

A Critical Examination of the International Humanitarian Law and Human Rights Law on the Protection of Underaged Children in Armed Conflict

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Introduction

One of the most troubling aspect of warfare generally is the involvement and recruitment of the underaged children in armed conflict, both in times past and in the modern day. This practice amounts to gross violation of the existing international law provisions under the Geneva Convention and Additional Protocols, the Convention on the Right of the Child, The African Charter and other similar enactments safeguarding the involvement of children in armed conflict.

Drawing from the contemporary warfare around the globe, the rate at which underaged children are being recruited into the armed conflict is alarming and, thus, calls for serious concern. Such children often are vulnerable to physical and psychological suffering as a

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result of their involvement and sometimes prosecuted for a crime they have no adequate knowledge of. Underaged children who are often enlisted into the armed forces are vulnerable because they are immature and, lack the mental capacity to express their mind. They are not able to withstand the pressure of intimidation and indoctrination and so easily fall prey in the hands of military group who conscript or recruit them into direct participation in armed conflict. It should be noted that these underaged children does not fully understand the implications of their actions as they are often pushed by their adult commanders into perpetrating atrocities.¹

This study does not intend to cover all the international humanitarian law and human rights law provisions that have bearings on the protection of underaged children in armed conflict. This study tries to conceptualize and define underaged children, analyse the various conventions dealing with the protection of children in armed conflict, and tries to unravel the age of criminal responsibility of a child and concludes that the lack of uniformity in the age of children poses a peculiar challenge to the provisions of international humanitarian law and human rights law.

The Concept and Definition of Underaged children

For a better understanding of this study, it is very important to give a legal definition of underaged children. Article 1 of the Convention on the Right of the Child defined a child as “every human being below the age of eighteen years, unless and under the law applicable to the child, majority is attained earlier.”² In the same vein, Black's Law Dictionary defines a child as “a person under the age of majority.”³ Historically, at Common Law, a person who has not reached the age of 14 years is counted as a child.

The Convention on the Rights of a Child was established for the purpose of ensuring that “children are afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”.⁴ This same convention has been ratified universally, with the exception of the United States and Somalia that have reservation. The Coalition to stop the use of child soldiers considers a child soldiers to be “any person under the age of 18 years who is a member of or attached to government armed forces or armed political group, whether or not an armed conflict exists”. The term 'child soldier' covers any child under the

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1. Coalition to stop the use of child soldiers: Briefing paper, Democratic Republic of the Congo. February, 2010.
 2. Art. 1 of the Convention on the Right of a child, 1990; Garner, B.A. (ed.) *Black's Law Dictionary*. (St. Paul's MN: West Publishing Co. 2009).
 3. Garner, B.A. (ed.) *Black's Law Dictionary*. St. Paul's MN: West Publishing Co. 2009.
 4. Para.5 Preamble to the Convention on the Rights of the Child, 1990

age of fifteen years that actively take part in hostilities.⁵

Furthermore, International organizations apparently sought to eradicate the use of children as soldiers when they adopted the definition of child soldier as follows:

*Any person under the age of eighteen years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and anyone accompanying such groups, other than family members.*⁶

The definition includes girls recruited for sexual purposes and for forced marriages. The definition is not limited to only children who are carrying or have carried arms. Notably, by the standard of the United Nations, 'child soldier' includes anyone conscripted under age eighteen". International law identifies any person under that age who is being involuntarily used by an armed group, whether as a sex slave, cook, porter, spy or messenger to be considered a child soldier.⁷

The age of majority in most countries of the world is eighteen years as is applicable to voting age - the case of Nigeria in particular. The highlights above are an indication that most conscripted underaged children are being abducted from their homes, markets, or on the streets while walking to the farm. These practices are totally absurd and strictly against the rules of International Humanitarian Law (IHL) and the provisions of Human Rights Law on the protection of children in armed conflict. Over the years, governments and non-governmental organizations have advocated for children's rights and protection, recognizing the fact that IHL is a compromise as well as a vehicle for the protection of children during times of armed conflict. That being the case, the argument is, how far would IHL go in protecting the underaged children who either voluntarily or involuntarily involved themselves in the armed struggle. Is the protection offered by these various instruments adequate? To answer this question affirmatively, the various conventions on the protection of underaged children would be analyzed to ascertain the extent and scope of the protection offered to underaged children in armed conflict.

