

Protection of Children from Recruitment and Use in Armed Conflict: Role of International Legal Framework

Siwnan Rasakandan¹ & Pardis Moslemzadeh Tehrani²

¹ University of Malaya, Malaysia

² Visiting Associate Professor, Faculty of Law, University of Malaya

Correspondence: Siwnan Rasakandan, University of Malaya, Malaysia. E-mail: Siwnan@gmail.com

Received: July 15, 2022

Accepted: September 5, 2022

Online Published: September 6, 2022

doi:10.5539/jpl.v15n4p230

URL: <https://doi.org/10.5539/jpl.v15n4p230>

Abstract

One of the most worrying developments in recent times is the act of recruitment and use of children in armed conflicts. This article examines the law relating to this phenomenon. The relevant law is found in five different treaties: Additional Protocol I; Additional Protocol II; Convention on the Rights of Child (CRC), Optional Protocol to CRC (OPAC); and the Rome Statute. Analysis shows that Additional Protocols I and II, CRC and the Rome Statute protect children, fundamentally by prohibiting the recruitment and use of under 15 children in hostilities, meanwhile the OPAC has raised the recruitment age to 18 years for armed groups. Law also allows the recruitment of children between the ages of 15 to 18, if preference is given to the oldest. It can be reasoned that the under 15 age level allows for a balance between military necessity and humanity whereas the under 18 moves towards humanity. The under 15 age limit is also favorable to armed groups in wars for self-determination while the recruitment of under 18s is preferable from humanitarian perspective. Classifying recruitment as compulsory, voluntary, conscription and enlistment appears irrelevant in the face of new wars. Distinction between direct part and indirect part or active participation is also seen as irrelevant. Law is substantially well structured with potential to inhibit recruitment of children while providing for evolving interpretation. The lack of enforceability is the main concern that needs to be researched and energized.

Keywords: recruitment, use, armed conflict, international framework, enforcement

1. Introduction

In addressing the dangers faced by children in recent times, it is imperative that the serious human rights issue of “recruitment and use of children in armed conflicts”, or commonly referred to as ‘child soldier’ phenomenon, is taken cognizance and researched.¹ The specter of recruitment and use of children in armed conflicts has seriously impacted on the optimum development of the individual child and on international level the world peace, security, and Sustainable Development Goals at large. Foreseeing the imminent danger, United Nations sprang into action by placing this issue under the agenda of the UN Security Council in 1999. Since then, UN had implemented a catalogue of multifaceted strategies to eradicate this horrendous crime.

Nevertheless, the most remarkable contribution is the pioneering effort to develop international law to prohibit the recruitment and use of children in armed conflict. This led to the development of the present law that provides the legal basis for prohibiting recruitment. In this study, the term ‘international legal framework’ is used interchangeably with ‘law’.² The primary purpose of this study is to analyze the international legal framework

¹ The issue is centered around the deployment of children to fight alongside adult soldiers, and the Paris Principle on the involvement of children in armed conflict defines the term ‘Child Soldiers’ as “A child associated with an armed force or armed group refers to any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes”.

² The international Legal Framework or law referred to includes: United Nations, 1977a. Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; United Nations, 1997b. Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II), 8 June; United Nations High Commissioner for Human Rights: United Nations, 1989. Convention on the Rights of the Child, 20. November 1989. New York City.; United Nations, 2000. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. 25 May 2000. New York City 1977; and United Nations. (1998). Rome Statute 1998, Article 8(2) (b) (xxvi), (c) (vii)

that regulates the recruitment and use of children in armed conflicts. This discussion precedes with a concise discussion of the background of this area of study.

1.1 Prevalence of Child Participation in Conflicts

Terms like drummer boys of Napoleonic armies, Hitler Jugend, Kamikaze, little bees, kadagos, and baby brigade all refer to the category of children who have participated during wars in the past. Yet, why is there so much agitation and opposition towards the participation of children in armed conflicts in the post-Cold-War period. Inter alia, the emergence of “new wars” in the post war era instigated the deployment of children in large numbers to armed conflicts.³ The blurring of distinction between combatants and non-combatants or permissible and criminal violence transformed new wars into a kind of ‘slaughterhouse’ for children. The serious consequences of child participation have made the world view this practice as abominable and devastating to the progress and development of the world.

Interestingly, since the end of 90s, the most favorite figure used to denote the number of child soldiers in the world is 300,000.⁴ Nevertheless, in recent times, the intensity of participation of children in armed conflicts has emerged as a serious threat to world peace.⁵ The number is said to have risen by 159 % since 2012, with some 30,000 cases verified in 17 countries worldwide.⁶ The 2018 report provides a list of the top ten countries using children as soldiers.⁷ According to the UN report for 2022 on the impact of armed conflict on children, of the 2021 grave violations committed against 22,645 children, 6319 of them were reported to have been recruited and used in armed conflicts.⁸ The same report also provides statistics on the child victims in each of the ten countries listed in the annex of the report. Though the above statistics cannot reflect the exact intensity of suffering endured by the children and their families, it does generate empathy towards the victims. A brief discussion of the causes and consequences of the participation of children in armed conflicts follows.

1.2 Causes and Consequences of Participation of Children in Armed Conflicts

Many scholars have investigated the causes and consequences of this heinous practice.⁹ The common misconception is that child soldiers exist only in poor countries. Though poverty leads to unemployment, social unrest, and insecurity, not all countries facing such problems resort to the use of child soldiers. Nevertheless, the commonly cited causes of child soldiering are poverty, unemployment, insecurity, as well as other psychological factors such as feeling of vengeance and insensitivity towards human life.

Literature also points out that the above factors come into play only when there is an armed conflict within the state leading to the deployment of child soldiers.¹⁰ Yet, to understand why the international community views child soldiering as a threat, the consequences of child soldiering need to be understood in context.

