

**CHILD SOLDIER RECRUITMENT UNDER INTERNATIONAL LAW:
EXAMINING THE ACCOUNTABILITY OF PRO-GOVERNMENT
MILITIAS**

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I. INTRODUCTION	102
II. UNDERSTANDING THE PROBLEM OF CHILD SOLDIER RECRUITMENT .	104
III. CHILD SOLDIER RECRUITMENT BY PRO-GOVERNMENT MILITIAS	109
IV. INTERNATIONAL LEGAL REGIME GOVERNING PROHIBITION AND ACCOUNTABILITY FOR CHILD SOLDIER RECRUITMENT: AN ANALYSIS	113
A. <i>International Humanitarian Law</i>	114
B. <i>International Human Rights Law (IHL)</i>	116
1. Optional Protocol to the Convention on the Right of the Child	119
C. <i>International Labor Law</i>	121
D. <i>International Criminal Law</i>	123
E. <i>Africa's Regional Treaty System</i>	125
V. EXAMINING THE OBLIGATIONS OF THE CIVILIAN JOINT TASK FORCE ON CHILD SOLDIER RECRUITMENT	127
VI. CONCLUDING REMARKS	131

ABSTRACT:

This article examines child soldier recruitment by Pro-Government Militias (PGMs) and how it presents a novel challenge under international law, especially with respect to determining the standards for considering them as a part of a state's armed forces, for the purpose of determining accountability. Whereas existing literature has focused on child soldier recruitment by armed groups fighting against states, the obscure nature of

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this same practice by PGMs has remained outside scholarly examination. The increasing use of children by groups of this nature challenges established rules of international law, especially as it relates to the issue of accountability. Given the clear obligation of states under international law with regard to the prohibition of child recruitment, the issue of child soldier recruitment by PGMs raises novel problems for the framework of accountability under the relevant rules of IHL. The goal of this article is to illuminate this problem by examining the sources of international law governing the prohibition of child soldier recruitment, namely International Human Rights Law (IHRL), International Humanitarian Law (IHL), International Labour Law (ILL), International Criminal Law (ICL), as well as the rules under regional instruments. The analysis will then narrow to the framework under IHL, to establish what shortcomings there are in the accountability of groups of this nature. It examines the issue of state responsibility for the wrongful acts of PGMs and the lack of clarity on the applicable standard for designating such groups as a part of the state's armed forces under IHL rules. It calls for further development in the law that will ensure clarity and specificity in the standards for accountability.

KEYWORDS: Child Soldiers, Recruitment, Militias, Human Rights, Accountability, International Law.

I. INTRODUCTION

Pro-Government Militias (PGMs) have become major players in modern armed conflicts,¹ maintaining constant relations with States in cooperative, antagonistic, and conflictual ways.² Fundamentally, they fight alongside state armed forces to defeat insurgents and other kinds of armed groups. Either as auxiliary forces fighting alongside governments' military forces or as volunteer local defense forces protecting their environment from rebel groups, the proliferation of groups of this nature is increasingly becoming a major concern for stakeholders in the international community. This concern reflects an emerging dimension to the activities of PGMs in armed conflicts. Recently, the crisis of child soldier recruitment, especially by armed groups in different armed conflicts, has been on an upward trajectory. For instance, in Nigeria, the Boko Haram insurgency has been the epicenter of child soldier recruitment. Boko Haram is a fundamentalist group that has been waging a vicious war against the Nigerian State since the outbreak of violence in 2009. To achieve its objective, the group has been deploying familiar tactics of asymmetric warfare in challenging the country's sovereignty and power. It has employed high-stake violence tactics such as the bombing of key government and military facilities, suicide bombing, large-scale attacks on

1. See generally Kamil C. Klosek and Emil A. Souleimanov, *One or Many? Disentangling the Puzzle of Pro-Government Militia Deployment*, *STUD. CONFL. & TERRORISM*, 1 (2022), <https://doi.org/10.1080/1057610X.2022.2111990>.

2. Andrew Thomson and Dale Pankhurst, *From Control to Conflict: A Spectrum and Framework for Understanding Government-Militia Relationships*, *STUD. CONFL. & TERRORISM*, 2 (2022), <https://doi.org/10.1080/1057610X.2022.2111990>.

soft targets, the ambush of military personnel and convoys, as well as kidnapping and abduction of persons either for use in attacks or as a form of negotiation. In its evolving use of violence, the group has targeted children, through coordinated attacks on communities and educational facilities for purposes of abduction. Since 2009, the group is reported to have recruited over 8,000 children.³ The behavior of the group reflects a similar pattern by armed groups in other parts of the globe, who have made the recruitment of children a key aspect of their operations. According to the United Nations (UN), in 2015 the Islamic State of Iraq and the Levant (ISIL) recruited 274 children in the Syrian armed conflict.⁴ Within the same period of time, it reportedly also abducted 1,000 children from the Mosul region of Iraq.⁵ Other armed groups such as Al-Shabaab in Kenya and Somalia, Movement for Unity and Jihad in West Africa, Ansar Eddine, Al-Qaeda in the Islamic Maghreb in Mali, and Abu Sayyaf in Philippines have equally been implicated in this respect. At the same time, it is well recognized that child soldier recruitment is prohibited under several children's rights-related treaties in international law. However, the recruitment of children by PGMs and their use in carrying out heinous crimes, bring a novel dimension to the problem. Given their innocence and usefulness in being effective disguises in executing operations, children have remained top targets for these groups. While the males are recruited as potential fighters, the females are abducted to be converted into suicide bombers. The situation is far worse in the West African Sahel, where nearly every corridor is ravaged by one type of armed conflict or the other.

Whereas existing literature has focused on child soldier recruitment by armed groups fighting against states, the obscure nature of this same practice by PGMs has remained outside scholarly examination. The increasing use of children by groups of this nature challenges established rules of international law, especially as it relates to the issue of accountability. Given the clear obligation of states under international law, with regard to the prohibition of child recruitment, the issue of child soldier recruitment by PGMs raises novel problems for the framework of accountability under the relevant rules of IHL. The goal of this article is to illuminate this problem by examining the sources of international law governing the prohibition of child soldier recruitment, namely International Human Rights Law (IHRL), International Humanitarian Law (IHL), International Labour Law (ILL), International Criminal Law (ICL), as well as the rules under regional instruments. It would then narrow its analysis to the framework under IHL, to establish what shortcoming there is in the accountability of groups of this nature. It examines the issue of state responsibility for the wrongful acts of such PGMs and the lack of clarity on

3. See U.N. Secretary General, *Rep. of the Secretary-General on Child. And Armed Conflict in Nigeria*, ¶ 29 U.N. Doc. S/2017/304 (Apr. 10, 2017).

4. See United Nations Office on Drugs and Crimes (UNODC), *Handbook on Children Recruited and Exploited by Terrorists and Violent Extremist Groups: The Role of the Justice System*, 1 (2017).

5. See *Children and Armed Conflicts: Rep. of the Secretary-General*, ¶¶ 65, 149, 150 U.N. Doc. A/70/836-S/2016/360 (Apr. 20, 2016).

the applicable standard for designating such groups as a part of the state's armed forces under IHL rules. It calls for further development in the law that will ensure clarity and specificity in the standards for accountability.

II. UNDERSTANDING THE PROBLEM OF CHILD SOLDIER RECRUITMENT

Today, child soldiers are key players in most armed conflicts, mostly Non-International Armed Conflicts (NIACs), especially as poverty and conflicts have created opportunities for their recruitment into militias and armies.⁶ In understanding the problem of child soldier recruitment, it is important to begin by defining, according to legal instruments, the two key aspects of this phenomenon i.e., the terms 'child soldier' and 'recruitment'. To start with, the Cape Town Principles defines a Child Soldier as:

Anyone under the age of eighteen who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and those accompanying such groups, other than just purely family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.⁷

The above definition has been reaffirmed by the Paris Principles, which in explaining the term 'Child Soldier,' states that:

A child associated with an armed force and armed group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls, used as fighters, cooks, porters, messengers, spies, or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.⁸

In a more expanded form, the term has also been explained to mean "any person under the age of eighteen who is or has been associated with any kind of regular or irregular armed group, including those who serve as porters, spies, cooks, or messengers and included girls recruited for sexual purposes

6. Naomi Cahn, *Poor Children: Child Witches and Child Soldiers in Sub Sahara Africa*, 3 OHIO STATE J. CRIM. L. 413, 419 (2006).

7. United Nations Children's Fund (UNICEF), *Capetown Principles and Best Practice on the Prevention of Recruitment fo Child*. In the *Armed Forces and Demobilization and Social Integration of Child Soldiers in Africa*, ¶ 2 (Apr. 30, 1997), <https://openasia.org/en/wp-content/uploads/2013/06/Cape-Town-Principles.pdf> [*Hereinafter* 'Cape Town Annotated Principles'].