5. Cape Town Principles and Best Practices, adopted at the Symposium on the Prevention of Recruitment of children into Armed Forces and on Demobilization and social disintegration of child soldiers in Africa. Cape Town: South Africa, April 1997.

6. Ibid

7. World CBC News, 'child soldiers on frontlines of Congo Conflict. Nov. 22, 2012. www.cbc.ca/news/world/story/2012. downloaded 14/7/2013.

However, before analyzing the various conventions, it is equally germane to provide a working definition of 'armed', and 'armed conflict'. Armed by definition is simply “involving the use of weapons”⁸ while armed conflict means “a state of open hostility between two nations, or between a nation and an aggressive force. A state of armed conflict may exist without a formal declaration of war by either side. It is a military action taken under Article 42 of the United Nations Charter”.⁹

An Analysis of the various Conventions on the Protection of Children in armed Conflict

- The International Labour Organization (ILO) on the protection of children

From the global point of view, international law has developed rapidly since the emergence of the United Nations (UN) as rules and norms regulating activities carried on across board of the nations, and most of these laws especially the (human rights) laws are incorporated into domestic laws. However, the use of children in armed conflict is the worst form of child labour, a violation of human right and a war crime. The ILO Convention defined “forced or compulsory recruitment of children for use in armed conflict as the worst form of child labour”.¹⁰

The above provision was part of a global campaign against the use of underaged children in armed conflict and to encourage all nations to ratify same. This provision commits each state that ratifies it to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency”.¹¹

- International Humanitarian Law

- Additional Protocols to the four Geneva Conventions of 1949 (1977):** This provision sets 15 years as the minimum age for recruitment of a child for use in armed conflict. This minimum standard is applicable to all parties both government and non-governmental, and to both international and domestic armed conflict.

8. Hornby, A.S. *Oxford Advanced Learner's Dictionary of Current English* 6th ed. (New York: Oxford University Press) 2000.

9. Garner, B.A. (9th ed.) *Black's Law Dictionary* (St. Paul MN: West Publishing Co.) 2009.

10. Article 3(a) Geneva Convention No. 182, International Labour Organization, 1999

11. *Ibid*

- **Article 77(2) of Additional Protocol I:** is applicable to international armed conflicts. This provision employs the parties to 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, that they shall refrain from recruiting them into their armed forces. The above provision is clear enough, any person under the age of fourteen years is excluded from participation in armed conflict. The provision went further to state that in the event that there are the mixture of ages under eighteen and fifteen to be compulsorily recruited, priority should be given to those who have attained the age above fifteen years,

- **Article 4(3)(c) Additional Protocol II:** prohibits under fifteen years to take part or be recruited in the armed forces. It states thus: “Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor be allowed to take part in hostilities.”¹²

- **Article 3 Common to all four Geneva Conventions:** Is specifically for non-international armed conflicts. It states as follows:¹³
 - In the case of armed conflicts not of an international character occurring in the territory of one of the High Contracting parties, each party to the conflict shall be bound to apply as a minimum the following provisions:
 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria...
 - ¶ The following acts are prohibited at any time and in any place whatsoever with respect to the above mentioned persons:
 - a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b. Taking of hostages;
 - c. Outrages upon personal dignity, in particular, humiliating and degrading treatment;

12. Art.4(3)(c) Additional Protocol II

13. Common Article 3 of the 1949 Geneva Conventions

- d. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples
2. The wounded, sick and shipwrecked shall be collected and cared for...

Customary International Humanitarian Law: The rules under this provision specify that children must not be recruited into armed forces or armed groups and that children must not be allowed to take part in hostilities. These rules are not only applicable to international armed conflict but non international armed conflicts as well.