There are scientifically verified reasons why child soldiering should be eradicated. Basically, immersing a child

³ New wars Kaldor, M. (2007), *New & Old Wars: Organized Violence in a Global Era*, 2nd edition, Cambridge: Polity Press. (2012); WHAT IS DISTINCTIVELY NEW ABOUT SO-CALLED ‘NEW WARS’? Özgür TÜFEKÇ International Journal of Economic and Administrative Studies; Wallström, M. and Zerrougui, L., (2017), *Ending the Use of Child Soldiers*, <http://www.swemfa.se/2017/02/12/ending-the-use-of-child-soldiers/>

⁴ It is reported that that the 300,000-figure first appeared in “The Impact of War on Children” by Graca Machel, published in 2001. But when we examined Machel’s footnotes, it turned out that she had relied on another source — the second (1998) edition of a 1996 book titled “Children: The Invisible Soldiers,” by Rachel Brett and Margaret McCallin. <https://www.washingtonpost.com/news/fact-checker/wp/2016/01/22/the-zombie-claim-that-300000-children-are-used-as-child-soldiers/>; McKnight. (2010). “Child Soldiers in Africa, A Global approach to human Rights Protection, Enforcement as Post-Conflict Reintegration,” *Afr. J. Int’l & Comp. L.* 18, 113; Grace, Machel. (1996). *Impact of Armed Conflict on Children*. United Nations. www.un.org/rights/introduce.htm; A/51/1306/(1996)xd

⁵ Since the 1990s, the ‘child soldier crisis has become a major humanitarian and human rights project, from the United Nations Machel Report in 1996 to the Kony 2012 phenomenon and the #BringBackOurGirls outcry over the 2014 kidnapping of 276 schoolgirls by Boko Haram in Nigeria, just to highlight a few; See also Hynd, S. Trauma, Violence, and Memory in African Child Soldier Memoirs. *Cult. Med. Psychiatry* (2020). Retrieved from <https://doi.org/10.1007/s11013-020-09668-4>

⁶ Child Soldiers International, *Child soldier levels doubled since 2012 and girls’ exploitation is rising*, (2019), available from <https://www.child-soldiers.org/news/child-soldier-levels-have-doubled-since-2012-and-girls-exploitation-is-rising>

⁷ Human Rights Watch, *A better US List of Countries using child soldiers (2018)*, available from <https://www.hrw.org/news/2018/06/29/better-us-list-countries-using-child-soldiers>

⁸ UN GA SC (2022) *Children and armed conflict Report of the Secretary-General A/76/871-S/2022/493* 23 June 2022 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/344/71/PDF/N2234471.pdf?OpenElement>

⁹ P.W Singer, *The Enablers of War: Causal Factors behind the Child Soldiers Phenomenon*. In Gates, S. & Reich, S. (eds) *Child soldiers in the age of fractured states*, (Pittsburgh, Pa.: University of Pittsburgh Press, 2010), 93-107; Rosen, D. M., *Armies of the young: child soldiers in war and terrorism*. (New Brunswick, N.J.: Rutgers University Press, 2005), Honwana, A., *Child soldiers in Africa*, (Philadelphia: University of Pennsylvania Press.2006): 202.

¹⁰ Ibid

into violence stunts the optimum development of the child's physical, mental, psychological, and emotional domains. A study on the mental health of former child soldiers reports that "33 percent had post-traumatic stress disorder (PTSD) while 36 percent of the total sample of 330 had major depressive disorders".¹¹ These conditions can disrupt the entire life of the child including the child's ability to work, his relationship with others, and his health and enjoyment, including the risk of developing suicidal disorders and drug addiction. In short, the child soldier has been deprived of his right to grow up as productive member of the society, instead participation of children in hostilities transform the child into a colossal liability to the family and society.

The socialization into war related violence breeds an entire generation of war mongering individuals predisposed to belligerence. This results in "a higher likelihood to engage in violent behavior in post-conflict societies" which needs to be stopped from the very outset.¹²

1.3 Problem Statement

Having read the above narrative, the spontaneous question will be why the child recruitment continues despite the presence of strong international law.¹³ The search for the right answer continues. Taking a proactive approach, as a priority, this study reasserts that the law has the intrinsic potential to prevent child recruitment provided it is enforced for the purpose for which it was created. The law contains the relevant legal elements for preventing recruitment and the standards prescribed for each element is suitable for most parties. Besides, the drafting of the law was supervised by world experts. These features bear testimony of the potential strength of the law.

Essentially, what instigates recruitment is the indifferent attitude of the state leaders or those holding vital positions in the state governance. Driven by the greed for political power, wealth, control over territory and property, these individuals holding key positions in the state hierarchy are prepared to use children as expendable commodities for their selfish gains. Yet, these perpetrators are quick to blame the law as being weak and inconsistent or they blame previous the colonial masters for inequality and poverty and other socio-economic drawback.

The accumulative effect is that there is a blatant disregard for the implementation and enforcement of these laws on the ground. Meanwhile, previous studies too have not been of much help as they have overlooked the need for highlighting the critical role of the law in protecting children. Besides there has been very little public pressure, especially from the intellectuals, demanding the immediate implementation and enforcement of the law. If this happens, perhaps, child soldiers would be able to see a glimpse of light at the end of the tunnel. With that in view, this study shall continue to rally support for the instant implementation of the law in all conflict-stricken zones.

1.4 Importance of the Study

Naturally, scholars were inclined to pursue research relating to the recruitment and use of children in armed conflicts or under the popular caption "child soldiers".¹⁴ The common feature in most of these studies is the inclusion of a detailed analysis of the legal framework. In the process of interpreting the legal provision, authors have pointed out certain weak areas in the law.¹⁵ Existing legal standards are said to be "insufficient by themselves and concurrently the international community needs to improve enforcement to meet these insufficient standards".¹⁶

However, authors have cautiously abstained from making inferences regarding the identified weakness and the

¹¹ Blattman Christopher and Annan, Jeannie. "The Consequences of Child soldiering," *The Review of Economics and Statistics*, 92, no. 4 (2010), 882-898.