8. *See* United Nations Children's Fund (UNICEF), *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, ¶ 2.1 (Feb. 2009), <https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf> [*Hereinafter* 'Paris Principles'].

and many others.”⁹ Humanitarian and human rights groups have also defined the term as “any person under eighteen years of age who has been recruited or used by an armed or armed group in any capacity.”¹⁰ The term ‘child soldier’ is deemed unsatisfactory, given that a soldier clearly refers to a person who has been trained in some form of military combat, but that children often referred to as child soldiers really have no such training.¹¹ The age of fifteen appears to enjoy a degree of consensus in the international legal system when it comes to conceptualizing the idea of a child soldier,¹² particularly as it is in prevalent use in the international legal regime governing the framework for protection and accountability.¹³ Recruitment, on the other hand, is defined as “compulsory, forced, and voluntary recruitment into any kind of regular or irregular armed force or armed group.”¹⁴ Article 4 of the Statute for the Special Court for Sierra Leone defines recruitment as “conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities.”¹⁵ This definition, however, speaks of forced recruitment. One important fact that scholars have emphasized over time is that though most child soldiers are forcefully recruited or abducted to be later converted to fighters, there are instances where children themselves voluntarily join armed groups.¹⁶ While some are conscripted, others are simply abducted and armed to go fight, and a number freely join for reasons personal to them.¹⁷ In Central Africa for instance, a study found that about two-thirds of the children used in the armed conflict were voluntarily recruited.¹⁸

The statistic on child soldier recruitment is alarming. A leading NGO at the forefront of the campaign against child soldier recruitment, i.e., Save the Children, notes that between 2005 and 2018, a total of 65,081 children are known to have been recruited and used by armed forces and armed groups.¹⁹ According to the same organization, in 2018, about 7,000 children were reportedly recruited as child soldiers, with the most verified cases being 2,300

9. Timothy Webster, *Babes with Arms: International Law and Child Soldiers*, 39 GEO. WASH. INT’L L. REV. 227, 230 (2007).

10. David M. Rosen, *Who is a Child? The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT’L L. 81, 83 (2009).

11. Jenny Kuper, *Child Soldiers and Civilians – Some Controversial Issues*, 29 U. LA VERNE L. REV. 12, 13 (2008).

12. Rosen, *supra* note 10, at 83.

13. *Id.*

14. Capetown Principles, *supra* note 7; Paris Principles, *supra* note 8 at ¶ 2.4.

15. Noah B. Novogrodsky, *Litigating Child Recruitment before the Special Court for Sierra Leone*, 7 SAN DIEGO INT’L L. J. 421, 421 (2006).

16. Bhavani Fonseka, *The Protection of Child Soldiers in International Law*, 2 ASIA-PACIFIC J. HUM. RTS. & L. 72 (2001).

17. Joseph N. Madubuike-Ekwe, *The International Standards Adopted to Stop the Participation of Children in Armed Conflicts*, 11 ANN. SURV. INT’L & COMP. L. 32 (2005).

18. Cahn, *supra* note 6.

19. See *Child Soldiers: The Tragic End of Childhood for Boys and Girls in Conflict*, SAVE THE CHILDREN, <https://www.savethechildren.org/us/charity-stories/child-soldiers>

recruited in Somalia, and 1,947 recruited in Nigeria.²⁰ Coalition to Stop the Use of Child Soldiers, a group of six Non-Governmental Organisations (NGOs) put the number of children below the age of eighteen, participating in armed conflicts across the world at over 300,000.²¹ In its report on Children and Armed Conflict in 2020, the UN stated that of the 23,946 violations in 2020, the highest number was in relation to recruitment and use of children which was 8,521.²² Most of these violations were in Afghanistan, the Democratic Republic of Congo, Somalia, the Syrian Arab Republic, and Yemen.²³ While 85 percent of those recruited and used were boys, 98 percent of the sexual violence was perpetrated against girls.²⁴ In its 2021 report, amongst the highest verified violations of 2021 were the recruitment and use and the killing and maiming of children, closely followed by the denial of humanitarian access and abduction of children.²⁵ In the same report, of the 19,165 violations against children, 6,310 involved the recruitment and use of children in armed conflicts, with the highest number being in DRC, Syria, Somalia, and Mali.²⁶ Within the same year, the violation with the greatest increase was the abduction of children which increased by 20 percent with 3,459 children abducted.²⁷ The abduction of children further increased by 40 percent,²⁸ with almost all abductions by armed groups, the highest reported in DRC, Somalia, the Lake Chad Basin, and Burkina Faso.²⁹ In addition, most cases of sexual violence perpetrated against children happened in the DRC, Somalia, Central African Republic (CAR), and Nigeria.³⁰ Notwithstanding these statistics, the exact number of children involved in armed conflicts across the globe remains a matter of continuing debate.³¹ This is more so as parties to armed conflicts, sparingly provide information on their involvement in this practice.³²

Factors responsible for child soldier recruitment are diverse; these include the values of the community where they live, pressure from peer

20. See ALVHILD STROMME, ET AL., SAVE THE CHILDREN, STOP THE WAR ON CHILDREN 2020: GENDER MATTERS, 21 (2020), <https://www.savethechildren.org/content/dam/usa/reports/emergency-response/gender-matters-swoc-report.pdf>

21. Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEORGETOWN J. INT'L L. 323, 325 (2007).

22. See U.N. Secretary General, *Children and Armed Conflicts: Report of the Secretary-General*, ¶ 4, A/75/837-S/2021/437 (May 6, 2021).

23. *Id.* at ¶ 5.

24. *Id.*

25. See, *Report of the Special Representative of the Secretary-General for Children and Armed Conflicts*, ¶ 4, A/76/871-S/2022/493 (July 17, 2022).

26. *Id.*

27. Secretary General, *supra* note 22, at ¶ 5.

28. *Id.*

29. *Id.*

30. *Id.*

31. Webster, *supra* note 9, at 231.

32. Nsongurua J. Udombana, *War Is Not Child's Play! International Law and the Prohibition of Children in Armed Conflicts*, TEMPLE INT'L & COMP. L. J. 57, 61 (2006).

groups, fundamentalist religious identity, the pursuit of revenge, or a feeling of vulnerability or helplessness.³³ The continually changing pattern of warfare equally makes it so that children are recruited to become a part of the prosecution of armed conflicts, serving both in support roles as well in active combat positions.³⁴ While the general view about child soldiers is that of boys recruited by armed groups for use in combat operations, the reality is that both genders are now recruited as soldiers, except that oftentimes the girls are put to additional uses, such as being wives and cooks of commanders, in addition to being victims of all forms of sexual crimes.³⁵ Generally, the attraction is that children are considered cheaper to recruit and train, more vulnerable to exploitation, and can be strategically deployed in operations, such as the use of girls in suicide attacks by the Boko Haram terrorist group in Nigeria.³⁶ Also, while war is a major determinant of the practice of child soldier recruitment, children may view their enlistment in conflicts as a means of survival for themselves, their family members, and their communities, which is often in the context of extreme poverty, violence, inequality, and injustices.³⁷ In some other cases, while some children join these groups as a form of escape from oppressive conditions back home, others see it purely as an adventure.³⁸ In the extreme, some children see it as a means of survival.³⁹ Children may also become enlisted as child soldiers as a means of escaping gender-based violence or some form of discrimination.⁴⁰ It is worthy to note the obscure practice in which cultural values and ideology play a role in armed groups' recruitment of children. This is common with groups sharing ethnic and cultural affinity with the people of the region where they operate, to the end that they use that as a vehicle for recruiting children into their fold. An example is the case of the Kamajor militia, a PGM which operated during the Sierra Leone civil war and enjoyed the influx of children into its ranks, fuelled by the permission of the parents.⁴¹ Most of the recruits considered joining the militia as a form of elevated status in society.⁴² This kind of culturally-sanctioned recruitment demonstrates the extent of the problem, especially as the accountability of groups of this nature seems to be outside the purview of the law.

The impact of child soldier recruitment on children is catastrophic and better imagined;

33. Fonseka, *supra* note 16.

34. Matthew Happold, *Children Participating in Armed Conflict and International Criminal Law*, 5 HUMAN RIGHTS & INTERNATIONAL LEGAL DISCOURSE, 83 (2011).

35. Cahn, *supra* note 6, at 420-21.

36. See SAVE THE CHILDREN, STOP THE WAR ON CHILDREN 2020: GENDER MATTERS, *supra* note 20.

37. *Id.*

38. Cahn, *supra* note 6.

39. Fonseka, *supra* note 16.

40. See SAVE THE CHILDREN, STOP THE WAR ON CHILDREN 2020: GENDER MATTERS, *supra* note 20.

41. Stephanie H. Bald, *Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for its Children*, 18 AM. UNIV. INT'L L. REV. 551 (2002).

42. *Id.*

[o]nce children are recruited, either voluntarily or forcibly, into a military regime, they are forced to fight, kill, steal food, and even forced into sexual submission. The children are either eventually killed or released from duty (as a result of an international request or an end to the conflict).⁴³

After disengaging from their use in conflict, such children face immediate and lifelong challenges. Fundamentally, they are robbed of their childhood and innocence, with many missing out on years of education, thereby destroying their future.⁴⁴ Also, they may also suffer from physical, developmental, and mental health issues.⁴⁵ Social integration is difficult as these children have lost ties with family and communities. The case of girls recruited as child soldiers is even worse. Girls who may have been forced into sexual relationships, forced marriage, or support roles, may never be released or reintegrated.⁴⁶ Others, who are fortunate to be released may face difficulties reintegrating into the community due to stigma, regardless of whether their role as child soldiers was as a combatant, sex slave, or forced bride.⁴⁷ For instance, a girl associated with an armed group may be regarded by family and community as impure, unnatural, and dishonorable. In addition, children born as a result of wartime rape are heavily stigmatized.⁴⁸ More so, boys recruited as child soldiers could be rejected by their communities as they could be viewed as a threat.⁴⁹ In her 1996 ground-breaking work presented to the UN General Assembly, Graca Machel, a former Minister of Education in Mozambique identified the disproportionate impact of war on children, stating that they are the primary victims.⁵⁰ Report from this project led to the adoption of the UN General Assembly Resolution 51/77, which later recommended that the Secretary-General appoint a Special Representative on the impact of armed conflict on children.⁵¹ Clearly, the heinous nature of child soldier recruitment is a point that can't be overstated, hence the imperative of a commensurate response under the law. It is, however, an open question

43. Marsha L. Hackenberg, *Can the Optional Protocol for the Convention on the Rights of the Child Protect the Ugandan Child Soldier?* 10 IND. INT'L & COMP. L. REV. 422 (2000).