Optional Protocol on the Involvement of Children in armed conflict to the Convention on the Rights of the Child: Provides thus:

Article 38(1) State Parties undertake to respect and to ensure respect for rules of international law applicable to them in armed conflicts which are relevant to the child;

(2) State Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities

(2) State Parties shall refrain from recruiting any person who has not attained the age of 15 years into armed forces. In recruiting among those who have attained the age of 15 years but who have not attained the age of 18 years, States Parties shall endeavour to give priority to those who are oldest.

In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflict, State Parties shall take all feasible measures to ensure protect and care of children who are affected by an conflict.¹⁴

- Article 39 of the Convention on the Rights of the Child (CRC) (1989) provides as follows:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any form of cruel, inhuman or

14. Article 38 Optional Protocol on the Involvement of Children in armed conflict to the Convention on the Rights of the Child.

degrading treatment or punishment, or armed conflict. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

This article obliges State Parties to take appropriate measures to ensure that all the necessities of life are accord the child and those necessities are an enabling factor to reintegrate the child into the society.

- **The Rome Statute:**¹⁵ The Rome Statute of the International Criminal Court makes it a war crime, leading to individual prosecution to conscript or enlist children under the age of fifteen years to participate actively in hostilities.

- **African Charter on the Rights and Welfare of the child:** So far, this Charter is the only regional treaty that has addressed the issue of child soldiers. It was a product of the Organization of African Unity (as it then was, and now African Union), which came into force in 1999. The African Charter defines a child as anyone below 18 years of age without exception. It also states that States Parties to the present Charter shall take **all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.** This provision is somewhat in agreement to Article 77(2) of Additional Protocol; although, did not define the age of a child nor did it prescribe the age for recruitment into hostilities.

Having examined the selected relevant legal instruments, it is clear that the concept of age and recruitment encompasses chiefly two categories of obligations on the Parties. It is an obligation on the States Parties according to Article 77(2) to take all “feasible measures” to ensure that under fifteen years do not take 'direct' part in hostilities... In the same vein, Art. 22(2) of the African Charter categorically emphasized that State Parties shall take all necessary measures to ensure that no child take a 'direct' part in hostilities. Although the latter provision could not define the age of a child, nor did it stipulate the age at which a child may or may not take direct part in hostilities.

No consensus was reached in the above provisions on the age at which children should be recruited under the various instruments, thus, creating a vacuum to be filled or calling for a review or re-examination of the various legal instruments, to ensure that international law and international humanitarian law and human rights law speak the same language.

The Geneva Convention in itself, purports to offer protection to victims that are

15. Articles 8(2)(b)(xxvi); 8(2)(e)(vii); 7(1)(g)) of the Rome Statute of the International Criminal Court.

vulnerable. It should be noted here that only Article 24 singled children out specifically, though it only focused on those who are “orphaned or separated from their families as a result of war”¹⁶

Article 38 on the other hand, is, for now, the only provision of the convention that departed from the general age bracket of 18 years, notwithstanding the fact that it is dealing with the most dangerous challenges that children can easily be exposed to armed conflict. Accordingly, Daniel observed that:

*“with respect to the prohibition to the recruitment and participation, it largely confined itself to repeating Article 77 of Protocol I Additional to the Geneva Conventions, applicable in international armed conflict. In so doing, it not only brought nothing new but could also detract attention from the stronger standard contained in Protocol II additional to the Geneva Convention which provides a more absolute and comprehensive prohibition for non-international armed conflict.”*¹⁷

From the above reasons, it becomes germane that Article 38 become subject to some considerable criticism. First, the scope of the obligation imposed on States is wide and the nature of the obligation is that of conduct rather than seeking for ways of achieving result. Secondly, from the findings above, the provisions of Protocol I is not strong enough to give adequate protection that the children deserve. It gave a weaker provision which is not mandatory on State, but only a duty that States “take all feasible measures to ensure that children should not participate. However, Additional Protocol II, has better answer in the sense that the clauses categorically stated that: “children shall not be allowed to take part in hostilities”¹⁸

