

# TARGETING OF CHILDREN IN NON-INTERNATIONAL ARMED CONFLICTS

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## **Abstract**

Albeit the prohibition of recruitment and use in hostilities of children is an established norm of international law, recognized under both international humanitarian law and international human rights law, the problem still remains. The main actors responsible for this reality are non-state armed groups (NSAGs), which kept recruiting and involving children in various tasks, including direct participation in hostilities (DPH). This in turn generates a dilemma regarding targetability of such children: whether to extend the special protection afforded to them by international law from being recruited and/or used in hostilities for targeting purposes as well. Additionally, the difficulty to determine targeting rules in the context of non-international armed conflicts (NIACs), which led to controversies as to targetability of even adult members of NSAGs while they do not take a direct part in hostilities, exacerbates the dilemma. This piece, accepting persuasiveness of the proposal in the ICRC Interpretive Guidance that those members of armed groups who have continuous combat function (CCF) are targetable, in addition to civilians taking a direct part in hostilities, questions whether children with such function/role are targetable in the same manner as adults of the same position. It is argued here that though children can be targeted during their DPH or when they have CCF, there is support in the law that the notions of DPH and CCF should be applied to them differently than adults. The piece also analyzes if the same means and methods used to target adults could be lawful when employed against children.

**Keywords:** Targeting Children, Direct Participation in Hostilities, CCF, NIAC, Non-State Armed Groups, IHL

## **1. Introduction**

Although the recruitment and use in hostilities of children is prohibited under international law<sup>1</sup>, ‘it has proven to be difficult to suppress the recruitment of children into armed groups’.<sup>2</sup>

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<sup>1</sup> Both treaty and customary international law has provided for such prohibition. See for eg art 4(3)(c) of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977 (hereinafter AP II); Art 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (May 25 2000) 2173 U.N.T.S. 222 (hereinafter OPAC); Customary International Humanitarian Law Rule 136 and Rule 137 – available in JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian*, vol I: Rules (ICRC

Reports indicate that the problem is observed in diverse territories and countries worldwide.<sup>3</sup> Albeit the majority of states have abandoned the use of child soldiers, hundreds of thousands of children are still participating in hostilities through non-state armed groups (hereinafter referred to, interchangeably, as NSAGs or armed groups).<sup>4</sup> In areas of armed conflict, many children voluntarily join the armed groups to survive or they may be so forced. In other cases, armed groups may entice children to become soldiers, and lacking hope of other option, the children may easily give in.<sup>5</sup> Due to the conflicts and a ‘combination of poverty, isolation, and upheaval’,<sup>6</sup> children have been used as ‘soldiers, spies, guards, human shields, human minesweepers, servants, decoys and sentries’.<sup>7</sup> Often such children are forced to fight on the front lines, carry provisions, operate as couriers, and serve as sex slaves.<sup>8</sup>

In any case, whether they have voluntarily joined, been enticed or forced, once children are associated with an armed group, which in turn is engaged in armed conflict, the question arises as to whether they may or should be targeted and killed in the same manner as an adult in the same position as them. On this issue, there is a dearth of literature as to what the law is, and even less about what the law should be.<sup>9</sup> Though the use and recruitment of children as soldiers is forbidden, international humanitarian law (IHL) does not place restrictions on the conduct of military operations against child soldiers. In the case of international armed conflict (IAC), IHL appears to allow child soldiers to be deliberately targeted, attacked and killed in the same manner as adult soldiers because of their status as combatants.<sup>10</sup> However, inexistence of combatant status in non-international armed conflict (NIAC) has led to controversies as to who could be targeted in such conflicts, especially from the side of NSAGs, apart from those civilians directly participating in hostilities (DPH), whom IHL treats as targetable in both IACs and NIACs. The International Committee of the Red Cross (ICRC) came up with the notion of ‘continuous combat function’ (CCF) to differentiate

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and Cambridge University Press 2005) (hereinafter CIHL); It is also made a war crime under Rome Statute of the International Criminal Court (1998) arts 8 (2)(b)(xxvi) and 8 (2)(e)(vii).

<sup>2</sup> DM Rosen, ‘The Dilemma of Child Soldiers’ (2010) 10 *Insights on Law and Society* 6, 13.

<sup>3</sup> See for eg recent annual reports of the UN Secretary-General on children and armed conflict of: 2020 (UN Doc A/74/845-S/2020/525); 2019 (UN Doc A/73/907-S/2019/509); 2018 (UN Doc A/72/865-S/2018/465); 2017 (UN Doc A/72/361-S/2017/821); 2015 (UN Doc A/69/926\*-S/2015/409\*); See also RKL Panjabi, ‘Sacrificial Lambs of Globalization: Child Labor in the Twenty-First Century’ (2009) 37 *Denver Journal of International Law and Policy* 421, 448; R Provost, ‘Targeting Child Soldiers’ (January 12 2016) <[www.ejiltalk.org/targeting-child-soldiers/](http://www.ejiltalk.org/targeting-child-soldiers/)> accessed 30 June 2019: noting that the phenomenon of child soldiers remains widespread, and their activities does include direct participation in hostilities.

<sup>4</sup> For recent data on this fact see recent annual reports of the UN Secretary-General on children and armed conflict cited at (n 3); See also Rosen (n 2): NSAGs are various in form, including insurgents; rebels; revolutionary movements; guerrilla fighters; terrorist networks; regional tribal, ethnic, and religious militants; and local defense organizations.

<sup>5</sup> J Hart, ‘The Politics of “Child Soldiers”’ (2007) 13(1) *Brown Journal of World Affairs* 217, 218.

<sup>6</sup> Panjabi (n 3) 448.

<sup>7</sup> *ibid.*

<sup>8</sup> TBC Begley, ‘The Extraterritorial Obligation to Prevent the Use of Child Soldiers’ (2012), 27(3) *American University International Law Review* 613, 615.

<sup>9</sup> S Pack, ‘Targeting Child Soldiers: Striking a Balance between Humanity and Military Necessity’ (2016) 7 *Journal of International Humanitarian Legal Studies* 183.

<sup>10</sup> C Garraway, ‘To kill or not to kill? – Dilemmas on the Use of Force’ (2010) 14(3) *Journal of Conflict and Security Law*, 502.

between those targetable and not targetable in case of persons involved in NIACs,<sup>11</sup> though it is received with criticism by some notable experts of the field.<sup>12</sup> Even when one accepts this proposition, it is not still clear in what manner this notion could be applicable to children. The specific provision on children under article 4(3) of Additional Protocol II (APII) only stipulates for ‘special protection’ of children when they are not engaged in hostilities and when they have been captured after engaging. There is nothing in the provision that deals with the intermediate period, i.e. the period in which they DPH or become fighters having CCF in the armed groups, which is relevant for analyzing the issue of targeting.<sup>13</sup>

Accordingly, this article addresses the issue whether children associated with NSAGs and/or directly participating in hostilities in the context of NIACs are targetable in the same manner as adults of the same position. In light of the observed perpetuation of the problem of child involvement in hostilities, mainly through armed groups, and the legal uncertainty in addressing the issue of targeting of such children, it attempts to analyze relevant treaty and customary international law rules applicable to the matter, and explores scholarly views and judicial perspectives related to the issue. Accordingly, it assesses whether children can be targeted in the same manner as their adult counterparts or should child specific approach to targeting be taken. In this regard, it inquires whether the notions of direct participation in hostilities and continuous combat function should be applied any differently to children; and appraises if the means and methods used to target children must reflect their protected status in international law. In doing so, it aims to suggest, for those making targeting decisions, the need to consider particular situations of children when they become potential legitimate targets so as to strike a balance between humanity and military necessity, as well as special protection accorded to them by IHL and international human rights law (IHRL) considering their vulnerability in armed conflict situations. Given the dearth of literature on the issue, the writer believes the piece will have importance in contributing additional perspective to the extant scant discussion.

