

# Through the Lens of the ICJ: Bridging the Gap between Human Rights and Humanitarian Norms in the Legal Protection for Child Soldiers

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## Abstract

In June 2022, the United Nations Special Representative of the Secretary-General for Children and Armed Conflict expressed that the ongoing use and recruitment of children in armed conflict globally warrants "international concern". Notwithstanding the existence of proscriptive norms in terms of international humanitarian law (IHL) and international human rights law (IHRL), international legal violations are nevertheless committed by states and non-state actors. A systematic analysis of the respective normative systems identifies a *lacuna* between specific provisions thereof. Consequently, violations are committed in armed conflicts for the purposes of IHRL but not IHL, it is contended that this inconsistency in the law perpetuates ongoing child soldiering. It is further contended that this inconsistency establishes a *genus* of children who are legally unprotected as they fall between the cracks of international law.

Based on progressive jurisprudence of the International Court of Justice, an approach which will bridge the *lacuna* between these norms is proposed. Contrary to the view of the International Committee of the Red Cross and with due consideration for the *lex specialis* principle, it is proposed that the IHL and IHRL instruments should apply in a complementary fashion, as opposed to the separate legal regimes under which they have developed.

## Keywords

Armed conflict; child soldiering; international humanitarian law; international human rights law; *lex specialis*; International Court of Justice.

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## 1 Introduction

The concept of "child soldiers" gained prominence in the late 1900s.<sup>1</sup> From 1960 onwards, internal tension within states globally had escalated in the fight for political power and resulted in a plethora of ensuing armed conflicts.<sup>2</sup> The spawning of non-state armed groups followed, together with a profusion of various factions of these groups.<sup>3</sup> A commonality shared by groups in the recruitment of their members, is the ideology that children are deemed vulnerable and thus useful recruits.<sup>4</sup> Once separated from their families, they become susceptible to control and propagation by states, non-state armed groups, and factions thereof.<sup>5</sup>

Preventative and prohibitive norms aimed at curbing child soldiering have developed in terms of international humanitarian law (IHL) and international human rights law (IHRL). By international law standards in general, child soldiering entails persons under the age of eighteen or fifteen years who directly, indirectly, or actively participate in armed conflict, whether of an international or non-international character.<sup>6</sup> Such participation includes their use, recruitment, or conscription into state armed forces or by non-state actors.<sup>7</sup>

The use, recruitment, and conscription of children in armed conflict nonetheless continues as noted by the International Committee of the Red Cross (ICRC):

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<sup>1</sup> Williams *War and Conflict in Africa* 7; Máusse and Nina 1999 <https://www.africaportal.org/publications/child-soldiers-in-southern-africa> 6; Bennett *Using Children in Armed Conflict* 1-6.

<sup>2</sup> Williams *War and Conflict in Africa* 7.

<sup>3</sup> Máusse and Nina 1999 <https://www.africaportal.org/publications/child-soldiers-in-southern-africa> 6; Bennett *Using Children in Armed Conflict* 1-6; Grover 2013 *EJIL* 451.

<sup>4</sup> Máusse and Nina 1999 <https://www.africaportal.org/publications/child-soldiers-in-southern-africa> 6; Bennett *Using Children in Armed Conflict* 1-6; Grover 2013 *EJIL* 451.

<sup>5</sup> Máusse and Nina 1999 <https://www.africaportal.org/publications/child-soldiers-in-southern-africa> 6; Bennett *Using Children in Armed Conflict* 1-6; Grover 2013 *EJIL* 451.

<sup>6</sup> See Art 77 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (1977) (Protocol I); Art 4 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (1977) (Protocol II).

<sup>7</sup> See Art 77 of *Protocol I*; Art 4 of *Protocol II*.

Participation by children in armed hostilities occurs too frequently. This participation may range from aiding combatants (bringing them weapons and munitions, carrying out reconnaissance missions, etc.) to the actual recruitment of children as combatants in national armed forces and other armed groups.<sup>8</sup>

The conduct of modern-day armed conflict is characterised by urban warfare and has colloquially been termed as "wars in cities".<sup>9</sup> Examples may be drawn from Syria,<sup>10</sup> Yemen,<sup>11</sup> and Myanmar; the latter resulting in the establishment of the world's largest refugee camp in Bangladesh.<sup>12</sup> As tension intensified and subsequently led to so called "wars in cities" in these states, so too did the use, recruitment, and enlistment of children in hostilities.<sup>13</sup> In June 2022, the United Nations (UN) Secretary-General published his Annual Report on Children and Armed Conflict<sup>14</sup> and highlighted the substantial increase in the number of child soldiers in Africa and in the Middle East,<sup>15</sup> whose respective conflicts (despite their modern-day nature) are not without child soldiers.<sup>16</sup>

International law has witnessed significant legal developments concerning children and their participation in armed conflict. However, four core elements in the existing IHL and IHRL normative systems are identified in this article as unduly prejudicing children in armed conflict, as it appears to inadvertently perpetuate child soldiering. These core elements include: (1) the definition of a child;<sup>17</sup> (2) the nature of child recruitment or enlistment;<sup>18</sup>

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<sup>8</sup> ICRC 2003 <https://www.icrc.org/en/document/legal-protection-children-armed-conflict-factsheet> 1.

<sup>9</sup> ICRC 2017 <https://www.icrc.org/en/document/war-cities-towards-holistic-response>.

<sup>10</sup> ICRC 2020 <https://www.icrc.org/en/where-we-work/middle-east/syria>.

<sup>11</sup> Council on Foreign Relations 2023 <https://www.cfr.org/backgrounder/yemen-crisis>.

<sup>12</sup> Siegfried 2019 *Refugee Brief*.

<sup>13</sup> UNGA and UNSC *Children and Armed Conflict: Report of the Secretary-General* UN Doc A/76/871-S/2022/493 (2022).

<sup>14</sup> See UNGA and UNSC *Children and Armed Conflict: Report of the Secretary-General* UN Doc A/76/871-S/2022/493 (2022).

<sup>15</sup> See UNGA and UNSC *Children and Armed Conflict: Report of the Secretary-General* UN Doc A/76/871-S/2022/493 (2022).

<sup>16</sup> See UNGA and UNSC *Children and Armed Conflict: Report of the Secretary-General* UN Doc A/76/871-S/2022/493 (2022).

<sup>17</sup> Article 50 of the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1949) (*Geneva Convention IV*); Art 77(2) of *Protocol I*; Art 4(3) of *Protocol II*; Art 2 of the *African Charter on the Rights and Welfare of the Child* (1990) (*the African Charter*); Arts 1 and 38 of the *United Nations Convention on the Rights of the Child* (1989) (*the CRC*); Art 1 of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000) (*the Optional Protocol*); Art 2 of the *ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (1999) (*ILO Convention 182*).

<sup>18</sup> Article 77 of *Protocol I*; Art 4(3)(c) of *Protocol II*; Art 22(2) of the *African Charter*; Art 38(2) of the *CRC*; Arts 1-4 of the *Optional Protocol*; Art 3(a) of *ILO Convention 182*.

(3) the nature of child participation in armed conflict;<sup>19</sup> and (4) the nature of the obligation on states to prevent child soldiering.<sup>20</sup>

It is submitted that these elements subsequently establish a disjunct between IHL standards and IHRL standards and collectively creates an emerging *genus* of children who are only deemed "children" for certain purposes and under certain circumstances.<sup>21</sup> In doing so, this article contends that a particular group of children, being those aged between fifteen and eighteen years are rendered legally unprotected by international law in armed conflict. On this basis, it is further contended that the inconsistent IHL and IHRL child soldiering standards contribute to the ongoing cycle of child soldiering.

