



The Interaction between International Human Rights Law and International Humanitarian Law:

Seeking the most effective protection for children in armed
conflicts

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Abstract

Since children are particularly vulnerable in armed conflicts, they are conferred legal protection under International law, like in the International Humanitarian Law and International Human Rights Law. Despite of international legislation, the situation of children remains critically worrying with numerous ongoing armed conflicts and instabilities globally. On the one hand, they are assumed special protection, yet on the other hand, they are commonly used as shields or forced into being combatants. The aim of the study is to outline legal areas of ambiguity or inadequacy in the legal framework and see whether they are sufficient in seeking to protect children in armed conflicts. Following relevant conceptual discussions on International Humanitarian Law and International Human Rights Law, the study employs a legal analysis in conjunction with a normative argumentation approach in reference to the works of various scholars. Based on the findings, I conclude that IHL and IHRL are often not adhered to, by state parties in armed conflicts due to a lack of binding power; hence such conventions do not produce the desired result. Since state parties are either in breach of the conventions, or have not yet ratified them, the conventions are not practically effective in protecting children.

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Abbreviations

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts	OPCRC
United Nations Convention on the Rights of the Child (1989)	UNCRC
International Labour Organization	ILO
International Court of Justice	ICJ
International Humanitarian Law	IHL
International Criminal Court	ICC
United Nations	UN
Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.	GCI
United Nations	UN
Geneva Convention III relative to the Treatment of Prisoners of War	GCIII
International Committee of the Red Cross	ICRC
Universal Declaration of Human Rights	UDHR
International Human Rights Law	IHRL
Geneva Convention IV relative to the protection of Civilian Persons in Time of War	GCIV
Prisoners of War	POW
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977	API
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)	APII

Chapter 1: Introduction

"War violates every right of a child –the right to life, the right to be with family and community, the right to health, the right to development of the personality and the right to be nurtured and protected" (UN Doc.A/51/306 art.30).

Only in the last decade of the 20th century, one million children became orphans or have been separated from their parents, 20 million were forced to leave their country and 4 million are permanently disabled as a result of armed conflicts (Aary 2011:112). Patterns of modern warfare have only further complicated and extended the possible areas of victimhood that children may suffer of globally (Dóra SZIJJ 2010).

According to a press release by UNICEF, in the year 2018 the *'world has failed to protect children in conflict* (UNICEF 2018b)'. While 2019 celebrates the 30th anniversary of the landmark Convention on the Rights of the Child and the 70th anniversary of the Geneva Convention, more countries are involved in either internal or international conflict than at any other time in the last three decades (Ibid.). In Syria alone, in the year 2018, 1106 children were killed in the fighting (see UNICEF 2018a), where the leading cause of child casualties can be traced to mine contamination, children forced into being combatants, systemic sexual violence or children being used as human shields (Ibid.) Countries such as; Afghanistan, Cameroon, the Central African Republic, Chad, Congo, Eastern Ukraine, Iraq, Myanmar, North-East Nigeria, Palestine, South Sudan, Somalia and Yemen are amongst the most affected areas where children live in conflict zones and are deprived of basic human rights (UNICEF 2018b). Despite of a range of international legislation, previous research demonstrates that children constitute about half of the civilian victims showing that they very often are not merely bystanders, but actual targets (Machel 1996:5).

With several ongoing wars and instabilities globally, the situation of children remains critically worrying, raising the question whether existing legal frameworks provide effective remedies to the protection of the rights of children in armed conflict. This problematic question is documented in previous academic research, which is demonstrated in this thesis, and while this study draws from this problematique, it does aims to contribute to finding legal loopholes or areas of inadequate protection through examining the effectiveness of existing legal regimes on the protection of children in armed conflicts. This particular objective of this study is further elaborated in the following 'Aim and Purpose' sub-heading.

i) Aim and Purpose

Based on the aforementioned brief information, there is a clear problem that can be outlined in regards to children being victims of armed conflicts despite of a variety of legal frameworks internationally. Currently, some of the most prominent international legislations are the ‘United Nations Convention on the Rights of the Child (UNCRC) adopted as a treaty as part of International Human Rights Law (IHRL) and the International Humanitarian law (IHL) consisting of the Geneva Conventions of 1949 and the Additional Protocols to the Geneva Conventions of 1977. But, without delving too much into the actual frameworks here, rather the aim of the study can be articulated as an intention to examine the protection, provided for children in armed conflicts under IHL and IHRL. The purpose of this is to analyse the degree to which international conventions are sufficient in protecting children in armed conflicts and possibly outline areas of ambiguity or inadequacy.

This aim will be carried out by using legal analysis as a ground due to the presentation of legal conventions; however, it has to be noted that despite of the empirical based, primarily legal design, some of the discussions of the study do combine elements of argumentative discourse (see Halperin and Heath 2012), through engaging with the views and normative argumentations of legal scholars.

In regards to achieving the outlined aim and thus in relevance to the design of the paper, it also has to be noted that while at first glance it may seem logical that a hypothesis could be utilized i.e. predicting or presupposing reasons or pinpointing legal ambiguities or inadequacies to explain why children are deprived of their rights in conflicts, such a hypothesis is not present in this study, as it would require a structurally different approach to tackling the outlined problem.

ii) Research questions

In consideration of the outlined aim, and in the process of comparing IHL and IHRL, four questions are considered:

- Which protections under IHL are provided for children in armed conflicts and are they considered effective i.e. do they produce the desired effect of protecting children, as they are sought to do in the conventions?

- What are the protections provided under the Fourth Geneva Convention and the Additional Protocols and to what extent can these protections be considered effective?

-How does the understanding of collateral damage in International Humanitarian Law create insecurity for children and how does this exemption leave space for war-fighting strategies against the civilians?

-Which provisions of the IHRL are vital in protecting children in armed conflicts and to what extent can these protections be considered effective?

Evidently, four research questions have been raised, which is explained by the legal character of the research and the outlined aim. While the notion of ‘effective’ may seem ambiguous in the formulation of the question, it refers to the convention achieving its desired outcome i.e. in this context protecting children in armed conflict. Relevant notions of limitations and delimitations are further discussed in the later sub-section (see vii).

iii) Methodology

In this subsection, the particular procedure for accomplishing the aim and eventually coming to the conclusion, i.e. a systematic approach to outline possible areas of legal ambiguity or inadequacy in protecting children is discussed.

As previously mentioned, this qualitative study employs a legal method, namely; Bert Lehrberg’s legal work procedure, which is comprised of six main steps from the point of identifying a legal problem to developing and supporting an argument:

- 1, identifying and structuring a legal problem
- 2, finding the right legal rule
- 3, reading and interpreting legal sources
- 4, identifying the necessary prerequisite in a legal rule
- 5, specifying the meaning of the necessary prerequisite with the support of legal sources
- 6, taking an independent stand with the support of appropriate interpretations

For the operationalization of this research, the first step, which is identifying a legal problem, should be understood as the violation of a right itself i.e. children being deprived of their rights, which is previously have been presented, but is demonstrated in more detail under the sub-section 'previous research'. Since the outlined legal frameworks of IHL and IHRL and given and the research questions are articulated, the necessary prerequisite of the legal rule should be simply understood in regards to children being the subject of analysis meaning that the individuals in relevance to the legal analysis fall within the legal definition of who a child is.

In relation to point five, a unique character of the research lies in the fact, that apart from the legal character of the analysis, the arguments of legal scholars are also utilized to build an argument, which in nature can be considered a normative approach. That is an evident combination of what otherwise could constitute two different methodological approaches, but hence the purpose of the study aims to go beyond a mere legal analysis and aid the knowledge production in practical terms, this normative dimension has been added. Thus the research is comprised of the legal analysis in which the presentation and elaboration of legal conventions, in combination with the works of legal scholars and their points of views, are carried out. These views can mainly be found under the sub-section entitled 'discussion' in chapters three and four. Many authors' points of views are thoroughly outlined and mentioned in the thesis in relation to how and why the conventions may or may not been able to protect children in times of armed conflicts. (Please see the sources within the bibliography.) The articles within the conventions on the protection children (IHL and IHRL) are presented and their efficacy analysed. What is meant by 'effectiveness' is - the degree to which something is successful in producing a desired result i.e. successfully protecting the rights of children.

The methodological choice of material to answer the research question is primary and secondary sources mentioned below in the subheading 'Material'. The problematique of children suffering in war is not a new phenomenon and there have historically been legal frameworks in the aim of protecting the rights of children. The desired effect of such conventions and treaties in practise is at best questionable due to continuous reports and for that reason does the research take an unorthodox analytical approach in which both legal method and normative argumentation are combined.

iv) Material

To answer the research questions, both primary and secondary sources are scrutinised. Primary sources are legal conventions and treaties whereas; secondary sources consist of a variety of research studies by legal scholars. Legal sources and their effectiveness, i.e. do they reach the desired result in protecting children in times of armed conflicts will be analysed based on legal analysis as well as the viewpoints of legal scholars opinions. Albeit, legal sources have been enforced and ratified by most states, their efficiency will be assessed by the help of different legal scholars opinions on why they are, or aren't effective. According to the International Court of Justice (ICJ) the following are considered as legal sources (ICJ art. 38):

- a. international conventions, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In relation to the secondary sources many scholars opinions have been utilised for this paper. It has to be noted; however that some of the sources for the arguments of the scholars may be questionable. However, they are a foundation for the purpose of structuring an argument. These are certainly not facts but theories to further the arguments posed in this essay. As long as the theories these scholars present seem logical, they are useful in building an argument, which is in line with the notion of argumentative discourse, which is a philosophical method of logic, reasoning, and argumentation (Halperin and Heath 2012; see Vaughn 2006)

Based on the above, the relevant conventions that purport to protect children in times of armed conflicts and confer them special rights are the following;

For the first part of the research, the most relevant IHRL agreements are;

- Universal Declaration of Human Rights (UDHR)
- International Covenant on Civil and Political Rights (ICCPR)

- International Covenant on Economic Social and Cultural Rights (ICESCR)
- United Nations Convention on Rights of a Child (UNCRC)

The most relevant IHL legislation is;

- The Fourth Geneva Convention which is relative to the Protection of Civilian Persons in Time of War (GCIV),
- The Third Geneva Convention relative to the Treatment of Prisoners of War (GCIII),
- The additional protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (API),
- The Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (APII)
- The Hague Conventions of 1899 and 1907.