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<sup>11</sup> N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) (hereinafter DPH Guidance) 33–5.

<sup>12</sup> For eg see M Schmitt, ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities’ (2010) 1 *Harvard National Security Journal*, 5; K Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’ (2010) 42 *New York University Journal of International Law and Politics*, 641.

<sup>13</sup> Customary IHL rules that are applicable in all armed conflict situations, including in states that have not adopted APII or where the situation does not fulfil the requirements for application of APII, recognize children are entitled to special respect and protection, particularly to be free from recruitment and taking part in hostilities. However, it is similarly moot as to the treatment that should be extended to them when they take a direct part in hostilities or are found to be fighting members of armed groups. See CIHL (n 1) Rules 135, 136 and 137. Note that Article 3 Common to the Geneva Conventions, which has general application including to children, is also likewise silent on this issue.

## 2. Targeting of Persons in Armed Conflicts: General Conceptual Description

IHL provides for rules on the conduct of hostilities in situations of armed conflict. Such rules in turn provide ‘instructions on how attacks must be conducted’<sup>14</sup>, and their observance determines whether an attack could be considered to be lawful under IHL. For attacks to be lawful under IHL, there are four cumulative conditions that they need to fulfil.<sup>15</sup> These conditions are observance of prohibited means and methods of warfare, direct targeting of only legitimate targets (principle of distinction), respect for the principle of proportionality even while targeting legitimate targets, and taking all feasible precautions during attack to spare civilian persons and objects from the effects of hostilities. When these conditions are met by an attack, the attack is considered as lawful under IHL, even if there is collateral damage to civilians and civilian objects resulting from it.<sup>16</sup>

As mentioned above, the issue of targeting is one of the four cumulative conditions that need to be scrutinized in assessing the lawfulness under IHL of attacks carried out during hostilities. It deals with persons and objects that can legitimately be attacked. IHL provides that an attack may only be directed against legitimate targets. What constitutes a legitimate target with regard to objects (military objectives) is defined in similar manner for both IACs and NIACs.<sup>17</sup> Accordingly, military objectives are ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’.<sup>18</sup> The ‘who constitutes a legitimate target’ with respect to targetable persons, and which is related to the main focus of this study, is not as clear and similarly defined as objects in the relative case of IACs and NIACs.

### 2.1. Targeting in International Armed Conflicts

In IACs, the fundamental principle of distinction entrenched under Article 48 of Additional Protocol I (API) provides that parties to an armed conflict must distinguish between civilians and combatants in directing attacks, and only combatants may be attacked. Article 51(3) of API further provides that civilians shall not be legitimate targets unless and until such time as they take a direct part in hostilities. Consequently, persons that can legitimately be targeted during IACs are combatants and civilians taking a direct part in hostilities during the time in which they engage in acts considered as DPH.

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<sup>14</sup> M Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, (Edward Elgar Publishing 2019) 29.

<sup>15</sup> *ibid.*

<sup>16</sup> Note that with respect to some categories of ‘specially protected’ persons (such as medical personnel) and objects (such as medical units and transports, cultural property, objects and installations indispensable for the survival of the civilian population, works and installations containing dangerous forces like dams and the natural environment), IHL provides for additional conditions that need to be observed.

<sup>17</sup> See CIHL (n 1) Rule 7.

<sup>18</sup> *ibid* Rule 8.

### 2.1.1. Combatants

Under IHL, combatants may be targeted as long as they do not surrender, are not wounded, sick or shipwrecked or are not otherwise *hors de combat*.<sup>19</sup> Generally speaking, combatants are members of armed forces belonging to a party to an IAC. *a contrario* reading of Article 50(1) of API provides for a summary of who shall be considered as combatants for IHL purpose as those persons who are ‘referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of [API]’. All other persons not falling in one of these categories, including in case of doubt, shall be considered to be civilian<sup>20</sup> and enjoy general protection against dangers arising from military operations; hence, not targetable unless and for such time as they DPH.<sup>21</sup>

Persons who have the status of combatant, hence, may be lawfully targeted at all times, whether they are fighting on the front-lines or resting in their beds.<sup>22</sup> If a child falls under one of the above categories and becomes combatant, many argue that the current state of the law makes him/her a legitimate target as there is no any reference to the age of persons concerned in the definition of a combatant.<sup>23</sup> Since targeting in IACs is beyond the scope of this paper, the scholarly debates on this assertion are not dealt with here.

### 2.1.2. Civilians Directly Participating in Hostilities

Even if IHL clearly provides that civilians directly participating in hostilities are targetable for the duration of their direct participation in hostilities,<sup>24</sup> the notion of DPH that establishes the dividing line between a lawful attack and an unlawful attack constituting the war crime of deliberately targeting a civilian, is not as clear. The notion is subject to various controversies and legal issues.<sup>25</sup> Yet, the practical importance of the notion of DPH has been growing due to the increasing ‘civilianization’ of armed conflicts, and this made it a cornerstone of IHL on the conduct of hostilities.<sup>26</sup>

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<sup>19</sup> Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter API) art 41. See also GD Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 188.

<sup>20</sup> Although IHL treaties suggest that in IACs everyone is either a combatant or a civilian, it is increasingly suggested that there is a third category called ‘unlawful combatants’ or ‘unprivileged belligerents’, who are neither combatants nor civilians. According to states espousing this view, persons falling in the latter category do not benefit from IHL protections afforded to either civilians or combatants. Sassòli (n 14) 24.

<sup>21</sup> See API arts 50(1), 51(1)(2) and (3).

<sup>22</sup> Garraway (n 10) 502.

<sup>23</sup> Pack (n 9) 186; Sassòli (n 14) 259.

<sup>24</sup> AP I art 51(3) and AP II art 13(3).

<sup>25</sup> For eg see the ICRC Interpretive Guidance on the notion of DPH and the critiques on it from scholars and practitioners of the field – DPH Guidance (n 11); Schmitt (n 12); Watkin (n 12); B Boothby, “‘And for such time as’: The Time Dimensions to Direct Participation in Hostilities’ (2010) 42 *International Law and Politics* 741.

<sup>26</sup> G Bartolini, ‘The “Civilianization” of Contemporary Armed Conflicts’ in HR Fabri and others (eds), *Select Proceedings of the European Society of International Law*, vol II (Hart 2008) 570; Sassòli (n 14) 356.

The notion of DPH has neither been defined in treaty nor in customary law.<sup>27</sup> Additionally, examination of state practice shows that there is no uniform interpretation of what kind of activities amount to DPH.<sup>28</sup> After a broad consultation of experts, the ICRC published in its ‘Interpretive Guidance’ (DPH Guidance)<sup>29</sup>, *inter alia*, what conduct amounts to DPH.<sup>30</sup> Accordingly, in order to classify an act as DPH, it has to satisfy three cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>31</sup>

Accordingly, in IACs, civilians can be legitimately targeted for the duration that their action fulfils the above three criteria constituting DPH.<sup>32</sup> In other words, civilians can only be momentarily exposed to direct targeting as legitimate targets while they participate directly in hostilities, and gain back their full civilian protection from direct targeting the moment they cease taking direct part in the hostilities. This approach, which is referred to as the ‘revolving door’ phenomenon,<sup>33</sup> is sanctioned by IHL.<sup>34</sup> The phrase ‘and for such time as’ that appears in article 51(3) API and article 13(3) AP II, provisions that provide for civilian protection in the conduct of hostilities, supports this assertion.<sup>35</sup> The phrase is also noted to have a wide

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<sup>27</sup> S Bosch, ‘Targeting Decisions Involving Voluntary Human Shields in International Armed Conflicts in Light of the Notion of Direct Participation in Hostilities’ (2013) 46(3) *The Comparative and International Law Journal of Southern Africa* 447, 453.