In light hereof, the article contemplates a novel approach in identifying why children continue to be used and recruited in armed conflict notwithstanding international proscription therefor. The article considers whether it is in fact the inconsistent IHL and IHRL standards respectively, which contribute to ongoing global child soldiering. In reality, the gravity of this legal conundrum entails that states may be faced with the dilemma of applying inconsistent international standards. This will be the on the ground reality unless states domesticate or enforce their international obligations in such a way as to establish coherency in their national law, notwithstanding their conflicting international obligations.

As global child soldiering continues to foster in armed conflict,<sup>22</sup> this article contends the urgency to reconsider the matter through the lens of the law. It is in this regard that the *lex specialis* principle finds application. As stated by the International Law Commission (ILC), it has long been accepted that special rules tend to override general rules as the former are seemingly "more binding".<sup>23</sup> However, in armed conflict it is generally accepted that IHL is the *lex specialis* and IHRL is the *lex generalis*.<sup>24</sup> The question, however, becomes whether the *lex generalis* remains subservient to the *lex specialis* even if it is to the detriment of civilians in armed conflict and for the purposes of this article, children in particular.

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<sup>19</sup> Article 77 of *Protocol I*; Art 4(3)(c) of *Protocol II*; Art 22(2) of the *African Charter*; Art 38(2) of the *CRC*; Arts 1-4 of the *Optional Protocol*.

<sup>20</sup> Article 50 of *Geneva Convention IV*; Art 77(2) of *Protocol I*; Art 4(3)(c) of *Protocol II*; Art 22(2) of the *African Charter*; Art 38(3) of the *CRC*; Arts 1-3 of the *Optional Protocol*; Art 1 of *ILO Convention 182*.

<sup>21</sup> See Art 77 of *Protocol I*; Art 4 of *Protocol II*.

<sup>22</sup> UNGA and UNSC *Children and Armed Conflict: Report of the Secretary-General* UN Doc A/76/871-S/2022/493 (2022) 1.

<sup>23</sup> ILC date unknown [https://legal.un.org/ilc/sessions/55/pdfs/fragmentation\\_outline.pdf](https://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf) 4.

<sup>24</sup> ICRC *International Humanitarian Law* 41.

In light hereof, the article proposes a conservative yet functional means by which the *lex specialis* may be interpreted and applied in armed conflict. This will ensure, not only in regard to international child soldiering norms, but in any inconsistency between the respective normative systems of IHL and IHRL – that the approach adopted is rooted simultaneously in the promotion of human rights and the protection of civilians in armed conflict. The authority upon which this approach is suggested finds itself in the jurisprudence of the International Court of Justice (ICJ).

As a point of departure, the IHL and IHRL normative systems will be systematically analysed in terms of the proscriptive provisions relating to children and their participation in armed conflict. Secondly, the four core elements in the IHL and IHRL norms identified in this article as unduly prejudicing children is considered in terms of the historical and political climate under which they were adopted. Thirdly, the jurisprudence of the ICJ will be used as an authoritative support for the proposed interpretation and application of the *lex specialis* principle, specifically in respect of children and their participation in armed conflict. The final section of this article offers a conclusion and summary remarks.

## 2 Geneva Convention IV

The Geneva Conventions purport to protect the interests of certain categories of persons primarily<sup>25</sup> during international armed conflicts (IACs). Insofar as they relate to child soldiering, only *Geneva Convention IV*<sup>26</sup> makes limited reference to children partaking in armed conflict.

Article 50 of *Geneva Convention IV* is the only provision that addresses the "enlistment" of children.<sup>27</sup> It provides that, in the context of occupied territories, occupying powers may not, in any case, "enlist" children into formations or organisations subordinate to it.<sup>28</sup> The difficulty arises in determining who qualifies as a child since all of the Geneva Conventions refer to the term "children" in different contexts.<sup>29</sup> Happold suggests that the Geneva Conventions appear to assert the view of childhood ending once one reaches the age of fifteen years.<sup>30</sup> Waschefort, however, suggests that where the Geneva Conventions use the term "children" in an unqualified manner, it should be interpreted as including all persons under the age of eighteen years, depending on the circumstances.<sup>31</sup> As such, opposing

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<sup>25</sup> But for Common Art 3 pertaining to non-international armed conflicts.

<sup>26</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1949) (*Geneva Convention IV*).

<sup>27</sup> Article 50 of *Geneva Convention IV*.

<sup>28</sup> See Art 50 of *Geneva Convention IV*.

<sup>29</sup> UN 2016 <https://media.un.org/en/asset/k1r/k1r6twunuku>.

<sup>30</sup> Happold 2011 *Human Rights International Legal Discourse* 86.

<sup>31</sup> Waschefort *International Law and Child Soldiers* 55.

views to this issue exist and no guidance is provided by the *Commentary*<sup>32</sup> as it did not address the age of children to which Article 50 refers.<sup>33</sup>

Overall, Article 50 provides vague and little protection to children. It remains disjunctive from the issue of child soldiering in four respects, namely that (1) protection is limited to situations of occupation; (2) protection is only afforded from occupying powers; (3) protection is accordingly limited to IACs; and (4) a lack of uniformity exists regarding the term "children".

The issue remains unresolved; however, it is suggested that in light of the principle of the best interests of the child, the definition should include all persons below the age of eighteen years. For years states have regarded children as persons under the age of eighteen years,<sup>34</sup> therefore in accordance with state practice, persons aged between fifteen and eighteen should be regarded as children in IACs. Non-international armed conflicts (NIACs), however, are regulated by two Additional Protocols to the Geneva Conventions.<sup>35</sup>

### 3 The Additional Protocols

The development of child soldiering norms in armed conflict only emerged upon the adoption of the two Additional Protocols to the Geneva Conventions in 1977.<sup>36</sup> However, by this time a culture of child soldiering had already developed. The reason for the adoption of the two Protocols was to allow IHL to acclimatise to the nature of modern warfare.<sup>37</sup> As the Geneva Conventions, but for Common Article 3, primarily govern IACs, the need had arisen for the regulation of NIACs.<sup>38</sup> However, since states were disinclined to grant the same extent of protection to both IACs and NIACs, two separate Protocols were adopted.<sup>39</sup> Article 77 of *Protocol I* regulates child soldiering in IACs whilst Article 4 of *Protocol II* regulates child soldiering in NIACs.<sup>40</sup>

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<sup>32</sup> Pictet *Commentary on the Geneva Conventions*.

<sup>33</sup> Pictet *Commentary on the Geneva Conventions* 284.

<sup>34</sup> Mann 1987 *ICLQ* 42.

<sup>35</sup> Kolb *Advanced Introduction to International Humanitarian Law* 22.

<sup>36</sup> *Protocol I* and *Protocol II*.

<sup>37</sup> ICRC 2009 <https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm>.

<sup>38</sup> ICRC 2009 <https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm>.

<sup>39</sup> ICRC 2009 <https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm>.

<sup>40</sup> Article 77 of *Protocol I*; Art 4 of *Protocol II*.