Invariably the provisions of Article 39 are wider in scope and are broadly formulated. According to Robinson, the nature and effect of this Article are therefore influenced by various factors, as provisions of the CRC of the international instrument are not enforceable per se.¹⁹

16. Hamilton, C. and Abu, T. “Armed Conflict: the protection of children under International Law. University of Essex. [Www.essex.ac.uk](http://www.essex.ac.uk)

17. Daniel H. Optional Protocol on the Involvement of Children in armed conflict to the Convention on the Rights of the Child 2000 (International Review of the Red Cross) No. 839

18. Ibid.

19. Robinson, J.A. “The Right of Child Victims of Armed Conflict to Reintegration and Recovery. Potchefstroom's Electronic Law Journal SAFILII, 2012.

Furthermore, the provisions of Article 39 imposes stronger obligations on State Parties than on other conventions, in the sense that it embodies the additional obligation of recovery and reintegration, to enable the child to survive and fit into his social status once again. Requiring the child to gain all the social benefits accrued to him, irrespective of his involvement in the armed conflict. Robinson saw the significance of referring to Article 6(3) of the Optional Protocol in this respect, to the effect that the “Article concerns the demobilization and recovery of child soldiers and to some extent serves to illustrate the provisions of Article 39. Against this backdrop, when can a child soldier cease from being members of the armed group? From the above provision which states that all States Parties shall take feasible measures to ensure that person within their jurisdiction recruited or used in hostilities contrary to the Protocol are demobilized or otherwise released from service, when necessary, such States Parties shall accord to such persons all appropriate assistance for their physical and psychological recovery and their social re-integration.²⁰ The above question can only be answered when all the full benefits accrued to the concerned child in armed conflict are accorded them.

The Article 3 which is common to all four Geneva Conventions marks a new step forward in the unceasing development of the idea on which the Red Cross is based and of the humanitarian law resulting from it. It constitutes an extension of Article 2 and embodies all the rules applicable to conflicts not of an international character.²¹

Agbede and Yinka, rightly opined with respect to Common Article 3 that:

This article was a welcome expansion to the horizons of IHL. However, it was on the whole quite inadequate in that it only extended some fundamental humanitarian protections to non-combatants.²²

However the unceasing development in this article, it left a gap which needed to be filled. Since the protection of children in armed conflict gains a topmost priority in most of the international provisions, this article ought to have captured that aspect, but rather it generalized the provisions and did not designate a specific portion to the protection of children.

20. Robinson, *ibid.*

21. Jean, S.P. Commentary: Geneva Convention II for the amelioration of the condition of the wounded, sick, and shipwrecked members of the armed forces at sea.

22. Agbede, I.O. & Yinka, O. Armed Conflicts in Africa: The Role and Importance of International Humanitarian Law Today In: Ajala, A & Sagay, I. *Implementation of IHL in Nig.* (Lagos: ICRC) 1997, 79

Prohibition of Recruitment of Child Soldiers under IHL and HRL

Having examined the relevant provisions of IHL and HRL on the protection of children in armed conflict, and tried to compare the provisions of the above norms on recruitment of child soldiers, the two branches of law almost speak the same language though they are of different branches of law. The provision in Article 38(2) CRC obligates states to “take all feasible measures to ensure that persons who have not attained the age of fifteen do not take a direct part in hostilities”²³ The same article in paragraph 3 requests that states “refrain from recruiting any person who has not attained the age of fifteen into their armed forces”.²⁴ And it also said that in the event they may recruit those at fifteen and eighteen years they should consider first the oldest. In comparing with the provisions of IHL Additional Protocol II, specifically request that “children that have not attained the age of fifteen shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.”²⁵ It is clearly obvious that the CRC did not fight to prohibit the recruitment of child soldiers to the age of eighteen; “instead, it somehow oddly advised states to prioritize to the older, when recruiting children between fifteen and eighteen.”²⁶ It is disappointing that the same convention that purports to have the best interests of the child can equally advise how to recruit children between the ages of fifteen and eighteen, not minding the fact that they can be easily engaged in hostilities; why standing in-between the fence? On the same note, only the African Charter was able to raise the prohibition of child soldiers recruitment to eighteen following its definition of a child as “any human being below the age of eighteen,”²⁷ nevertheless, in Article 22 which concerns armed conflict (comparing IHL) demanding states to “ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