<sup>28</sup> *ibid.*

<sup>29</sup> DPH Guidance (n 11).

<sup>30</sup> It should be noted here that the response to the DPH Guidance is a mixed one, inviting criticism from various experts on the field. See S Bosch, ‘A Legal Analysis of How the International Committee of the Red Cross's Interpretation of the Revolving Door Phenomenon Applies in the Case of Africa's Child Soldiers’ (2015) 24(1) *African Security Review* 3, 7.

<sup>31</sup> DPH Guidance (n 11) 46.

<sup>32</sup> Note that the ICRC Interpretive Guidance that came up with these criteria received a mixed response, with notable scholars of the field criticizing it. For eg see (n 12), (n 25) and (n 30) above.

<sup>33</sup> Bosch (n 30) 6 citing WH Parks, ‘Air War and the Law of War’ (1990) *Air Force Law Review*, 32.

<sup>34</sup> Bosch (n 30) 6-7; The inclusion of the revolving door approach in the DPH Guidance has its critics. For eg Boothby criticized the inclusion arguing that there no evidence of a comparable approach in customary international law: Boothby (n 25) 743.

<sup>35</sup> In the same wording both provisions, applicable in IACs and NIACs respectively, provide that ‘civilians shall enjoy the protection afforded by this section, unless and *for such time as* they take a direct part in hostilities’ [emphasis added].

recognition globally, thereby identified to constitute customary international law.<sup>36</sup> This adds strength to the validity of the assertion.

## **2.2. Targeting in Non-International Armed Conflicts: Civilians Directly Participating in Hostilities and Members of Non-State Armed Groups having Continuous Combat Function**

For NIACs, the rules on targeting are much more difficult to determine.<sup>37</sup> The law is clear as to civilians DPH and provides, in similar manner to IACs, that civilians DPH are legitimate targets until their direct participation ceases (which in other words means the ‘revolving door’ phenomenon is equally applicable in the context of NIACs).<sup>38</sup> Likewise, the three-pronged criteria to classify an act as DPH is applicable to NIACs. However, due to lack of combatant status in NIACs, it is controversial whether members of NSAGs (fighters) could be legitimately targeted while they do not DPH.<sup>39</sup> It is uncontroversial, even if it is not self-evident, that government soldiers may be targeted at all times until they surrender or are otherwise *hors de combat*.<sup>40</sup> The controversy concerning targeting in NIACs, hence, revolves around fighters who, according to some, may be legitimate targets at all times, even if they are not taking a direct part in hostilities at the moment of the attack that targeted them.<sup>41</sup> Additionally, it is controversial if all members of NSAGs or only those members with CCF are targetable at all times.<sup>42</sup>

Due to lack of the status of combatant in NIACs, one may also assume that everyone is, hence, civilian and shall not be targeted unless they directly participate in hostilities. This would mean that members of NSAGs are permitted to use the revolving door protection, thereby get a significant operational advantage as ‘farmers by day and fighters by night’ over

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<sup>36</sup> See CIHL (n 1) Rule 6; N Melzer, ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’, (2010) 42 *New York University Journal of International Law and Politics*, 883–6.

<sup>37</sup> ‘First, it is challenging to identify the IHL rules on who is a legitimate target under which circumstances. Second, it is controversial whether those rules of IHL always prevail over the human rights law rules on the lawful use of force or, alternatively, in which circumstances such rules prevail’: Sassòli (n 14) 601.

<sup>38</sup> See AP II art 13(3).

<sup>39</sup> D Kretzmer, A Ben-Yehuda and M Furth, “‘Thou Shall Not Kill’: The Use of Lethal Force in Non-International Armed Conflicts’ (2014) 47(2) *Israel Law Review* 191; The ICRC Customary Law Study concludes that while it is generally recognized that state armed forces do not qualify as civilians, practice is not clear as to whether the same applies with regard to members of NSAGs. Henckaerts and Doswald-Beck (n 1) 19.

<sup>40</sup> Sassòli (n 14) 32; see also M Sassoli and LM Olson, ‘The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’ (2008) 90 *International Review of the Red Cross*, 607; P Grzebyk, ‘Who Can be Killed?: Legal Targets in Non-international Armed Conflicts’ in SJ Barela (ed), *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs* (Ashgate 2005) 58.

<sup>41</sup> Sassòli (n 14) 32.

<sup>42</sup> *ibid.* There are scholars who prefer the approach of considering that all persons integrated into a NSAG on a permanent basis should be treated identically to state armed forces, irrespective of their specific function: see Schmitt (n 12) 5; Watkin (n 12) 641.

government soldiers, who are targetable at all times.<sup>43</sup> However, this assumption could make the fundamental IHL principle of distinction meaningless and impossible to apply<sup>44</sup> since the principle foresees existence of legitimate targets that can directly be targeted on the one hand and civilians that benefit protection from direct attack on the other. According to this assumption, even if they remain targetable by the forces of NSAGs at all times during an ongoing conflict, government forces would be unable to determine whom to legitimately target and whom to spare while members of the opposing party to the conflict are not engaging them at a particular time. This in turn would suggest inequality between government forces and NSAGs and creates a situation that is militarily unrealistic for the government forces<sup>45</sup> thereby undermine any respect for IHL<sup>46</sup> that would otherwise be expected realistically. Additionally, it would be against the principle of equality of belligerents<sup>47</sup> because it would be disadvantageous to government forces if they are to be prohibited from attacking clearly identified fighters belonging to armed groups, to weaken the group in advance rather than only react to its attacks, unless and until such time as the latter engage in acts satisfying the criteria of DPH.

Consequently, The DPH Guidance proposes that those members of armed groups whose specific function in the groups is to continuously commit acts that constitute DPH (have CCF) do not benefit from protections accorded to civilians, and hence are targetable at all times during the NIACs.<sup>48</sup> Though states do not in most cases publicly acknowledge the precise targeting rules employed by their forces, the practice seems to confirm that this is the correct interpretation of the law.<sup>49</sup> Though still contentious, the majority of IHL experts also contend that in addition to civilians DPH, who are only targetable for the duration of their participation in acts constituting DPH members of NSAGs with a CCF can be targeted at all times in which they keep this status/function because ‘if the target is a member of an armed group with a continuous combat function or a civilian directly participating in hostilities, IHL rules on the conduct of hostilities apply’.<sup>50</sup>

The DPH Guidance ‘rests on the fundamental assumption that it is possible to distinguish between permanent combat personnel and civilians participating in hostilities on an ad hoc

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<sup>43</sup> D Van der Toorn, “‘Direct Participation in hostilities’: A Legal and Practical Evaluation of the ICRC Guidance” (2009) 19 available at <[www.works.bepress.com/damien\\_van\\_der\\_toorn/1](http://www.works.bepress.com/damien_van_der_toorn/1)> accessed 08 July 2019; DPH Guidance (n 11) 72.

<sup>44</sup> Sassòli (n 14) 359.

<sup>45</sup> *ibid.*

<sup>46</sup> Van der Toorn (n 43) 19.

<sup>47</sup> There are arguments as to whether this principle applies in NIACs as no international *jus ad bellum* exists for NIACs and domestic laws invariably prohibit the use of force by NSAGs. Yet, the majority opinion asserts that, at least with regard to obligations under IHL, all parties to NIACs must be equal. See Sassòli (n 14) 585; F Bugnion, ‘*Jus ad Bellum, Jus in Bello* and Non-International Armed Conflict’ (2003) 6 Yearbook of International Humanitarian Law 167.

<sup>48</sup> DPH Guidance (n 11) 33–5; see also the Commentary to Additional Protocol II, which considers that ‘[t]hose belonging to armed forces or armed groups may be attacked at any time.’ in Y Sandoz and others (eds), *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff 1987) para 4789.