Given that the chosen method is legal method, the source of material comes from legal documents that support that method, mentioned above. Since this study deals with legal problems it will focus on international agreements, treaties and conventions. The thesis will focus on legal sources that fall into the above mentioned categories, and examine what kind of protection is provided for children in armed conflicts under international law. The interpretation and understanding of such international documents is vital.

Per article 31 of the Vienna Convention on the Law of Treaties (VCLT) legal papers and international documents “*shall be interpreted in good faith*”. Taking that into consideration the thesis will study the material in accordance with the good faith obligation. Several bodies confirmed that the presentation of IHRL is necessary in wartimes; therefore, it is a matter of contention which law has precedence in times of conflict. To determine which law should enjoy priority, the doctrine of *lex specialis* needs to be mentioned. Per this principle, in situations where two different laws are applicable to a certain conflict, the law that governs the specific subject closely should have priority as it has the *lex specialis* status and it overrides the *lex generalis* law, which has the status of general law. After determining the status of the different laws, *lex generalis* still applies and should be considered as an addition to the *lex specialis*. It is crucial that the two are harmonized and used together as much as possible (Zorzetto 2012:61). For the study of children’s protection in armed conflicts it is assumed that IHL has priority however this does not mean that IHRL should be excluded. Since IHRL states fundamental rights and freedoms that hold core importance it should be applied as an addition to gain a better understanding of IHL (UN Doc: CCPR/C/21/Rev.1/Add. 13 art. 11).

The choice of material is explained by the assertion that the legal protection that the conventions on basic human rights provide in times of armed conflicts is a central legal framework within the studies of human rights. It is prior knowledge that children are conferred special protection due their vulnerability. Therefore, human rights are closely linked to the legality of measures that can be taken in times of armed conflicts. They are indeed, complementary. (International Review of the Red Cross no 296 1993:242) For example, Humanitarian law contains human rights concepts, such as Protocol II Articles 4(2) and Protocol I, Article 75 and Common Article 3 of the Geneva Conventions. An individual does not cease to have basic rights once an armed conflict begins. Two

chapters within the study are solely based on the above conventions. Many articles within the conventions are analysed based on scholars' points of views on why these are ineffective, which constitute the analysis per se.

v) Limitations and Delimitations

Clearly a number of limitations exist, which need to be clarified at this stage to eliminate confusion for the reader. In relation to the secondary sources, many scholars' opinions have been utilised for this paper. The opinions of those researchers; however, that have been used for this study may coincide with some of the pre-existing assumptions of mine. On this note I tried, throughout the writing of the paper, keep in mind Marx Weber's 'value neutral' criteria, which argues that it is the duty of researchers to identify and account for their own values, in order to avoid bias (Halperin & Heath 2012: 55-56). On this note, it has to be mentioned that I firmly believe in the importance of the rights of children and that is also the reason why I decided to write about this topic.

Following, that line of thought, it has to be pointed out that before the writing of the paper I did presuppose the possibility of a legal loophole or ambiguity in the international legal framework, which may explain the impact of armed conflict on children, but that being said, a hypothesis was not developed for this research. The reason for this is that I found the current approach more suitable and less demanding in light of my personal expertise in this area of legal field.

Regarding an interesting limitation, it has to be mentioned that no universal agreement on who falls under the definition of a child exists as the age limit differs from state to state. Also, there is a difference in terminology and in what conditions the term "child" needs to be defined. It could be legal voting age; it could be consuming alcoholic beverages, military age, or when one

can be held responsible for committing a crime. The general age regarding the end of childhood is age 18. Pursuant to the Convention on the Rights of the Child (CRC) anyone below the age of 18 is considered a child (CRC art. 1). As per the International Child Soldiers Association *“The internationally agreed definition for a child associated with an armed force or armed group (child soldier) is any person below 18 years of age”* (Child-soldiers.org, 2015). The Optional Protocol to CRC (2002) states that the minimum age for taking part in hostilities is 18, and anyone under that age should not participate. Furthermore, the protocol forbids any government force to recruit soldiers for compulsory military service. Considering these universal papers in this thesis the term child refers to anyone under the age of 18 (OPCRC 2002).

The difference between international conflicts and civil conflicts is that international conflicts affect the whole international community, while taking care of a civil war is the duty of the nation. All nation states claim their sovereignty since it is crucial for a state to govern the country per their own will and determination. However, an issue under constant scrutiny is the threshold that must be passed for the protection of the civilians vis-a-vis upholding a states right to sovereignty in respect of their own sovereign rights and determination (Ratner 2011). This thesis does not differentiate between international and civil armed conflicts, and will not go into details of sovereignty as the focus is on children’s protection in armed conflicts and not on the importance of a nation state’s sovereignty. Since more than two nation states may be involved, diplomatic ties of various countries may be at stake and hence, numerous countries may get involved (Chelimo 2011:2).

The paper is limited to analysing a certain number of international documents that are of the greatest relevance to answering the question of this research. The very length of the paper also necessitates the limitation of the documents. The decision on the choice of instruments utilized in the paper was based on several factors. The analytical focus of the research is on children's protection in armed conflicts; therefore, it is inevitable to include the most important documents that focus on civilian protection in war times. Also, since IHRL documents are rudiments of international law concerned with fundamental human rights, they are of great relevance too for this paper.

When it comes to children’s rights; their protection, well-being and development, one of the main rights bestowed is the right to education. A child’s right to education has key importance not just for the young person but also for the country. By educating children, they learn values, practises that are necessary to aid them to become a responsible citizen. By building their

knowledge they will understand their duties and claims as a vital part of the community and they will have a higher chance of employment, hence paying taxes and hence strengthening the country (Howe and Covell 2005:5-6). Even in time of peace some states struggle to provide right to education, and when a conflict breaks out, it becomes even more difficult to use utilise the right to education. Further in this essay I will mention the relationship between the difficult situation of children in conflict and the deprivation of their right to education. Do note that this this paper will not go into deep investigation of children's right to education in armed conflicts.

It is important to define "War" and the conventions that regulate it, where children's lives are at stake. Pursuant to the Geneva Convention "*all cases of declared war or of any armed conflict that may arise between two or more high contracting parties, even if the state of war is not recognized, the convention shall also apply to all cases of partial or total occupation of the territory of a high contracting party even if the said occupation meets with no armed resistance*" (GCI. Art.2). The conflict is not between the states in their entirety but their armed forces. To clarify, where the forces consist of regular combatants, the non-combatants fall under the protection of the Geneva convention. Per The Hague Conventions of 1899 and 1907, article 3 of both conventions states that '*The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.*' Article 4 of the same convention goes on to state that '*Prisoners of war [...] must be humanely treated*'. Whether the previous obligation has been adhered to in conflicts is debateable. However, it gives us an indication that prisoners of war shall not be stripped off of their basic rights, if held captive by the enemy.

Lastly, one notion that is particularly noteworthy, is that the term 'protection' is loosely defined in the conventions. It so seems, that, 'protection' is a compromise between humanitarian ideals and military necessity. So long as military necessity is achieved, children's lives may be put at risk if the attack is proportional. The protections provided are minimum rights and are derogable where military necessity can be achieved.

vi) Relevance of the study to Human Rights

Human rights are closely linked to the legality of measures that can be taken in times of armed conflicts. They are indeed, complementary (International Review of the Red Cross no 296 1993:242). For example, Humanitarian law contains human rights concepts, such as Protocol II Articles 4(2) and Protocol I, Article 75 and Common Article 3 of the Geneva

Conventions. As a human rights instrument, some may contend that the Convention on the Rights of the Child, has no place in times of armed conflict. Nevertheless, an individual does not cease to have basic rights once an armed conflict begins. As a general rule legal international documents, state that civilians or non-combatants shall be cleared from any attack. Both International Human Rights Law (IHRL) and International Humanitarian Law (IHL) provide protection for civilians, including children in case of an armed conflict, but still nearly half of the civilian victims are children (UNICEF 2015). In the 21st century just under 10 years nearly two million children have been killed in wars and even more have been injured and disabled for a lifetime (UN Doc: A/51/306). IHL rules have been violated, hence it is important to study how effective the instrument is. Various examples of wars and conflicts will be presented and legal framework applied to demonstrate the complexity of the issue at hand. The paper argues that the increasing attacks on the children population is due to dual reasons; legal weakness in terms of binding power of conventions, and the very core of the realist arguments which state that state parties will pursue their self-interest, regardless of the consequences of casualties by disregarding those very conventions. Thus, the study aims to examine the unfair and difficult situation of children in armed conflicts by reviewing the existing international regime on the protection of children. As Graça Machel stated "*It is unconscionable that we so clearly and consistently see children's rights attacked and that we fail to defend them.*" The Machel report provides an opening for people in general and for our governments to push for a change in the practice, law and attitude regarding children's rights.

vii) Previous research

Generally, when researchers study "new wars" they examine the issue from mainly two different angles. One of them is the change that comes with new technology and globalization, while the other angle looks at the negative shift in how the fighting sides act in war. These two aspects are to some extent interrelated, but they do not necessarily go hand in hand.