¹² P. W. Singer, "Caution: Children at war", (Parameters, 31(4), 40-56.

¹³ See Note 2 above.

¹⁴ Hamilton, Carolyn, and Tabatha Abu El-Haj. (1997). *Armed Conflict: The Protection of children under international law*, The International Journal of Children's Rights, 5, 1-46. © 1997 Kluwer Academic Publishers, Netherlands; Happold, M. (2000). 'Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities,' 47 NILR 27, 47; Fox, Mary-Jane. (2005). *Child Soldiers and International Law: Patchwork Gains and he Conceptual Debates*. Human Rights Review, 7(1), 27-28

¹⁵ Some of the works consulted include Becker, Jo. (2005). *Child Soldiers- Changing Culture of violence*, Human Rights, Vol. 32 No.1 Winter, p.16-18; Henckaerts, M. and L. Doswald-Beck (eds). (2005), *Customary International Humanitarian Law, Volume I; Rules, Rules 136-137*(Cambridge, Cambridge University Press (2005); Van Bueren, Geraldine. (1994), *The International Legal Protection of Children in Armed Conflicts*, The International and Comparative Law Quarterly 43(4), 809-826. Kuper, J. (2000). *Children and Armed Conflict, Some Issues of Law and Policy*, in Fottrell, D. *Revisiting Children's Rights; 10 years of the UN Convention on the Rights of the Child*; Breen, Claire. (2007). *When is a child Not a Child? Child Soldiers in International Law*. Human Rights Review; 8(2):71-103. Mulira, Dorcas B. (2007). *International Legal Standards Governing the Use of Child Soldiers*. LLM Theses and Essays. Paper 88.http://digitalcommons.law.uga.edu/stu_llm88; Carolyn Hamilton and Tabatha Abu El – Haj. (1997) *Armed Conflict: The Protection of children under International Law*. The International Journal of Children's Rights, 5, 1- 46;

¹⁶ Nair, Sandhya. (2017). *Child soldiers and international Criminal Law Is the existing legal framework adequate to prohibit the use of children in armed conflict*. Perth International Law Journal 2, 40.

unabated recruitment of the children in armed conflicts. The most common explanation cited in studies for this ongoing recruitment is that the law lacks enforcement. Unfortunately, no clear relationship between the result of analysis of the law and the effect of the law on the rate of recruitment is verified. In short, how the observed weakness obstructs enforcement is not explained. The fundamental logic of cause-effect relationship is not discernable leaving a researchable gap.

Therefore, to address this gray zone, this study aspires to take a proactive approach to highlight the potential strength inherent in the legal framework towards the protection of children. Having established that the law is relevant, adequate, and effective, will proceed to argue that the law has not been applied for the purpose for which it was intended. These shortcomings in the enforcement of the law have resulted in the unabated recruitment of children in armed conflicts and the subsequent use. Rationally, adopting this approach, the question why the problem continues despite there being a strong law could be explored. This is the unique and innovative feature of this study.

Based on the above, this study intends to examine the international legal framework using both doctrinal and socio-legal methods to show that the international legal framework consists of all legal elements relevant to the control of the recruitment of children in armed conflicts.

2. Research Method

Legal scholarship has adopted two broad approaches to research in law – ‘the black-letter law’ and ‘law in context’.¹⁷ Traditionally, the black-letter law or referred to as doctrinal research method has dominated the legal scholarship. The scope of this study requires an integrated approach applying both doctrinal and non-doctrinal or the socio-legal approach.

A good starting point is to examine ‘what is the law’ on child recruitment’ is using qualitative ‘doctrinal method’ or the ‘black-letter approach. This involves the critical analysis of the relevant treaties that constitute the primary source for this research including case-law, and precedents. Using logical analysis, adopting deductive and inductive process, it could be concluded whether the law protects children by preventing recruitment. Having confirmed through doctrinal analysis that the law indeed applies for the purpose for which it was adopted, research needs to go beyond this to assess if any contemplated change to the law is relevant. The necessary data could be extracted from the relevant secondary sources such as UN reports. For example, the call to raise the minimum age level for recruitment from 15 to 18 must be examined methodically using statistics from validated reports. For this, the socio-legal method becomes useful.

In the context of the current research, this requires a multidisciplinary input including disciplines such as sociology, political science, military science, economics, and others. For example, by analyzing data on the age of active child soldiers in conflict zones it would be possible to decide whether increasing the age limit would be helpful to control the recruitment of child soldiers. Additionally, statistics on the availability of birth registration facility in a particular state and the method of determining the age of the child will be useful in making decision whether any change to the recruitment age would be productive.

This process could be extended to other aspects such as the military capability and political stability of states involved in conflicts. This approach serves dual purpose: first it verifies what the law is on the recruitment and use of children in armed conflict; next it verifies what should be the law. In the present case, it is expected to reach a probable conclusion that the present legal framework needs no urgent changes as the law is absolutely sustainable.

3. Analysis of International Legal Framework

3.1 Development of International Legal Framework

The law or the international legal framework governing the recruitment and use of children in armed conflicts is not arranged in a single document. The law or the legal framework that is being applied or researched in the legal scholarship is a synergy of specific articles drawn from humanitarian, human rights, and criminal law treaties.¹⁸

The development of international legal framework proceeded in stages beginning with the humanitarian law (IHL) which laid a solid foundation in 1977 by adopting two Additional Protocols to the Geneva Convention (1949), namely Additional Protocol I and Additional Protocol II. In Article 77 (2) of the Additional Protocol I and Article 4 (3) (c) of the Additional Protocol II, the issue of prohibition of recruitment of children in armed conflicts was addressed specifically. Following this, the human rights law (IHRL) came into the picture.