<sup>49</sup> M Hlavkova, ‘Reconstructing the Civilian/Combatant Divide: A Fresh Look at Targeting in Non-international Armed Conflict’ (2014) 19(2) *Journal of Conflict and Security Law*, 258-259.

<sup>50</sup> Sassòli (n 14) 608.



basis'.<sup>51</sup> Schmitt challenges this assumption arguing that it is impossible to distinguish between combat and non-combat personnel involved with NSAGs.<sup>52</sup> This argument is not persuasive because despite the challenge to distinguish between the two in time-sensitive situations, the 'pattern of involvement may be proven through intelligence'.<sup>53</sup> Sassòli, on the other hand, raises a practical question as to how opposing forces could determine whether a person has a 'CCF' for a NSAG during such time when the person does not commit hostile acts.<sup>54</sup> He, then, suggests that those who do not identify themselves as members of an armed group should be considered as civilians and not targeted unless they take a direct part in hostilities, except where very reliable intelligence information indicating otherwise exists.<sup>55</sup> There can be situations in which reliable intelligence, like captured membership list or communication intercepts, or as in the case of Hamas and Hezbollah, wearing of uniforms or distinctive signs, could enable establishment of such distinction.<sup>56</sup> Therefore, the writer is convinced and, in this paper, adopts the position that in NIACs, proven members of NSAGs having CCF and civilians directly participating in hostilities are legitimate targets.

### 3. Special Protection of Children in Relation to Armed Conflicts

Children benefit from 'special protection' in relation to armed conflicts, under both IHL and IHRL, due to their unique vulnerabilities and protection needs.<sup>57</sup> The main protection in this regard relates to the prohibition of recruitment and use in hostilities of children. API, APII and the Convention on the Rights of the Child (CRC) provide the age of 15 as a threshold for this prohibition.<sup>58</sup> The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OPAC) raised the threshold for use in hostilities and compulsory recruitment to the age of 18<sup>59</sup>; and as to voluntary recruitment of children, it prohibited NSAGs from recruiting children under the age of 18<sup>60</sup> while merely obliging States to raise the minimum age of voluntary recruitment, subject to other strict conditions, into their armed forces to the age of 16 with the exception that States may allow the voluntary enrolment of persons aged 15 to 16 into military schools<sup>61</sup>.

The prohibition on the use of children in hostilities is not only limited to DPH. The jurisprudence of international criminal tribunals indicates that the concept of participation in

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<sup>51</sup> Hlavkova (n 49) 264.

<sup>52</sup> Schmitt (n 12) 23.

<sup>53</sup> Hlavkova (n 49) 263.

<sup>54</sup> Sassòli (n 14) 360.

<sup>55</sup> *ibid.*

<sup>56</sup> Hlavkova (n 49) 264.

<sup>57</sup> V Popovski, 'Protection of Children in International Humanitarian Law and Human Rights Law' in R Arnold and N Quenivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Leiden: Martinus Nijhoff Publishers 2008); E Baimu, 'Children, International Protection' in Oxford University Press, *Max Planck Encyclopedia of Public International Law* (April 2013).

<sup>58</sup> AP I, Art. 77(2); AP II, Art 4(3)(c); CRC, Art 38.

<sup>59</sup> OPAC, Arts 1-2; Note that, as a treaty, the African Charter on the Rights and Welfare of the Child is a pioneer in providing a straight 18 ban on the recruitment and use of child soldiers: African Charter on the Rights and Welfare of the Child, SICAB/LEG/24.9/49, Addis Ababa: OAU, 1990.

<sup>60</sup> OPAC, Art 4.

<sup>61</sup> OPAC, Art 3.

hostilities with regard to children (i.e. their use in hostilities) is broader and includes other indirect forms of participation, like performing domestic work as finding, carrying, and providing food, which may put children in danger even if they do not constitute acts that qualify as DPH.<sup>62</sup> Sassòli cautions that such expanded concept of prohibited involvement of children with NSAGs coupled with the minimum age of 18 for recruitment should not result in requirements that prohibit members of NSAGs to stay together with their families.<sup>63</sup> He argues that, according to the principle of equality of belligerents, as States are not prohibited from involving children in other governmental activities, the law should not be interpreted as prohibiting any association of children with NSAGs.<sup>64</sup> His argument is also practically sound since there are situations where children, whose family members are in the ranks of NSAGs, need to live with such family as these are their only care givers specially in poor countries where there is no alternative welfare care system for children. Interpretation of the law to strictly prohibit any association like this kind will have unrealistic results, and in the words of Sassòli himself, ‘unrealistic laws protect no one’<sup>65</sup>, not even the children it aims to protect. Hence, it can be concluded that prohibited forms of participation of children with NSAGs depend on a case by case analysis of particular forms of participation and the dangerous impact such may have on children.

Despite the special protection children are afforded by law in relation to recruitment and use in hostilities, as well as preferential treatment afforded to them by IHL if captured after involving in hostilities, the law does not provide any rule as to whether children could be targeted like adults while they engage in hostile conduct. Consequently, it is unclear whether children involved in hostilities are subject to the same rules that apply to adults in making targeting decisions. This issue is argued to have put IHL in ‘a conflict between two of its driving principles: humanity and military necessity’.<sup>66</sup> While the principle of humanity requires protection of the vulnerable, like children, from effects of hostilities, the principle of military necessity in turn recognizes the need to overcome enemy fighters during hostilities even if such are children.<sup>67</sup>

One may argue that the special protection of children in situations of armed conflict extends to the question of targeting because of IHRL, which continues to apply also in such situations and generally prohibits use of lethal force unless employed as a last resort.<sup>68</sup> This is in opposition to IHL that does not require graduated use of force as employed against legitimate targets. The argument may suggest a need to make determination of the applicable norm in case of conflict between norms in IHRL and IHL because the two bodies of laws are

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<sup>62</sup> See for e.g. ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment (March 14, 2012), paras 627–628.

<sup>63</sup> Sassòli (n 14) p. 285.

<sup>64</sup> *ibid.*

<sup>65</sup> In class discussions during IHL MAS course that professor Sassòli taught at the Geneva Academy of International Humanitarian Law and Human Rights, which the writer attended during 2018/19 academic year, he often uses this saying while challenging extended interpretations of rules of laws which he feels would be unrealistic to implement.

<sup>66</sup> Pack (n 9) 184.

<sup>67</sup> *ibid.*

<sup>68</sup> Human Rights Committee, General Comment No 36 (2018) CCPR/C/GC/36 paras 12 and 64.

incompatible on the issue of deliberate targeting, which is basically intended to deprive life through use of lethal force, of legitimate targets.<sup>69</sup> The writer alludes to the current development in international law that evidences the recognition that situations of armed conflict are primarily regulated by IHL even if IHRL continues to apply and IHL rules inform the interpretation of IHRL norms dealing with deprivation of life in such situations.<sup>70</sup> According to the UN Human Rights Committee, use of lethal force that is consistent with IHL rules would not amount to violation of the right to life under IHRL.<sup>71</sup> It follows from this, since under IHL deliberate targeting of legitimate targets is lawful without any condition based on age, lawfulness of limitation of the right to life of children through use of lethal force as regulated under IHRL must be assessed in light of this lens.<sup>72</sup> In fact, the principle of distinction between legitimate targets and protected persons is a cornerstone of IHL<sup>73</sup>, and this principle should also be taken into consideration while analyzing IHRL protections accorded to persons, including children, in situations of armed conflict. Consequently, the writer asserts that children could be deliberately targeted while they are legitimate targets as recognized under IHL, but the manner in which they could be targeted (whether in the same way as adults) is not definitively determined and, hence, both IHL and IHRL rules and principles can be resorted to complementarily in analyzing this issue.<sup>74</sup> In the subsequent sections, the article deals with this particular issue emphasizing on the context of NIACs as its scope is delimited to targeting of children in NIACs.