According to Popvoski, “This became the first international legal text that prohibits the recruitment or direct participation in hostilities or internal strife of all children, including those above fifteen.”²⁸

At the 26th International Conference of the Red Cross and Red Crescent in 1995, the age

23. Child Rights Act

24. Ibid.

25. AP II, Art.4(3) 1977

26. Popvoski V. ” Protection of Children in International Humanitarian Law and Human Rights Law” in: Arnold, R. and Quenivet, N. (eds.) International Humanitarian Law and Human Rights Law: Towards a New Merger in international law. (The Netherlands: Martinus Nijhoff) 2008.

27. Article 2 African Charter on the Rights and Welfare of the Child, 1990.

28. PPopvoski, ibid at 399

of eighteen years was placed as a limit for participation in armed forces.²⁹ The Council of Delegates also adopted a movement's plan of action in which they decided to promote the principle of non-recruitment and non-participation in armed conflict of children under the age of eighteen. The 1990 ILO Convention No.182 sees forced or compulsory recruitment of children for use in armed conflict” as one of the “worst forms of child labour” and urges all ILO members to “take immediate and effective measures to secure the prohibition.”³⁰ Among the conventions that were instrumental in raising the minimum age of recruitment into armed forces from fifteen to eighteen which was finally established in 2000 Optional Protocol to the CRC on the involvement of children in armed conflict, were the African Charter on the Rights and Welfare of the Child (ACRWC), the International Convention on the Right of the Child (ICRC) and the ILO. In the words of Popvoski:

*the OP to the CRC generally strengthens the protection of children in armed conflict and can be seen as a pioneer example of adopting a treaty text in HRL that entirely addresses an issue relevant exclusively to the IHL; that this Protocol may be regarded so far as the best example of a potential merger of HRL and IHL with regard to children.*³¹

From the beginning, not all States ratified the Optional Protocol to the CRC as they expressed reservations. This made the enforcement of the Optional Protocol to the CRC “in some circumstances to be weak.”³² Interestingly, the OP to the CRC compares and distinguishes forceful recruitment and voluntary recruitment, obliging States to ensure that members of armed forces who have not reached the age of eighteen do not take a “direct part in hostilities”, and that persons who have not attained the age of eighteen are not “compulsorily recruited”.³³ Article 3 imposes restrictions such as:

Such recruitment is genuinely voluntary; it is carried out with the informed consent of the person's parents or legal guardians; such persons are fully

29. www.icrc.org (last visited 25 July 2013)

30. ILO Convention

31. Popvoski, *ibid*

32. Marsha Hackenberg, Can the Optional Protocol for the Convention of the Rights of the Child Protect the Ugandan Child Soldier, 10 *Ind. Int'l & Com. L. Rev.* 417 (2000)

33. Art 1 and Art. 2 CRC

*informed of the duties involved in such a military service; and that they provide reliable proof of age prior to acceptance into national military service.*³⁴

This provision is an encouragement that if at all States should recruit the under eighteen years into the armed forces, it has to be by permission and it has to be of their own volition. It is also an obligation on States to maintain safeguards to ensure that the above conditions were met.

However, the argument here is how genuine is the voluntariness of the under eighteen years joining the armed forces, knowing fully well that children are vulnerable to some kind of treatment and could easily succumb to pressure. One could not decode their mind-set whether the voluntariness is induced due to poverty or lack of the necessities of life. The various conventions of IHL and HRL need to review this provision and consider the negative impact of direct participation of children in armed conflict.