¹⁷ McConville, M. and Chui, W.H. (2007), *Research Method for Law*, Edinburg: Edinburg University Press.

¹⁸ Note 2 above

UN adopted the Convention on the Rights of Child (CRC) in 1989 to reinforce the concept of ‘best interests’ of the child. Importantly, under Article 38, the most dominant article on recruitment, the Convention prohibited the recruitment and use of children in armed conflicts. However, it was felt that the Convention did not raise the existing standards as expected, and this triggered the adoption of the Optional Protocol to the Convention on the Rights of Child (OPAC) in 2000. Inter alia, Article 3 of the OPAC has been lauded as a significant achievement as it raised the minimum age for voluntary recruitment to 18 years for armed forces while prohibiting absolutely the recruitment of under 18 children by armed groups.

Although the norm development phase may appear to be settled, the legal system had no means of punishing perpetrators. Hence, the International Criminal Law (ICL) developed an international criminal court together with the Rome Statute to regulate its functioning, thus completing the norm development phase and moving into the era of application. The specific Articles relating to the recruitment and use of children in armed conflicts within each field of international law listed above are analyzed here, beginning with the IHL followed by IHRL and ICL.

3.2 International Humanitarian Law

The international humanitarian law (IHL), traditionally referred to as *jus in bello* is the outgrowth of initiative of two legendary figures, namely Florence Nightingale and Henry Dunant; this led to the creation of the First Geneva Convention that culminated in the development of IHL. The primary purpose of the international humanitarian law is to protect the victims of a conflict and to regulate the conduct of hostilities. The warfare and political instability in the African region during the cold-war – decolonization period of 1946-1989 was characterized by an increase in the deployment of child soldiers.¹⁹ Civilians, mainly children and women became victims of this indiscriminatory warfare. This instigated the adoption of two Additional Protocols for the protection of children, namely Additional Protocol I (AP I) and Additional Protocol II (AP II) which will be examined here.

3.2.1 Additional Protocol (AP I) to Geneva Conventions

The first Protocol (AP I),²⁰ applicable in international armed conflicts, in Article 77 underscores the overriding principle that children should not be recruited in armed conflicts, while stressing the duty of parties to provide continuous protection to children during armed conflicts.

Article 77 (1) reaffirms the customary international norm that children, due to their age factor and vulnerability, should be given exclusive treatment and care. In armed conflict situations children should be protected from all forms of cruelty. This umbrella provision requires all parties to the conflict to prioritize the safety of children and act prudently with utmost respect for the law of war.²¹ Article 77 is the first documented declaration on the need for precautionary treatment to protect children from the act of oppression arising from unpredictable conduct of parties.

Next, Article 77(2),²² which is the most pertinent clause, delineates three key elements relating to the duty of Parties to the conflict. First, it is the primary duty of the parties to avert and repulse the direct participation of under 15 children in hostilities. Children have the right to life and liberty. Therefore, authorities owe a duty of protection by not permitting children in frontline combating. Second, it is reminded that children under the age of 15 years are the most vulnerable group and consequently they should not be recruited at all. Third, in recruiting children between the age of 15 years to 18 years, the oldest child must be selected first. This provision provides some degree of freedom of choice for parties who may encounter difficulties in keeping the recruitment to children under the age of 15 years. This presumably is in consideration of the need to balance the two opposing entities - military necessity and humanity. Nevertheless, this provision allows some freedom to Parties in setting a lower or higher age threshold in terms of recruitment and use, provided the lives of young children are not unduly endangered.²³

However, the application of Article 77(2) on the ground has led to some problematic issues which needs further

¹⁹ <http://www.systemicpeace.org/vlibrary/ConflictTrendsAfrica2006MGMarshall.pdf>

²⁰ The First Protocol Additional to Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,

²¹ Carolyn Hamilton and Tabatha Abu El – Haj. (1997) Armed Conflict: The Protection of children under International Law. The International Journal of Children’s Rights, 5, 1- 46: The author refers this as ‘a certain democratization of protection’,

²² Article 77(2): 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.

²³ ICRC Commentary on Protocol I Additional I

verification. The use of the terms like “*take all feasible measures*”, and “*refrain from*” in Article 77 (2) is said to have considerably weakened the compelling effect of the law. Instead, more coercive language such as “*all necessary measures*”, is suggested in place. This issue needs to be examined in context of applicability in conflict situation. Treaties are produced in different languages and the shades of ordinary meaning of specific terms may vary from one situation to another. Besides, such language precision may not be relevant to the soldiers in the battlefield. Even if the term “all necessary measures” is used as in the African Charter,²⁴ no decline in the rate of recruitment during armed conflicts in African states was reported. Therefore, it is unreasonable to expect total compliance upon the insertion of the term necessary measures. In the same tone, the use of the term “refrain” does not impute the meaning that duty to protect becomes optional. What is required is a reasonable degree of compliance notwithstanding the linguistic issue.

Another common criticism here is over the term “direct part”. It is argued that this provision could be easily misinterpreted leading to abuse.²⁵ One possibility is that children could be forced to participate in dangerous activities or enticed to take direct part in the guise of claiming that the participation is merely ‘*indirect part*’, amounting to non-dangerous activities, and hence permissible. Nevertheless, by inserting the term direct part specifically, the law warns of the inherent dangers associated and the need to be overtly cautious in using children in international wars.

Besides the term “direct participation” is not defined while case law indicates that the decision has to be made “on case-by – case basis” to avoid abuse of this term. The use of this term should be seen as a precautionary principle against the backdrop of inherently harmful situations, particularly to children under 15 years. Interpretation of this term needs a socio-legal approach against the backdrop of new wars. Nevertheless, the current practice is to avoid the dichotomy between direct and indirect participation.