Considering the first angle, it has to be pointed out that the traditional ways of war in history have been very different than what we call war today (Kaldor 1999:6). New conflicts can be contrasted to old wars in many ways, for instance how they were financed, what their goals or aims were, but most importantly the methods of warfare. What one may call traditional wars, largely involved horses, swords and human based physical forces where combatants were also distinguishable from one another. Nowadays, due to the new characteristics of modern warfare, the tools used are much more effective and potentially lethal. Developments in military

technology explain the existence of these new tools and methods employed during wartime, however there are also inherently new dangers and more likelihood for mass destruction. (Kaldor 1999:7). Warfare has developed to the extent where pushing one button in a given room can kill hundreds, thousands or even more people on the other side of the world. Warfare is no longer fought by merely human power, but by armed drones and chemical weapons that possess inhumanely large collateral damages. This new face of modern warfare of course creates many problems and raises a number of questions such as; is it possible to calculate the human costs of such decisions? Can the authorities with the use of such tools and forces control the outcome of the inflicted damage by preventing civilian casualties? Is it possible to see a clear distribution of civilians and combatants?

A large number of studies dealing with the new trends of wars mainly analyse how the the civilian victims are effected. According to Roberts, there are some wars where 89-90% of the victims are civilians (Roberts 2010:115). Ioannis Vralis when talking on the behalf of the European Union stated: *“we have been witnessing a series of troubling developments linked to conflict leading to mass displacements, humanitarian catastrophes and serious violations of international humanitarian and human rights law”* (Vrailas 2015). A report that looks at the number of deaths that occurred between March 2011 and August 2014 in Syria reports that a large number of children were killed during the Syrian conflict. The report notes down that it is very difficult to gain information about the exact age of the victims, as very often they are not identified. The study claims that the age is unknown 83% of all records, but even this way the number of children victims is quite high. Just under the three and half years that the study analysed there were nearly 9000 persons under the age of 18 who died in the Syrian war. Considering that this number comes from the 17%, if the researchers were able to identify all the deaths this number would be significantly higher, if we estimate an average five times higher. This means that in reality it is high number of children that die, but it is very difficult to identify the exact age (Price 2014:1-2). Another data from Africa suggest that just in 2014 there was a 30% increase in the number of civilian victims (The guardian 2015). Roberts claims that oftentimes governments distort figures to give a better picture of the situation, and it is difficult to get hold of real data (Roberts 2010: 118). This means that the information that is provided to the public may be exaggerated or false and the actual situation might be worse than what is presented. The use of new weapons is not the only reason why there is a significant increase in the number of civilian victims. It is suggested that authorities choose to deliberately target civilians for strategic reasons, since there are certain things they can benefit from. When

the battle takes place on a contested territory if done on a large scale killing civilians will give the attacking party a higher possibility for claiming the territory. The second argument suggests that attacking civilians reduces the enemy's capability to retrieve behind frontlines and uphold low intensity warfare and it also deters civilians or other supporting groups to provide any form of assistance. This means that by launching an attack on non-combatants, the attacking party minimizes the possibility for the enemy to hide within the civilians as it will discourage the citizens to actively support them (Horowitz 2013).

An increasing number of children have become, both directly and indirectly, victims of armed conflicts. Historically, a pressing need existed for the implementation of international legal conventions for the protection of children. Till date the most prominent international legislation is the 'United Nations Convention on the Rights of the Child' which came into effect on 2 September 1990. International Humanitarian law (hereinafter IHL) consisting of the Geneva Conventions of 1949 and the Additional Protocols to the Geneva Conventions of 1977, and nor human rights law has successfully reduced the suffering and involvement of children in armed conflict. IHL's aim is to grant children special protection (ICRC Legal Fact Sheet 2003). When an armed conflict occurs, avoiding the violations of interstate and international legal obligations, and avoiding civilian casualties is justified from a moral stance. As a result, these obligations are now entrenched within numerous International legal instruments. Yet, these legal instruments efficacy is under scrutiny and some scholars constantly criticise them for being blatantly ineffective (See Roberts 2010, Machel 1996). To enforce the previous claim, in present day, children constitute about half of the civilian victims in armed conflicts, which makes one doubt IHL's efficacy. From 1986 to 1996, "*an estimated two million children have been killed in armed conflicts*" (Machel 1996:5) and 6 million have been permanently disabled or seriously injured. (Ibid.) In many conflicts, millions of children are "*not merely bystanders, but targets.*" (Ibid.)

In relation to actual children rights, The Child Rights International Network, together with UNICEF, Red-cross and many more (please see the bibliography for full list) have published a vast array of reports covering issues on the protection of children in armed conflicts where it's made clear that children are still being employed as decoys and their death toll is on the rise. Despite the fact that the conventions purport to protect children and articles such as, the ones mentioned right below exist, children casualties are increasing.

Relevant articles of the Convention of the Rights of the Child (CRC) dealing with armed conflict are:

(article 38): States Parties shall take all feasible measures to ensure that children under 15 years of age have no direct part in hostilities. No child below 15 shall be recruited into the armed forces. States shall also ensure the protection and care of children who are affected by armed conflict as described in relevant international law.

A major part of the study is inspired by the work of Professor and Jurist, Jaap Doek and his research entitled 'The international legal framework for the protection of children in armed conflict' (Doek:2009). In Dr Doek's research an array of international conventions and their efficacy are analysed where Dr Doek states that the most important and relevant international legal framework for the protection of children in armed conflict should mainly focus on the following documents and conventions (Doek: 2009:1):

- Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), adopted in 1949
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), adopted in 1977
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), adopted in 1977
- Convention on the Rights of the Child (CRC), adopted in 1989
- Rome Statute of the International Criminal Court (Rome Statute), adopted in 1998
- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention 182), adopted in 1999
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC), adopted in 2000
- Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles), adopted in 2007

In Dr Doek's report and concluding remarks, it is highlighted that '*Despite many international human rights and humanitarian provisions for the protection of children in armed conflict, the sobering and often shocking reality is that these children are still too often the victim of grave violations of their rights. [...] The shocking reality is that atrocities committed against children during armed conflict go far beyond our imagination.*' (Doek: 2009:8) Thus, the current study will build on the work of Dr Doek and other reports to create a more comprehensive and in-depth work. The concluding remarks of both studies is that the conventions on the protection of children is still ineffective.

viii) Chapter outline

The study is divided into six different chapters in which, each chapter serves a specific purpose to meet the desired aim of the study i.e. answering the research questions. For the sake of clarification, it has to be noted that while the first chapter is devoted mostly for building of the research design that sets the operationalization of the study in motion, both chapter three, four and five are part of the analytical discussions. Prior to that, chapter two provides legal background information in relation to core concepts and principles.

Chapter 2- International customary law will be examined and the general principles and rules will be outlined. To set the picture, the proportionality rule, jurisdictional issues, and the use of children as human shields will be presented. These notions are of great importance as they are the backbone to the implementation of the conventions that regulate the legal protections for the benefit of children in armed conflicts.

Chapter 3- IHRL provides for a wide range of protection for the civilian population, in writing. Yet, the effectiveness of the 'protection' is possibly contentious as will be presented by relevant scholarly work. IHRL applies in both peacetime and conflict (However, derogation of certain rights is allowed during times of war), IHRL regulates the relationship between the government and the citizens and aims to give a guidance of how authorities should form their national law to ensure safety and well-being. IHRL provides protection for every citizen without discrimination.

For the first part of the research, the most relevant IHRL agreements are;

- Universal Declaration of Human Rights (UDHR)
- United Nations Convention on Rights of a Child (UNCRC)

Why the law fails to protect children will be discussed, in relation to some scholars' views.

Chapter 4- IHL applies only in times of conflict. IHL was created to protect civilians in war, and those that are no longer taking part in hostilities. IHL aims to make conflict times as human and as tolerable as possible, and tries to ensure that minimum harm is caused to the civilians as possible (ICRC 2004). The most important legislation of IHL is the Geneva convention and the Law of The Hague. The Law of Geneva protects ‘victims of war’ who find themselves in the hands of a party to the conflict: i.e. people who are non-combatants and rendered outside the conflict. Conversely, The Law of the Hague regulates the methods and means of warfare. Parts of the Additional Protocols are developments relating to means and methods of warfare, they are also part of Hague Law.

The most relevant IHL legislation is;

- The Fourth Geneva Convention which is relative to the Protection of Civilian Persons in Time of War (GCIV),
- The Third Geneva Convention relative to the Treatment of Prisoners of War (GCIII),
- The additional protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (API),
- The Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (APII)
- The Hague Conventions of 1899 and 1907.

Why the law fails to protect children will be thoroughly mentioned, based on scholars’ views in the discussion part.

Chapter 5- A comparison of IHL and IHRL will be presented and their effectiveness analysed based on the principles within the conventions and based on scholars opinions. Recommendations will be presented based on scholarly opinion on how to improve and effectively better the protection provided for children in armed conflicts. Meaning, recommendations of what can be done i.e. how the conventions enforceability in practice can be strengthened in relation to scholarly studies. Concluding remark is that state parties should adhere to the law, yet the problem remains that many countries have not ratified the conventions and treaties.

Chapter 6 – Concluding remarks including summary and a reflection of the findings in relation to the posed research questions.

Chapter 2: Overview of the Principles of IHL and IHRL

The most fundamental challenge for any international legal system which wishes to mitigate the suffering of children in war is to ensure their very survival. UNICEF in its report, *The State of the World's Children 1996*, estimates that there have been 2 million child deaths in the last decade.

The Right to Life and the Right to Survival

Article 6, United Nations Convention on the Rights of the Child

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

The reason for the rise in the numbers of fatalities post WWII is due to various reasons. Firstly, there is an increasing tendency for perpetrators to abandon provisions of IHL. Secondly, in recent decades most armed conflicts have been civil wars. Recent conflicts have been marked by complex affairs, fought in the streets of populated villages and cities where the distinction between combatants, children and other civilians is ignored. The failure to distinguish between combatant and non-combatant has led to higher child casualties. Thirdly, 'ethnic cleansing' marked the 1990's, for example in Bosnia and Rwanda where children were directly targeted as the future generations of the enemy.