44. *Child Soldiers: The Tragic End of Childhood for Boys and Girls in Conflict*, *supra* note 19.

45. *Id.*

46. *Stop the War on Children 2020: Gender Matters*, *supra* note 20, at 24.

47. *Id.*

48. *Id.*

49. *Id.*

50. See *Graca Machel and the Impact of Armed Conflict on Children*, OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, <https://childrenandarmedconflict.un.org/about/the-mandate/mandate/the-machel-reports/>.

51. *Id.*

whether the current laws have developed well enough to match the increasingly dynamic nature of the practice.

III. CHILD SOLDIER RECRUITMENT BY PRO-GOVERNMENT MILITIAS

In armed conflicts, child soldier recruitment is connected to the activities of different actors. As stated in the earlier part of this article, aside from states' armed forces and armed groups, other types of irregular forces, especially those fighting alongside states' armed forces such as PGMs are known to engage in this practice. Accordingly, the child soldier recruitment activities of this category of irregular forces would be the focus of this section of the article. However, it is important to first understand how such groups are conceptualized. Much of the scholarship that has developed over time on PGMs derives from the works of scholars in the Social Science discipline. Akins for instance defines PGMs as, "irregular forces not officially part of the State security apparatus, but acting alongside or in place of regular security forces to counter domestic insurgencies or civilian opposition."⁵² Carey, Mitchel, and Lowe on their part view PGMs as "a group that is identified pro-government or sponsored by the government national or subnational; is identified as not being part of the regular security forces; is armed; and has some level of organization."⁵³ The use of PGMs by States has positioned them as an emerging risk to the protection of civilians and the stability of developing countries.⁵⁴ Though unofficial and mostly illegal, these groups have access to the resources and status ordinarily reserved for the State.⁵⁵

Their increasing use falls within discussions on the relationship between States and militias in armed conflict situations. For Staniland, this relationship could be on four grounds: Suppression, incorporation, containment, or collusion.⁵⁶ As opposed to the other three grounds, most States that work with PGMs in armed conflicts do so on the basis of incorporation. Such incorporation involves a collaborative relationship in which the PGM is deployed to serve the State's interests while, in return, PGM members access benefits such as subsistence allowance, political patronage, government protection, social approval, etc. In this collaboration, PGMs serve different purposes. As noted by Carey and Mitchel, states either

52. Harrison Akins, *Violence on the Homefront: Interstate Rivalry and Pro-Government Militias*, *TERRORISM & POL. VIOL.* 1. (2019).

53. Sabine C. Carey, Neil J. Mitchel and Will Lowe, *States, the Security Sector and the Monopoly of Violence: A New Database on Pro-Government Militia*, 50 *J. PEACE RES.* 250 (2012).

54. Clionahd Raleigh and Roudabeh Kishi, *Hired Guns: Using Pro-Government Militias for Political Competition*, 32 *TERRORISM & POL. VIOL.* 582 (2020).

55. *Id.*

56. Paul Staniland, *Militias, Ideology and the State*, 59 *J. CONFL. RES.* 772 (2015).

establish or align with armed groups not under the control of their full military apparatus for reasons such as addressing security challenges, or simply for political benefits (e.g., electoral gains).⁵⁷ With respect to collaboration, the nature of the group's relationship with the state is crucial, as it determines the issue of agency and the implications for the level of violence.⁵⁸ While some groups have a semi-informal relationship with the state,⁵⁹ others operate on a more or less informal basis.⁶⁰ This can provide insights into the motivation underlying the behavior of governments and PGMs and how this impacts the civilian population.⁶¹

PGMs can either be established directly by States or exist independently and later co-opted by the State in an armed conflict. In other instances, some may come out of defecting rebels who joined government forces in the conflict after being a part of an insurgent group.⁶² For members of PGMs, fighting on the side of the government is often motivated by a number of factors. While some see a chance to revenge against their peers in insurgent groups, others see an opportunity to defend their local environment. This often happens when the civilian population perceives that government forces aren't doing enough to protect them. For instance, failure on the part of troops to follow laid down doctrinal principles with respect to protecting the civilian population, leading to an overreliance on the kinetic approach, is one such ground.⁶³ This was the case in the early phase of the British counterinsurgency in its conflict with the Irish Republican Army (IRA), which, in retrospect, was viewed as ineffective.⁶⁴ As noted by Eastin and Zech, violence following state neglect and a weak security apparatus could lead civilians to take up the responsibility of providing their own security.⁶⁵ At the same time, joining PGMs could be a case of ethnic defection, in which regardless of prior ideology, insurgents flip or defect to the government side,

57. Sabine C. Carey and Neil J. Mitchel, *Pro-government Militias*, 20 ANN. REV. POL. SCI. 128 (2017).

58. Neil J. Mitchel, Sabine C. Carey and Christopher J. Butler, *The Impact of Pro-Government Militias on Human Rights Violations*, 4 INT'L INTERACTIONS, 813 (2014).

59. *Id.*

60. Sabine C. Carey, Neil J. Mitchel and Katrin Paula, *The Life, Death and Diversity of Pro-Government Militias: The Fully Revised Pro-Government Militias Database Version 2.0*, RES. & POL. 1 (2022).

61. Sabine C. Carey and Belen Gonzalez, *The Legacy of War: The Effect of Militias on Post-war Repression*, 38 CONFLICT MGMT. & PEACE SCI. 249 (2021).

62. Konstantin Ash, *Threats to Leaders' Political Survival and Pro-Government Militia Formation*, 42 INT'L INTERACTIONS, 704 (2016).

63. Aaron Edwards, *Misapplying Lessons Learned? Analysing the Utility of British Counterinsurgency Strategy in Northern Ireland, 1971 – 76*, 21 SMALL WARS & INSURGENCIES 311 (2010).

64. Andrew Sanders, *Operation Motorman 1972 and Search for a Coherent British Counterinsurgency Strategy in Northern Ireland*, 24 SMALL WARS & INSURGENCIES 469 (2013).

65. Joshua Eastin & Steven T. Zech, *Joining the Counterinsurgency: Explaining Pro-Government Militia Participation in the Philippines* at 4, STUD. CONFL. & TERRORISM (2019).

to fight against those of the same ethnicities as themselves.⁶⁶ It could also be a matter of economic opportunity fuelled by conditions such as unemployment.⁶⁷ Generally, the conduct of PGMs in a conflict is influenced by state behavior as well as that of the rebels.⁶⁸

The alliance between the government and a PGM can equally continue after the conflict ends based on a number of reasons, amongst which are continued relations with PGMs for strategic interest, economic benefits of such PGMs, the usefulness of PGMs in implementing repressive policies in the post-war era, and lastly, where the state simply tolerates such PGMs.⁶⁹ Scholarship on PGMs hinges largely on two perspectives: i.e., the angle of experts in counterinsurgency and irregular warfare who view them as auxiliary forces useful for gathering intelligence required to identify insurgents, and those who see them as agents of brutality.⁷⁰ For instance, in the over thirty years of the Northern Ireland insurgency, PGMs fighting for the state to remain in Great Britain killed about 1,000 persons.⁷¹ In the same light, it has been observed that states involved in genocidal acts rely on groups of this nature to carry out this violence.⁷² Furthermore, it has been observed that a state's use of a PGM increases its ability to commit violence on its territory, while also leading to an upsurge in terrorist acts, as the PGM itself could attract violence through its actions.⁷³ At the same time, as Carey, Colaresi, and Mitchel note, states' use of militias are often towards lowering accountability for acts of violence, by relying on the militia's organizational structure as separate from its regular forces.⁷⁴ Generally, the focus has been on established contexts such as their recruitment as militias to fight for parties to an armed conflict; as parts of fragmented armed groups operating in a collapsed state and exercising governance over territories; as community-based armed groups/vigilantes providing local security functions in the absence of state presence; or as Civilian Defense Forces (CDFs) acting as a volunteer defense force, that have taken up arms against insurgents to protect their local community.

As is to be expected, states mostly lacking in capacity and resources are unable to control these groups, the result being they end up abusing the power

66. Paul Staniland, *Between a Rock and a Hard Place: Insurgent Fratricide, Ethnic Defection and the Rise of Pro-State Paramilitaries*, 56 J. CONFL. RES. 18, 168 (2012).

67. Eastin & Zech, *supra* note 65, at 5.

68. Shane Joshua Barter, *State Proxy or Security Dilemma? Understanding Anti-Rebel Militias in Civil Wars*, 9 ASIAN SEC. 75, 77 (2013).

69. Carey & Gonzalez, *supra* note 61, at 250-251.

70. Ariel I. Ahram, *Pro-Government Militias and the Repertoires of Illicit State Violence*, 39 STUD. CONFL. & TERRORISM 207, 209 (2016).

71. Neil T.N. Ferguson, *Just the Two of Us: Civil Conflicts, Pro-State Militias and the Violence Premium*, 29 TERRORISM & POL. VIOL. 296, 314 (2017).

72. See Alexander Alvarez, *Militias and Genocide*, 2 WAR CRIMES, GENOCIDE, & CRIMES AGAINST HUMANITY 1 (2006).

73. Harrison Atkins, *Delegating Repression? Pro-Government Militias and Domestic Terrorism*, 14 DYNAMICS ASY. CONFL. 73 (2021).