Concept of Criminal Responsibility of underaged children in armed conflict

The search for the value of humanity has become a necessary corollary to a peaceful and orderly world, and this began with the formation of the United Nations Organization in 1945 after the collapse of the League of Nations. With this, came up other regional groupings for the purpose of uplifting and the recognition of human dignity and value. The focus of these groupings were the adoption of the Universal Declaration on Human Rights in 1948, and that was when human dignity and values began to assume the status of fundamental right. According to Shaba, “the flagrant violation of human value and dignity accounted for the worst moments of crisis the world has ever witnessed in the major part of the 20th Century with women and children being the worst hit in such bizarre moments.”³⁵ However, “perpetrators of flagrant violation of human rights during armed conflicts in the 19th century, especially before 1945”,³⁶ could not be made to answer for their atrocities. This is because of the lack of an international legal order and machinery for bringing culprits to justice. Also, the signing of the United Nations Charter marked the beginning of a conscious and focused effort in pursuit of an international legal order for the prosecution of war

34. Optional Protocol

35. Shaba, S. “The International Criminal Court: An Appraisal of the Law, Practice and Machinery”. Kogi: Kogi State University.

36. The formation of the UN in 1945 marked a turning point in the brazen and blatant abuse of human rights under whatever façade. Ibid.

37. Rebecca, M.M. Wallace, *International Law*, 5th Edn. (London: Sweet & Maxwell. 2005) P230

criminals.³⁷ With this development, the UN has actively been involved in the establishment of ad-hoc and permanent tribunals, hybrid court and other judicial and quasi-judicial bodies to try and punish violators of human rights and humanitarian law.³⁸

Now, International Humanitarian Law (IHL) has gradually developed specific measures of protection of children in time of armed conflict. In parallel, the Human Rights Law (HRL) has built up on the rights of the child, applicable in all time. The landmark 1989 Convention on the Rights of the Child (CRC)³⁹ was negotiated, signed and ratified in a record-time. Regional human rights law regimes have also continuously elaborated a child-rights approach. In advancement, the United Nations principal organs General Assembly, Security Council, and Secretary-General adopted and enforced various measures, among them, the reduction and elimination of recruitment and use of child soldiers. Most recently the recruitment of child soldiers and other crimes against children have gradually been criminalized in international law and prosecuted in international criminal tribunals.⁴⁰

According to Robinson, the legal provision adopted criminalized the recruitment of children and the inclusion of that crime in competence of any specific justice seeking mechanisms established in the context of conflict (e.g war crimes tribunal, truth and reconciliation bodies). The safeguards adopted were designed to ensure that the rights of the child as a victim and as a witness are respected in these mechanisms in light of the convention on the Rights of the child.⁴¹

With this mind set, is it possible for children to be held accountable for their crimes during conflicts, knowing fully well that they were forcefully conscripted and influenced to act in that capacity? There was actually a mix reaction on this issue. According to the coalitions' report, it was acknowledged that underaged children should indeed be held responsible for the crimes they committed during conflicts. But that notwithstanding however, they are to adopt “many effective and appropriate methods, other than detention and prosecution , enabling children to come to terms with their past and the acts they committed.”⁴² Moreover, the report also prescribed that underaged children should not be prosecuted simply for association with an armed group or for having participated in hostilities. There are instances where children are accused of crimes under national or

38. Yerima, T.F. (eds.) *International Law, Human Rights and Development*. (Ado-Ekiti: Petoa Educational Publishers, 2004) p. 41.

39. Article 14 GVIV

40. Popovski, V.” Ibid.

41. Robinson, *ibid*

42. Coalition to stop the use of child soldiers: Briefing paper, Democratic Republic of the Congo. February, 2010.

international law and are prosecuted before a criminal court.

In yet another view, because of the involvement of irregular combatants and the grievous role they play, they are often treated as aberrant from the rules of conflict. “The world community's believe is that their tactics inherently violate the laws of war, and that they deserve severe punishment, not protection.”⁴³ This view was held because of some contemporary wars which have been fought by irregular forces consisting of civilian children, and those children were used in actual combat and, more often, in an 'auxiliary capacities' by both sides of the conflict, and so has taken a new level of participation by children as actual combatants.