Hence, survival itself is the major problem for children in armed conflicts. Many child deaths are directly attributable to hostilities, yet even more children are indirect victims of disease, malnutrition or starvation. The supply of food is disrupted due to war. One 1980 study in a war zone in Uganda, attributed only 2% of deaths to violence whereas 20% were caused by disease and 78% by hunger. (Machel 1996:20) Many children die since humanitarian relief does not arrive to the intended destination or because governments armed groups make the growing of food impossible by the placing of landmines (as in Chechnya and Angola) or by a scorched earth policy (as in Tigray). Such a policy would be contrary to *Article 54* Protocol I (except where it's a Parties own territory and is a defence against invasion) and *Article 14* of APII.

The aim of this study is to examine international legal obligation in regards to protection of child in armed conflicts and assess their effectiveness. By effectiveness we mean, the degree to which international conventions are successful in protecting children in armed conflicts. The study aims to have a critical look at the existing legal conventions that relate to international conflicts and wars, especially where civilians and non-combatants are at stake. Furthermore, what is examined is the relevance and adequacy of existing legal standards in relation to children. I recognise that humanitarian law has a limited scope and is not intended to be a human rights instrument. Instead I seek to ascertain whether there is room for legal amendments to existing humanitarian law and children's rights instruments.

i) Proportionality rule

Most importantly, the proportionality rule is the backbone of all human rights conventions today. The rule itself gives an indication that the attacking states shall try to avoid the deliberate attacks on civilians. Under article 51(4) of the API, the definition of proportionality also known as prohibition of indiscriminate attacks, is one "*which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated* [emphasis added]."

While civilians (including children) gain protection under API, all protection is still within the framework of considerations of military necessity. API recognizes, as Louise Doswald-Beck rightfully points out:

'Those which expect to find civilians virtually immune from hostilities ... will therefore be disappointed. ... [the Protocols are an attempt] to limit the use of military capabilities whilst preserving a combatant's ability to win within these rules which is essential for the Protocols' survival' (Louise Doswald-Beck 1989)

Even when a hostile attack takes place the possible harm to the civilian population shall be relatively less than the harm created within the lawful target. Hence, the aim of the attack, shall not exceed the effect, in other words the loss of the lives of children. This puts a great deal of difficulties in defining the terminology 'proportionality' which requires one to measure, and further weigh and balance whether an attack towards civilians, where children may be present, is lawful under the above conventions. This leaves room for the interpretation of 'proportionality', rather fluid and further establishes grey areas or in other words, room for attackers to justify acts or killings of children as lawful under API.

It also suggests that excessive injury should not be caused to the civilian population however, it does not define what excessive is. What is the proportion or what is the ratio that is considered excessive?

With regards to children there is no separate protection provided for them and since they are vulnerable it would be vital to refer to them. Another problem arises with the proportionality analysis, which establishes whether the cost of an attack is in a good ratio with the aim of the attack. State parties shall make sure that the attack they are about to launch will not take too many civilian lives. How many children can be killed for it to become for the proportionality

rule to be breached? For example, when combatants hide or mingle munitions around areas where children are present, the attacker will intentionally or unintentionally hurt or kill the children. Let's assume that it is unintentional killing of the children, then how incidental is the loss of life? If the attacker knows about the presence of children is it ever incidental?

Overall the proportionality rule puts a large emphasis on the "intend" rather than the actual injuries caused. The rule itself is focusing on the idea of intention which is impossible to prove.

For example, during the Gulf War, the US launched an attack, towards Al Amiriyah, per them, an intelligence centre. The supposed Iraqi intelligence centre turned out to be a bunker, a shelter, home to thousands of children. As the Coalition forces had no knowledge that civilians would be there, and supposedly no intention to attack them either, they had no legal obligation to modify their plan of attack, which was legal even under Protocol I, had it applied, because the bunker was a legitimate military target. (War memorial 2013)

ii) The use of children as human shields

Since children are very often used as human shields due to their exclusive protection under IHL this part will analyse what laws and regulations there are to avoid such act, and which side of the conflict is responsible for providing them.

The term human shield refers to the military action of deliberately placing non-combatants around the area of a combat targets and using protected persons this way to avoid the adversary's attack (Newton 2013). Children might be deliberately placed near these areas, munitions and weapons can be hidden near places where children are present for example schools or a person taking active part in the war can try to blend in and mix with children. The international community distinguishes between two different types of human shields namely voluntary and involuntary. As their names suggest voluntary human shields are those civilians that by their own will decide to aid with combatants by using their status as a civilian. Involuntary human shields are those that do not have control over the situation. They might or might not be aware of their status as human shield but even if they are aware very often they are too scared to act, or to change the situation (Wischik 2004). As these two are different the question with regards to children is; to which category do they belong? Are children voluntary or involuntary human shields?

There are two main scenarios that children face when they are being used as human shields, one is when they are accompanied by adults, and the other when they are not. According to

resolution 14 of the International Review of the Red Cross and Red Crescent Movement in its Budapest session “*persons under the age of eighteen years may not be sufficiently mature to understand the consequences of their actions and to comply with international humanitarian law*”. Thus, children are considered as involuntary human shields (Sandoz ICRC 1992 resolution 14). The act of using human shields is unlawful under international humanitarian law as it puts the civilian population under high risks. GCIV article 28 states that the presence of protected persons shall not be used to reduce the risk of military attacks. API article 12(4) states that medical units shall not be used as a shield to avoid an armed attack.

Additionally, ICCPR article 8(2)(b)(xxiii) prohibits the utilization of the presence of protected persons to render certain areas from military operations. The commentary of API article 51, paragraph 1990 states that it is particularly important that if the attackers are aware of the adversary’s use of human shields they inform the civilian population, as the non-combatants themselves are rarely able to access the danger they are facing. Besides, the article recommends that the attacking states shall take measures to provide what is stated under article 57 (Com API article 51).

GCIV article 147 states that the wilful killing of hostages is considered a grave breach of the convention. Very often the use of involuntary human shields is associated with taking hostages. Therefore, if we recognize the use of human shields as taking a hostage then killing protected persons while they are being used as a human shield is considered a grave breach (GCIV article 147). Thus, under this article children enjoy a larger range of protection. It is not clearly stated in the convention to which side this applies to. Does it constitute wilful killing if the attacking side causes the death, or is it the party that is taking the hostages (as using human shields) that need to cause the death to define it as wilful killing? As there is no exact definition this article leaves space for misinterpretation and deliberate advantage.

In cases when a party to the conflict, intentionally takes advantage of IHL, namely using involuntary human shields, the treatment of the defender party¹ is different and the obligations of the attacker party² are also different. Michael N. Schmitt suggests that there are different categories of the obligation of the attackers mainly concerning the rule of proportionality.

¹ Defender party refers to the party that is using involuntary human shields

² Attacking party refers to the side that is about to begin a launch.

There are two important factors that are not being considered but have significant importance. Namely: knowledge and consent. Workers that choose to work in a closely military related area are aware of the higher risks and still choose to pursue this profession. Since they have the knowledge about the risks and they give their consent they should not be equitized with the civilians that are not closely related to military operations. The suggestion is not that these persons will be deprived from their status as civilians or deprived from protection but that such principles are taken into account (Schmitt 2009:332). Turning back to knowledge and consent this position does not put emphasis on these important factors. Adults that are used as involuntary human shields usually have the knowledge, as they can understand what is going around them; however they do not have the consent. When it comes to children they do not have the knowledge nor the consent, this way they should have special protection and should not be taken under the same safety as for example the factory workers.

The fourth position that is suggested by Schmitt is an alternative option to resolve such problems. The suggestion is that voluntary shields that have the knowledge and the consent to directly participate in war lose their protection provided by IHL when an attack occurs, and thus their presence does not provide immunity from an attack. Furthermore those who voluntarily participate to take part in a hostility should not be calculated when it comes to the calculation of proportionality and precautions. On the other hand, involuntary shields are those that enjoy full protection and immunity from attacks. The attacker in all cases shall make careful considerations whether to launch an attack on such territories where involuntary shields are present. Even if the attack occurs first and most importantly the invader needs to ensure that it will not cause excessive harm, and should also try to use weapons tactics and target options that will cause the least harm and least suffering (Schmitt 2009:336).

iii) Jurisdictional issues

Several jurisdictional and practical problems must be dealt with. Jurisdictional issues arise when the right, power, or authority to administer justice by hearing and determining controversies concerning a legal matter cannot be brought before a legal jury or the conventions that ought to apply to an armed conflict do not fit into the wording of a convention.

The distinction between IHL and HR law is important as they differ in character and their applicability. IHL is applicable to non- state actors (NSA's) whereas IHRL is applicable to States and their responsibility toward its citizens where the latter's rights are held towards the state. Hence NSA's are often not addressed in IHRL and consequently not bound by IHRL

conventions and treaties. NSA's are individuals or organization that has significant political influence but is not allied to any particular country or state for example the ISIS who perpetrate many attacks against children. Human rights law is generally not binding on NSAs in non-international conflicts. International humanitarian law obligations are binding towards NSA's, however, only if the NSA breaches legislative obligations, governmental claims or customary international law.

Jurisdictional problem arises where a non-state actor (NSA) launches attack towards civilians including children. As demonstrated above, United Nations Convention on the Rights of the Child refers to 'State Parties', yet what about those parties which launch an attack i.e. NSA's? They are not bound by any obligations to respect civilian autonomy. Recently, Palestinian Authority's 'ratification' of Convention on the Rights of the Child in April 1995, yet many Palestinian children die every day. (Machel 1996 and UN Doc. A/51/306 Para.230.) Thus, apparatus is desirable to implement such ratifications and Declarations. For example, according to the Red Cross, Israel denies the application of the Fourth Geneva convention throughout its occupation in Gaza and the West Bank. Hence, children as a result, face a war that they are a part of, without any international protection and core legal rights. Further, albeit targeting civilian population is unlawful, this still happens. Unless these issues are dealt with, international conventions and agreements which purport to protect children will remain futile.