74. Sabine C. Carey, Michael P. Colaresi & Neil J. Mitchel, *Governments, Informal Links to Militias and Accountability*, 14 J. CONFL. RES. 850, 852 (2015).

ceded to them. These groups and the challenges they pose have become a menace to the complicated security architecture in sub-Saharan Africa,⁷⁵ where a number of them are active in counterinsurgencies.⁷⁶ Notable ones include the Kamajors of Sierra Leone, the Arrow Boys of Teso Uganda, the Zande Arrow Boys of South Sudan, and the Civilian Joint Task Force (CJTF) of Nigeria.⁷⁷ These groups share similarities in nature, characterization, operation, and overall objective. Concerning the problem of child soldier recruitment, Africa occupies a unique position. Amongst other armed conflict concerns, insurgencies have remained a major challenge on the continent, accounting for extensive destruction of human life while also impeding socio-economic development. Insurgency on the continent is not an isolated issue, but rather symptomatic of the rapidly changing dynamics of warfare in the twenty-first century. Child soldier recruitment on the continent is rife in countries battling insurgencies such as the Democratic Republic of Congo (DRC), Liberia, Libya, Nigeria, Sudan, Sierra Leone, South Sudan, Uganda, etc. In the Middle-east, child soldier recruitment has also been reported in countries battling armed conflicts such as Iraq, Syria, and Yemen. In Iraq for instance, children were recruited, trained, and used by armed groups to take direct and indirect parts in hostilities.⁷⁸ Such children were made to act as spies and scouts, transport military supplies and equipment, conduct patrols and man checkpoints, plant explosives, and engage in attacks and combat situations.⁷⁹ The practice has also occurred in parts of Asia, such as in the Philippines and Sri Lanka. As of 1999, reports indicated that children made up about 40 – 50% of the Rebel United Front (RUF) 15,000-man strong force in Sierra Leone.⁸⁰ In the war in Congo, child soldiers have also been a major feature, with both sides of the conflict alleged to be complicit in this regard.⁸¹ Generally, it is noted that even with the demobilization of child soldiers in Sierra Leone and South Sudan, more than 120,000 children are engaged in active combat on the African continent.⁸²

As PGMs are the focus of this article, it is important to establish from documented reports, their child soldier recruitment activities. Reports indicate that at a time, about one-fifth of the 25,000 soldiers in the ranks of the Kamajor PGM in the Sierra Leone Civil War was made up of children.⁸³

75. D.J. Francis, *Introduction*, in D.J. Francis (ed.) *CIVIL MILITIA: AFRICA'S INTRACTABLE SECURITY MENACE* (Milton Park, Abingdon: Routledge, 2005), 25.

76. INTERNATIONAL CRISIS GROUP, *Double-Edged Sword: Vigilantes in African Counter-Insurgencies* 1 (2017), <https://www.crisisgroup.org/africa/west-africa/sierra-leone/251-double-edged-sword-vigilantes-african-counter-insurgencies>.

77. *Id.*

78. U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in Iraq*, ¶ 29 U.N. Doc. S/2014/852 (Nov. 9, 2015), <http://undocs.org/S/2015/852>.

79. *Id.*

80. Aubrey F. Mitchell, *Sierra Leone: The Road to Childhood Ruination Through Forced Recruitment of Child Soldiers and the World Failure to Act*, 2 REGENT J. INT'L L. 81, 97 (2004).

81. Cahn, *supra* note 6, at 421.

82. Grossman, *supra* note 21, at 326.

83. Mitchell, *supra* note 80.

Also, as of 2016, the manpower strength of the CJTF in Nigeria was put at 26,000, which reportedly included many boys between the ages of ten and eighteen years old.⁸⁴ Between November 2015 and December 2016, the UN documented the recruitment and use of 226 children by the group, made up of 209 boys and nineteen girls.⁸⁵ In addition, despite the fact that the oral code of conduct of the group showed that fifteen years was the minimum age for recruitment, it is reported that they were using children as young as nine years old in their operations.⁸⁶ In Iraq, child soldier recruitment has been associated with the activities of the Popular Mobilization Forces and other PGMs that operated in Baghdad and Basra.⁸⁷ For example, leaders from these groups publicly commended children for liberating the country in the fight against ISIL.⁸⁸ Children have also been linked with the Yezidi as well as self-defense groups who were fighting alongside the Peshmerga in Ninawa, the frontline in Sinjar Mountains, Tallkayf, Hamdaniyah, and Makhmour.⁸⁹ In the Syrian Armed Conflict, the recruitment and use of children PGMs have also been verified.⁹⁰

IV. INTERNATIONAL LEGAL REGIME GOVERNING PROHIBITION AND ACCOUNTABILITY FOR CHILD SOLDIER RECRUITMENT: AN ANALYSIS

The worrying spate of recruitment of child soldiers in armed conflicts prompted the need to create international benchmarks to prohibit the act.⁹¹ Since the phenomenon happens mostly in armed conflict situations, it would be important to begin analysis in this section of the article, by examining the rules of International Humanitarian Law (IHL). Consideration would also be made of subsequent regimes later developed under International Human Rights Law (IHRL), International Labour Law (ILL), as well as International Criminal Law (ICL).⁹² These four (4) sub-divisions of international law provide a broad framework of prohibition and accountability. Accordingly, this section of the article examines responses under these regimes, as well as the challenges and shortcomings.

84. U.N. Secretary-General, *supra* note 3, ¶ 29.

85. *Id.* ¶ 34.

86. *Id.*

87. U.N. Secretary-General, Children and Armed Conflict in Iraq, *supra* note 79, ¶ 35.

88. *Id.* ¶ 35.

89. *Id.* ¶ 37.

90. U.N. Secretary-General, Children and Armed Conflict, *supra* note 5, ¶ 152.

91. Happold, *supra* note 34, at 83.

92. *Id.* at 83-84.

A. *International Humanitarian Law*

IHL, also known as the law of war, made up of the four Geneva Conventions,⁹³ and the two additional protocols,⁹⁴ generally deal with the regulation of methods of warfare and the protection of the civilian population.⁹⁵ In over a century of continuous engagements, IHL as a body of laws has systematically developed a number of core humanitarian principles, which are the principles of distinction, proportionality, humanity, and military necessity, intended to guide the conduct of hostilities by parties to an armed conflict.⁹⁶ While the four Geneva Conventions deal with armed conflicts of an international character, Article 3 common to all four conventions provides some degree of humanitarian protection for persons caught in non-international armed conflicts.

IHL rules afford children direct protection from being used in armed conflicts. Additional Protocol I (Protocol I), relating to International Armed Conflicts requires state parties to “take all feasible measures” to prevent children under the age of fifteen from being directly involved in hostilities, and if persons between the ages of fifteen and eighteen are to be enlisted, the protocol encourages the prioritization of the older ones.⁹⁷ While Protocol I provides for an exception, prohibition under Additional Protocol II (Protocol II), which relates to Non-International Armed Conflicts (NIAC), is total. It prohibits all forms of participation in armed conflicts by children under the age of fifteen, whether direct or indirect.⁹⁸ These two provisions later formed the nucleus of the provision prohibiting child soldier recruitment under the Rome Statute. These standards are generally accepted as part of customary

93. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force 21 Oct. 1950) [hereinafter Geneva I]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force 21 Oct. 1950) [hereinafter Geneva II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force 21 Oct. 1950) [hereinafter Geneva III]; Convention Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force 21 Oct. 1950) [hereinafter Geneva IV].

94. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125, U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts 8 June 1977, 1125, U.N.T.S. 609 [hereinafter Protocol II].

95. Madubuike-Ekwe, *supra* note 17, at 35.

96. *Id.* at 35-36.

97. Protocol I, *supra* note 94, art. 77(2).

98. In particular, the Protocol states that “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.” Protocol II, *supra* note 94, art. 4(3).

international law and therefore applicable to all states, whether or not they have ratified these protocols.⁹⁹

In addition, as a part of the civilian population, IHL affords children protection against inhumane treatment and attacks in armed conflict situations.¹⁰⁰ In addition to being under the control of a party, IHL also demands protection for children and other persons caught in the midst of hostilities, providing that children must be accorded special respect, protection, care, and assistance.¹⁰¹ Generally, IHL aims to protect children from the effect of combat operations as well as prevent the direct involvement of those who are under the age of fifteen in hostilities.¹⁰² It has been recognized that a state's obligation to children caught in armed conflicts extends beyond not recruiting them into the government's military forces.¹⁰³ Importantly, in both IACs and NIACs, children have special affirmative protection under IHL rules, prohibiting warring parties from harming anyone not taking an active part in hostilities.¹⁰⁴

The scholarly opinions on the IHL's prohibitive framework are disparate. Jesseman for example recognizes that Protocol II provides quite an effective and robust prohibitive framework, as it covers key areas such as the direct participation of children in hostilities, recruitment, voluntary enlistment, and the elimination of all restrictions on the steps that can be taken by the state.¹⁰⁵ However, Madubuikwe-Ekwe notes that the language in Article 77(2) of AP II has been criticized as providing a rather low threshold of obligation to state parties.¹⁰⁶ By requesting state parties to "take all feasible measures" to ensure that children less than the age of fifteen do not take direct part in hostilities, it is argued that government may simply hide behind this to evade responsibility.¹⁰⁷ The idea of "feasible measures" is itself clothed in ambiguity, as what is 'feasible' to one state may not be 'feasible' to another. Also, it appears that the only concern of IHL is 'direct participation in hostilities.'¹⁰⁸ What of where children are deployed in obscure combat roles which are not necessarily direct involvement in hostilities? It however appears that this issue has been addressed where the rule states that children are not allowed to be involved in any form of military operation, including

99. See ILO, *Wounded Childhood: The Use of Children in Armed Conflict in Central Africa*, INT'L PROGRAMME ON ELIMINATION OF CHILD LABOR, INT'L LABOR OFFICE 2 (Apr. 2003).

100. Amy Beth Abbott, *Child Soldiers: The Use of as Instruments of War*, 23 SUFFOLK TRANSNAT'L L. REV. 499, 520 (2000).

101. Elina Almila, *Protecting Children During Armed Conflict: International Humanitarian Law*, 5 J. OF INT'L HUM. L. STUDIES 217, 218 (2011).

102. *Id.* at 218.