### 3.1 *Protocol I*

Article 77 of *Protocol I* introduces a prohibition on the use and recruitment of children under the age of fifteen years into state armed forces.<sup>41</sup> Parties to a conflict are required to take all feasible measures to ensure that children under the age of fifteen years do not directly partake in hostilities.<sup>42</sup> Parties also ought to refrain from recruiting these children into their armed forces.<sup>43</sup> Where parties recruit persons between the ages of fifteen and eighteen years, they shall endeavour to prioritise the oldest (the priority rule).<sup>44</sup> *Protocol I* also extends special protection, ordinarily afforded to children generally, also to children under the age of fifteen years who directly partake hostilities.<sup>45</sup> This protection continues to apply to children should they fall into the hands of an adverse party regardless of whether or not they have acquired prisoner of war status.<sup>46</sup>

### 3.2 *Protocol II*

Article 4 of *Protocol II* addresses child soldiering in NIACs and introduces a prohibition on the use and recruitment of children under the age of fifteen years.<sup>47</sup> It provides that such children shall not be recruited into armed forces or groups, nor shall they be allowed to partake in hostilities.<sup>48</sup> Article 4 also affords children under the age of fifteen years special protection.<sup>49</sup> This special protection is not waived by virtue of children directly partaking in hostilities, even if they are subsequently captured.<sup>50</sup> This is the same norm established by Article 77(3) of *Protocol I* for IACs. However, both Protocols require "direct" participation in hostilities for the special protection to apply. The following question arises: if a child under the age of fifteen years partakes in the hostilities of an armed conflict, will that child retain the special protection if their participation in the armed conflict is not direct? As the answer to this question is unclear, McKnight avers that these provisions are therefore not suited to protect the interests of all children.<sup>51</sup>

### 3.3 *Protocol I versus Protocol II*

As Article 4 of *Protocol II* provides that children under the age of fifteen years shall not be allowed to partake in hostilities, it establishes the first inconsistency between the two Protocols. *Protocol I* limits the prohibition of

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<sup>41</sup> Article 77(2) of *Protocol I*.

<sup>42</sup> Article 77(2) of *Protocol I*.

<sup>43</sup> Article 77(2) of *Protocol I*.

<sup>44</sup> Vandewiele *Commentary on the UN CRC Optional Protocol* 5-6.

<sup>45</sup> Article 77(3) of *Protocol I*.

<sup>46</sup> Article 77(3) of *Protocol I*.

<sup>47</sup> Article 4(3)(c) of *Protocol II*.

<sup>48</sup> Article 4(3)(c) of *Protocol II*.

<sup>49</sup> Article 4(3)(d) of *Protocol II*.

<sup>50</sup> Article 4(3)(d) of *Protocol II*.

<sup>51</sup> McKnight 2010 *AJICL* 142.

children partaking in hostilities to "direct participation" whereas *Protocol II* tacitly extends the prohibition to include any form of participation as the word "direct" was omitted. This suggests that in an IAC, where children under the age of fifteen years are participating in hostilities but not directly, their participation is not prohibited. However, although *Protocol II* seemingly provides more protection for children, a second inconsistency between the two Protocols must be noted: *Protocol II* does not include the priority rule in its provisions. Thus, in a NIAC, children aged between fifteen and eighteen years who are recruited into armed groups or forces are left without legal protection.

Protection for children aged between fifteen and eighteen years is only provided in the form of the priority rule, which applies in IACs only. During the drafting stages of the Protocols, the inclusion of the priority rule in both Protocols was intended to constitute a compromise.<sup>52</sup> Some states proposed raising the minimum age for participation in hostilities to eighteen years whilst others opposed on the basis that many states permit recruitment from the age of fifteen years.<sup>53</sup> In an effort to reach a compromise, it was suggested by a Swiss Delegate that special protection be afforded to children between the ages of fifteen and eighteen years.<sup>54</sup> This later culminated in the priority rule, however, it had only been included in *Protocol I*.<sup>55</sup> Mann states that in the Report to the Third Committee on the Work of the Working Group, no indication was provided as to why the priority rule is excluded from *Protocol II*.<sup>56</sup>

The Additional Protocols are certainly not without criticism for the weakness of its child soldiering provisions. However, to criticise these provisions without understanding why they had been adopted so is futile. The inconsistencies identified above require examination in light of their teleological development.

### **3.4 Draft text: Protocol I**

After considering the initial wording of both Protocols as stated in the Draft Additional Protocols to the Geneva Conventions,<sup>57</sup> one can discern, for the most part, the extent to which the final text represents a compromise of opposing views. What is now Article 77(2) in *Protocol I*, was previously Article 68(2) in its draft form, which stated:

The Parties to the conflict shall take *all necessary measures* in order that children under fifteen years shall not take any part in hostilities and, in

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<sup>52</sup> Mann 1987 *ICLQ* 42.

<sup>53</sup> Mann 1987 *ICLQ* 42.

<sup>54</sup> Mann 1987 *ICLQ* 42.

<sup>55</sup> Mann 1987 *ICLQ* 42.

<sup>56</sup> Mann 1987 *ICLQ* 42.

<sup>57</sup> ICRC 1973 <https://www.loc.gov/item/2011525430/>.

particular, they shall refrain from recruiting them in their armed forces or accepting their voluntary enrolment.<sup>58</sup>

A systematic analysis of the initial wording of Article 77(2) shall follow in respect of: (1) the definition of a child; (2) the nature of child recruitment or enlistment; (3) the nature of child participation in armed conflict, and (4) the nature of the obligation on states to prevent child soldiering.

#### 3.4.1 *All feasible measures versus all necessary measures*

The first difference in the wording between the texts is the extent to which the parties to the conflict are required to take measures. In the draft text, parties are required to take "all necessary measures". In the final text, parties are merely required to take "all feasible measures". During the drafting process, it had become apparent that states were disinclined to accept unconditional obligations, such as those which would be imposed by the "all necessary measures" standard.<sup>59</sup> The ICRC suggested the "all feasible measures" standard be adopted as it had already been used in other provisions of the Protocol.<sup>60</sup> This subsequently led to the final wording of Article 77(2) as far as the standard of responsibility is concerned.

The adopted is problematic since it is not as onerous as initially intended. In any given situation of armed conflict, where a Party endeavours to take feasible measures, that which is necessary, is not always that which is feasible. Nair avers that it is this shortcoming of the law which renders many children unprotected, which makes it permissible for parties to avoid doing what is necessary to ensure that children do not directly partake in hostilities.<sup>61</sup> Doing what is "feasible" then invariably becomes a subjective determination.<sup>62</sup> The question arises as to how this subjective determination is deciphered. Ang suggests that as a minimum, it entails a prohibition on the "use" of children.<sup>63</sup> It has also been suggested that "feasible" entails that which is practical or practicably possible considering in the circumstances.<sup>64</sup> Furthermore, in determining what is practical or practicably possible, one ought to consider the potential of the success of the military operation in question.<sup>65</sup> However, Waschefort laudably submits that "the systematic use of children in armed conflict can never be justified on the basis that all feasible measures had been taken to prevent such participation".<sup>66</sup>

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<sup>58</sup> ICRC 1973 <https://www.loc.gov/item/2011525430/> 86.

<sup>59</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 3184.

<sup>60</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 3184.

<sup>61</sup> Nair 2017 *Perth ILJ* 46.

<sup>62</sup> Waschefort *International Law and Child Soldiers* 61.

<sup>63</sup> Ang *Commentary on the UN CRC* 46.

<sup>64</sup> Waschefort *International Law and Child Soldiers* 61.

<sup>65</sup> Waschefort *International Law and Child Soldiers* 61.

<sup>66</sup> Waschefort *International Law and Child Soldiers* 62.

It is argued that the initial wording, per the draft text, sought to establish a threshold of responsibility more onerous than the final text. For those states failing to adequately give effect to their international obligations, the lowered threshold of responsibility in the final text establishes a loophole. This entails that a state which has taken inadequate measures to prevent children from directly partaking in hostilities may justify such inadequacies as being the "only measures that were feasible at the time".