#### **4. Children Involved in Non-International Armed Conflicts and the Notions of Direct Participation in Hostilities and Continuous Combat Function**

As described above, children are granted special protection during armed conflicts under IHL and IHRL. However, this protection does not cover the law of targeting.<sup>75</sup> This led to controversies as to whether children could be legitimately targeted in the same way as their adult counterparts. The issue of targeting of children in NIACs arises in situations where children take a direct part in hostilities (as civilians) or become members of armed groups having CCF (as fighters). This section analyzes whether the notions of DPH and CCF, which

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<sup>69</sup> M Matthews, 'The Interaction Between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-International Armed Conflicts' (2013 17 International Journal of Human Rights), 637.

<sup>70</sup> Human Rights Committee (n 68) para 64; also see ICJ, Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons (1996) para 25; Sassòli and Olson (n 34) 604-5; M Milanovic, 'The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law' (2014) 27-8 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2463957](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463957)> accessed 09 July 2019.

<sup>71</sup> Human Rights Committee (n 68) para 64.

<sup>72</sup> Pack (n 9) 195.

<sup>73</sup> Matthews (n 69) 635.

<sup>74</sup> The UN Human Rights Committee noted that even if rules of IHL may be relevant for the interpretation and application of IHRL rules, particularly on the right to life, in the context of armed conflicts, 'both spheres of law are complementary, not mutually exclusive'. See Human Rights Committee (n 68) para 64.

<sup>75</sup> J Nicholson, 'Is Targeting Naked Child Soldiers a War Crime?' (2016) 16(1) International Criminal Law Review, 144; Pack (n 9); see also APV Rogers, 'Unequal combat and the law of war' (2004) 7(3) Yearbook of International Humanitarian Law, 17.

serve as a basis for lawful targeting in NIACs, could and should be applied differently to children considering their vulnerability and the special protection they are accorded under IHL and IHRL during armed conflicts with regard to other issues related to the same context.

Lack of treaty provision addressing the specific issue of targeting of children involved in armed conflict led many to the presumption that they may be targeted in the same way as their adult counterparts under IHL.<sup>76</sup> The DPH Guidance also suggests that children may lose protection against direct attack where, as civilians, they participate directly in hostilities or exhibit a CCF, even if it does not clearly rule out the possibility that a different standard could arguably be applied to children as opposed to adults.<sup>77</sup> Bosch notes that the notions of DPH and CCF, as suggested in the DPH Guidance, are ‘both necessary and yet especially problematic when applied to child soldiers’.<sup>78</sup> This article also takes the position that children that take a direct part in hostilities or have CCF could be legitimately targeted during NIACs, but questions if the notions of DPH and CCF should be applied to them in the same way as adults of the same position to make them directly targetable.

#### **4.1. Children and the Notion of Direct Participation in Hostilities**

As discussed above, the notion of DPH has neither been defined in treaty nor in customary law; and examination of state practice shows that there is no uniform interpretation of what kind of activities amount to DPH.<sup>79</sup> The International Criminal Court (ICC), in *Lubanga*, in an attempt to expand the liability of those who recruit and use children in hostilities (in the particular case *Lubanga*’s), had interpreted the notion in a manner that considered expansive kind and types of activities to constitute DPH, like performing domestic work in the frontlines and serving as decoys and couriers.<sup>80</sup> The Court’s approach was hailed for its ability to promote protection of children by making those responsible for their recruitment and use in hostilities liable under a wider range of activities; however, it is criticized for being an incorrect application of the law regulating civilian DPH<sup>81</sup> and putting children at greater risk of being legitimate targets for engaging in activities that may not necessarily amount to DPH.<sup>82</sup>

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<sup>76</sup> For eg Happold argues that ‘when participating in hostilities, children are no more privileged than any other combatant. There are no additional rules restricting what the forces of an adverse party can do to them. They may be shot, shelled, bombed or bayoneted just as may any other combatant’. M Happold, *Child Soldiers in International Law* (Juris Publishing and Manchester University Press 2005) 101.

<sup>77</sup> DPH Guidance (n 11) 59-60; see also RC Barrett, ‘Humanising the Law of Targeting in the Light of Child Soldier’s Right to Life’ (2019) 27 *International Journal of Children’s Rights* 1, 7; Melzer, *Keeping the Balance between Military Necessity and Humanity...* (n 36) 831.

<sup>78</sup> Bosch (n 30) 13.

<sup>79</sup> Bosch (n 27) 453; Henckaerts and Doswald-Beck (n 1) 23.

<sup>80</sup> ICC, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment (March 14 2012) analyzed in C Jenks, ‘Law as Shield, Law as Sword: The ICC’s *Lubanga* Decision, Child Soldiers and the Perverse Mutualism of Participation in Hostilities’ (2013) 3 *University of Miami National Security and Armed Conflict Law Review* 106.

<sup>81</sup> The Court is criticized for making a false distinction between active and direct participation in hostilities, which “refer to the same quality and degree of individual participation in hostilities” under IHL. See Jenks (n 72) 121.

<sup>82</sup> Jenks (n 80) 109, 121-22.

Thus, this piece accepts the criteria proposed by the ICRC in its DPH Guidance because its application would enable to limit deprivation of civilian protection from direct attack to activities that amount to direct participation as suggested under IHL, rather than bringing an entire war effort within the notion of DPH by including indirect participation. Accordingly, the writer asserts that children may lose the IHL protection against direct targeting when they engage in activities that fulfil the three pronged test establishing DPH like any other civilian.<sup>83</sup> Though some scholars claim that children cannot be considered as legally capable of choosing to directly participate in hostilities and thereby become legitimate targets<sup>84</sup>, the writer contends that the law does not distinguish on this point based on a person's age, making the default position that children DPH may be lawfully targeted.<sup>85</sup> Yet, it is questionable whether the same approach to targeting applies for all civilians that take a direct part in hostilities, *inter alia* children, as IHL is silent on this issue.

According to Provost, there are elements in IHL that support adapting a child-specific approach to targeting, suggesting that there should be a *prima facie* doubt for targeting when the potential target is a child.<sup>86</sup> He notes that the DPH Guidance offers the approach that persons who do not have CCF are to be considered as civilians who may only lose their entitlement to protection against targeting while they DPH. He then argues, basing on the IHL norm that states 'in case of doubt whether a person is a civilian, that person shall be considered to be a civilian',<sup>87</sup> the notion of DPH should be differently applied to children in the sense that in case of doubt whether a child is taking a direct part in hostilities thereby lose civilian status, the test should be comparatively more restrictive than for adults to overcome children's civilian status.<sup>88</sup> Bosch also agrees that the presumptive civilians status requirement appears to have some additional protection with respect to children as children's 'civilian dress and their obvious youthfulness place a heavy burden upon those opposing these child soldiers to verify that their actions do indeed amount to [DPH] before they can target them directly'.<sup>89</sup> Accordingly, the three elements constituting DPH, i.e. the threshold of harm, the direct causation, and the nexus to the conflict, 'are not met unless the facts are sufficiently clear to overcome the presumption that a child is not directly participating'.<sup>90</sup> Provost gives an example in support of this argument: 'an adult fighter in uniform running away from battle may not be considered as unambiguously opting out of hostilities, as this

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<sup>83</sup> The DPH Guidance recognizes that children could DPH. Likewise, the ICC and Special Court for Sierra Leone, though not specifically dealt with the issue of targeting, suggest children can DPH. The 2015 US Law of War Manual, under para4.20.5.3, also states that "whether a civilian is considered to be taking a direct part in hostilities does not depend on that person's age". See DPH Guidance (n 11) 60.