In several internal armed conflicts, the state that used to exist is no longer a fully functioning state. Hence, the matter will not or cannot be brought before a legal jury, for example the international criminal court. Conversely, the state may retain control over a territory, yet the infrastructure and organisation of the state is not fully functioning. In such a case the capacity to implement the Conventions that seek to protect children may be impossible.

Chapter 3: Protection under IHLR

IHLR provides for a wide range of protection for the civilian population, in writing. Yet, the effectiveness of the ‘protection’ is contentious. IHLR applies in both peacetime and conflict³ IHLR regulates the relationship between the government and the citizens and aims to give a guidance of how authorities should form their national law to ensure safety and well-being. IHLR provides protection for every citizen without discrimination.

For the first part of the research, the most relevant IHLR agreements are;

- Universal Declaration of Human Rights (UDHR)
- United Nations Convention on Rights of a Child (UNCRC)

³ However, derogation of certain rights is allowed during times of war

Why the law fails to protect children will be thoroughly mentioned, based on many scholars' views in the discussion part.

i) Universal Declaration of Human Rights (UDHR)

As the UDHR is considered as one of the most important documents in the field of human rights as it is a common starting point when studying the base of universal rights. It was adopted on 10 December in 1948, by the UN General Assembly and it states important social, political and economic rights. After more than 60 years of the adoption it has become the backbone of a branch of international documents. During the years, many of the parts have attained customary status and therefore considered as legally binding international customary law (Danchin 2001).

The relevant articles are;

- article 3-Right to Life, Liberty, Personal Security
- article 5- Freedom from Torture and Degrading Treatment
- article 25 - Right to Adequate Living Standard. This goes on to state in its subsection 2, that *'Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'*

The right to life is the most fundamental human right and has achieved a jus cogens status i.e. that derogation of this right is not allowed under international agreements.

ii) United Nations Convention on Rights of a Child (UNCRC)

It is vital to note that children's rights are breached, not only during an armed conflict, but also due to the aftermath of an armed conflict. For instance, Economic crisis which is the repercussion of any armed conflict, always leads to dislocation of services, increased national debt and increased family impoverishment. Also, the collapse of community infrastructures may lead to the death of children for avoidable causes. For instance, in Mozambique between 1982 and 1986, over 40% of health centres were destroyed.

General protection for children, in peacetime and in wartime, are provided in the UN convention on rights of a child.

Best interest of the child (Article 3)

Provides, *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best*

interests of the child shall be a primary consideration’ However, a major problem with working towards the ‘best interest’ of the child proves to be redundant when the definition is not provided in the article. For example, during the Gulf War, the US launched an attack, towards Al Amiriyah, according to them, an intelligence centre. The supposed Iraqi intelligence centre turned out to be a bunker, a shelter, home to thousands of children. As the Coalition forces had no knowledge, and supposedly no intention to attack civilians, they had no legal obligation to modify their plan of attack, which was legal even under Protocol I, had it applied, because the bunker was a legitimate military target. (War memorial 2013)

Melton found that:

‘The most acute event in many of their minds was the bombing of the shelter in the Baghdad suburb of Al Ameriyah, where more than 1000 people were killed, including many children. An enormous number of children in the Al Ameriyah neighbourhood tried to cope with the terrible impressions of sounds of the bombing and sights and smells of burned bodies. They are tormented by memories of what they had touched. (Melton 1993: 26)

Accordingly, ‘best interests’ of the child can be at odds with what is legal during an armed conflict. It so seems, that the law is never likely to be able to fully protect children from the realities of war. Hence, law must be accompanied with work to prevent the on-set of war; in the words of the ICRC:

‘Armed conflict cause unspeakable suffering, whatever is done to prevent it and however well international humanitarian law is respected. It is therefore vital to encourage and intensify all efforts to tackle the root causes of conflicts, such as poverty, inequality, illiteracy, racism and the uncontrolled growth of huge cities, the collapse of governmental and social structures, corruption, crime organized on a world-wide scale, drug trafficking and arms dealing. To encourage compliance with international humanitarian law is not enough.’ (International Review of the Red Cross no 296 1993)

Right to life (Article 6)

States that *‘state parties shall ensure to the maximum extent possible the survival and development of the child.’* Hence, state parties must ensure children’s very survival and secondly, move on to the other protections provided under a vast array of international conventions. The same applies to the prohibition of torture, as this right is also a jus cogens right, and inhumane, degrading treatment of individuals is not accepted in most cases

(UNTERM). This right holds special importance in times of conflict as very often individuals are tortured in captivity, leading to their deaths. In war cases authorities, must make sure that they take effective measures to avoid such problems.

Standards of health (Article 24)

'States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health [...] ensure that no child is deprived of his or her right of access to such health or care services.'

Due to war relief agencies experience shortages in staff and many hospitals are shut down or bombed. Armed conflict also disrupts the government institutions which support community health and well-being. Armed conflict brings contaminated water which in turn may bring increased health risks. Poor health services exacerbate developmental problems in children. (Dawes, 1996)

Economic Crisis (Article 27)

'The States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.'

Economic crisis accompanies armed conflict resulting in dislocation of services, increased national debt and increased family impoverishment. (Dawes 1996) Poorer families and their children, are excessively affected which affect the survival and development of children. (Dawes 1996)

Loss of Education (Article 28)

1. States Parties recognize the right of the child to education, ...

The destruction or closing of schools, results in loss of schooling for children and young people leading to loss of opportunities in life. In Chechnya, for example, less more than 50% of schools were functioning in 1995 and those schools that continued to exist were overpopulated, unclean and insecure. (Balian 1995). Children and young people have their opportunities reduced in later life leading to poor standards of life.

The UN Convention on the Rights of the Child contains its own provisions relating to armed conflict in *Articles 38 and 39*:

Take all feasible measure requirement (Article 38)

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child...

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

Article 38(4) merely urges state parties to take all feasible measures to protect children. It does not confer a positive duty on the state party to do so. Hence, there exists a dichotomy between rhetoric and reality. The rhetoric is that that children need to be protected yet the reality, sadly, remains that children till this day, become victims of war. Hence, it is the lowest common denominator and sets minimum rights in favour of children in armed conflicts. Hammarberg has rightly stated

‘Article 38 specifically addresses the situation of children in armed conflicts ... however all other articles of the Convention are relevant. In fact there is no derogation clause in this Convention, it applies in its entirety also in times of war or emergency.’ (Hammarberg 1994)

The child has a right to a family environment, to go to school, to play, to get health care and adequate nutrition - also during the armed conflict. The principles of the Convention are valid as well: that all children without discrimination should enjoy their rights, that the best interests of the child be a primary consideration in decisions, that the right to life, survival and development be protected‘

Prohibition of inhumane treatment (Article 39)

States Parties shall take all appropriate measures to promote physical and psychological recovery and social re-integration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and re-integration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Make principles known (Article 42)

‘States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.’

A positive attempt should also be made to educate the military, and youth in military academies, on the provisions and interpretation of the Convention.

iii) International Covenant on Civil and Political Rights (ICCPR)

The ICCPR was adopted by the UN General Assembly in 1966, and it has been ratified by nearly 170 states. ICCPR at its core is similar to the UDHR. They both emphasize the importance of the core rights for example the right to life and the right not to be tortured or treated inhumanely. Article 6 of ICCPR states that all humans should have the right to life and each nation should aim to protect that right. Article 7 of the agreement concludes what UDHR prohibits torture. With regards to special protection for children the covenant considers their interest, when it comes to guardian issues (article 14(1), marital dissolution (article 23(4)). Most importantly, article 24(1) states that due to their general status as a minor they shall be protected.

Chapter 4: Protections under IHL

After the Second World War the international community realized that there is an urgent need for protection of the civilians and that is when the legal protection of children was added to IHL. There are IHL documents that grant special protection to children as they are perceived as a vulnerable group. Some of the articles provide protection for them through other means such as, through their mother (GCIV art. 16). For this part of the study, the outlined conventions are chosen because the Geneva Convention was the first major international instrument for protecting human rights after the horrors of the Second World War. The other three conventions are core parts of the Geneva Convention. They are chosen due to their significant role as being part of the Geneva Convention as well as their direct relevance to this thesis. These are:

- The Fourth Geneva Convention which is relative to the Protection of Civilian Persons in Time of War (GCIV),
- The additional protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (API),
- The Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (APII)
- The Hague Conventions of 1899 and 1907.

IHL applies only in times of conflict. IHL was created to protect civilians in war, and those that are no longer taking part in hostilities. IHL aims to make conflict times as human and as tolerable as possible, and tries to ensure that minimum harm is caused to the civilians as possible (ICRC 2004). The most important legislation of IHL is the Geneva convention and the Law of The Hague. The Law of Geneva protects ‘victims of war’ who find themselves in the hands of a party to the conflict: i.e. people who are non-combatants and rendered outside the conflict. Conversely, The Law of the Hague regulates the methods and means of warfare. Parts of the Additional Protocols are developments relating to means and methods of warfare, they are also part of Hague Law.

i) Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (GCIV)

The convention was adopted in August 1949, to regulate the treatment of civilians in times of war. The formation of the convention was a watershed in the development of IHL, and it has created important contributions by raising awareness to the importance of protecting civilians including children during wartimes.

Firstly, there is a general protection provided for the civilian population from the consequences of the hostilities. Secondly the convention creates three different types of categories; aliens in the territory of a party to the conflict, persons in occupied territories, and internees and takes further steps to protect them. Furthermore, the agreement grants protection to children per their age and their presence in the conflict the convention.

Part II of the convention provides protection to civilians in the aftermath of wars and not from military operations during was. It also deals with the general protection of the overall population states the non-discrimination principle and suggests that no distinction should occur based on religion, race, colour, nationality or religion (article 13).