Another constituent element that must be noted is the minimum cut – off age for children’s participation, which is set at 15 years. This issue, popularized as ‘politics of age’,²⁶ has been heavily debated although the plain meaning of the law is clear as well as straight forward. It is claimed that at the age of 15 years children are not fully prepared to face the gruesome challenges of war. Therefore, it is argued that minimum age limit should be raised to 18 years. Nevertheless, since there is no definition of ‘child’ in the Protocol and hence it is untenable to make such claims. Yet, the choice of age 15 years can be justified on the basis that 15 years is the most used reference point in the parent Geneva Conventions and hence its usage is meaningful, and time tested.

Further to that, the customary international law Rule 136 also prohibits the recruitment and use of children in armed conflicts.²⁷ Therefore, it imputes the character of customary law to AP I thus creating a natural and universal binding effect upon all parties. Beyond the minimum age for recruitment at 15, law also provides some freedom of choice by allowing the recruitment of children between the age of 15 and 18 years, provided the oldest is selected first.

The next Article - 77 (3), offers additional blanket protection over and above what is provided in 77(2). Under Article 77(3) children under 15 years taking direct part in hostilities should be given special protection in case they fall into the power of an adverse Party. Article 77(4) provides that children who are detained are still entitled to special protection including to holding in quarters separate from the quarters of adults. Article 77 (5) excludes death penalty on persons who had not attained the age of eighteen years at the time of the offence was committed. Having analyzed AP I, shall proceed to analyze AP II that regulates internal armed conflicts, the most common form of armed conflict in the post-war era.

3.2.2 Additional Protocol II (AP II) to the Geneva Conventions.

In the aftermath of dictator Idi Amin in 1979, Joseph Kony led an infamous rebel group - Lord’s Resistance Army (LRA) – that had caused unmeasurable suffering to men, women and children in Uganda and Democratic Republic of Congo including the horrendous act of kidnapping children and turning them into child soldiers. Under such circumstances, the introduction of AP II was well timed and appropriate.

Additional Protocol II underscores the fundamental guarantees under Article 4. Essentially, Article 4 (1) reaffirms

²⁴ AU African Charter

²⁵ Carolyn Hamilton and Tabatha Abu El-Haj, “The Protection of Children under International Law,” *The International Journal of Children’s Right* 5, no -1(1997): 46.

²⁶ Rosen, D.M. (2007). Child soldiers, International Humanitarian Law, and the Globalization of Childhood, *American Anthropologist*, 109(2), 296-306.

²⁷ Rule 136. Children must not be recruited into armed forces or armed groups. Volume II, Chapter 39, Section C. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

that all persons who do not take a direct part or who have ceased to take part in hostilities are entitled to respect for their persons, honor, convictions, and religious practices. Nevertheless, it is in Article 4(3)(c) that the doctrine of protection is elaborated and heightened.²⁸

Article 4 (3) (c), the most dominant paragraph, reiterates that both the armed forces and the armed groups owe a compelling duty to protect children in the context of armed conflicts. This duty requires that the recruitment of children under the age of 15 years and their participation in armed conflicts is totally rejected. The duties of the parties are clear and straight forward without space for raising questions about the exact age of recruitment and the type of participation as encountered in the AP I.²⁹

In view of the nature of internal armed conflicts where the distinction between combatants and non-combatant is blurred by excessive violence and criminality, it is appropriate that the rules had to be strict and non-arbitrary. Meanwhile, Article 4 (3) (d) complements there by requiring the parties to extend the protective measures spelt out above should children under 15 years still participate in hostilities.

While providing a simple but effective law to protect children by imposing restrictions on crucial factors, Article 4 above seeks to strike a balance between the military necessity and humanity pursuant to the fundamentals of humanitarian law

To further strengthen the protectionism of children in armed conflicts, the humanitarian law moved towards the human rights law culminating in the adoption of the CRC. The relevant treaty provisions of the international human rights law that address the protection of children in armed conflicts will be discussed here.

3.3 *International Human Rights Law*

Universal Declaration of Human Rights (UDHR) is the founding document of human rights. The rights enshrined in UDHR have been translated into a series of international treaties. International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESR) together with other series of treaties spell out the basic civil, political, economic, social, and cultural rights that everyone should enjoy, and this forms the body of international human rights law that becomes binding on parties that have ratified them. Two key treaties relating to the protections of children in armed conflicts are Convention on the Rights of the Child (CRC) and the Optional Protocol (OPAC) that will be discussed below.

3.3.1 *Convention on the Rights of the Child (CRC)*

The UN Convention on the Rights of the Child (CRC), adopted by UN in 1989 is the most widely ratified human rights instrument with 196 State Parties as members.³⁰ Almost the entire world has recognised the rights of children and the duty to protect them, yet it is heartbreaking to see that grave violations against children are prevalent.

Of the 54 articles of the CRC, Article 38 is the most sought after provision, especially by those pursuing their research on child soldiers. Beyond that, Article 38 also provides the legal basis for prohibiting the recruitment and use of children in hostilities, from the perspective of rights based approach which is acclaimed as non-derogable.

The specific paragraph Article 38 (1) transposes international humanitarian law components into human rights domain. This moderates the effects of law of war during peace time emphasizing the need to extended protection to women and children. This amelioration also makes it irrelevant to distinguish between international and internal armed conflicts. The interrelationship between humanitarian and human rights law has generated greater force to the doctrine of protection of civilians in armed conflicts.