<sup>84</sup> AA Sampaio and M McEvoy, 'Little Weapons of War: Reasons for and Consequences of Treating Child Soldiers as Victims' (2016) 63 Netherlands International Law Review, 65.

<sup>85</sup> Pack (n 9) 187; S Bosch, 'Targeting and Prosecuting 'under-aged' Child Soldiers in International Armed Conflicts in Light of the International Humanitarian Law Prohibition against Civilian Direct Participation in Hostilities' (2012) 45(3) The Comparative and International Law Journal of Southern Africa 324, 341-43.

<sup>86</sup> Provost (n 3) 1.

<sup>87</sup> AP I art 50(1). This IHL rule, providing for presumption of civilian protection, is arguably equally applicable in NIACs too even if not codified in IHL of NIACs as in the case of IACs: See DPH Guidance (n 11) 76; also see Y Sandoz et al (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 4789.

<sup>88</sup> Provost (n 3) 3.

<sup>89</sup> Bosch (n 30) 11.

<sup>90</sup> Provost (n 3) 3.

could be a mere strategic fallback, but that same behavior by a child fighter would meet a lower threshold'.<sup>91</sup> The writer is convinced that this argument is reasonable considering the relative inexperience of children to strategically play with the appearance of DPH and appreciate the possible consequence following thereof.

There are counter arguments against affording a special protection for children who take a direct part in hostilities. Some argue that such children may pose a deadly threat that needs to be overcome by the opposing party just like adults who are participating directly in hostilities.<sup>92</sup> This argument, however, cannot always be strong since much younger children holding assault rifles would perhaps be more of a danger to themselves and those they are fighting with than they would be to the opposing forces.<sup>93</sup> Others argue that affording special treatment for such children may further incentivize NSAGs to recruit children and use them in hostilities, so that they take advantage of their opponents' hesitation to target them.<sup>94</sup> This is a valid concern; however, it should not serve as a bar to affording extra protection for children within careful limits, depending on particular situations they find themselves in, because recruitment and use in hostilities of children, predominantly by NSAGs<sup>95</sup>, as well as hesitation to attack them is already a practical reality.<sup>96</sup> Therefore, depending on a case by case analysis, the three requirements to establish DPH, could and should be applied in a manner that takes into cognizance the capacity of children to fulfil them and recognizing additional protection to children as impliedly required in the law in armed conflict situations. The revolving door protection for civilians, the time when they constitute a legitimate target and when they regain full civilian immunity from attack, should be specially considered in the case of children so as to avoid erroneous or arbitrary attack resulting from similar treatment of them with adults.

#### **4.2. Children and the Notion of Continuous Combat Function**

Mégret proposes that children should be considered as non-combatant members of the armed forces and not targeted unless they are participating in hostilities, suggesting that there would be no CCF possibility for children.<sup>97</sup> Provost notes that the underlying assumption for this proposition seems to be the inability of children to become combatants in the full sense of the term due to their age, and challenges the assumption arguing that in reality children have proven to be as ruthless fighters as adults.<sup>98</sup> Though case law dealing with the issue of targeting of children is lacking, the ICC in *Ntaganda* case, holding that 'mere membership of children under the age of fifteen years in an armed group cannot be considered as

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<sup>91</sup> *ibid.*

<sup>92</sup> See Pack (n 9) 196.

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid* 196-197; see also Bosch (n 85) 340.

<sup>95</sup> Bosch (n 30) 5.

<sup>96</sup> For eg in 2000, a Royal Irish Regiment was taken captive by enemy child soldiers in Sierra Leone partly because the Irish commander refused to fire on them because of their age. See L Westra, *Child Law: Children's Rights and Collective Obligation* (Springer 2014) 130

<sup>97</sup> F Mégret, 'Targeting Child Soldiers', (2013) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2223619](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223619)> accessed 05 June 2019.

<sup>98</sup> Provost (n 3) 2.

determinative proof of their direct/active participation in hostilities; and child soldiers remain under the protection of IHL unless they are in fact directly/actively participating’,<sup>99</sup> insinuated that the notion of CCF should be applicable to children associated with NSAGs, at least those below the age of fifteen, differently than their adult counterparts.<sup>100</sup> For Provost, there may be a room in IHL to argue that children that are said to have CCF should be treated differently than adults, but not the impossibility that they may have a CCF.<sup>101</sup> This position is persuasive considering the practical existence across regions of large number of children forming fighting members of armed groups in a continuous basis; and yet, studies indicate that relatively few of them are engaged in a solely combat role<sup>102</sup>.

The reality that even if children have membership in NSAGs, they may not necessarily have continuous fighting role like their adult counterparts suggests the need to acquire sufficiently clear facts to determine the primary role of children in the armed groups in which they are members, to thereby establish whether they could actually be considered as having CCF. Accordingly, what could be considered as sufficient proof by default to determine that adults have CCF because of their membership in armed groups, from practical experience,<sup>103</sup> should not likewise be assumed in the case of children as IHL would not condone a direct targeting of persons whose primary role is engaging in ordinary tasks like cooking or fetching water even if they are associated with armed groups.<sup>104</sup> This is not to say that children whose primary role is engaging in hostilities should not be considered as having CCF if at the time they are targeted, they were engaged in ordinary role. It is to mean that the factual evidences the studies established should be appreciated so as to take caution with regard to those children who would not actually have CCF even if adults in their situation would normally have.

Pack also challenges Mégret’s proposal citing Mégret’s omission of the word ‘direct’ from his participation requirement, “a word which greatly limits the scope of participation”.<sup>105</sup> According to Bosch, undermining the legal distinction between ‘direct’ and ‘indirect’ participation inherent in treaty and customary IHL would suggest an overly broad notion of legitimate targets that includes those who merely accompany NSAGs.<sup>106</sup> Pack argues that if ‘indirect’ participation is included as a basis for targeting, children engaged in any activity

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<sup>99</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, ICC-01/04-02/06, 9 June 2014, paras 78-79.

<sup>100</sup> Nicholson (n 75) 19.

<sup>101</sup> Provost (n 3) 2.

<sup>102</sup> MA Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP 2012) 149-152: Substantial number of child soldiers are engaged in various ordinary tasks such as fetching water, serving as cooks, cleaners, or porters.

<sup>103</sup> Grzebyk (n 40) 61-2.

<sup>104</sup> In practice, of course, such association itself puts the children in a situation where there is a reasonably foreseeable threat to their lives since they could become collateral damage of attacks directed at other legitimate targets in the NSAGs. For evidence that this is a rampant reality see for eg reports of the Secretary-General on children and armed conflict of: 2020 (UN Doc A/74/845-S/2020/525); 2019 (UN Doc A/73/907-S/2019/509); 2018 (UN Doc A/72/865-S/2018/465) 2017 (UN Doc A/72/361-S/2017/821); 2015 (UN Doc A/69/926\*-S/2015/409\*).

<sup>105</sup> Pack (n 9) 198-99.

<sup>106</sup> Bosch (n 30) 10. Also see Melzer, *Keeping the Balance between Military Necessity and Humanity...* (n 36) 837.

with NSAGs could become legitimate targets.<sup>107</sup> This shows that children having CCF could simply be covered under Mégret’s proposal, as they are members of armed groups having a continuous role of engaging in hostile activity, which obviously amounts to ‘participation’.

