html)> [2006, April 7]

Clarke B (2003) *International Law Nutshell* Thomson Lawbook Co

Defence for Children International — Palestine Section (2002) *Alternative Report to the State of Israel's First Periodic Report to the Committee on the Rights of the Child* (March) [Online] Available: <[www.crin.org/resources/infoDetail.asp?ID=2992](http://www.crin.org/resources/infoDetail.asp?ID=2992)> [2006, April 10]

Defence for Children International — Palestine Section (2004) *Use of Children in the Occupied Palestinian Territories* (July) [Online] Available: <[www.dci-pal.org/english/Display.cfm?DocId=277&CategoryId=8](http://www.dci-pal.org/english/Display.cfm?DocId=277&CategoryId=8)> [2006, March 25]

Defence for Children International — Palestine Section (2005) 'Dealing with alleged child collaborators in the Occupied Palestinian Territory in the spirit of the Convention on the Rights of the Child', paper presented at the Workshop in Ramallah, 20 April

Dershowitz A (2003) *The Case for Israel* John Wiley & Sons

Dudkevitch M (2004) 'Palestinian boy, 14, captured wearing explosives vest' *The Jerusalem Post* 24 March

Givol A, Rotem N and Sandler S (2004) 'Child recruitment in Israel' (29 July) *The New Profile Report*

Graff J (1993) 'Crippling a people: Palestinian children and Israeli state violence' 13 *Alif: Journal of Comparative Poetics* p 46

International Criminal Court website [Online] Available: <[www.icc-cpi.int/home.html](http://www.icc-cpi.int/home.html)> [2006, May 15]

International Review of the Red Cross (1998) *Ratifications, Accessions and Successions of the Geneva Conventions as at 31 December 1997* [Online] Available: <[www.icrc.org](http://www.icrc.org)> [2006, April 10]

Israel Ministry of Foreign Affairs (2002) *Israel and the International Criminal Court* (June) [Online] Available: <[www.mfa.gov.il](http://www.mfa.gov.il)> [2006, May 12]

Israel Ministry of Foreign Affairs (2004) *Palestinians Exploit Children for Terror* (March) [Online] Available: <[www.mfa.gov.il](http://www.mfa.gov.il)> [2006, March 30]

Kittichaisaree K (2001) *International Criminal Law* Oxford University Press

Kuttab D (1998) 'A profile of the stonethrowers' 17(3) *Journal of Palestine Studies* p 14

Mann H (1987) 'International law and the child soldier' 36 *International and Comparative Law Quarterly* p 32

Militant Islam Monitor (2006) ' Hamas launches kiddie suicide bomber website to encourage "the fun of martyrdom"' 7 March [Online] Available: <[www.militantislammonitor.org/article/id/1726](http://www.militantislammonitor.org/article/id/1726)> [2006, April 1]

Office of the High Commissioner for Human Rights (2006) *Status of Ratification of the Convention of the Rights of the Child* [Online] Available: <[www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm](http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm)> [2006, March 30]

Palestinian Centre for Human Rights (2006) *Statistics Related to Al Aqsa Intifada* 1 May [Online] Available: <[www.pchrgaza.org/Library/alaqsaintifada.htm](http://www.pchrgaza.org/Library/alaqsaintifada.htm)> [2006, May 30]

Palestinian Human Rights Monitor (2001) *Human Rights and Legal Position of Palestinian Collaborators* (July) [Online] Available: <[www.phrmg.org/monitor2001/jul2001.htm](http://www.phrmg.org/monitor2001/jul2001.htm)> [2006, March 23]

Playfair E (1992) *International Law and the Administration of Occupied Territories* Clarendon Press

Siraj Sait M (2004) 'Have Palestinian children forfeited their rights?' 35(2) *Journal of Comparative Family Studies* p 211

Starke J (1989) *Introduction to International Law* (10th edn) Butterworths

Stewart J (2003) 'Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict' 85 *International Review of the Red Cross* p 313

Swaine E (2002) 'Rational custom' 52 *Duke Law Journal* p 559

UN Committee on the Rights of the Child *Summary Record of the 829th Meeting: Israel 10/10/2002* [Online] Available: <[www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fb6b6327d4892a8bc1256c53002cbfdd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb6b6327d4892a8bc1256c53002cbfdd?Opendocument)> [2006, April 8]

Veerman P and Levine H (2001) 'Protecting Palestinian Intifada children: peaceful demonstrators, child soldiers or child martyrs?' 9 *The International Journal of Children's Rights* p 71

Weiner J (2002) 'The use of Palestinian children in the Al-Aqsa Intifada: a legal and political analysis' 16 *Temple International and Comparative Law Journal* p 43

Wessells M (2005) 'Child soldiers, peace education and postconflict reconstruction for peace' 44(4) *Theory into Practice* p 363

Westwood J N (1984) *The History of the Middle East Wars* Hamlyn Publishing Group Limited