Next, Article 38(2)³¹ weights the burden of protecting children under the age of 15 years upon the State parties by requiring them to take all necessary precautions to avert children's direct participation in hostilities. Children taking direct part in hostilities would be exposed to the risk of becoming legitimate targets to the adversary. Nevertheless,

²⁸ Article 4 (3). Children shall be provided with the care and aid they require, and in particular: (c) 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 hostilities; (d) The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

²⁹ Ibid

³⁰ World Vision Children's rights and the Convention on the Rights of the Child (May 04, 2021) <https://www.worldvision.ca/stories/child-protection/child-rights-convention-on-the-rights-of-the-child>. CRC was adopted by UN in 1989, and came into force on 2 September 1990 and contains 54 articles. The right to life, survival and development, and non-discrimination constitute the guiding principles of the CRC.

³¹ Article 38(2) – "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".

this could mean indirect participation is still possible allowing space for armed groups fighting for self – determination to use underage children.

Hence, it may appear that the term “direct part’ could have been avoided in Article 38(2) as advanced by some critics. Nevertheless, while operating as a precautionary principle to protect children, this provision also offers some leeway to armed groups to use young children to continue their struggle for self determination reflecting the obligation to strike a balance between war and peace.

Not forgetting, struggle for independence and war of self determinations are human rights centered and are not sustainable without the supply of child soldiers to meet manpower demand. However, as discussed previously, the distinction between direct participation and indirect participation is becoming irrelevant in the realm of new wars reducing significance of this qualifying term ‘direct’.

Another comment frequently cited is the use of the term “.. take all feasible measures” instead of the more forceful term “all necessary measures”. It is argued that when translated into other vernacular languages, there may not be any significant difference in the potency of the law arising from the current usage. As explained previously, while assigning duties to child soldiers in the battle ground it is virtually impossible to predetermine which situations are direct and which are not. This is more conspicuous in situations where the use aerial attacks, drones, cluster bomb, IEDS, and suicide bombers that have become the order of the day, ignoring the rules of jus in bello and jus ad bellum.

Further on the interpretational approach, the socio-legal aspect must be taken into consideration. For example, on the use of the term “feasible” it must be understood that a persuasive approach is preferred to coercion which may result in total disregard for the law. The subsequent soft law instruments and UN Resolutions have repeatedly reminded all parties of the urgency of enforcing the law. The success of the law ultimately rests on the parties entrusted with the duty of enforcement. The law has provided what is basically necessary for the doctrine of protection of children to be energized.

Article 38 (3)³² which is similar to Article 77 (2) of AP I, basically reiterates the importance of precluding the recruitment and use of children under the age of 15 years in hostilities. Next, it provides a broad and continuous range of age level for recruitment from under 15 to under 18 years, subject to the priority rule, that is, obliged to recruit the oldest first. The intention of the drafters was to enable those involved in freedom struggles, self determination, and decolonisation wars are not unduly put at a disadvantage through stringent laws prohibiting child soldiers.

Unfortunately, the abuse of this privilege has perpetuated the spiking of terrorism, banditry, and other criminal acts resulting in anarchism, instead of peaceful and prosperous independent states. Nevertheless, in the current form, Article 38 of the CRC gives direction towards achieving a balance between military necessity and humanity while attempting to provide the optimum protection to children.

As a human rights instrument, it may not be appropriate for the CRC to alter the standards such as the age of recruitment established by the Humanitarian law in Additional Protocols, where the humanitarian law is the *lex specialis*. Thus, CRC has rightly maintained the norms fixed in the humanitarian law. With the aim of raising the standards, the human rights law adopted the Optional Protocol to CRC (OPAC) which prima facie raised the existing standards. Did the OPAC produce any significant change among the parties to conflict in respect of banning the use of child soldiers? This shall be discussed hereafter.

3.3.2 Optional Protocol to CRC (OPAC)

Optional Protocol to the Convention on the Rights of the Child is deemed to have shown some improvement over the standards that prevailed in previous instruments. ³³ Of the 13 articles of the Protocol, Articles 1, 2, 3, and 4 specifically address the issue of “recruitment and use of children in armed conflicts”.

Article 1 of OPAC asserts that State Parties to abstain from permitting members of armed forces who are under 18 years to take a direct part in conflicts. This article has indeed raised the age for taking direct part for armed forces. It has been suggested that this imposition should have been made absolute rather than being persuasive and should have included indirect participation. Yet, even such absolute imposition would not produce better results as the

³² Article 38 (3): 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 years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

³³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (OPAC) was adopted on 25 May 2000 and came into force on 12 February 2002 with the current status of 171 parties and 130 signatories as on 27.10.2021. Retrieved from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11-b&chapter=4

State compliance depends on the political disposition and physical capacity to implement the rules.

Next, in Article 2, it is stated that States Parties are not to recruit compulsorily under 18 children into their armed forces. While in Article 1 the age is raised in respect of direct participation, this article has raised the age on the basis of compulsory recruitment. However, since there is no express prohibition on voluntary recruitment, states might continue to recruit of under 15 children claiming that it is voluntary recruitment. The same argument applies to direct and indirect participation. In this respect, the changes introduced vide OPAC are not really effective in curbing child soldiering. Nonetheless, the adoption of some new standards indicates the international community is moving towards strengthening the protection mechanism offered to children.

Whereas, Article 3 (1) urges States Parties to raise the minimum age for voluntary recruitment from 15 years to 18 years for those enlisting in the armed forces and not for armed groups. The obligation to ensure the safety of children under voluntary recruitment is reiterated in Article 3 (3).

Article 4 (1) imposes a strict liability upon armed groups, who under no circumstances, are allowed to recruit or use in hostilities persons under the age of 18 years. Rightfully, this imposes higher standards on armed groups who are the major offenders in armed conflicts. Article 4 (2) requires state parties to enforce domestic laws to punish those involved in unlawful recruitment and use of children. This has prepared the way forward towards ending impunity and punishing the perpetrators, which provision has been missing thus far.