The notion of CCF offers that those fighters having this function could be targeted at all times, while engaging in hostilities or not, during the NIAC.<sup>108</sup> Bosch, noting the relative vulnerability of children to have the necessary capacity to make a choice of engaging with and remaining part of armed groups, questions if a child ‘who has been recruited against his will, and in violation of IHL, be subject to the harsh consequences of the [CCF] regime’,<sup>109</sup> the consequence being subjection to direct targeting. Unfortunately, the law of targeting does not concern itself with the issue whether such children have joined the armed groups in which they have CCF forced, coerced or illegally.<sup>110</sup> It would be impractical to argue that children cannot be members of NSAGs having CCF because the reality evidences there still exist thousands of child soldiers within the ranks of various NSAGs, whose specific function in the groups is to continuously commit acts that constitute DPH.<sup>111</sup> What could be arguable is whether such children should be treated in the same way as adults for targeting purpose, especially while they are not engaging in hostile activity at the material time.

Sassòli notes that, due to lack of clarity under IHL in this regard, ‘it may be argued that IHRL considerations or the principle of military necessity should somehow restrict’ attacks aimed at targeting such children ‘to cases where capture is impossible’.<sup>112</sup> Goodman supports this position claiming that there are circumstances in which a fighter could be made *hors de combat* by capture or wound than death, without endangering the attacking party; hence, it is unlawful to use lethal force in such circumstances.<sup>113</sup> This approach, which has been surmised as a least restrictive means, has been suggested by Goodman to be applicable as a matter of law.<sup>114</sup> One of the circumstances in which this approach should be applicable to children having CCF is a situation in which they are not engaged in hostile activity at the material time, and do not pose an imminent threat to the opposing forces, making it feasible for them to employ a least restrictive means. The DPH Guidance also favors this position noting that:

‘while operating forces can hardly be required to take additional risks ... in order to capture an armed adversary alive, it would defy basic notions of humanity to

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<sup>107</sup> Pack (n 9) 199.

<sup>108</sup> Bosch (n 85) 355.

<sup>109</sup> Bosch (n 30) 12.

<sup>110</sup> Mégret (n 97).

<sup>111</sup> For recent data on this see annual reports of the Secretary-General on children and armed conflict (n 3); also see Rosen (n 2).

<sup>112</sup> Sassòli (n 14) 259. See also Pack (n 9) arguing that “a proper balance between military necessity and humanitarian concerns requires IHL to provide some protection from attack for child soldiers”.

<sup>113</sup> R Goodman, ‘The Power to Kill or Capture Enemy Combatants’ (2013) 24(3) The European Journal of International Law 819, 822. He argues that the rule on this is embodied in the prohibition on superfluous injury and unnecessary suffering.

<sup>114</sup> *ibid* 819-20.



kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force'.<sup>115</sup>

Schmitt disagrees with the 'capture rather than kill' argument asserting that, even if capture is usually preferred for operational and policy reasons, there is no such a rule in the extant IHL.<sup>116</sup> Fenrick supports Schmitt's position contending that one can envisage a situation, particularly in NIACs, where military personnel will be directed to take risks 'to limit death or injury inflicted on opposing forces', but for reasons of policy rather than as a legal obligation.<sup>117</sup> However, this position is not convincing compared to Sassòli's and Goodman's because, in the absence of clear rules on the issue, the context in which rules of IHL must be interpreted should be informed by the principles of military necessity and humanity. In turn, these principles, combined, 'reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances'.<sup>118</sup> This is in line with the Martens Clause,<sup>119</sup> which is recognized in IHL treaties and jurisprudence for over a century, that provides a particular action is not necessarily lawful simply because it is not expressly prohibited or otherwise regulated in treaty law, and targeting decisions cannot be made arbitrarily for want of a written provision.<sup>120</sup> Moreover, IHRL obligation in relation to use of lethal force, which provides for capture rather than kill approach,<sup>121</sup> also needs particular consideration in circumstances where the concerned children are not conducting hostilities even if they have membership in NSAGs having CCF.<sup>122</sup> Accordingly, in some prevailing circumstances where capture is possible, direct targeting of children having CCF may go against the underlying principles of IHL; and coupled with special protection for children afforded by IHRL, it could, hence, be unlawful.

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<sup>115</sup> DPH Guidance (n 11) 77-82. Responding to a critique on Part IX of the DPH Guidance, where this proposition is featured, that the proposal has no basis in treaty law, state practice or jurisprudence, Melzer admits that there is no specific treaty law expressly providing for it but contends that this does not mean it cannot be drawn from the interpretation of existing treaty provisions. Melzer further presents evidence for the proposal in international and national jurisprudence, state practice and contemporary military manuals. For more on this see Melzer, *Keeping the Balance Between Military Necessity and Humanity...* (n 36) 904-13.

<sup>116</sup> M Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'' (2013) 24(3) *The European Journal of International Law* 855.

<sup>117</sup> W Fenrick, 'ICRC Guidance on Direct Participation in Hostilities' (2010) 12 *Yearbook of International Humanitarian Law* 287, 299.

<sup>118</sup> DPH Guidance (n 11) 79.

<sup>119</sup> Analyzing the contemporary significance of the clause, Meron notes that the clause 'argues for interpreting [IHL], in case of doubt, consistently with the principles of humanity and the dictates of public conscience' and asserts that it should be considered in evaluating the legality of, *inter alia*, methods of war. (emphasis added): T Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94(1) *American Journal of International Law* 78, 87-88.

<sup>120</sup> *ibid* 80.

<sup>121</sup> Though it is still contentious and analysis of the issue is beyond the scope of this piece, there is a growing tendency to consider NSAGs too may have IHRL obligations in certain circumstances, including in such situation. For detailed analysis on this see for eg A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006); D Murray, *Human Rights Obligations of Non-State Armed Groups* (Bloomsbury Publishing 2016); K Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

<sup>122</sup> Kretzmer, Ben-Yehuda and Furth (n 39) 224.

## 5. Means and Methods to Target Children

As discussed above, apart from the controversy whether children DPH or having CCF may be targeted any differently than adults, IHL does not outlaw targeting of children. Yet, similar to the notions of DPH and CCF as applied to children, it is still arguable if the same means and methods used to target adults could be lawful when employed against children.

On this issue, Provost argues that ‘the moral intuition that children remain children even if they take direct part in hostilities has an impact on applicable legal standards’.<sup>123</sup> This seems to be supported by the DPH Guidance, albeit impliedly, that noted ‘even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law’.<sup>124</sup> It is customary IHL that ‘the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited’.<sup>125</sup> For Provost, this norm requires an appreciation of ‘the necessary use of any means or methods of war in every case, to balance the military advantage against the injury and suffering caused in the operation’.<sup>126</sup> He argues that ‘a duty to use the least injurious means or method of warfare against a child soldier can find some support in the French version of the prohibition of superfluous injury and unnecessary suffering, which speaks of *maux superflus*’, that refers not only to injury/suffering but also to evil.<sup>127</sup> Accordingly, in the case of children DPH or having CCF, ‘direct targeting can be considered permissible only to the extent that it is a necessary evil, meaning that no viable option can be identified and that there is a tangible military necessity for this attack, otherwise it violates the treaty and customary prohibition of superfluous injury and unnecessary suffering’.<sup>128</sup> Hence, the argument that lawful means and methods applied to achieve a particular military advantage against adults may be unlawful when applied on children in the same circumstances has support in the law considering the norms under IHL and IHRL that require special protection for children against harm. In the presence of less harmful means and methods that could be used against children while maintaining the military advantage, it would be unlawful to use means and methods that could cause unnecessary evil.

The practice also suggests that army commanders and front-line soldiers use differentiated means and methods when they are faced with legitimate targets that are children. In a roundtable discussion of experts, two retired officers of the US Army noted there is a practice by their soldiers of avoiding means and methods, which they would normally employ against adults, when the legitimate targets are children, even assuming additional risk to themselves.<sup>129</sup> One retired General noted that if he had ever issued a kill order on a child

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<sup>123</sup> Provost (n 3) 4.

<sup>124</sup> DPH Guidance (n 11) 77.

<sup>125</sup> CIHL (n 1) Rule 70.