103. Grossman, *supra* note 21, at 334.

104. *Id.*

105. Christine Jesseman, *The Protection and Participation Rights of the Child Soldier: An African and Global Perspective*, 1 AFR. HUM. RTS. L. J. 140, 144 (2001).

106. Madubuikwe-Ekwe, *supra* note 17, at 37.

107. *Id.*

108. *Id.*

transporting arms and sabotage.¹⁰⁹ Most importantly, scholars have made the point that the dynamically changing pattern of warfare in the modern era has been a major factor undermining the humanitarian objectives of the additional protocols.¹¹⁰ For instance, a key challenge with Protocol II lies in the fact that many states are yet to ratify it. As many conflicts are non-international in character, and it is sometimes difficult to distinguish what constitutes a NIAC from a mere internal disturbance, many states often claim the protocol does not apply to their class of conflict.¹¹¹ The result is that this vacuum can be exploited to deprive children of the protection that international law ordinarily provides for them.¹¹²

B. International Human Rights Law (IHRL)

The relationship between IHRL and the recruitment of children for fighting in armed conflicts is an established one. Following the understanding that the protection of human rights has indeed become a universally shared commitment, IHRL treaties create obligations that state parties are expected to progressively pursue and seek to realize. They are to realize these obligations over a period of time, in a manner consistent with the overall objective of the class of right in question. It is therefore immaterial that there may be a disparity in terms of the financial resources of state parties, where there is an underlying commitment to follow through on these obligations, it becomes realized with time. A unique aspect of IHRL obligations is the part that deals with members of vulnerable groups such as women, children, and the disabled. Given the special nature of this class of persons, IHRL treaties have also been developed outside the general human rights framework to specially cater for their needs. One group within this framework, children, is the focus of this article.

As early as the 1920s, the need to protect children in armed conflicts had become a major concern under international law.¹¹³ As a first step, and following the issues that trailed children caught in the Balkan war, the League of Nations in 1924 adopted the Geneva Declaration of the Rights of the Child,¹¹⁴ which noted that children must have priority in terms of relief in an armed conflict.¹¹⁵ The 1924 Geneva Declaration asserts that the human community owes the child the very best protection available.¹¹⁶ In addition, it stated that ‘the child shall be protected against all forms of neglect, cruelty,

109. Alison D. Renteln, *The Child Soldier: The Challenge of Enforcing International Standards*, 21 WHITTIER L. REV. 191, 194 (1999).

110. See Abbott, *supra* note 100, at 523.

111. Madubuike-Ekwe, *supra* note 17, at 39.

112. See *id.*

113. Fonseca, *supra* note 16, at 77.

114. See League of Nations Geneva Declaration of the Rights of the Child (adopted Sept. 26, 1924).

115. Fonseca, *supra* note 16, at 78.

116. Abbott, *supra* note 100, at 501.

and exploitation.¹¹⁷ However, even with these noble intentions, failure of the declaration appeared a settled fact, as it did not directly address the participation of children in conflicts and also did not impose clear obligations on states to implement its provisions.¹¹⁸ For the first time, the UN adopted a far-reaching instrument relating to children's rights with the UN Declaration of the Rights of the Child 1959.¹¹⁹ In its agenda-setting, the 1959 Declaration makes the best interest of the child a guiding principle, and places responsibility on adults for the realization of children's rights.¹²⁰ A major vacuum in the declaration was the clear omission of a definition of a child, which has left states with room to run with their own idea of majority age.¹²¹

The shortcomings of the 1924 and 1959 Declarations, were later vacated with the adoption of the most comprehensive international treaty on children, i.e., the Convention on the Rights of the Child (*hereinafter* the 'CRC') 1989.¹²² The journey towards adopting the CRC began in 1979 when the Government of Poland made a proposal to the UN Commission on Human Rights on the need for a convention on children's rights.¹²³ The initial drafting process was impeded by issues of the Cold War which had generally affected international efforts on coming to an agreement on human rights issues.¹²⁴ The difference in the views between the western and eastern blocs of countries towards human rights, in which the west favored civil and political rights while the east leaned towards socio-economic rights, significantly affected the drafting process; even though the Polish proposal clearly tilted towards the eastern bloc idea rights.¹²⁵

The CRC has been adjudged as the most far-reaching document, promoting and protecting children in the twenty-first century.¹²⁶ Importantly, it has been acclaimed as positioning the child as a holder of internationally binding rights, which encompasses the right to protection, as well as participation.¹²⁷ The increasing tension between these two sides of the right of the child, will be given consideration later in this article; however, of important note is the fact that the CRC's worldwide influence has seen to the development and eventual adoption of similar and complementary treaties at the regional levels across the world. Article 36 of the CRC mandates state parties to "protect the child against all forms of exploitation prejudicial to any

117. Geneva Declaration of the Rights of the Child, *supra* note 114.

118. See Fonseca, *supra* note 16, at 78.

119. G.A. Res. 1386 (XIV), Declarations of the Rights of the Child (Nov. 20, 1959).

120. Abbott, *supra* note 100, at 502.

121. Fonseca, *supra* note 16, at 79.

122. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [*hereinafter* CRC].

123. Ann Quennerstedt, Carol Robinson & John l'Anson, *The UNCRC: The Voice of Global Consensus on Children's Rights*, 36 NORDIC J. HUM. RTS. 38, 40 (2018).

124. *Id.*

125. *Id.* at 40-41.

126. Geraldine Van Bueren, *The International Law on the Rights of the Child*, 19 FORDHAM INT'L L.J. 831, 832 (1995).

127. Jesseman, *supra* note 105, at 141.

aspects of the child's welfare."¹²⁸ Unarguably, recruiting a child for the purpose of fighting in an armed conflict must be deemed an act prejudicial to the child's welfare. It does not matter that the state is not the actor recruiting such a child to fight; it is still under an obligation to ensure the protection of such a child. Addressing frontally, the problem of child soldier recruitment, the CRC reiterates the prohibition under Protocol I and Protocol II in a broad range of provisions.

For instance, Article 38(1) states that:

State parties shall undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.¹²⁹

Article 38(2) adds that:

State parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take direct part in hostilities.¹³⁰

Article 38(3) states that:

State parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting amongst those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, state parties shall endeavor to give priority to those who are oldest.¹³¹

Article 38(4) states that:

In accordance with their obligation under international humanitarian law to protect the civilian population in armed conflicts, state parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.¹³²

It is worth stating that the age limit of fifteen years used in Article 38 above is an exception under the CRC, as other articles are applicable to persons under the age of eighteen years.¹³³ As with other treaties made before its adoption, the CRC continues to be hamstrung by challenges. Major in this respect is the fact that only states that have ratified the Convention are bound

128. CRC, *supra* note 122, art. 36.

129. *Id.* at art. 38(1).

130. *Id.* at art. 38(2).

131. *Id.* at art. 38(3).

132. *Id.* at art. 38(4).

133. *Id.* at art. 38(3).

by its provisions.¹³⁴ Guerrilla forces, paramilitaries, and other kinds of armed groups are not bound by its rules, yet these groups are most culpable when it comes to the phenomenon of child soldier recruitment.¹³⁵ Another issue is the fact that the treaty does not provide a framework for actually punishing non-compliance, but rather provides for a system of accountability involving periodic reports to the Committee on the Right of the Child.¹³⁶ Additionally, it does not provide for third parties to submit complaints regarding violations of its provisions.¹³⁷ As it has become evident, the near-universal ratification of the CRC has not brought much gain, given that the treaty has hardly resulted in an increased standard of living or better recognition of children's rights by governments across the globe.¹³⁸

1. Optional Protocol to the Convention on the Right of the Child 1989 (Hereinafter 'Optional Protocol')¹³⁹

In a further expansion of the CRC's framework, two additional protocols have been adopted, with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (*hereinafter* 'Optional Protocol'),¹⁴⁰ directly covering the subject matter under consideration in this article. In the context of the current IHL framework, the Optional Protocol is that specific framework dealing with the recruitment of children as fighters in armed conflicts. To start with, it reaffirms the fact that, "the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security."¹⁴¹ Additionally, it underscores the "harmful effect and widespread impact of armed conflict on children and the long-term consequences that has for durable peace, security, and development."¹⁴² Importantly, it notes "the adoption of the Statute of the International Criminal Court and, in particular, its inclusion as a war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities both in international and non-international armed conflicts."¹⁴³

The protocol expressly prohibits the forced recruitment of children into a country's armed forces and circumscribes their direct participation in

134. Abigail Leibig, *Girl Child Soldiers in Northern Uganda: Do Current Legal Framework Offer Sufficient Protection*, 3 NORTHWESTERN J. INT'L HUM. RTS. 1, ¶ 30 (2005).

135. *Id.*

136. Fonseca, *supra* note 16, at 81.

137. *Id.*

138. Cahn, *supra* note 6, at 432.

139. G.A. Res. 54/263, at 3, U.N. Doc. A/54/263, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (May 25, 2000) (entered into force Feb. 12, 2002) [*hereinafter* Optional Protocol].

140. *Id.*

141. *Id.*, Annex I.