### 3.4.2 *Direct participation*

The second notable difference between the draft and final text of the Protocols relate to the nature of the participation in hostilities by children under the age of fifteen years. Whilst the draft text expressly included "any" form of participation in hostilities, the final text is limited to "direct" participation. During the drafting stages, the ICRC's proposal excluded the term "direct" since it could lead to an interpretation that permits indirect acts of participation.<sup>67</sup> The draft text had therefore been carefully worded with the specific intention of prohibiting any form of participation.<sup>68</sup> However, the final text omits participation if it is not direct, thus permitting conduct that is prohibited in the draft text. This is considered a significant flaw in *Protocol I* as it fails to consider children under the age of fifteen years who indirectly partake in hostilities which has been described as a "custom commonplace in numerous states".<sup>69</sup>

The question arises as to what type of participation is considered to be "direct". In 2009 the ICRC published an interpretive guideline on the notion of direct participation in hostilities.<sup>70</sup> Although non-binding, the recommendations contained in the guideline represent the ICRC's position on how this notion ought to be interpreted in the context of contemporary armed conflicts.<sup>71</sup> The guideline considers the term "direct participation in hostilities" to refer to acts that are carried out by individuals as part of the conduct of hostilities in armed conflict and it submits three cumulative requirements, which must be met for one's actions to constitute such participation.<sup>72</sup>

When using this criterion to decide direct participation, consideration must be given to the circumstances which prevail at the time of the determination. More specific to the conduct of child soldiers, in *Prosecutor v Charles*

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<sup>67</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 3187.

<sup>68</sup> ICRC *International Humanitarian Law* 87.

<sup>69</sup> Nair 2017 *Perth ILJ* 46.

<sup>70</sup> Melzer *Interpretive Guidance*.

<sup>71</sup> Melzer *Interpretive Guidance* 9.

<sup>72</sup> Melzer *Interpretive Guidance* 46.

*Ghankay Taylor*<sup>73</sup> the Special Court for Sierra Leone considered the following actions by children to constitute "active" participation in hostilities: (1) food finding missions where children carried arms and/or committed crimes against civilians;<sup>74</sup> (2) following a commander's instruction to burn houses in a village;<sup>75</sup> (3) fighting with rebels whilst bearing arms;<sup>76</sup> (4) following a commander's instruction to rape women;<sup>77</sup> (5) partaking in patrols, food-finding missions, and ambushes;<sup>78</sup> (6) openly carrying arms and ammunition;<sup>79</sup> and (7) safeguarding the physical safety of military commanders.<sup>80</sup>

Although the jurisprudential guidance by the Special Court for Sierra Leone (SCSL) assists in the determination of "active" participation, it does not speak to what constitutes "direct" participation. Contentious academic discussion has ensued regarding whether "active" participation and "direct" participation are synonymous. International jurisprudence has not provided definitive clarity as the International Criminal Tribunal for Rwanda has held that the respective terms amount to the same standard whereas the International Criminal Court (ICC) has held an opposing view.<sup>81</sup> According to Happold, this issue had been raised in the Preparatory Commission for the ICC but clarity had already been given in a preceding session.<sup>82</sup> This interpretation was subsequently followed in *Prosecutor v Thomas Lubanga Dyilo*<sup>83</sup> in which the ICC held that "active" participation entailed a meaning which goes beyond that of "direct" participation.<sup>84</sup>

Although the answer to this interpretative dilemma is not definitive, the question is whether or not sufficient persuasive value has been afforded by relevant academic opinion, jurisprudence, and soft law to adequately assist in the determination of whether or not conduct amounts to "direct" participation in hostilities. Making this determination is crucial as it indicates which children are protected and which are not, depending on the nature of their participation. It is for this reason that this provision of the final text of

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<sup>73</sup> *Prosecutor v Charles Ghankay Taylor* SCSL-03-1-T (Judgement Summary) 26 April 2012 (the *Taylor* case).

<sup>74</sup> *Taylor* case para 1509.

<sup>75</sup> *Taylor* case para 1511.

<sup>76</sup> *Taylor* case para 1513.

<sup>77</sup> *Taylor* case para 1519.

<sup>78</sup> *Taylor* case para 1523.

<sup>79</sup> *Taylor* case para 1524.

<sup>80</sup> *Taylor* case para 1526.

<sup>81</sup> Waschefort *International Law and Child Soldiers* 63.

<sup>82</sup> Happold 2011 *Human Rights International Legal Discourse* 93-94.

<sup>83</sup> *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 (Appeals Chamber Judgement) 1 December 2014.

<sup>84</sup> Happold 2011 *Human Rights International Legal Discourse* 94.

*Protocol I* has come under scrutiny — had the original draft text been adopted, no such interpretive conundrum would exist.

### 3.4.3 *Voluntary enrolment or recruitment*

The third inconsistency between the text of the draft and final protocol lies in the prohibition of the voluntary enrolment of children under the age of fifteen years. This prohibition appears in the draft text but was omitted in the final text. Since it is not expressly prohibited in Article 77 of *Protocol I*, it does not follow that it is automatically permitted as the *Martens clause* would have it. According to the draft text, recruiting children under the age of fifteen years is prohibited and so too is accepting the voluntary enrolment of these children.<sup>85</sup> According to the final text, states are prohibited from recruiting children under the age of fifteen years, however, they are not expressly prohibited from accepting the voluntary enrolment of such children.<sup>86</sup>

Grossman suggests that a prohibition on voluntary enrolment does exist in Article 77 and can be inferred from the prohibition on the "use" of children under the age of fifteen years.<sup>87</sup> This may be inferred from the priority rule as even for those recruited persons aged between fifteen and eighteen years, a limitation is imposed. If limitations are already imposed for the recruitment of children over the age of fifteen years, it is argued that it cannot be that the voluntary enrolment of children below that age is permissible. Despite the final text not expressly prohibiting the voluntary enrolment of children under the age of fifteen years, this article submits that it does so implicitly in light of the priority rule read together with the prohibition on the use and recruitment of such children.

There are three essential differences between the draft text of *Protocol I* and its final text. All three of which form the basis of contentious academic discourse relating to the wording adopted in this Protocol. The same can be said for *Protocol II* as the wording in its draft form also differs from the final text adopted.

## 3.5 *Draft text: Protocol II*

What is now Article 4(3)(c), was previously Article 32(e) of the draft text, which stated that:

Parties to the conflict shall *inter alia*: take the necessary measures in order that children under fifteen years of age shall not take any part in hostilities

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<sup>85</sup> ICRC 1973 <https://www.loc.gov/item/2011525430/> 86.

<sup>86</sup> Article 77 of *Protocol I*.

<sup>87</sup> Grossman *Rehabilitation or Revenge* 573.

and, in particular, they shall refrain from recruiting them in armed forces or accepting their voluntary enrolment.<sup>88</sup>

The final text of *Protocol II* kept a close relation to its draft text in comparison to *Protocol I*, albeit slightly amended. As with *Protocol I*, the final text also did away with the prohibition on the voluntary enrolment of children under the age of fifteen years.<sup>89</sup> Consequently, as *Protocol II* does not contain the priority rule, it cannot be inferred that the prohibition is tacitly imposed.

The question arises as to whether or not armed groups or forces may accept the voluntary enrolment of children under the age of fifteen years since they are not expressly prohibited from doing so. In this regard, the ICRC's *Commentary*<sup>90</sup> asserts that the principle of non-recruitment as encompassed in *Protocol II* also prohibits voluntary enrolment. Therefore, no children under the age of fifteen years may be permitted to enlist themselves to participate in military operations, whether directly or not.<sup>91</sup>

Overall, the adoption of the two Additional Protocols does little to protect children aged between fifteen and eighteen years *albeit* for the priority rule. The *lacuna* in the law in this regard cannot be ignored and should be considered prejudicial towards children and contrary to the principle of the best interests of the child.

### 3.6 Analysis: final text of the Protocols

The above discourse provides clarity as to why the draft text of the Protocols diverge from their final text and render the latter weaker in its protective value than what had initially been intended.