Literally, OPAC has raised the age for indirect participation among government forces from 15 years to 18 years. The age level for voluntary recruitment and compulsory recruitment too has been raised from 15 to 18 years in armed forces. On the contrary, the armed groups are weighted with the raised standard of 18 years for recruitment and participation. This rationalized differentiation was probably designed to minimize the flow of damage from armed groups.

In short, two additional Protocols and CRC have prohibited the recruitment and use of children under the age of 15 years. This standard is regarded as the minimum that is attainable threshold for the protection of children. Whereas the standard set by OPAC for armed groups at 18 years must be seen as the maximum standard that is necessary. Nevertheless, whether the changes introduced by OPAC would have any significant impact on the child soldier problems is not verifiable yet. It appears that the matrix of child recruitment created in OPAC could be easily manipulated, hence, ultimately, integrity is the prerequisite for the success of the law.

3.4 International Criminal Law.

Along with the inclusive development of humanitarian law and human rights law towards protecting children in armed conflicts, the international criminal law (ICL), though appearing rather late, has made significant contribution towards the protection of children. After much deliberation and discords, ultimately, in 1998 with adoption of the Rome Statute, the issue of crime of recruitment of children in armed conflicts was settled.

The Rome Statute closed the gap in the legal system by defining the crimes that came under the jurisdiction of the ICC, namely, crimes of genocide, crimes against humanity, war crimes and crime of aggression. Of particular importance is that within the definition of war crimes under Article 8, the Rome Statute brought the recruitment of child soldiers under the jurisdiction of ICC, resulting in the indictment of many perpetrators who were responsible for recruiting child soldiers.

3.4.1 Rome Statute

Article 8 (2)(b)(xxvi) and Article 8(2) (e) (vii) of Rome Statute codify the crime of child recruitment in international conflicts and non-international conflicts respectively. Both provisions stipulate that 'conscripting or enlisting children under the age of fifteen years to participate actively in hostilities' is a war crime. The plain meaning is that any form of recruitment of children under the age of 15 years, be it compulsory or voluntary, will expose them either to direct or active participation and therefore this act becomes punishable under the law. Article 8(2) explicitly details the crime of child recruitment strengthening the arms of the law to punish perpetrators. The law can effectively induct the perpetrators which was not possible previously.

Nevertheless, the creation of International Criminal Court under the Rome Statute has overcome the issue of prosecuting perpetrators who have gone unpunished and enjoyed impunity hitherto. Of historical importance is the case of Thomas Lubanga, the military commander of the Union of Congolese Patriots, who was convicted for the war crime of child recruitment under the Rome Statute, for the first time by the ICC. Hence, the judicial cycle was completed with the functioning of a court to judge – ICC. The Rome Statute has bridged the serious gap that existed between the substantive laws and the enforcement of these laws through a court to adjudicate violations of international law. Apart from the five instruments discussed above, there are some additional soft law instruments that provide continuous support and strength to the functioning of the legal framework.

The ILO Worst Forms of Child Labour Convention 182 asserts that persons under the age of 18 are still regarded as children and therefore child soldiering is treated as a “worst form of labour”. The African Charter on the Rights and Welfare of the Child (African Charter) of 1999 raised the age limit to 18 by defining a child as anyone below the age of 18 years. Both, ILO and African Charter, have reinforced the need to avert the recruitment of children under the age of 18 years intending to upgrade the level of protection. Another effective strategy was the adoption of Resolutions for children and armed conflict by the UN Security Council beginning with Resolution 1261 of 1999 urging parties to show commitment to the protections of children.

4. Results of Analysis

The law has identified three different age groups for the functioning of the two conduct verbs of recruitment and use. The three age groups are, namely: i) recruitment and use of children *under the age of 15 years*; ii) recruitment and use of children *under the age of 18 years*; iii) and recruitment and use of children *between 15 years and 18 years*.

The under 15 age category appears to favour both the armed forces and armed groups while the under 18 standard is more likely to be achieved by the government armed forces and not so easily by the armed groups. Meanwhile, the 15-18 years standard provides equal degree of freedom of choice to both government forces and armed groups.

The law attempts to strike a balance between the needs of government forces and the non government forces, concurrently striving to raise the standard of protection through review and refinement of the applicable law with the aid of soft law instruments.

Therefore, the presence of three different standards should not be interpreted as a source of inconsistency or uncertainty in law but as a methodical device for making the law become enforceable while remaining practical. The need to adopt a “compromising approach” in international treaties has made it necessary for this balancing mechanism. International relations is pivoted on persuasion and less frequently on coercion.

It needs to be pointed out that the under 15 age level besides striking a balance between the military necessity and humanity, its origin can be traced back to the Geneva Conventions of 1949, imputing the customary law character while asserting its durability. Overall, at the age of 15, children are considered not ready to endure gruesome challenges of armed hostilities. Concurrently, raising the age limit to 18 years creates several practical problems, especially for the armed groups.

On the other hand, the under 18 age level which is more human rights oriented standard heightened in the OPAC reflects the current emphasis on human rights. At the same time, it can also destabilise the armed groups that are fighting for self determination or involved in national liberation wars who are unlikely to find sufficient number of children in this age category to join their ranks.

Besides, the stiff standard of achievement can also discourage ratification of treaties as in the case of Rome Statute and OPAC as opposed to the universal ratification of CRC which maintains the minimum cut-off age at 15. Setting of high standards is likely to result in the avoidance of the law rather than motivate compliance. Armed groups will be reluctant to engage in peace negotiations or other mediation efforts

Meanwhile, the 15 year to 18 years age category provides a flexible choice ranging from 15, 16, 17 and 18 years depending on the availability of persons and also on the state priority in terms of military capability. Nevertheless, it must be pointed out that each of the three levels of recruitment has a specific purpose and it is a near impossible task to point out which provides greater protection. High standard setting as in OPAC may not necessarily produce better results than the lower age limit as in API I, AP II and CRC due to its (un)achievable target as reflected in the performance of the African Charter which had set 18 years as the ceiling. The under 15 age limit is still the preferred standard although much criticised. It allows for equilibrium in the state functionary as well as the legal system in meeting the military necessity and humanity considerations.