142. *Id.*

143. *Id.*

combat action. One of its objectives is to ensure that the age at which any child can participate in any armed conflict is the age of eighteen.¹⁴⁴ In dealing with the place of children in terms of the combat units of regular armed forces, Article 1 encourages state parties not to allow persons yet to attain the age of eighteen years to take direct part in hostilities,¹⁴⁵ while Article 2 provides that where such underage persons have even been recruited, then state parties must desist from any form of compulsory recruitment.¹⁴⁶ Though this part of the protocol reaffirms what Article 22(2) of the ACRWC already guarantees, the interpretation one gets from Article 2 of the protocol is that states can actually recruit persons below the age of eighteen into their armed forces, but such recruitment should not be done forcefully or made compulsory. In tightening the prohibition on forced recruitment, Article 3 requests that state parties submit a binding declaration stipulating the age at which it permits voluntary recruitment into its armed forces and the safeguards it has put in place to ensure this is followed through, particularly safeguards showing the voluntariness of recruitment and that such recruitment is backed by the full and informed consent of the parents.¹⁴⁷ An important section of the Protocol is the part that deals with non-state actors. Article 4(1) provides that “Armed groups that are distinct from the armed forces of a State should not, under any circumstance, recruit or use in hostilities persons under the age of 18 years.”¹⁴⁸ Article 4(2) adds that “State Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.”¹⁴⁹

Article 4 is further strengthened by Article 6 which enjoins “each state party to take all necessary legal, administrative and other measures” towards the implementation of the Protocol.¹⁵⁰ The contents of the Protocol are also expected to be given sufficient publicity to educate everyone including children, regarding its provisions,¹⁵¹ while children who may have been recruited as soldiers are to be demobilized by the state and accordingly rehabilitated and reintegrated into society.¹⁵² To achieve the ‘implementation’ of the protocol domestically as well as the goal of rehabilitating and reintegrating current child soldiers, Article 7(1) enjoins state parties to make the most of international cooperation in such areas as technical assistance and financial support.¹⁵³ For the purpose of monitoring compliance, in line with Article 8(1) state parties are expected to submit within two years of coming into force, a report to the Committee on Rights of the Child, detailing the

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144. Leibig, *supra* note 133, ¶ 34.
145. Optional Protocol, *supra* note 138, art. 1.
146. *Id.* art. 2.
147. *Id.* art. 3(2), (3).
148. *Id.* art. 4(1).
149. *Id.* art. 4(2).
150. *Id.* art. 6(1).
151. *Id.* art. 6(2).
152. *Id.* art. 6(3).
153. *Id.* art. 7(1).

measures it has taken to ensure the implementation of the provisions of the Protocol.¹⁵⁴

The Protocol has however been criticized as being gender non-sensitive, as it does not cover the girl child soldier.¹⁵⁵ This omission is key, as it is assumed girls are less likely to engage in direct combat activities but are more likely to be put to use, behind the scene. This assumption is however highly faulty, given that the use of girls as suicide bombers, though not mainstream combat, can still be classified as making a child take part directly in hostilities. The aim of a suicide bombing operation is to maim and kill, which is not entirely different from what happens when children bearing arms engage the other side in a gun battle. To this end, the idea of viewing the child soldier largely through the lens of the male child soldiers is clearly misplaced. However, the argument exists that since the protocol does not lay out a definition of a child soldier, the definition it provides can be interpreted to cover children affected by the armed conflict by not being involved in direct combat activities.¹⁵⁶ Despite this, the Protocol must be regarded as a major milestone in the international effort to provide for a direct framework prohibiting the practice of child soldier recruitment. To indeed reap the fruit of the Protocol, NGOs have continued to advocate for ratification by states that are yet parties.¹⁵⁷ The only problem is, as is the case with current signatories, ratification of the Protocol does not translate into a cessation of the practice.¹⁵⁸

C. *International Labor Law*

Though the International Labor Organisation (ILO) has long been at the forefront of combatting mainstream child labor practices, only recently did it begin to devote attention to the dimension of child labor that child soldier recruitment represents.¹⁵⁹ This it did, with the adoption of the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor Convention (*hereinafter* 'Worst Forms of Child Labor Convention 182').¹⁶⁰ On the road to drafting the Worst Forms of Child Labor Convention 182, it was a major contention as to whether the recruitment of children in armed conflicts should be defined as the worst form of child labor.¹⁶¹ There were divergent views on the propriety of this move in several rounds of discussions, particularly at the international labor

154. *Id.* art. 8(1).

155. Leibig, *supra* note 133, ¶ 41.

156. *Id.*

157. Cahn, *supra* note 6, at 432.

158. *Id.*

159. Holly Cullen, *Does the ILO Have a Distinctive Role in the International Legal Protection of Child Soldiers*, 5 HUM. RTS. & INT'L LEG. DISCOURSE 63, 63 (2011).

160. Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor Convention art. 1–3, June 17, 1999, S. Treaty Doc. No. 106-5, 2133 U.N.T.S. 16 [*hereinafter* ILO Convention 182].

161. Cullen, *supra* note 158, at 66.

conferences of 1998 and 1999.¹⁶² Ultimately, the majority view was that forced recruitment of children should be included in the convention, but under the prohibition of slavery and similar practices, as against the worst form of child labor.¹⁶³

Under this convention, child soldier recruitment is categorized as one of the worst forms of child labor. With reference to this point, the Convention states that the worst forms of child labor comprise “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor including forced or compulsory recruitment of children for use in armed conflicts.”¹⁶⁴ It also defines hazardous child labor as “work which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, and morals of the child.”¹⁶⁵ Within the same framework, recruiting a child for the purpose of sexual exploitation or for participation in armed conflict is also considered a form of trafficking in persons.¹⁶⁶ This position is in line with the definition of trafficking under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Person (*hereinafter* ‘Palermo Protocol’).¹⁶⁷ Abducting and recruiting children as soldiers is a form of exploitative labor having the same character as slavery.¹⁶⁸ The Worst Forms of Child Labor Convention 182 advocates surveillance measures and measures to ensure that children do not enter these kinds of practices, as well as to withdraw, rehabilitate, and socially rehabilitate such children.¹⁶⁹ It also calls on states to collaborate and mutually assist each other in implementing provisions of the Convention.¹⁷⁰ The Convention has been commended as a landmark treaty, given that with respect to curtailing child soldier recruitment, it recommends the age of eighteen years as the minimum age of enlistment, and it is the first time this practice would be recognized as a form of child labor.¹⁷¹ The ILO Minimum Age Convention reaffirms the same aspirations, while considering the issue of a minimum age of employment.¹⁷²

162. *Id.*

163. *Id.* at 67.

164. ILO Convention 182, *supra* note 160, art. 3(a).

165. *Id.* art. 3(d).

166. Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 *FORDHAM INT’L L.J.* 415, 417-18 (2007).

167. G.A. Res. 55/25, annex II, art. 3 (Nov. 15, 2000) (“Trafficking in persons shall mean the recruitment, transportation, transfer, harboring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, or the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”).

168. Tiefenbrun, *supra* note 166, at 419.

169. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art. 5-7, June 17, 1999, ILO No. 182, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000).

170. *Id.* art. 8.

171. *Id.* art. 2.

172. *See* Convention Concerning Minimum Age for Admission to Employment, art. 3, June 26, 1973, ILO No. 138, 1015 U.N.T.S. 297 (entered into force June 19, 1976).

It states that “the minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, and morals of the child shall not be less than 18 years.”¹⁷³

D. *International Criminal Law*

The urgent need for accountability on the increasing recruitment of child soldiers in armed conflicts has seen a global shift from just regimes of states’ human rights obligations to a framework of international criminal prosecution. Though the recruitment of child soldiers had not been a major feature of both the Yugoslavian and Rwandan armed conflicts, the establishment of ad hoc international criminal tribunals for both countries coincided with the strident call by the UN Secretary General’s Special Representative for Children and Armed Conflict demanding more compliance with the existing international rules.¹⁷⁴ For this reason, it appeared to be a matter of make-or-break whether the new regime of international criminal law would even think of dealing with this problem. However, with relentless campaigns by international Non-Governmental Organisations (NGOs), this eventually happened with the Statute of the International Criminal Court (*hereinafter* the ‘Rome Statute’).¹⁷⁵

The Rome Statute provides for the establishment of a permanent international court to prosecute persons alleged to have committed offenses such as war crimes, crimes against humanity, and genocide.¹⁷⁶ Highlights of the statute relevant to the child include criminalizing intentional attacks on educational institutions, exempting children under eighteen from criminal prosecution, and establishing special means of taking evidence from children as a part of the court’s procedure.¹⁷⁷ Also, it was agreed that children’s direct participation in hostilities, as well as in other military functions, should be prohibited.¹⁷⁸ This prohibition, a major advancement in international criminal law, has been commended for its speed in terms of implementation as well as its universality.¹⁷⁹ Importantly, the Rome Statute states, “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities...” is a war crime, whether the conflict is an IAC or a NIAC.¹⁸⁰ It has also been suggested that the use of the words ‘conscripting’ and ‘enlisting’ in the statute means that both the acts

173. *Id.* art. 3(1).

174. Happold, *supra* note 34, at 84.

175. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 8 (July 17, 1998) [*hereinafter Rome Statute*].

176. Madubuike-Ekwe, *supra* note 17, at 41-42.

177. Webster, *supra* note 9, at 239.

178. Madubuike-Ekwe, *supra* note 17, at 42.

179. Webster, *supra* note 9, at 227.

180. *Rome Statute*, *supra* note 175, art. 8(2)(b)(xxvi).

of actively recruiting children or simply allowing them to sign up are prohibited.¹⁸¹

In terms of protecting children from recruitment in armed conflicts, aside from treaties, the most impact has come from international courts established in this respect.¹⁸² For instance, the first case before the ICC was in fact for the crime of child soldier recruitment,¹⁸³ and in several of its indictments it has charged many individuals for conscripting and enlisting children below the age of fifteen in armed conflicts.¹⁸⁴ The Special Court for Sierra Leone (SCSL) was the first international court so established to prosecute this crime.¹⁸⁵ The SCSL is a hybrid tribunal established by the UN and the Sierra Leonean government to try persons alleged to have violated IHL rules in the Sierra Leonean Civil War.¹⁸⁶ The statute establishing the court made effort to address the problem of child soldier recruitment by allowing for the possibility of prosecuting soldiers as well as those responsible for their recruitment.¹⁸⁷ The establishment of the SCSL became imperative given the serious atrocities that were committed against children during the course of the Sierra Leonean Civil War. For instance, during the course of the conflict, children were recruited to fight alongside adults; they were also subjected to all forms of human rights abuses.¹⁸⁸

Important to the analysis in this part of the article is the judgment of the SCSL, which held in *Prosecutor v. Samuel Hinga Norman*¹⁸⁹ that an individual can indeed be criminally responsible for the crime of recruiting child soldiers in an armed conflict; becoming the first international criminal tribunal to do so.¹⁹⁰ It is important to note that a year earlier, the prosecutor of the SCSL had indicted the former Liberian President, Charles Taylor, with parts of the charges being the recruitment of children below the age of fifteen to participate in armed conflicts.¹⁹¹ Though the basis for classifying child soldier recruitment as a war crime was challenged by the indictees, the court subsequently upheld the indictment.¹⁹² Additionally, all the defendants that

181. Webster, *supra* note 9, at 240.

182. *Id.* at 244.