In respect of participation in hostilities, *Protocol II* offers more protection than *Protocol I*. This is since the latter limits participation to "direct" participation whereas the former excludes the distinction between direct and indirect participation.<sup>92</sup> Therefore, in a *Protocol II* NIAC, children under the age of fifteen years are prohibited from any participation in hostilities.<sup>93</sup>

As far as the minimum age limit for participation is concerned, *Protocol II* did not steer away from the standard established by *Protocol I*. Fifteen years remains the minimum age limit for both Protocols. The *Commentary* on the Protocols<sup>94</sup> notes that several delegations opposed the minimum age limit of fifteen years and favoured a minimum age limit of eighteen years.<sup>95</sup>

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<sup>88</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> 163.

<sup>89</sup> Article 4(3)(c) of *Protocol II*.

<sup>90</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 4557.

<sup>91</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 4557.

<sup>92</sup> Vandewiele *Commentary on the UN CRC Optional Protocol* 3.

<sup>93</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 4557.

<sup>94</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 4557.

<sup>95</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 4556.

However, contradictory national legislation did not allow for this to materialise.<sup>96</sup> The ICRC also followed the fifteen years age limit as it appeared as the most realistic age limit to be accepted by all states.<sup>97</sup>

Regarding the threshold of responsibility on the parties to a conflict, the issue of parties not being required to take necessary or feasible measures to ensure that children under the age of fifteen years do not take part in any hostilities cannot be ignored. Regarding *Protocol I*, "all necessary measures" in the draft text was replaced with "all feasible measures" and the threshold of responsibility on parties to an IAC nevertheless exists, *albeit* vaguely. *Protocol II* requires that parties to the conflict merely "take measures" to comply with its corresponding obligation. Whether the parties are under an obligation to take all "necessary measures" or to take all "feasible measures" to comply with the obligation remains uncertain.

As the norms developed in terms of IHL for IACs and NIACs in terms of child soldiering are not without shortcomings, they also do not exist in a vacuum. Other branches of international law like custom and IHRL have also developed proscriptive norms.

#### 4 Customary international law

Customary international law (CIL) is accepted as one of the main sources of international law comprising of state practice and *opinio juris*.<sup>98</sup> It is recognised by states as legally binding without the need for ratification as required by treaty law.<sup>99</sup> It thereby fulfils the role of bridging the gap between treaty law and a lack thereof resulting from either non-ratification or limited rules.<sup>100</sup> In this regard, the SCSL held that "a norm need not be expressly stated in an international convention for it to crystalize as a crime under customary international law".<sup>101</sup>

The ICRC published the *Study of Customary International Humanitarian Law* (hereafter the *Study*) which comprises of rules of IHL, which are deemed to have acquired customary status.<sup>102</sup> Concerning child soldiering, two rules have acquired customary status, namely Rule 136, which provides that children are not to be recruited into armed forces or groups; and Rule 137, which provides that children must not be allowed to partake in

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<sup>96</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 4556.

<sup>97</sup> ICRC 1987 <https://www.loc.gov/item/2011525357/> para 4556.

<sup>98</sup> Schlutter *Developments in Customary International Law* 15.

<sup>99</sup> Buck *International Child Law* 47.

<sup>100</sup> ICRC 2005 <https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm#a3>.

<sup>101</sup> *Prosecutor v Sam Hinga Norman* SCSL-2004-14-AR72(E) (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) 31 May 2004 para 38.

<sup>102</sup> Henckaerts and Doswald-Beck *Customary International Humanitarian Law* XV.

hostilities.<sup>103</sup> The *Study* does not, however, address the definition of the term "children" per Rules 136 and 137. However, in *Norman*<sup>104</sup> the SCSL held that the use, recruitment, and enlistment of children under the age of fifteen years in armed conflict is a war crime in terms of CIL<sup>105</sup> and this applies to IACs and NIACs.<sup>106</sup> It may hereby be inferred that for CIL, the minimum age for children to partake in armed conflict should not be any lower than fifteen years.<sup>107</sup>

Where states are not a party to the international instruments regulating child soldiering, the CIL provisions find application. Contextualising this into reality entails that the recruitment of children aged between fifteen and eighteen years into armed forces or groups is not prohibited. These children may also participate in hostilities, and it will not constitute a war crime in IACs nor NIACs. It is contended that shortcomings of CIL establish their own legal issues of noteworthy concern. However, for the purposes of this article, it is stated merely to acknowledge the potential of CIL to also contribute to the use and recruitment of children in armed conflict.

## 5 International human rights law

IHRL is the branch of international law that binds states as opposed to individuals.<sup>108</sup> It regulates relations between states and individuals within its territory or individuals who are subject to its jurisdiction.<sup>109</sup> It may be universal, in which case it binds all states or it may be regional, in which case it only binds a specific group of states whether geographically or ideologically.<sup>110</sup> One of the main sources of IHRL is treaty law. When states ratify these treaties, they assume the obligations and duties in terms of international law to protect, respect, and fulfil human rights through acts of domestication.<sup>111</sup>

IHRL norms relative to child soldiering only began to develop towards the latter part of the 1900s, after the adoption of the Geneva Conventions and their two Additional Protocols. Until 1990, the human rights law instruments<sup>112</sup> which had developed in respect of children did not address

<sup>103</sup> Henckaerts and Doswald-Beck *Customary International Humanitarian Law* 482-488.

<sup>104</sup> *Prosecutor v Sam Hinga Norman* SCSL-2004-14-AR72(E) (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) 31 May 2004 para 38.

<sup>105</sup> UN 2009 <https://inee.org/sites/default/files/resources/SixGraveViolationspaper.pdf> 11.

<sup>106</sup> Nair 2017 *Perth ILJ* 54.

<sup>107</sup> La Haye *War Crimes* 132, 170.

<sup>108</sup> Shaw *International Law* 1.

<sup>109</sup> ICRC *International Humanitarian Law* 38.

<sup>110</sup> Shaw *International Law* 2.

<sup>111</sup> UN date unknown <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>.

<sup>112</sup> In terms of the League of Nations *Geneva Declaration of the Rights of the Child* (1924); UNGA *Declaration on the Rights of the Child* (1959); UNGA *Declaration on*

the issue of children partaking in armed conflict. This later began to change as the need for the development of these norms emerged both on the regional and international sphere.

### **5.1 The African Charter on the Rights and Welfare of the Child**

With specific reference to regional treaty law, the *African Charter on the Rights and Welfare of the Child*<sup>113</sup> is the only binding instrument regulating the use and recruitment of children in armed conflict.<sup>114</sup> It recognises the vulnerability of African children and therefore all persons below the age of eighteen years, without exception, are regarded as children for purposes of this instrument.<sup>115</sup>

*Albeit* an instrument of IHRL, Article 22 regulates armed conflicts insofar as children are concerned.<sup>116</sup> As Africa accounts for a substantial portion of the world's child soldiers,<sup>117</sup> the inclusion of this article is not surprising considering that the Charter was drafted in consideration of the plight of African children. It requires state parties to respect and ensure respect for IHL norms that pertain to children.<sup>118</sup> Furthermore, state parties are required to take all measures which are necessary to ensure that they refrain from recruiting children and to ensure that children do not directly partake in hostilities.<sup>119</sup> Although the Charter does not specifically address children participating in NIACs, it does establish obligations for state parties and does not limit those obligations to any particular kind of armed conflict.

Overall, the Charter is a significant legal development since it is not only the first but also the only instrument, *albeit* regional, to afford children greater protection, particularly when they fall victim to armed conflict.<sup>120</sup> Firstly, it raises the minimum age for participation in hostilities to eighteen years. Secondly, it imposes a higher threshold of responsibility on state parties as

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*the Protection of Women and Children in Emergency and Armed Conflict* (1974); *Convention on the Rights of the Child* (1989) (the CRC).

<sup>113</sup> *African Charter on the Rights and Welfare of the Child* (1990).

<sup>114</sup> Vandewiele *Commentary on the UN CRC Optional Protocol 3*; Ang *Commentary on the UN CRC 4*.