The main provisions of GCIV Part II are;

Part II. General Protection of Populations Against Certain Consequences of War

Art. 14. *In time of peace, the High Contracting Parties [...] may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones [...] to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven..*

Art. 16. *The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.*

Art. 17. *The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases [...]*

Art. 23. *Each High Contracting Party [...] shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.*

Art.24. *The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, [...] are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.*

As indicated above, main function of the Fourth Geneva Convention "is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to military operations themselves." (Pictet 1958)

Frits Kalshoven has rightly stated that the Geneva Convention 'serves to provide protection for all those who as a consequence of armed conflict, have fallen into the hands of the adversary. The protection envisaged here is, hence, not protection against the violence of war itself, but against the arbitrary power which one belligerent party acquires in the course of the war over persons belonging to the other party'. (Burgos 1989)

Thus, protection from the conduct of hostilities itself, is outside the scope of this Convention and is encoded only in the Law of The Hague. The convention itself does not state that children, due to their status, should enjoy more protection however; the First Additional Protocol revises this and gives explicit grant for children. Further, GCIV is inadequate in protecting children or

recognizing their status as vulnerable beings. Little or no protection is provided for them during military operations, which leaves it to limited number of conventions such as UNCRC to protect children in armed conflicts. There is no separate instrument that relates the protection of children specifically, under IHL.

Then why is it that children are not protected under IHL, since the topic has, since world war 2 been on the agenda. Hitch in her article entitled postulates that childhood, "*is per se, a relatively recent phenomenon and that it is really only in the post-World War II period that significant portions of the world community have had as much money and time to spend on extending the average length of childhood to the proportions that we see today.*" (Hitch 1989) Thus, in 1949 there was no pressing need for specific protection for children in wartime. She further argues that the lack of a social concept of 'childhood,' rendered children to take part in war children at a much younger age than would be thought normal in the world today. This reasoning, however may be flawed, as the International Labour Organization (ILO), in 1919 recognised the concept of special protection of children and abolition of their forced labour. (Document number C005 - Minimum Age (Industry) Convention, 1919 (No. 5)). However, due to their low ratification rate by member parties, these never came into force.

Article 24 of GCIV which provides protection for orphaned children, or those who are separated from their families because of war, are provided protection in the sense that they shall not be left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. However, one major flaw is that children, in times of armed conflict, who do not belong to the category of 'orphans', may also have similar need of maintenance. Further, the child's practice of religion and education seems to be of higher importance than the basic right of the child to survive or receive medical care. Hence, the priority of rights conferred to children in conflicts seem to be muddled, by focusing on their education first and chance of survival as a subordinate right. Article 3(2) of GCIV states that '*The wounded and sick shall be collected and cared for [by] An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict*'. The forgoing provision leaves protection of children in the hands of the red cross and similar institutions, which are criticised for being unaccountable and partial. (npr.org 2016) Further, the threshold that needs to be passed for article 3 to apply is unknown. Where a state party denies the occurrence of an armed conflict, human rights law applies. Meron has rightly stated in his book,

'Scholars have assumed that in conflict situations, either "human rights" or "humanitarian rights" or sometimes both will apply, excluding a legal void. ... Unfortunately, this is not always the case in reality. In many instances of armed conflict, States utilize a number of techniques to derogate from peacetime human rights without recognizing the applicability not only of humanitarian law as a whole, but even of common Article 3. ... In short, it must be recognized that there is a legal uncertainty, or perhaps even a lacuna, in the law.' (Merón 1987:135)

For example, according to the Red Cross, Israel denies the application of the Fourth Geneva convention throughout its occupation in Gaza and the West Bank. Hence, children as a result, face a war that they are a part of, without any international protection and core legal rights. Further, albeit targeting civilian population is unlawful, this still happens. Unless these issues are dealt with, international conventions and agreements which purport to protect children will remain futile.

ix) Additional Protocol I (API)

There are two articles in the additional protocol that are specifically devoted for the protection of children, and provide very detailed regulations and rules how children should be dealt with in times of conflicts. These are of great importance to rights of children under The Hague Law, namely article 77 and article 78. At the heart of the protocol, parties taking part in hostilities shall refrain from attacking civilian objects and shall aim their target only at combatants of war or the perpetrator. (article 52(1) and 53(3)). Any other military objective would be rendered illegal, such as attacking a school or house of prayer. However, a lawful target could be serving two purposes, such as an electricity generator which provides electricity for the civilian population and to the military of the enemy. Such an attack toward the electricity generator, under API would be rendered lawful, yet would inadvertently cause great harm to the civilian population as well. Hence, the definition of military objective is fluid under the API.

The protocol applies to all children in a conflict regardless whether affected by the war. The first paragraph of the article 77(1) notes that children, due to their vulnerable nature shall enjoy special protection, and shall be protected against any hostilities. The wording "*special protection*" in the article emphasises the importance of protecting children, and suggests that on top of general protection, state parties shall recognize the vulnerable nature of children, and shall ensure that there is special protection granted for them. Subsection 2 of article 77 states that any child under the age of fifteen shall not take an active part in hostilities, and most importantly states shall not recruit anyone below that age, into armed forces.

Furthermore, when it comes to the selection of children that are above the age of fifteen but below the age of eighteen and can partake in armed conflicts, states should select those that are eldest (API article 77(2)).

In cases when persons below fifteen are directly taking part in hostilities for some reason, they are entitled to special protection regardless whether they are prisoners of war or not (article 77(3)). Subsection 4 of article 77 states that in cases when children are arrested, or detained the only time they shall be placed together with adults is when they are quartered with family. In all other cases, they shall not be placed together with the detained adults, but shall be placed with other children (article 77(4)). The last part of the article notes down what the GCIV article 68 stated, regarding the prohibition of the exercise of the death penalty on children under the age of eighteen (article 77(5)).

Article 77 serves as a development and a great leap forward, compared to the GCIV, to protect civilians in armed conflicts. However, it should be noted that the protocol merely grants minimum protection to children in armed conflicts and not the maximum level of protection. Indeed, on September 26, 1924, the League of Nations adopted the Geneva Declaration which introduced the Declaration on the Rights of the Child. This was the first international statement that recognized specific rights to the children by pinpointing the responsibilities of adults. The preamble of the declaration reads '*mankind owes to the child the best it has to give*', however the results of the statement, in effect, are disappointing and do not serve justice to children. It can be rightly concluded, that protocol I provides minimum consideration of the need to act in the child's best interest.

Article 78 deals with the evacuation of children and what should be provided when an evacuation occurs. First and most importantly, evacuation of children should only happen if it serves safety or health issues. In case an evacuation happens, states shall ensure that children are provided everything necessary for education and the practise of religion.

One notion that is particularly noteworthy, is that the term 'protection' is loosely defined in the protocol. It so seems, that, 'protection' under the protocol is a compromise between humanitarian ideals and military necessity. So long as military necessity is achieved, children's lives may be put at risk if the attack is proportional. Albeit, the API is the first to explicitly outline protections for children in armed conflicts, the protections provided are minimum rights and are derogable where military necessity can be achieved.

iii) Additional Protocol II (APII)

The main difference between API and APII is that the latter applies to civil armed conflicts (article 1) while API applies to international conflicts, i.e. conflicts between two or more nation states. The two are very similar and in many paragraphs, they provide the same rights and freedoms.

Protocol II is article 4(3) states;

‘Children shall be provided with the care and aid they require, and in particular: they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

all appropriate steps shall be taken to facilitate the reunion of families temporarily separated; children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.’

In Article 4(3) all children are being given fundamental guarantees in times of armed conflicts. The problem with the additional protocols is that they are not ratified by all nation states. For example, during the Gulf Conflict in 1991, neither the United States, the United Kingdom, France nor Iraq ratified Protocol I (Roberts 1993). Also, many governments, given their interest in maintaining sovereignty, are unlikely ratify Protocol II. Another limitation is that protocol II does not apply to "situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts". (article 1(2)). For children, the distinction between the two may be little or none, as their core rights would still be in violation. Fraser in his book *Children in Conflict* (Fraser 1977) concludes that children, in the ‘internal disturbances’ of Northern Ireland, suffered a form of psychosis in the form of mental disturbance, acute anxiety and depression. Children are effected the most by the political tensions and as provided evidence for, civil war need not break out for children to be affected.

A UNICEF survey shows that children in Mostar experienced cold and hunger to the point that they thought they might die, which for some was more horrid than the outbreak of violence. Children suffer the most due to family members being absent in times of political tensions. Children end up providing for themselves by becoming self-sufficient, leading to that their childhood is cast away. (Yule et al 2013)

Hence, a series of obstacles are faced by children due to internal disturbances, such as the creation of economic crises, separation of children from parents because of political detentions or deportations. Child protection services become problematic to implement as the government loses control. Further, internal disturbances are renowned for making education difficult as schools are shut down by authorities.

However, APII takes a slightly stricter approach when it comes to death penalty. Article 6(4) gives a specific restriction on death penalty not to even be pronounced on persons below the age of eighteen.

Chapter 5: Comparison

The distinction between IHL and HR law is important as they differ in character and their applicability. IHL is applicable to non- state actors (NSA's) whereas IHRL is applicable to States and their responsibility toward its citizens where the latter's rights are held towards the state. Hence NSA's are often not addressed in IHRL and consequently not bound by IHRL conventions and treaties. NSA's are individuals or organization that has significant political influence but is not allied to any particular country or state for example the ISIS who perpetrates many attacks against children. Human rights law is generally not binding on NSAs in non-international conflicts. International humanitarian law obligations are binding towards NSA's, however, only if the NSA breaches legislative obligations, governmental claims or customary international law.