183. Happold, *supra* note 34, at 84; *see also* Prosecutor v. Lubanga, ICC-01/04-01/06-803, Decision on Confirmation of Charges, ¶ 238-39 (Jan. 29, 2007); Prosecutor v. Katanga, ICC-01/04-01/07-717, Decision on Confirmation of Charges, ¶ 246-52 (Sept. 30, 2008).

184. Webster, *supra* note 9, at 244.

185. Sarah L. Wells, *Crimes Against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law*, 12 TUL. J. INT'L & COMP. L. 287, 289 (2004).

186. Novogrodsky, *supra* note 15, at 421.

187. Wells, *supra* note 185, at 289.

188. *Id.* at 292.

189. Prosecutor v. Norman, Case No. SCSL-04-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 8 (Special Ct. for Sierra Leone May 31, 2004).

190. Novogrodsky, *supra* note 15, at 421.

191. Cahn, *supra* note 6, at 431.

192. *Id.*

were brought before the SCSL were subsequently charged with the crime.¹⁹³ The judgment in the *Norman* case has been viewed as aligning IHL with IHRL and helping to stretch the governance of criminal law to the crime of child soldier recruitment.¹⁹⁴ In this case, Norman was charged with grave breaches of IHL as well as recruiting children for direct participation in hostilities.¹⁹⁵ In his defense, he argued that though both Additional Protocol II and the CRC prohibit the recruitment of child soldiers, he claimed that they do not criminalize the act and that the criminalization of the act under the Rome Statute does not equate to the codification of the same crime under customary international law.¹⁹⁶ In response, the court made two important pronouncements: 1) that the definition of the crime under Article 4 of the Rome Statute does not preclude a retroactive application, and 2) that in any case, the act in question had crystalized into a crime under existing customary international law and that persons can therefore be prosecuted under the jurisdiction of the SCSL.¹⁹⁷ Since a violation of IHL necessarily triggers individual criminal responsibility under international law, it was the rules prohibiting the recruitment of child soldiers under IHL that were adopted as the grounds for developing the rules in international criminal law today.¹⁹⁸

E. Africa's Regional Treaty System

This article will consider the prohibition of child soldier recruitment under regional instruments within the African context, essentially examining two instruments: the African Charter on the Rights and Welfare of the Child (*hereinafter* 'the African Children's Charter')¹⁹⁹ and the African Union Convention for the Protection and Assistance of Internally Displaced Persons of 2009 (*hereinafter* 'the Kampala Convention').²⁰⁰ Though not the first African effort at addressing the need to provide special protection to children, the African Children's Charter is unarguably the most far-reaching. Its strength lies in the fact that for the first time, children's rights protection was given the required African flavor, taking into deep consideration those unique issues that have troubled, and continue to trouble, the African child. It is also

193. Happold, *supra* note 34, at 84; *see, e.g.*, Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgement, ¶ 15 (Special Ct. for Sierra Leone June 20, 2007); Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgement, ¶ 182 (Special Ct. for Sierra Leone Aug. 2, 2007); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgement, ¶ 2220 (Special Ct. for Sierra Leone Mar. 2, 2009).

194. Novogrodsky, *supra* note 15, at 425.

195. *Id.* at 422.

196. *Id.*

197. *Id.*

198. Happold, *supra* note 34, at 85.

199. *See* Org. of African Unity [OAU], *African Charter on the Rights and Welfare of the Child* (July 11, 1990) (entered into force Nov. 29, 1990) [*hereinafter African Children's Charter*].

200. *See* Org. of African Unity [OAU], *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (Oct. 22, 2009) [*hereinafter Kampala Convention*].

the first regional treaty to specifically deal with the problem of child soldiers.²⁰¹ Speaking to the issue of child soldier recruitment, the African Children's Charter states that, "states parties to this Charter shall undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflicts, which affect the child."²⁰² It further provides that, "States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child."²⁰³ As a last leg of this part of the Charter, it also adds that "States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension, and strife."²⁰⁴ Article 22(3) has been described as instructive in the sense that not only does it protect children caught in mainstream armed conflicts, but it also applies to so-called less intense violence such as internal strife.²⁰⁵ By implication, this provision profoundly reaffirms the entire gamut of customary international humanitarian law. This provision is important as it recognizes the complementary framework between Africa's leading child's rights document and the international governance of armed conflicts.

Concerning child soldier recruitment, the Kampala Convention imposes similar obligations on both state and non-state armed groups, stating that, "members of armed groups shall be prohibited from... Recruiting children..."²⁰⁶ and that, "States Parties shall protect the rights of internally displaced persons regardless of the cause of displacement by refraining from, and preventing, the following acts, amongst others... recruitment of children..."²⁰⁷ Within the same vein, the 1999 Declaration of Maputo concerning the use of child soldiers also prohibits the recruitment of any child under the age of 18 years by any armed force or armed group, and it is immaterial that such a child is said to be a volunteer.²⁰⁸ This establishes the fact that the framework under Africa's regional treaty system reflects the norm under international law and helps to reinforce it. Despite this abundance of laws, child soldier recruitment by armed groups, especially the seemingly under-reported activities of PGMs, continues to thrive. But beyond this is the bigger problem of accountability for these acts, which is yet to even become

201. *Wounded Childhood*, *supra* note 99, at 4.

202. *African Children's Charter*, *supra* note 199, art. 22(1).

203. *Id.* art. 22(2).

204. *Id.* art. 22(3).

205. *See* Fonseca, *supra* note 16, at 81.

206. *Kampala Convention*, *supra* note 200, art. 7(5)(e).

207. *Id.* art. 9(1)(d).

208. Martin Kalis, *Child Soldiers in Africa*, ACCORD (June 25, 2002), [https://www.accord.org.za/ajcr-issues/child-soldiers-in-africa/#:~:text=The%20Conference%20resulted%20in%20the,a%20volunteer%E2%80%9D%20\(Maputo%20Declaration%20on.](https://www.accord.org.za/ajcr-issues/child-soldiers-in-africa/#:~:text=The%20Conference%20resulted%20in%20the,a%20volunteer%E2%80%9D%20(Maputo%20Declaration%20on.)

a topical issue. The next section of the article will examine the major shortcoming in the current framework, that is likely to impede any attempt at holding groups of this nature accountable.

V. EXAMINING THE OBLIGATIONS OF THE CIVILIAN JOINT TASK FORCE ON CHILD SOLDIER RECRUITMENT

Determining the extent to which a State has an obligation to prevent child soldier recruitment by a PGM operating on its behalf, must be done in light of the group's relationship with the State. A good place to draw insight, is the extensive work already done by the International Committee of the Red Cross (ICRC) on groups of this nature. Since such groups are to be viewed in the context of the State-PGM relationship, the relevant organization of the State to direct attention to is the Armed Forces. Rule 4 of Customary International Humanitarian Law (CIHL) defines 'Armed Forces' as follows, "The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates."²⁰⁹ This definition flows from the earlier definition from the Hague Conventions, as well as the Third Geneva Convention, with respect to determining Prisoner of War (POW) status.²¹⁰ Specifically, Article 1 of the Hague Regulations provides that, in addition to regular armies, all laws, rights, and duties of the law of war apply also to militias and volunteer units that are commanded by a person responsible for its subordinates, who wears a fixed distinctive emblem recognizable at a distance, carries arms openly, and conducts their operations in line with the law and custom of war.²¹¹ Geneva Convention III also contains a similar provision for organized resistance groups.²¹² This rule is affirmed under Additional Protocol I:

The Armed Forces of a party to a conflict consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by adverse party; such armed forces shall be subject to an internal disciplinary system which

209. International Committee of the Red Cross [ICRC], *Rule 4. Definition of Armed Forces*, INT'L HUMANITARIAN L. DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4 (last visited Jan. 30, 2023) [hereinafter *ICRC Rule 4*].

210. *Id.*

211. Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, art. 1, Oct. 18, 1907 (entered into force Jan. 26, 1910), <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907/regulations-art-1?activeTab=undefined> [hereinafter *Hague Regulations*].

212. Third Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(1)-(2), Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950), <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949?activeTab=default>.

shall ‘inter alia’ enforce compliance with the rules of international law applicable in the conflict.²¹³

Whereas this is a rule of state practice applicable to an International Armed Conflict (IAC), it has, however, been noted that for the purpose of compliance with the principle of distinction, it may also be applicable in a Non-International Armed Conflict (NIAC).²¹⁴ This rule also forms a part of the military manual of a number of countries, Nigeria inclusive.²¹⁵ For instance, Nigeria’s Military Manual of 1994 states that:

In general, the armed forces of a state and of a party to a conflict consist of all organized units and personnel which are under the command responsible for the behavior of its subordinates and each state and belligerent party must determine the categories of persons and objects belonging to its armed forces...Furthermore, the armed forces shall be subject to an internal disciplinary system in order to uphold and enforce the law of war.²¹⁶

For these rules to be applicable to a militia group or volunteer unit, such a group must have been incorporated into the regular armed forces of the state through an enabling law.²¹⁷ Where such a law is lacking, the status of such a group will be determined based on the facts and the standards for defining the armed forces.²¹⁸ As noted earlier, the definition under CIHL may be applicable to a NIAC, for the purpose of compliance with the principle of distinction. Interestingly, child soldier recruitment by PGMs mostly takes place in NIACs, which makes this provision instructive. With respect to NIACs, Article 1(1) of Additional Protocol II (also applicable to the counterinsurgency in issue) states that:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying the existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of Additional Protocol of the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts Protocol I and which take place in the territory of a High Contracting Party between its armed forces and

213. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43(1), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978), <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977?activeTab=1949GCs-APs-and-commentaries>.