<sup>115</sup> Article 2 of the *African Charter*.

<sup>116</sup> Article 22 of the *African Charter*.

<sup>117</sup> Bennett *Using Children in Armed Conflict* 1-6.

<sup>118</sup> Article 22(1) of the *African Charter*.

<sup>119</sup> Article 22(2) of the *African Charter*.

<sup>120</sup> The European Union (EU) developed the EU Guidelines on Children and Armed Conflict which purports to consolidate regional efforts to address the short, medium, and long-term effects of armed conflict on children. However, these guidelines are not legally binding and do not address the issue of the age of "children". Furthermore, notwithstanding the European Convention on the Exercise of Children's Rights coming into force in 2000, this legally binding regional instrument does not make reference to children in armed conflict at all; *European Union Guidelines on Children and Armed Conflict* (2007); *European Convention on the Exercise of Children's Rights* (2010).

they are required to take all necessary measures to prevent participation and recruitment. This article submits that the *African Charter on the Rights and Welfare of the Child* establishes a standard of protection for children in armed conflict, unachieved by IHL.

## **5.2 The United Nations Convention on the Rights of the Child**

The *UN Convention on the Rights of the Child* (the CRC)<sup>121</sup> extends legal protection to children<sup>122</sup> and, *albeit* an IHRL instrument, it also contains an article relative to armed conflicts.<sup>123</sup> "Children" for the purposes of the CRC are any persons below the age of eighteen years.<sup>124</sup> However, in terms of Article 38, which regulates armed conflicts, the protection extended to "children" changes to persons under the age of fifteen years.<sup>125</sup>

The CRC requires all state parties to respect and ensure respect for IHL that pertains to children.<sup>126</sup> Parties are also required to take all feasible measures to ensure that children below the age of fifteen years do not take a direct part in hostilities.<sup>127</sup> They are also required to ensure that they refrain from recruiting such children into their armed forces.<sup>128</sup> Where state parties recruit children aged between fifteen and eighteen years into their armed forces, they should endeavour to prioritise the oldest.<sup>129</sup>

Since Article 38 specifically regulates armed conflicts, it is said to be rather exceptional as it brings together two branches of international law, which are traditionally dealt with as separate legal regimes.<sup>130</sup> It should be noted that the norms established in terms of the CRC as it pertains to child soldiers are identical to the norms established by IHL in *Protocol I*.<sup>131</sup> As such it is submitted that the shortcomings of IHL exist in IHRL by virtue of Article 38 of the CRC, constituting a replication of Article 77 of *Protocol I*.

During the drafting stages of the CRC, the Working Group received overwhelming support from states and civil society for a more comprehensive and clear-cut Article 38.<sup>132</sup> Many states and the ICRC suggested a minimum age limit for participation in hostilities of eighteen years.<sup>133</sup> However, the final text of Article 38 did not establish this minimum

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<sup>121</sup> *United Nations Convention on the Rights of the Child* (1989) (the CRC).

<sup>122</sup> Preamble of the CRC.

<sup>123</sup> Article 38 of the CRC.

<sup>124</sup> Article 1 of the CRC.

<sup>125</sup> Article 38 of the CRC.

<sup>126</sup> Article 38(1) of the CRC.

<sup>127</sup> Article 38(2) of the CRC.

<sup>128</sup> Article 38(3) of the CRC.

<sup>129</sup> Article 38(3) of the CRC.

<sup>130</sup> *Ang Commentary on the UN CRC* 3.

<sup>131</sup> UN 2016 <https://media.un.org/en/asset/k1r/k1r6twunuku>.

<sup>132</sup> OHCHR *Legislative History of the Convention on the Rights of the Child* para 84.

<sup>133</sup> OHCHR *Legislative History of the Convention on the Rights of the Child* para 12.

age limit. The adoption of the CRC had initially created the necessary platform for IHRL to afford greater protection to children during armed conflict (as opposed to IHL). However, at a global standard, this did not materialise as the contention surrounding the "eighteen years standard" was incontrovertible during the drafting and deliberation stages of the CRC.<sup>134</sup> This led to its eventual adoption as a mere restatement of IHL.

### **5.3 *The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict***

The *Optional Protocol*<sup>135</sup> was adopted to improve the protection afforded to children in armed conflict and strengthen the CRC.<sup>136</sup> It establishes obligations not only for state parties but also for armed groups<sup>137</sup> and subsequently extends its protection to children involved in NIACs.

The *Optional Protocol* does not expressly define the term "children" but refers to the term in such a way that one can infer that the word "child" refers to a person who has not attained the age of eighteen years. This is evident by the recognition of this category of persons being entitled to special protection.<sup>138</sup> Article 1 requires state parties to take all feasible measures to ensure that the members of their armed forces who are below the age of eighteen years, do not take a direct part in hostilities.<sup>139</sup> State parties are also required to ensure that persons under the age of eighteen years are not compulsorily recruited into their armed forces.<sup>140</sup> In addition, those parties whose minimum age for voluntary enrolment emanates from Article 38(3) of the CRC, are required to raise that minimum age from fifteen to eighteen years.<sup>141</sup> However, the *Optional Protocol* does not establish an absolute prohibition on the voluntary enrolment of persons under the age of eighteen years.<sup>142</sup>

Article 4 provides that armed groups should not, under any circumstances, use or recruit persons below the age of eighteen years in hostilities.<sup>143</sup> Furthermore, state parties are required to take all feasible measures to prevent the use and recruitment of children, even if they need to adopt legal measures to prohibit and criminalise such practices.<sup>144</sup> The Protocol

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<sup>134</sup> OHCHR *Legislative History of the Convention on the Rights of the Child* para 12.

<sup>135</sup> *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000) (the *Optional Protocol*).

<sup>136</sup> Preamble of the *Optional Protocol*.

<sup>137</sup> Article 4 of the *Optional Protocol*.

<sup>138</sup> Article 3(1) of the *Optional Protocol*.

<sup>139</sup> Article 1 of the *Optional Protocol*.

<sup>140</sup> Article 2 of the *Optional Protocol*.

<sup>141</sup> Article 3(1) of the *Optional Protocol*.

<sup>142</sup> Article 3(3) of the *Optional Protocol*.

<sup>143</sup> Article 4(1) of the *Optional Protocol*.

<sup>144</sup> Article 4(2) of the *Optional Protocol*.

envisages the difficulty in binding armed groups to treaty obligations. It therefore establishes a prohibition in Article 4, which must be enforced by state parties and thereby ensures that armed groups are held to the obligations established by the Protocol.

The adoption of the *Optional Protocol* can be said to represent the dissatisfaction of the international community concerning Article 38 of the CRC.<sup>145</sup> As an entire Protocol had to be established to address the shortcomings of Article 38, it suggests that an amendment to Article 38 would simply have led to ceaseless negotiations. Too many states are disinclined to be bound by absolute obligations such as those contained in the Protocol.

This Protocol represents the highest standard of protection available to child soldiers, but its provisions are not without compromise and, accordingly, criticism. The threshold of responsibility on state parties has always been contended in respect of the "all feasible measures" standard, yet the *Optional Protocol* does not establish a threshold higher than that established by the CRC.<sup>146</sup> As such, the "all necessary measures" standard remains absent in the Protocol.<sup>147</sup> Furthermore, the Protocol distinguishes between direct and indirect participation in hostilities.<sup>148</sup> It consequently limits the prohibition on children under the age of eighteen years partaking in hostilities to direct participation.<sup>149</sup>

Lastly, despite the Protocol's intention to prevent all children under the age of eighteen years from being involved in military activities, it does not establish an absolute prohibition in this regard.<sup>150</sup> It permits the "voluntary enrolment" of children aged between fifteen and eighteen years, provided that certain requirements are adhered to.<sup>151</sup> It is submitted that Article 1 together with Article 3(3) of the Protocol suggests that the voluntary recruitment of persons aged between fifteen and eighteen years prohibits their direct participation in hostilities but not from indirect participation in hostilities.