Allied terms in the law include compulsory recruitment and involuntary recruitment or enlistment and conscription.³⁴ In the case of Lubanga, ICC treats both conducts (voluntary) enlistment and (compulsory) conscription equally and defer further deliberations on voluntariness issue.³⁵ Hence, the distinction between voluntary and compulsory recruitment has become legally irrelevant which has made the law straightforward and easily enforceable.

³⁴ Compulsory recruitment in Article 2 of OPAC, Voluntary recruitment in Article 3 (1) of OPAC, and enlistment in Rome Statute. Article 8 (2)(b)(xxvi) and Article 8(2) (e) (vii)

³⁵ Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch. I, 14 March 2012 (hereinafter ‘Judgment’), para. 14 ii).

Case laws indicate that the plain meaning “use” is preferable without any distinction between direct and indirect participation in view of the almost impossible task of pinpointing which activity is fatal and which is not in the midst of armed conflicts. Since case laws insist that any form participation should be criminalised, the need for further separation of participation into direct and indirect becomes redundant, especially in the situation of new wars.

Therefore, it could be submitted that the substantive law is plain and straightforward as far as the basic commands are concerned. The element of child protection is cross cutting throughout the entire legal framework. Those under 15 years are still not ready for combat activities and should not be used in hostilities. That is the essence of the doctrine of protection envisaged.

Nevertheless, the compliance factor is a big challenge towards realising the objectives of the law due to enforceability issues that remain illusory. Enforceability has often been used as a form of defensive tool for the unabated proliferation of child soldiers which inadvertently shifts the burden upon the law. This approach needs to be reviewed.

5. Conclusion

This paper has examined the international legal framework in respect of its potential strength to protect children from recruitment and use in armed conflict. Additional Protocol I sets into motion the entire international duty to protect children in armed conflicts. Article 77(2) stipulates that Children under 15 years are prohibited from taking direct part in hostilities, and they are neither to be recruited. Parties are also allowed to recruit children who are over 15 years but under 18 years, provided the oldest is selected first.

Next, AP II which addresses internal armed conflict has adopted a very strict and forceful ruling in Article 4 (3) (c). Humanitarian law considers children under 15 years as most vulnerable and as such their recruitment and use in armed conflicts must be banned, if possible, absolutely.

The CRC in Article 38 (2) prohibits children under 15 years from taking direct part in armed conflicts. In Article 38 (3) which is a repetition of Article 77 (2) of AP I, prohibits the recruitment of children under 15 years. Children between 15 and 18 can also be recruited with priority to the oldest.

Next, OPAC provides slightly different picture. OPAC raised the age to 18 years for those in armed forces in respect of taking direct part in hostilities and compulsory recruitment. However, the armed groups are strictly not allowed to recruit and use children under 18 years in hostilities.

The Rome Statute has stipulated that conscripting or enlisting children under the age of fifteen years to participate actively in hostilities is a war crime, thus criminalising this act.

The legal framework is driven towards realising the doctrine of protection of children in armed conflicts. Based on age related recruitment process and the risk based use, a set of rules have been formulated. The sources include international law and customary international law. A constant balance between military necessity and humanity has been aspired with due consideration to the demands of new wars. The legal framework is well placed as the ultimate tool to control and regulate the recruitment and use of children in armed conflicts though the nexus between law and recruitment rate remains to be explored satisfactorily.

As mentioned in some studies, the inevitable reason is the lack of enforceability of the law. Nevertheless, the scope of this study is limited to the highlighting the positive features of the law and no attempt is made to drift into the issue of enforcement. A well-known author in this field asserts that now attention must be shifted from norm development phase to the enforcement of the law, implying that the required law has been well configured to fulfil its designated role.³⁶

The ultimate mission is that children in the conflict zones should be protected from the scourge of war. Children should be sent to school and playground and not to barracks and battleground. They should be given pen and not gun. The potential strength of the positive international law is not fully realised due to the willful reluctance to enforce the law. Recalling the philosophy, morality and the obligation underlying the protection of children, it is hoped more and more young academics would support this global mission. To this end, the incumbent law must be interpreted proactively and the objective and purpose of the law made known, at least to fellow academics. What is lacking is the full implementation of these international standards to see its efficacy and not just law on

³⁶ Waschefort, C.A. (2015). *International Law and Child Soldiers*, Hart Publishing. Oxford. (Asserted that “the focus of international law should be shifted from norm creation to norm enforcement”)

paper.³⁷ We need to move into an era of application that needs socio-political transformation.³⁸ Dedicated to child soldiers is an adapted version of a poem.

“The Children of War are like little flowers trampled... .. Stripped of their childhood years, their youth stolen away An irrational tragedy, no justification to be found.” By William Sutherland³⁹ (Adapted)

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).

³⁷ Doek, Jaap. (2011). The international legal framework for the protection of children in armed conflict. Disarmament forum Retrieved from http://www.operationspaix.net/DATA/DOCUMENT/6360~v~The_International_Legal_Framework_for_the_Protection_of_Children_in_Armed_Conflict.pdf

³⁸ Waschefort, C.A. (2011). CHILD SOLDIERS AND INTERNATIONAL LAW: PROGRESSING TOWARDS “AN ERA OF APPLICATION”? Thesis submitted for the PhD degree to: The School of Oriental and African Studies (SOAS) University of London

³⁹ William Sutherland, retrieved from <https://www.poemhunter.com/poem/children-of-war/>