Against this backdrop, the International Humanitarian Law meanders between the vague and the hazy when it comes to its stance on the age of criminal responsibility. According to Maher,

*the area of most vociferous debate remains the determination of an age of majority. The ICRC has completely abandoned the struggle to define a uniform age of majority. This results from the previous international disagreements regarding the age question. First by specifying fifteen as the age of minority, traditionally recognized minors under eighteen can be recruited.*⁴⁴

In the same vein, the argument on the determination of age of minority continues to soar higher as there has not been any consensus on the actual age of direct participation, recruitment, and the age at which an underaged child can be criminally liable. Some argue that persons of ages fifteen and sixteen were often better equipped to fight than were their fathers. It was therefore suggested that an age limit of eighteen should be unacceptable to a large number of states. The Vietnamese for instance, accepted the inevitable participation of children under the age of eighteen years, but, however, stressed that parties should treat those combatants under the age of eighteen years with special consideration.

In the same stance, HR Laws provisions, and the Geneva Conventions obliges all member states to act on grave breaches of HRs, but does not stipulate the age of criminal responsibility.

43. Roberts, *The News Rules for Waging War: The case Against Ratification of Additional Protocol I*, *Journal of International Law*, 109, 115 (1985)

44. Coleen C. Maher *The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare*, 9 *Boston College Third World Law Journal*, 297 (1989).

In Robert's opinion, IHL remains “silent” on the age of criminal responsibility for perpetrators of grave HR abuses, such as willful killing, torture and inhuman treatment.⁴⁵

Article 8(2)(b)(xxvi) of the Rome Statute of the International Criminal Court (ICC) frowns at conscripting or enlisting of children under the age of fifteen years into the armed forces or using them to participate actively in hostilities under the definition of war crime and also prescribed for charging those in breach of this provision to be tried by the ICC.

Also, Article 26 of the same statute prevents the ICC from prosecuting anyone under the age of 18 years, but not because it believes children should be exempted from prosecution from international crimes, but “rather that the decision on whether to prosecute should be left to states.”⁴⁶ Invariably, due to possible argument which may erupt between states on the minimum age for international crimes, the ICC simply exclude children from their jurisdiction when it notes that age of criminal responsibility varies from country to country, from 7 16 years, but the bar is most commonly set at 14.

On the other hand, IHL is not clear on the minimum age for criminal responsibility for international crimes. The argument here is that a yardstick has been laid down for some form of indemnity through IHL's recognition that recruitment of child soldiers under 15 years was a war crime. According to the report of the working paper no.3, where a child under the age of 15 is considered too young to fight, then, that child must also be considered too young to be held criminally responsible for serious violations of IHL.

The provision in the Fourth Geneva Convention, which relates to children, Article 50 makes it an obligation for the occupying power to facilitate the proper working of all institutions devoted to the care and education of children, listing in great detail all steps that need to be taken. Furthermore, Art. 51 excludes persons under eighteen from any circumstances that might necessitate them to be enlisted and compel to labour by occupying power. In yet another vein, Article 68 excludes from the death penalty children under eighteen at the time of the offence. It was observed that this has not been the practice in some national courts until very recently.⁴⁷

First of all, there is a wide lacuna created because of the lack of uniform age at which a child soldier who committed a war crime could be held responsible. Secondly, who should be

45. Robert, Y. Analysis: Should child soldiers be prosecuted for their crimes? Johannesburg 6 Oct. 2011

46. Working paper No.3: Children and Justice during and in the Aftermath of Armed Conflict. Sept. 2011

47. It was reported that on March 1, 2005, the ruling by the US Supreme Court in *Roper v. Simmons* declared the imposition of capital punishment for crimes committed by juveniles under 18 years “cruel and unusual punishment,” therefore contradicting the 8th Constitutional amendment. The USA became the last country in the world abolishing the capital punishment for juvenile offenders. See also William Schabas, *The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*, in Arts & Popovski.

held responsible for the criminal liability of underaged children, especially when they were recruited forcefully.