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<sup>145</sup> Waschefort *International Law and Child Soldiers* 90.

<sup>146</sup> Article 1 of the *Optional Protocol*.

<sup>147</sup> Article 1 of the *Optional Protocol*.

<sup>148</sup> Article 1 of the *Optional Protocol*.

<sup>149</sup> Article 1 of the *Optional Protocol*.

<sup>150</sup> Article 1 of of the *Optional Protocol*.

<sup>151</sup> Article 3(3) of the *Optional Protocol*.

#### 5.4 *International Labour Organisation Convention on the Worst Forms of Child Labour*

The *ILO Convention on the Worst Forms of Child Labour* identifies forms of child labour which are considered to be the worst.<sup>152</sup> It requires members to take immediate and effective measures to eliminate and establish prohibitions on these forms of child labour.<sup>153</sup> Children are regarded as all persons under the age of eighteen years<sup>154</sup> and in armed conflict, the forced or compulsory recruitment of children is deemed to be one of the worst forms of child labour.<sup>155</sup>

The recognition of children participating in armed conflicts — as one of the worst forms of child labour — is indicative of the attitude of the international community towards child soldiering. The Convention asserts that the participation of children aged between fifteen and eighteen years in military activities is still potentially damaging.<sup>156</sup> The Convention is, however, silent on the issue of voluntary enrolment.<sup>157</sup>

It can be noted from the progressive development of treaty law, that IHL has not seen much of a legal development. Where IHRL was considered inadequate, particularly Article 38 of the CRC, these inadequacies were addressed in the form of developing human rights law, which culminated in other regional or international instruments such as the *African Charter on the Rights and Welfare of the Child* and the *Optional Protocol*.

Seeing as IHL has not realised much legal development, the question which then arises is how these conflicting norms should be applied in armed conflict?

### 6 The principle of the *lex specialis*

The interplay between IHL and IHRL is notorious for the pugnacious discussion which it prompts. It has generally been accepted that although IHL only applies during times of armed conflict, IHRL applies at all times.<sup>158</sup> The question arises as to the role of IHRL during an armed conflict to which IHL applies. The interpretation and application of the *lex specialis* principle becomes crucial at this point. As a point of departure, the ILC has stated that the principle finds application where there is an inconsistency between

<sup>152</sup> *ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (1999) (*ILO Convention 182*).

<sup>153</sup> Article 1 of *ILO Convention 182*.

<sup>154</sup> Article 2 of *ILO Convention 182*.

<sup>155</sup> Article 3(a) of *ILO Convention 182*.

<sup>156</sup> Happold 2008 *University of La Verne Review* 69.

<sup>157</sup> Grossman *Rehabilitation or Revenge* 574.

<sup>158</sup> Ang *Commentary on the UN CRC* 10.

two provisions that emanate from IHL and IHRL, respectively.<sup>159</sup> The principle is only used where diverging outcomes are produced by the two normative systems, at which point the *lex specialis* determines which of the conflicting provisions prevails.<sup>160</sup>

The jurisprudence of the ICJ offers guidance on the interpretation of the *lex specialis*. The ICJ held that in determining whether or not the right to life may be derogated from in armed conflict, the doctrine of the *lex specialis*, that being "the law applicable in an armed conflict" is applicable.<sup>161</sup> The ICRC, which acts as the guardian of IHL, holds the view that when IHL and IHRL are at a crossroads, the *dictum* of the ICJ entails that IHL prevails as the *lex specialis* as IHRL is deemed to be the *lex generalis*.<sup>162</sup>

The following question arises: if during armed conflict, IHRL provides greater protection on a particular matter than IHL, as it does with child soldiering norms, is the *dictum* of the ICJ so concrete to render IHRL, as the *lex generalis*, subservient to IHL? This, notwithstanding its more comprehensive protection. The ICRC's interpretation of the ICJ's *dictum* has come under scrutiny as it is argued that the court had not intended to "recognise the *lex specialis* status of [IHL] as a whole in situations of armed conflict".<sup>163</sup> This is evidenced in a subsequent case by the ICJ in which the court held that the rights afforded by IHRL, apart from instances of derogation, do not cease to exist during armed conflict.<sup>164</sup> Although some rights may be matters of IHL or IHRL exclusively, some rights may be matters of both IHL and IHRL.<sup>165</sup> For a court to determine the issues before it, it must consider both IHRL and IHL (the latter being the *lex specialis*).<sup>166</sup> Gowlland-Debbas and Kalshoven avers that in the *Wall* case, the ICJ implicitly acknowledged the complementarity of these branches of international law.<sup>167</sup> Therefore, any reference made by a court to the *lex specialis*, cannot entail the displacement of IHRL by IHL in armed conflict.<sup>168</sup>

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<sup>159</sup> OHCHR *International Legal Protection of Human Rights* 59.

<sup>160</sup> OHCHR *International Legal Protection of Human Rights* 60.

<sup>161</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports (8 July 1996) (the *Nuclear Weapons* case).

<sup>162</sup> ICRC *International Humanitarian Law* 41.

<sup>163</sup> OHCHR *International Legal Protection of Human Rights* 61.

<sup>164</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Reports (9 July 2004) (the *Wall* case) para 106.

<sup>165</sup> The *Wall* case para 106.

<sup>166</sup> The *Wall* case para 106.

<sup>167</sup> Gowlland-Debbas and Kalshoven 2004 *ASIL Proceedings* 359.

<sup>168</sup> Gowlland-Debbas and Kalshoven 2004 *ASIL Proceedings* 359.

In the *Case Concerning Armed Activities on the Territory of the Congo*,<sup>169</sup> the ICJ reiterated its findings in the *Wall* case in which it had alluded to the complementarity of IHL and IHRL.<sup>170</sup>

As regards the relationship between [IHL] and human rights law, there are thus three possible situations: some rights may be exclusively matters of [IHL]; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

*In casu*, it held that not only was Uganda internationally responsible for violations of IHL,<sup>171</sup> it was also internationally responsible for violations of IHRL<sup>172</sup> committed by members of the Ugandan armed forces.<sup>173</sup> It had been proven in this case that Congolese children had been recruited into the Ugandan armed forces' training camps for military training.<sup>174</sup> Notwithstanding an IAC existing between the Democratic Republic of the Congo and Uganda, the court applied both IHRL and IHL – it subsequently extended protection to all of the victims *in casu*.<sup>175</sup> This allowed for the shortcomings of IHL to be circumvented through the complimentary application of IHRL.

Had it not been for application of the IHRL which finds its origins in the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, the recruitment of some of children in the *DRC* case would not have been prohibited because they were aged between fifteen and eighteen years. If a strict interpretation of the *lex specialis* was followed (whereby IHL applies exclusively in armed conflict), these children would have remained legally unprotected and fallen into a grey area of international law.

Apart from the ICJ, in a case concerning an allegation of "unlawful detainment" and "maltreatment" by the United Kingdom government against foreign detainees, the United Kingdom Court of Appeal (UKCA)<sup>176</sup> also made reference to the *lex specialis*.<sup>177</sup> The court held that any interpretation of the *lex specialis* which would entail IHL displacing IHRL solely on the basis that an armed conflict exists, would be inconsistent with the

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<sup>169</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports (19 December 2005) (the *DRC* case).

<sup>170</sup> The *Wall* case para 106.

<sup>171</sup> Namely, *Geneva Convention IV* and *Protocol I*.

<sup>172</sup> Namely, the CRC and its first *Optional Protocol*.

<sup>173</sup> *DRC* case para 220.