<sup>126</sup> Provost (n 3) 4.

<sup>127</sup> *ibid* 5; also see DPH Guidance (n 11) 77-78.

<sup>128</sup> Provost (n 3) 5.

<sup>129</sup> Pack (n 9) citing ‘Roundtable Discussion Transcript: The Legal and Ethical Limits of Technological Warfare’, (2013) available at <<http://epubs.utah.edu/index.php/ulr/article/viewFile/1193/868>> 1321.

target, the soldiers given such an order ‘would probably have, on their own initiative, tried very, very hard to find an alternative way of dealing with the target’.<sup>130</sup> Many others in the roundtable agreed that this would be the instinct of any soldier.<sup>131</sup> This suggests that soldiers would try to find less harmful means and methods to deal with legitimate child targets as opposed to adults. Even if such practice is noted to be and should be rampant, virtually all of the participants in the discussion referred to it as a ‘moral obligation’ rather than a legal one based in treaty or customary law.<sup>132</sup> Yet, it could strengthen the argument suggested above that the law has a room in requiring a differentiated application of the prohibition of superfluous injury and unnecessary suffering in the case of means and methods used to target children.

The DPH Guidance notes that, in the absence of clear rules, choice of means and methods employed against legitimate targets should be determined ‘based on the fundamental principles of military necessity and humanity, which underlie and inform the entire normative framework of IHL and, therefore, shape the context in which its rules must be interpreted’.<sup>133</sup> The practical importance of the restraining function of these principles in determining the kind and degree of permissible force against legitimate targets is particularly relevant in the case of NIACs, where ‘armed forces operate against selected individuals in situations comparable to peacetime policing’.<sup>134</sup> Together, ‘the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances’.<sup>135</sup> Additionally, in the absence of contradiction between the main governing law of conduct of hostilities, which is IHL, and IHRL regarding possible special consideration for targeting of children, additional restrictions on the use of force provided under IHRL may complement and inform the choice of means and methods of warfare.<sup>136</sup> In this regard IHRL provides that the amount of force applied should not exceed the amount strictly needed for responding to the threat posed by the target,<sup>137</sup> and there could be situations in which a child genuinely poses a lesser threat than an adult. This shows, depending on the circumstances, the means and methods necessary to accomplish a legitimate military purpose against adults might not be necessary in the case of children. Accordingly, the fundamental principles of IHL and the privileged treatment accorded to children in both IHL and IHRL on variety of issues in armed conflicts suggest the need to make special consideration in the assessment and determination of the means and methods employed on children directly participating in hostilities or having CCF.

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<sup>130</sup> *ibid* 1345.

<sup>131</sup> Pack (n 9) 188.

<sup>132</sup> *ibid* 189.

<sup>133</sup> DPH Guidance (n 11) 78.

<sup>134</sup> *ibid* 80-1.

<sup>135</sup> *ibid* 79.

<sup>136</sup> Barrett (n 77) 9; Grzebyk (n 40) 67-68.

<sup>137</sup> Human Rights Committee (n 68) para 12.

## 6. Conclusion

Even if international law afforded special protection for children by prohibiting their recruitment and use in hostilities, hundreds of thousands of children are still participating in hostilities mainly through NSAGs. This reality gives rise to the question whether the special protection extends to the issue of targeting. Particularly, the difficulty to determine the rules on targeting in the context of NIACs led to controversies as to targetability of members of NSAGs while they do not take a direct part in hostilities in general, and children associated with them in particular. To mitigate this difficulty, the ICRC in its DPH Guidance (Interpretive Guidance) proposed that those members of an armed group whose specific function in the group is to continuously commit acts that constitute DPH (have CCF) are targetable, in addition to civilians directly participating in hostilities the group engages in. This paper asserts that the proposition in the DPH Guidance is persuasive considering the need to make the fundamental IHL principles of distinction and equality of belligerents meaningful and observing state practice impliedly confirming its correctness. Additionally, there is no suggestion in the law or in the DPH Guidance that children cannot take a direct part in hostilities or have CCF in NSAGs. Moreover, albeit forbidding their recruitment and use in hostilities, the extant IHL, which is the main body of law regulating conduct of hostilities, does not place restrictions on the conduct of military operations against children who turn into legitimate targets due to their DPH or association with armed groups having CCF. Yet, it is not clear if the notions of DPH and CCF could and should be applied to children differently in making targeting decisions considering the special place international law afforded to them in armed conflict situations due to their unique vulnerabilities and protection needs. Accordingly, this piece addressed, as its main research question, the issue whether children associated with armed groups having a CCF or DPH in the context of NIACs are targetable in the same manner as adults of the same position.

Children may be targeted when their activity fulfils the three elements constituting DPH that are identified in the Interpretive Guidance, viz. the threshold of harm, the direct causation, and the nexus to the conflict. However, the notion of DPH should be applied to children differently than adults. The presumptive civilian status requirement in case of doubt, as entrenched in IHL, supports adapting the three pronged test more restrictively to children because a particular action by an adult compared to a child may not necessarily indicate the same behavior due to children's relative inexperience to adapt their action strategically with its possible consequence and their differentiated capacity to cause harm, particularly in the case of much younger ones. Applying the same standard may result in erroneous or arbitrary attack of children as the time when civilians constitute a legitimate target (for DPH) and when they regain full civilian protection from attack (for ceasing DPH) may not be similar in all circumstances. This, coupled with special attention accorded to children under IHL and IHRL in the context of armed conflicts, places additional burden to verify if children's action do indeed fulfil the three-pronged test establishing DPH before they can be targeted.

Likewise, children may be associated with armed groups having CCF and become legitimate targets in the context of NIACs. However, the notion of CCF should be applied to them differently than adults. For one thing, studies indicate, in majority of the cases, the primary role of children associated with armed groups may not be of a combat one unlike their adult counterparts. This calls for taking of additional caution in determining if children actually have CCF before directly targeting them. Secondly, IHL is not clear about targetability of children having CCF. Consequently, consideration of IHL principles of humanity and military necessity, as well as IHRL obligation to employ graduated force particularly with regard to those that do not pose imminent threat, can be resorted to in analyzing the issue. These, read together, provide that lawfulness of use of lethal force, even against legitimate targets, depends on circumstances. Accordingly, it can be argued that direct targeting of children having CCF is restricted to cases where their capture is impossible, especially during such time in which they do not engage in hostile activity (do not pose imminent threat to the opposing forces). Moreover, the need to consider children's vulnerability in armed conflicts and afford them additional protection is recognized under IHL and IHRL. It can be argued that it is implicit in this special protection that targeting decisions based on the notion of CCF should afford special consideration to children unlike their adult counterparts. Hence, depending on the age differences and particular circumstance of the situation, the law requires a differentiated application of the notion of CCF in the case of children.

Another contentious issue about targeting of children taking a direct part in hostilities and having CCF relates to the means and methods used to target them. Similar to the notions of DPH and CCF as applied to children, it is still arguable if the same means and methods used to target adults could be lawful when employed against children. The legal argument on this issue primarily depends on IHL prohibition of superfluous injury or unnecessary suffering. Accordingly, it can be argued that in the presence of less harmful means and methods that could be effectively employed against children while maintaining the military advantage, it would be unlawful to use means and methods that could cause unnecessary evil, even if such may be acceptable as used against adults in the particular circumstance. The practice also shows that soldiers would try to find less harmful means and methods to deal with legitimate child targets as opposed to adults. Even if such practice is recognized only as a moral obligation, it should inform the interpretation of rules governing means and methods as applied in the case of children. Still on this issue, consideration of IHL principles of military necessity and humanity, as well as IHRL restrictions on the degree and kind of permissible force to be used, suggest the need to make special consideration in the determination of the means and methods to be employed when the potential targets are children participating directly in hostilities or having CCF.