Jurisdictional problems arise where a non-state actor (NSA) launches attack towards civilians including children. As demonstrated above, United Nations Convention on the Rights of the Child refers to 'State Parties', yet what about those parties which launch an attack i.e. NSA's? They are not bound by any obligations to respect civilian autonomy. Recently, Palestinian Authority's 'ratification' of Convention on the Rights of the Child in April 1995, yet many Palestinian children die everyday. (Machel 1996 and UN Doc. A/51/306 Para.230.) Thus, apparatus is desirable to implement such ratifications and Declarations. For example, according to the Red Cross, Israel denies the application of the Fourth Geneva convention throughout its occupation in Gaza and the West Bank. Hence, children as a result, face a war that they are a part of, without any international protection and core legal rights. Further, albeit targeting civilian population is unlawful, this still happens. Unless these issues are dealt with, international conventions and agreements which purport to protect children will remain futile

There are several bodies that confirmed that the presentation of IHRL is necessary in war times; therefore, it is a matter of contention which law has precedence in times of conflict. However, we do know that NSA's are often not addressed in IHRL and consequently not bound by IHRL conventions and treaties. To determine which law should enjoy priority, the doctrine of *lex specialis* needs to be mentioned. Per this principle, in situations where two different laws are applicable to a certain conflict, the law that governs the specific subject closely should have priority as it has the *lex specialis* status and it overrides the *lex generalis* law, which has the status of general law. After determining the status of the different laws, *lex generalis* still applies and should be considered as an addition to the *lex specialis*. It is crucial that the two are harmonized and used together as much as possible (Zorzetto 2012:61).

For the study of children's protection in armed conflicts it is assumed that IHL has priority however this does not mean that IHRL should be excluded. Since IHRL states fundamental rights and freedoms that hold core importance it should be applied as an addition to gain a better understanding of IHL (UN Doc: CCPR/C/21/Rev.1/Add. 13 art. 11).

As mentioned above the right to life is a core right provided for everyone without discrimination. However in ICCPR the wording of this right is unclear as it states: "*no one shall be arbitrarily deprived of his life*" (ICCPR art.6). As the convention does not further explain or clarify what falls under the definition of 'arbitrarily' it becomes difficult to determine whether targeted killings of civilians are considered arbitrary or not. Per ICJ advisory opinion, whether deprivation of life is arbitrary depends on the IHL that is applicable

in that certain case. This means that if the deprivation of life is in accordance with the superior IHL treaty and is lawful.

Albeit, most states recognize right to life as a non-derogable right, per the European Convention on Human Rights (ECHR) article 15(2) “*No derogation from Article 2, except in respect of deaths resulting from lawful acts of war*”. Thus, if the war is defined as lawful, the act of arbitrary deprivation of life is allowed, and is not considered a violation. Therefore, if we assume that IHL is superior, and children’s right to life under IHRL is *les generalis*, then the act of killing children in times of armed conflicts. This means that children’s right to life in certain situations is not considered *jus cogens* and deprivation of their life can be lawful.

In relation to International Humanitarian Law, we conclude that The Geneva Convention 1949 does not give specific regards to children, as it does not state that there is a need to recognize the vulnerability of children. However, with the introduction of API there is a clear statement that addresses the need of children to be treated preferentially due to their vulnerable nature, and this creates a wide umbrella under which children are protected. This, of course, is remarkable.

However the API does not address matters concerning protection of children in situations of attacks. One notion that is particularly noteworthy is that the term ‘protection’ is loosely defined in the protocol. It so seems, that, ‘protection’ under the protocol is a compromise between humanitarian ideals and military necessity. So long as military necessity is achieved, children’s lives may be put at risk if the attack is proportional. They are being attacked purposely, where the attacker’s intention is to kill the children, which is considered illegal. Such deliberate attacks on the civilian population, including children are prohibited by the rule of distinction and they also constitute war crimes under article 8(2) of the Rome Statute, and under article 85(3)(a) of API. The other scenario is when munitions or weapons are hidden by the combatants near to a building or close to an object where children are present. In this case the attack targets a military objective but due to its geographical placement it causes injury of children. In such situation there are two possibilities; one is that the injury caused and the loss of children’s lives is unintentional and even though the attacker is aware of the presence of the children the injury of them is not an aim but an unintended result. The other possibility is that the attacker aims to destroy the targeted military object together with the whole civilian population including children.

First, it is important to note that it is difficult to distinguish between the two different situations since the intention of the attacker can hardly be ever known, and this creates a difficulty and leaves room for violation. When this scenario happens, another very important question that arises is whether this act can be considered a lawful reprisal. Whether or not the loss of children lives is intentional the knowledge is present and therefore it can be questionable whether the attacker state is acting to take lawful revenge. In the world of international law, reprisals are acts that would otherwise be unlawful but are considered lawful since they are a way to react to another state's violation of the law. In other words, reprisal is one party taking revenge on the other party for committing an unlawful act (Kalshovan 2011). With regards to children, when the defender state is using its own child population to create shield from attacks, the state is violating the law. Therefore, the attacking state might be able to claim reprisal when injuring the children. Under customary IHL the act of reprisal was allowed even if it was carried out on the civilian population. However with the introduction of GCIV it has been banned for civilian population on occupied territories (GCIV article 33).

Furthermore, with the first additional protocol API 1977, the act of reprisal on the civilian population was entirely banned. The UN general assembly in its 1970 declaration on Principles of International Law declared that all states should aim to avoid or at least try to minimize the use of force when they commit the act of reprisal. There are quite some states though that argued against this ban, since reprisal is a useful way to discourage states to violate the law in the first place. The ban to use reprisal on the civilian population is therefore useful and protective towards children however its effectiveness is still questionable.

The difficulty with reprisal is that in each case the intention of the attacker to kill the children needs to be proven. If the state does not intend to kill the children when launching the attack then the whole act does not fall under the definition of reprisal, as then it is not unlawful. In other words reprisal would occur if the attacker state intentionally creates the unlawful act of killing children to take revenge on the defender state, but if the intention cannot be proven then it is not reprisal it is just an attack on lawful targets where children lives are considered as collateral damage.

Another problem that arises is that it can be argued that the use of children as human shields does not constitute a good reason to call for a reprisal. Even though, both the use of children as human shields and the act of reprisal on the civilian population are forbidden under IHL (API article 51(6), it leaves space for misinterpretation and allows states for argue against it.

Another rule that needs to be considered when there is a mix in the civilian and non-civilian population is the rule of indirect attacks. Even though combatants are within the civilian population it does not mean that the non-combatants lose their civilian status. In other words, even when there are a number of fighters among the civilians, the population as such is still considered as civilian. Therefore, if an attack is launched it is indiscriminate. According to API article 51(4) those attacks are considered indiscriminate that either cannot be directed at a specific target or come with effects that are uncontrollable and do not follow IHL regulations. These types of attacks are considered unlawful under IHL (API article 51(4)). Furthermore, launching an attack is only lawful if it is aimed to destroy a military objective, and all other objects enjoy immunity from attacks. Whenever the category of an object is not clear it should be considered a civilian building, which cannot be targeted. In other words if the attacker is not convinced that the object that is about to be attacked is a military object, and then the launch should not happen. If there is a suggestion, that a civilian object might be used for military purposes then it enjoys immunity and the attack shall not take place (API 52(2)). Under the fourth Geneva Convention the wilful killing of civilians or causing serious damage or injury to them is a breach of the Convention, which would mean that even hurting the civilians during an armed conflict is a breach. However the commentary of the convention states that when the killing occurs as a result of war then it becomes difficult to call it wilful killing, and then therefore it is not a breach (Commentary to article 147 GCIV:597).

The main difference between API and APII is that the latter applies to civil armed conflicts (article 1) while API applies to international conflicts, i.e. conflicts between two or more nation states. The two are very similar and in many paragraphs and provide the same rights and freedoms.

However, limitations of Protocol II are threefold. Firstly, no definition of civilians and combatants exist because of the sensitivity of the sovereignty debate which recognises the independence of a state, combined with the right and power of regulating its internal affairs without foreign interference. Secondly, no explicit positive obligations to minimise civilian deaths exist. Thirdly, prohibition of reprisals against civilians is not mentioned in the protocol. Overall, the deliberate or intentional killings of children, that are not within or in the vicinity of a military are prohibited under IHL. The situation becomes more difficult when either soldiers are hidden among them, or when weapons are being placed near to them. This way, deciding the damage that might be caused, and whether that can be collateral damage becomes very problematic. The causing of indirect attack, where the

attackers know about the presence of children but unintentionally kill them is also prohibited. Reprisals are forbidden but they are controversial since the intention of committing them needs to be proven in each case, and that is again very difficult. Recommendations

"Protection" under IHL is a term of art; and open for interpretation for state parties. Humanitarian law embodies a compromise between humanitarian and military considerations. IHL seeks to accommodate military necessity, at the expense of humanitarian considerations, in the pursuit of 'feasibility'.

The most effective way to improve the protection of children under IHL is to improve compliance with its provisions where its applicability should be simplified, expanded and opened to adjudication, and its prosecution mechanisms should be strengthened.

The possibility to challenge or deny IHL by any state party, should be abolished and adjudication by an impartial international court should be implemented. A set of legally binding provisions relating to children and civilians in both international armed conflicts and internal conflicts should be implemented. Discrepancies, under each nomenclature are many and basic rights of children need to be strengthened. All States should adhere to their obligations "*to respect and to ensure respect*" for the Fourth Geneva Convention and its Additional Protocols (*Article 1*). States should respect their Fourth Geneva Convention "*obligation to search for persons alleged to have committed, or to have ordered to have committed, such grave breaches,*" and to "*bring such persons, regardless of their nationality, before its own courts*" (*Article 146*).

All States institutions should make clear their military obligations to their employees such as military officers and their legality. Humanitarian bodies should be allowed to provide assistance on the ground of the disputed state where the conflict occurs without facing any resistance of a state party. Both parties to the conflict should be reminded of their obligations to permit children to receive education and should respect schools as neutral zones. Hence no attack should be launched against schools. The only justifiable reason for closing a school is if its students are in direct danger. The obligation of compulsory universal jurisdiction in relation to grave breaches should become a reality rather an ideal or subject which is taught in lectures on the law of armed conflict. The Committee on the Rights of the Child should simplify the meaning of *Articles 38(2) and (4) and re-examine Article 38(4)* to make clear what is expected of States by replacing the term 'feasible' with a more precise term. The role of the Committee on the Rights of the Child should become pro-active rather than passive in protecting children

during times of armed conflict for instance by reacting to information from NGO's and IGO's that a serious emergency existed, allowing the Committee to pledge early action to guarantee that children's rights are upheld by state parties. NGO groups working towards the betterment of children's rights in armed conflicts should receive funding for this purpose from the UN.