<sup>174</sup> *DRC* case para 220.

<sup>175</sup> *DRC* case para 220.

<sup>176</sup> *Serdar Mohammed v Ministry of Defence* UKSC 2015/0218 of 17 January 2017 (the *Mohammed* case).

<sup>177</sup> *Mohammed* case para 2.

jurisprudence of the ICJ and the views of the UN General Assembly and Human Rights Committee.<sup>178</sup>

A strict interpretation of the *lex specialis* evidently does not automatically entail a suitable outcome for the persons which IHL purports to protect. This article therefore submits that the manner in which the ICJ has treaded through the interpretive vines of the *lex specialis* is laudable. It has, without expressly saying so, developed a functional means by which the principle can be interpreted and applied in light of prioritising and furthering the interests and protection of the victims of armed conflict.

Since the Teheran Conference in 1968,<sup>179</sup> various approaches have been proposed in pursuit of addressing how the *lex specialis* should be interpreted.<sup>180</sup> This article submits, however, that the progressive jurisprudence of the ICJ together with that of the UKCA provide the requisite authoritative platform to ensure that international child soldiering norms are optimally realised. They should not be interpreted nor applied as norms of separate legal regimes. This would be counterproductive as a strict interpretation of the *lex specialis* would serve perhaps an academic but not a functional nor practical purpose. This article therefore considers such an interpretation to be one without regard for the realities on the ground for civilians, children, and victims of armed conflict.

## 7 Conclusion

The proscriptive child soldiering norms (which have developed in terms of IHL and IHRL) are as developed as they possibly can be, considering the political and historical climate under which they emerged. It is not within the foreseeable future that further development of these norms is likely, despite the ongoing use and recruitment of children in armed conflict.

Considering the inconsistencies between IHL and IHRL standards as outlined throughout this article, it is submitted that — as separate legal regimes — each respective branch of international law is less effective without the other. Many of the initial child soldiering provisions adopted in the relevant international instruments were a resultant compromise of opposing views of various states and entities during its drafting stages. This consequently entailed the adoption of weaker provisions than those initially intended. Despite these shortcomings, only IHRL norms were further developed. It therefore became the branch of law to provide the most protection to children under eighteen years partaking in armed conflict. However, IHL made no such progression.

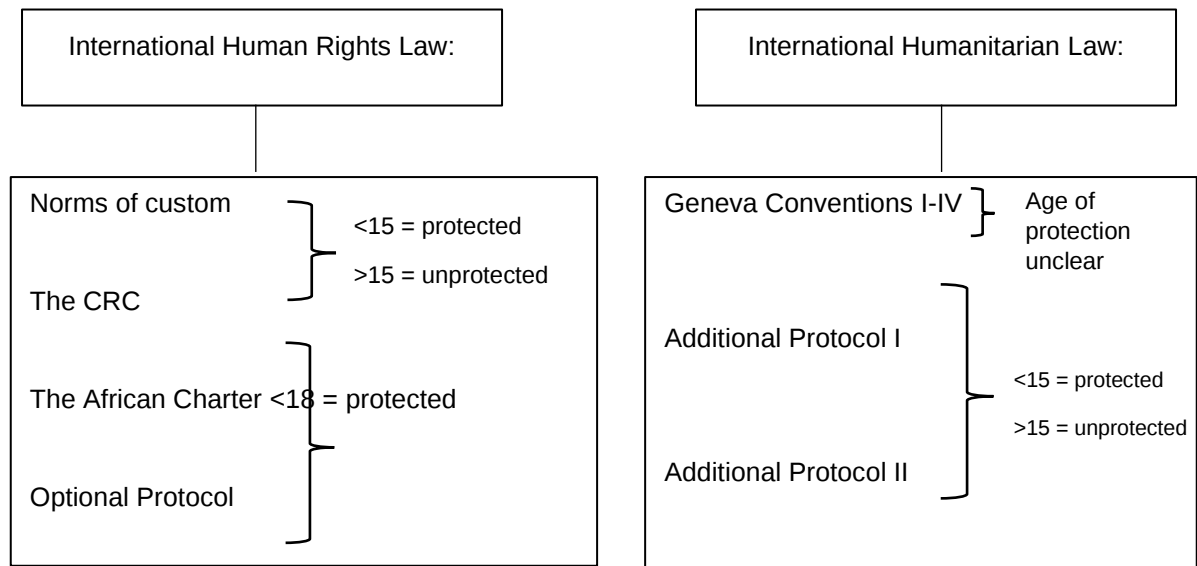
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<sup>178</sup> *Mohammed case* paras 273-294.

<sup>179</sup> Prud'homme 2007 *Israel L Rev* 362.

<sup>180</sup> Prud'homme 2007 *Israel L Rev* 362.

This may be depicted as follows:



Each of the four core elements<sup>181</sup> in the international child soldiering norms contribute collectively to the overarching *lacuna* in international law: children aged between fifteen and eighteen years are legally unprotected as their use, recruitment, and conscription in armed conflict is not prohibited by the *lex specialis* being IHL.

To fill this gap in the law without amendment or development, it may be that the solution lies in shifting the approach to interpreting the *lex specialis* principle. The IHL and IHRL norms should be interpreted and applied in a complementary fashion to materialise all-encompassing protection for all children partaking in armed conflict. In this way, each respective branch of international law can compensate for the weaknesses and *lacunae* in the other, as supported by the most recent jurisprudence of the ICJ on the matter.<sup>182</sup>

This article takes cognisance of the importance of interpretative guidelines and principles and does not purport to disregard it. Rather, it purports to prevent rigid interpretations of international law which display no regard for the on the ground realities of the victims of armed conflict. In doing so, this article changes the way in which international norms are perceived such that their scope of application is not limited to the separate legal regimes under which they have developed.

<sup>181</sup> (1) the definition of a child; (2) the nature of child recruitment or enlistment; (3) the nature of child participation in armed conflict; and (4) the nature of the obligation on states to prevent child soldiering.

<sup>182</sup> *Nuclear Weapons* case; *Wall* case; *DRC* case.

In terms of the approach proposed by this article in relation to the application of the *lex specialis*, children aged between fifteen and eighteen years will be legally protected. Their use, recruitment, and conscription in armed conflict by state armed forces and non-state actors will be prohibited, and they will subsequently not form part of an emerging *genus* of children who fall between the crevices of international law.

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## List of Abbreviations

|                  |                                                                           |
|------------------|---------------------------------------------------------------------------|
| AJICL            | African Journal of International and Comparative Law                      |
| ASIL Proceedings | Proceedings of the Annual Meeting (American Society of International Law) |
| CIL              | customary international law                                               |

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|              |                                                                 |
|--------------|-----------------------------------------------------------------|
| CRC          | Convention on the Rights of the Child                           |
| EJIL         | European Journal of International Law                           |
| EU           | European Union                                                  |
| IACs         | international armed conflicts                                   |
| ICC          | International Criminal Court                                    |
| ICJ          | International Court of Justice                                  |
| ICLQ         | International and Comparative Law Quarterly                     |
| ICRC         | International Committee of the Red Cross                        |
| IHL          | international humanitarian law                                  |
| IHRL         | international human rights law                                  |
| ILC          | International Law Commission                                    |
| ILO          | International Labour Organisation                               |
| Israel L Rev | Israel Law Review                                               |
| NIACs        | non-international armed conflicts                               |
| OHCHR        | United Nations Office of the High Commissioner for Human Rights |
| Perth ILJ    | Perth International Law Journal                                 |
| SCSL         | Special Court for Sierra Leone                                  |
| UKCA         | United Kingdom Court of Appeal                                  |
| UN           | United Nations                                                  |
| UNGA         | United Nations General Assembly                                 |
| UNSC         | United Nations Security Council                                 |