Who should be held Responsible for the crimes of underaged in armed conflict

The general customary rules of international humanitarian law are sets of guiding principles that border on the implementation, applicability, and enforcement of IHL. Rules 149-155 focuses especially on 'responsibility and reparation' and it is applicable in both international and non-international armed conflict. The rules provisions borders on the responsibility of those who violate or breach the provisions of IHL.

Rule 149: A state is responsible for violations of international humanitarian law attributable to it, including:

- a) Violations by its organs including armed forces;
- b) Violations by persons or entities it empowered to exercise elements of government authority
- c) Violations by persons or groups acting in fact on its instruments ...
- d) Violations by private persons which it acknowledges and adopts as its own conduct

Rule 150: A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused

Rule 151: Individuals are criminally responsible for war crimes they commit

Rule 152: Commanders and other superiors are criminally responsible for war crimes committed pursuant to their order.

Rule 153: Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission...

Rule 154: Every combatant has a duty to disobey a manifestly unlawful order

Rule 155: Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered;

State Parties in this regard, is referred to the prosecutor in any situation of violation of the provisions as contained in Article 5 of the Statutes of the International Criminal Court, and

request the 'Prosecutor' to investigate the crime.⁴⁸ However, the only category of persons exempted from criminal liability are those under the age of eighteen years,⁴⁹ a person that is mentally diseased and involuntarily intoxicated and crimes committed in self-defence.⁵⁰

A close examination of the above rules reveals the position of the law regarding those in violation or breach of the IHL. This indicates that whenever an organ of a state (armed forces) breaches the provisions of the IHL, or any of the states entities empowered to exercise government authority, or any person acting on the instructions or direction or control of an agent of the state, automatically becomes responsible for the violations. Notably, individuals are also criminally responsible when they commit any of the war crimes stipulated. From the definition of war crimes given by the Rome Statutes, it includes: “conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities”⁵¹ in international armed conflict; and in the case of an internal armed conflict, “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities”.⁵² It goes further to include sexual slavery as war crime, and a crime against humanity.⁵³ Furthermore, Commanders and other superiors who conscript or do any of the acts that is against the provision of the Rome Statutes are criminally liable. However, the provision failed to recognize as a crime, those multinational corporations who one way or the other, engages in the habit of supplying 'poisonous gas which is being used to commit crime against humanity. This category of persons should be prosecuted as well.

Worthy of note is a very salient point that combatants have a duty to 'disobey' any order that is manifestly unlawful. That explains the insistence of various views that children should be criminally responsible for any breach of war crimes, irrespective of the fact that they may be immature, lack the mental capacity or knowledge of their actions and may be induced or indoctrinated.

Conclusion

The crux of this study has been the critical examination of the IHL and HRL as the backbone norm that deals with the protection of children (both aged and underaged) in

48. Art. 13-14

49. Art. 26 Statute of the ICC

50. Art. 31

51. The Rome Statute of the ICC

52. Ibid

53. Articles 8(2)(b)(xxvi); 8(2)(e)(vii); 7(1)(g) of the Rome Statute of the International Criminal Court.

armed conflict. The findings from the examinations reveal that the IHL and HRL remain absolutely relevant in the enforcement of the protection of underaged children in armed conflict all over the world. Both norms are overlapping and have developed broader children's rights and principles. Although, a consensus has not been reached as to the appropriate fixed age within which a child can be comfortably recruited into the armed forces. This is a serious concern and calls for the international law to regulate or bring to consensus the actual age at which a child can be recruited in the armed conflict, having in mind that children need the protection both in time of war and in time of peace, because they are most vulnerable and suffer a great deal in time of war and in time of peace, therefore, it becomes absolutely necessary to adopt a cumulative application of both IHL and HRL with respect to children.

Finally, the provisions of the Rome Statute should be enforced and the violators prosecuted accordingly.