Chapter 6: Conclusion

The paper analyses the degree to which international conventions are successful in protecting children in armed conflicts and argues that the increasing attacks on the children is due to dual reasons; legal weakness in terms of binding power of conventions, and the very core of the realist arguments which state that state parties will pursue their self-interest, regardless of the consequences of casualties by disregarding those very conventions. As Graça Machel stated "*It is unconscionable that we so clearly and consistently see children's rights attacked and that we fail to defend them.*" The Machel report provides an opening for people in general and for our governments to push for a change in the practice, law and attitude regarding children's rights.

Most importantly, the proportionality rule is the backbone of all human rights conventions today. The rule itself gives an indication that the attacking states shall try to avoid the deliberate attacks on civilians. Under article 51(4) of the API, the definition of proportionality also known as prohibition of indiscriminate attacks, is one "*which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated [emphasis added].*"

While civilians (including children) gain protection under API, all protection is still within the framework of considerations of military necessity. API recognizes, as Louise Doswald-Beck rightfully points out, as mentioned earlier:

'Those which expect to find civilians virtually immune from hostilities ... will therefore be disappointed. ... [the Protocols are an attempt] to limit the use of military capabilities whilst preserving a combatant's ability to win within these rules which is essential for the Protocols' survival' (Louise Doswald-Beck 1989)

Even when a hostile attack takes place the possible harm to the civilian population shall be relatively less than the harm created within the lawful target. Hence, the aim of the attack, shall not exceed the effect, in other words the loss of the lives of children. This puts a great deal of difficulties in defining the terminology 'proportionality' which requires one to measure, and further weigh and balance whether an attack towards civilians, where children may be present, is lawful under the above conventions. This leaves room for the interpretation of 'proportionality', rather fluid and further establishes grey areas or in other words, room for attackers to justify acts or killings of children as lawful under API.

It also suggests that excessive injury should not be caused to the civilian population however, it does not define what excessive is. What is the proportion or what is the ratio that is considered excessive?

There are several bodies that confirmed that the presentation of IHRL is necessary in wartimes; therefore, it is a matter of contention which law has precedence in times of conflict. To determine which law should enjoy priority, the doctrine of *lex specialis* needs to be mentioned. Per this principle, in situations where two different laws are applicable to a certain conflict, the law that governs the specific subject closely should have priority as it has the *lex specialis* status and it overrides the *lex generalis* law, which has the status of general law. After determining the status of the different laws, *lex generalis* still applies and should be considered as an addition to the *lex specialis*. It is crucial that the two are harmonized and used together as much as possible (Zorzetto 2012:61). For the study of children's protection in armed conflicts it is assumed that IHL has priority however this does not mean that IHRL should be excluded. Since IHRL states fundamental rights and freedoms that hold core importance it should be applied as an addition to gain a better understanding of IHL (UN Doc: CCPR/C/21/Rev.1/Add. 13 art. 11).

Under IHL and pursuant to the Geneva Convention “*all cases of declared war or of any armed conflict that may arise between two or more high contracting parties, even if the state of war is not recognized, the convention shall also apply to all cases of partial or total occupation of the territory of a high contracting party even if the said occupation meets with no armed resistance*” (GCI. Art.2). The conflict is not between the states in their entirety but their armed forces. To clarify, where the forces consist of regular combatants, the non-combatants fall under the protection of the Geneva convention. Per the Hague Conventions of 1899 and 1907, article 3 of both conventions states that ‘*The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.*’ Article 4 of the same convention goes on to state that ‘*Prisoners of war [...] must be humanely treated*’. Whether the previous obligation has been adhered to in conflicts is debateable. However, it gives us an indication that prisoners of war shall not be stripped off of their basic rights, if held captive by the enemy. We conclude that The Geneva Convention 1949 does not give specific regards to children, as it does not state that there is a need to recognize the vulnerability of children and it does not state that children should benefit from extra care due to their status as a child. However, with the introduction of API there is a clear statement that addresses the need of children to be treated preferentially due to their vulnerable nature, and this creates a wide umbrella under which children are protected. This, of course, is remarkable however on the other hand none of these conventions or protocols deal with the protection of children in situations of attacks. The main difference between API and APII is that the latter applies to civil armed conflicts (article 1) while API applies to international conflicts, i.e. conflicts between two or more nation states. The two are very similar and in many paragraphs, they provide the same rights and freedoms. However, limitations of Protocol II are threefold. Firstly, no definition of civilians and combatants exist because of the sensitivity of the sovereignty debate, which recognises the independence of a state, combined with the right and power of regulating its internal affairs without foreign interference. Secondly, no explicit positive obligations to minimise civilian deaths exist. Thirdly, prohibition of reprisals against civilians is not mentioned in the protocol.

The problematic understanding of protections provided for children under IHRL is threefold. Firstly, as mentioned above the right to life is a core right provided for everyone without discrimination. However in ICCPR the wording of this right is unclear as it states: “*no one shall be arbitrarily deprived of his life*” (ICCPR art.6). As the convention, does not further explain or clarify what falls under the definition of arbitrarily it becomes difficult to determine

whether targeted killings of civilians are considered arbitrary or not. Per ICJ advisory opinion, whether deprivation of life is arbitrary depends on the IHL that is applicable in that certain case. This means that if the deprivation of life is in accordance with the superior IHL treaty, it is not unlawful. Albeit, most states recognize right to life as a non-derogable right, per the European Convention on Human Rights (ECHR) article 15(2) “*No derogation from Article 2, except in respect of deaths resulting from lawful acts of war*”. Thus, if the war is defined as lawful, the act of arbitrary deprivation of life is allowed, and is not considered a violation. Therefore, if we assume that IHL is superior, and children’s right to life under IHRL is *les generalis* if the act of war is lawful deprivation of their lives is also lawful. This means that children’s right to life in certain situations is not considered *jus cogens* and deprivation of their life can be lawful.

Under IHRL and IHL, deliberate killings of civilians is rendered unlawful, albeit some exceptions such as ‘military necessity’ do exist, yet child casualties are still on the rise. (Roberts 2010:115-117) International law seeks to provide a wide range of protection for them. In times of armed conflicts, children are granted special treatment under many international rules as discussed above. However, this protection is incomplete and ineffective in many ways and as a result a large number of children remain unprotected and suffer the unfortunate consequences. Furthermore, the rules do not specify such situations where children are involved in the targeted area. Children are very often in between the two parties and where their situation becomes very difficult and problematic. Children can be abused by their own state, and in return their lives are in the hand of the attacker party. This should not happen since the children should not be the victims of the defender party’s violations, and they should not be the ones suffering for the defender party’s risks. The number of attacks on the civilian population especially children is extremely worrying and this trend seems to remain in such a way as a result of states neglecting protection of these people. State parties will seek their interest in the most beneficial way which unfortunately does not necessarily take account of international law regulations.

The proportionality rule does not specify many core issues and leaves many unanswered questions. Therefore, it allows states for subjective interpretation where parties to the conflict can easily use rules for their own benefit. The wording, the phrasing of many contexts is very problematic and very vague where there is space for violation. Everyday children are being used in armed conflicts, they are being forced to join wars, and they are permanently injured and very often killed. International Humanitarian Law needs to be reviewed and re-examined to create a more effective and more protective legal paradigm. There should be less emphasis

put on the intention and the aim of the states and more focus on the actual consequences, and the actual attacks.

The protection for children under legal instruments is ineffective as evidenced by data and the non-binding force of the conventions. To prove the foregoing statement, historically, and what is very important to note is that during the First World War only 5% of the victims were civilians, while this number has risen to 46% by the end of the Second World War. This means that just under a little more than 20 years state parties, and soldiers developed a habit of respecting the civilians less, and focusing a smaller amount on protecting their lives and well-beings in war. In present day conflicts, nearly 90% of the victims are non-combatants, very often children and women. The number of children who died as a consequence of an armed conflict in the past 10 years is more than two million. More than six million children have been injured permanently and the number of those who have gone through life lasting trauma is uncountable. (BBC 2015). A challenge facing legal systems that seeks to alleviate the suffering of children is to make sure these children survive. UNICEF in its report, *The State of the World's Children 1996*, estimates that there have been 2 million child deaths in the last decade. Everyday there are nearly 30 million children living in warzone and there about 250.000-300.000 of them that are under the age of 18 and are forced to take part as armed soldiers (UN Doc: A/59/695). Human rights groups now calculate that approximately 90 percent of all casualties in recent armed conflicts have been made up of civilians, of which 40 percent are children.

States taking part in an armed conflict will pursue their interest and it remains very important that international law takes a more effective approach to avoid as many civilian casualties particularly children as possible. International law needs to build up more binding force and answers to violations to provide better protection for children in armed conflicts. In internal armed conflicts, the situation is different where the state that used to exist is no longer a fully functioning state. The state may retain control over territory, yet the infrastructure and organisation of the state is not fully functioning. In such a case the capacity to implement the Conventions that seek to protect children may be impossible. Another major problem is that the conventions are not ratified by some states. For example, according to the Red Cross, Israel denies the application of the Fourth Geneva convention throughout its occupation in Gaza and the West Bank. Hence, children, face a war that they are a part of, without any international protection and core legal rights. Further, albeit targeting civilian population is unlawful, this

still happens. Unless these issues are dealt with, international conventions and agreements which purport to protect children will remain futile.

In a final nutshell; I conclude in the thesis that IHL and IHRL are not adhered to, by state parties in armed conflicts, and hence they do not produce the desired result. Hence, state parties are either in breach of the conventions in light of a lack of legal binding power, or have not yet ratified the conventions and consequently, the conventions are not practically effective in protecting children.

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