214. ICRC Rule 4, *supra* note 209.

215. ICRC Rule 4, *supra* note 209.

216. International Committee of the Red Cross [ICRC], *Practice Relating to Rule 4. Definition of Armed Forces Section A. General Definition – Nigeria’s Military Manual*, INT’L HUMANITARIAN L. DATABASES, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule4?country=ng>.

217. ICRC Rule 4, *supra* note 209.

218. *Id.*

dissident armed forces or organized armed groups, which under responsible command, exercise such control over a part of its territory as to enable them carry out sustained and concerted military operations and to implement this Protocol.²¹⁹

Additional Protocol II further develops and supplements the earlier definition of a NIAC in Common Article III by adding the ‘territorial control’ requirement on the side of the NSAG.²²⁰ The jurisprudence of the International Criminal Tribunal for Yugoslavia (ICTY) has further adumbrated on and expanded the understanding regarding NIACs.²²¹ In *Prosecutor v. Tadić*, the ICTY notes that whenever there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,” there is a NIAC.²²² The instructive phrase in Article 1(1) of AP II, which is relevant to the discussion in this article, is ‘its armed forces,’ i.e., the armed forces of the contracting State.²²³ It means that, in construing the definition of ‘armed forces’ in an armed conflict, a PGM can be inferred as being part of the armed forces of the State, which is in tandem with Rule 4 of CIHL, Article 1 of the Hague Regulations, and Article 1(1) of AP II.²²⁴ Such groups, being PGMs, also come within the contemplation of the following expressions: “...all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates,” and “...all organized units and personnel which are under the command responsible for the behavior of its subordinates,” captured under Rule 4 of CIHL.²²⁵ Giving clarity to the terms ‘militias’ and ‘volunteer corps,’ a commentary on the Draft Additional Protocols notes as follows, “...in every case they are groups of volunteer fighters not enlisted in the regular armed forces but fighting for a Party to the conflict, along with the regular armed forces should there be any.”²²⁶

To this extent, it is therefore clear that the general IHL obligation of the states’ armed forces, extends to PGMs it is operating alongside with in an armed conflict, as forms of militia/volunteer corps fighting alongside the regular military. However, given the irregular nature of PGMs, determining

219. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978), <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977?activeTab=1949GCs-APs-and-commentaries> [hereinafter *Additional Protocol II*].

220. INT’L COMM. OF THE RED CROSS (ICRC), HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 4 (Op. Paper 2008), <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>.

221. *See id.*

222. *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

223. *Additional Protocol II*, *supra* note 219.

224. *ICRC Rule 4*, *supra* note 209; *Hague Regulations*, *supra* note 211; *id.*

225. *ICRC Rule 4*, *supra* note 209.

226. Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary, INT’L COMM. OF THE RED CROSS (ICRC), at 48 (Oct. 1973).

the exact scope of their obligation and standard to be applied, has to be further examined within the context of whether they are a party to the conflict and the extent to which they can be considered a party. The rules of IHL recognize the State and opposition NSAGs, such as the Boko Haram, Al-Shabaab, and ISIL, as parties in a NIAC. Determining whether and the exact extent to which a PGM is a party to such a conflict will be based on a determination of clarity on its legal status in such conflict. This can be achieved by examining the domestic legislation which forms the basis on which the group was incorporated into the counterinsurgency, i.e., the domestic law on which it was co-opted.

On the basis of such a law and in line with the law of state responsibility under the International Law Commission's (ILC) Draft Articles on Responsibility of the State for Internationally Wrongful Acts, the conduct of the group can be attributed to the State under certain conditions.²²⁷ While the draft article presents several scenarios based on which attribution can be anchored, relevant to the relationship between a PGM and a State is Article 8, which governs situations when groups of this nature are acting under the direct control of the State,²²⁸ and Article 9, which deals with when such a group exercises governmental authority in the absence of official authorities.²²⁹ With respect to PGMs, these two conditions are applicable because they are mostly an active part of the operations of the armed forces, as well as operating under the command of units of the military, which establishes a level of control flowing from the State to the group.

The key issue, however, is that in most states, the required legislation expected to form the basis of attributing the conduct of PGMs to states is often lacking. This presents significant challenges, especially as it torpedoes the direct applicability of the law of state responsibility and, in this context, with respect to such groups' conduct on recruitment of child soldiers. Accordingly, the only option available is to consider the group's activities on the basis of facts and the standards for defining the armed forces. But the question then arises, "What are the facts and standards for defining the armed forces?" Such will relate to matters such as the wearing of an identifiable uniform, the bearing of common insignia, being tutored and instructed on relevant rules of IHL, and operating under the command and control of a commander of a superior. Factually, when PGMs operate alongside military troops in combat operations, they do not wear identifiable uniforms such as that of the armed forces, nor do they bear a common insignia. Rather, given their background as mainly hunters and vigilantes, they wear civilian clothes that may not be uniform in all units. Though they may operate under a commander from the armed forces, it is not clear whether they are often tutored and instructed on the need to comply with the rules of IHL.

227. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Extract from Report on Fifty-Third Session, INT'L L. COMM'N, U.N. Doc. A/56/10, art. 4-11 (Nov. 2001).

228. See *id.* art. 8.

229. See *id.* art. 9.

One must establish at this juncture, that finding a state co-opting a PGM into its military operations and preparing such a group on the same standards required of the state's regular armed forces, is most difficult. These groups are often engaged on an ad hoc basis, especially when the state is dealing with manpower challenges in its armed forces, as well as when it faces issues of troops' inability to understand the local terrain. For such states, the readiness to prepare PGMs, on the same standards as that of their regular armed forces is always lacking. In fact, most times members of such groups are simply rushed into combat operations, with insufficient military training, the result being that providing adequate instructions in the rules of IHL is mostly ignored. What follows is that, whereas the noble intentions under IHL rules with respect to the accountability of these groups may be inherent in the rules, the absence of a recognizable incorporating domestic law or clear determinable standards of military engagement makes these intentions unrealizable. This is a vacuum in the current framework under IHL rules, and with such a gap, the State can easily dissociate itself from the group's activities, thereby escaping accountability. What this implies is that the redress for thousands of child soldiers whose innocence is often exploited by groups of this nature remains in limbo and unprotected.

VI. CONCLUDING REMARKS

This article has examined the problem of child soldier recruitment by PGMs operating on behalf of states in armed conflicts. It has examined four regimes of international law, namely International Human Rights Law (IHRL), International Humanitarian Law (IHL), International Labour Law (ILL), and International Criminal Law (ICL), as well as the rules under regional instruments. This analysis in this article has been carried out against the backdrop of the current rules of IHL, which considers such groups as a part of the states' armed forces. It has drawn out the inherent shortcoming in this framework and how this makes the accountability of such groups unattainable, particularly by highlighting the lack of clarity under the rules on what standard should be used for determining how such PGMs, are to be considered members of a state's armed forces.

As things stand now, especially with the lack of clarity in the law, the onus rests on states to deal with infractions relating to child soldier recruitment by PGMs in their domain, as their domestic criminal law may prescribe. The expectation is that States as parties to international treaties would take necessary measures to trigger domestic prosecutorial frameworks to fully implement their obligations under international law. It has also been suggested that the preamble to the Rome Statute indeed tends towards an international consensus that States have an obligation to prosecute and punish offenders in this regard.²³⁰ One must reiterate that such criminal prosecution must only target members of the PGM involved in this act, and not the child soldiers recruited. This is more so as the international legal system supports

230. Grossman, *supra* note 21, at 337.

the notion that child soldiers, who may have been involved in direct participation in hostilities, should be shielded from criminal prosecution. Specifically, the Rome Statute and Optional Protocol to the CRC both support the consensus that children of age fifteen to eighteen be excluded from criminal liability in an armed conflict.²³¹ In addition to the above, as noted in the Paris Principles, to indeed eradicate the problem of child soldier recruitment, a comprehensive prevention plan must be enacted by States. In addition to ratification of international treaties, States must enforce domestic laws which criminalize unlawful recruitment and use of children in armed conflicts. Also, legal reforms should be followed by public information campaigns on child protection laws, as well as support for a community effort to protect children at the local level.

What can be distilled from this is that the domestic system of States already provides an opportunity for accountability of PGMs in this area. While this is desirable, the only challenge is the possibility that such States may be unwilling or unable to undertake criminal prosecutions, as may be appropriate. Challengingly, this appears to be the case in most jurisdictions where the phenomenon of child soldier recruitment remains prevalent. It, therefore, means that ultimately, there is a need for the international legal framework to be further developed, to give a clear pathway to the accountability of PGMs. The developing debate in international law, that armed groups should have a degree of direct human rights obligations, presents a good opportunity for further work on this part of IHL rules. Commendably, with increased reporting by the UN and other NGOs, this issue is increasingly attracting the required attention, but the world must go beyond information. For the sake of thousands of children who are continuously dragged into conflicts they know nothing about, it is increasingly becoming urgent that the accountability of PGMs for child soldier recruitment be framed in clearer terms.

231. *Id.* at 342.