Reimagining the Scope of Children’s Legal Protection During Armed Conflicts Under International Humanitarian Law and International Criminal Law

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Recommended Citation
Anaise Muzima, "Reimagining the Scope of Children’s Legal Protection During Armed Conflicts Under International Humanitarian Law and International Criminal Law", (2018) 8:1 online: UWO J Leg Stud 2
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Abstract
This paper calls for a clarification of the law and a re-evaluation of the status of children who are participating in hostilities by highlighting that any fruitful debate on child soldiers needs to go beyond the binary and limited discussion on whether such children are merely victims or perpetrators. The author focuses on the principles defined by International Humanitarian Law and International Criminal Law as to the distinction between “direct” and “active” participation to hostilities and argues that such distinction is ambiguous and inapplicable to the specific context of child soldiering. This paper concludes by emphasizing the necessity to reimagine the status of child soldiers by paying closer attention to the special protection afforded to all children under fifteen during armed conflicts. The author demonstrates that child soldiers retain their status as children thanks to their special protection that challenges the distinction between combatants and civilians under International Humanitarian Law.

Keywords
child soldiers, humanitarian law, international criminal law
REIMAGINING THE SCOPE OF CHILDREN’S LEGAL PROTECTION DURING ARMED CONFLICTS UNDER INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW

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INTRODUCTION

The debate about the issue of child soldiers in international law has been narrowly framed around the question of whether child soldiers should be prosecuted or deemed innocent victims. This question, while essential, marginalizes several considerations related to the multi-dimensional and intersecting identities and roles of child soldiers. As Drumbl notes, “it seems fundamentally unfounded to stereotype all child soldiers as depersonalized tools of atrocity or as weapons systems industrially committing crimes against humanity” since it can no longer be seriously disputed that “where there is armed conflict, invariably, there are child soldiers.”1 Few scholars have investigated the major gaps related to the legal protection of child soldiers in international law. While acknowledging that children are passive victims in armed conflicts, and that some of them can display “tactical agency to cope with the concrete, immediate conditions of their lives created by their violent military environment,” this paper focuses on the legal consequences deriving from their lack of maturity to participate in hostilities.2 Before going further into this matter, it is important to keep in mind that children are affected in many ways during armed conflicts: some are killed, maimed, abducted, sexually abused, and physically exploited, whereas others are brainwashed or uprooted from their families and communities.3 In 2005, the United Nations Secretary-General

identified six grave violations that are committed against children during armed conflict. These violations are entrenched in the main legal instruments in International Humanitarian Law (IHL), International Human Rights Law (IHRL), and International Criminal Law (ICL), and they are listed as follows:

a) Recruitment and use of children;
b) Killing or maiming of children;
c) Sexual violence against children;
d) Attacks against schools or hospitals;
e) Abduction of children; and,
f) Denial of humanitarian access.4

This paper will focus on the prohibition of the recruitment or use of children under fifteen years old to participate in hostilities. It will demonstrate that the international discourse on the prohibition of the recruitment and use of child soldiers does not align with the continuing practice of child soldiering. Despite the impossibility of precisely assessing the number of children recruited or used by armed groups or armed forces, humanitarian organizations, researchers, and academics consistently cite 300,000 as the most authoritative and accurate number of child soldiers.5 Moreover, in 2015, the United Nations Secretary-General estimated that 230 million children live in countries and areas where armed groups actively operate, and that there are 15 million children who are directly affected by the violence resulting from armed conflicts.6

Through a multi-dimensional legal framework combining IHL and ICL, this paper will address two major arguments. First, children under fifteen years old enjoy a special status that prevents them from being targeted or treated as regular combatants in armed conflicts; and second, such children lack the intent to be considered civilians who are directly participating in hostilities. Consequently, this paper will posit that such children cannot be considered legitimate targets.

This paper comprises three main parts. The first part will explain the established principles on the protection of children during armed conflicts. This section will emphasize the scope and extent of the prohibition on recruiting or using children in hostilities in international law. It will conclude that such prohibition is not only widely entrenched in international law but, most importantly, it has crystallized into customary international law. This analysis will explain the chronological evolution of the law in the prohibition of children’s participation in hostilities to illustrate the progress made in

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6 UNSCOR, 70th Year, 7414th Mtg, UN Doc S/PV.7414 (2015).
the understanding and codification of the phenomenon of child soldiering, while shedding light on some of the remaining limitations.

Furthermore, the second part of this paper will identify inconsistencies and confusions in ICL and IHL in the understanding of the terms “active” and “direct” participation in hostilities. To explore and clarify these distinctions, this paper will examine the International Committee of the Red Cross’s Interpretive Guidance on the Notion of Direct Participation under International Humanitarian Law (ICRC Interpretive Guidance), which has articulated the constitutive elements of direct participation in hostilities under IHL.\(^7\) This part will also analyze some of the International Criminal Court’s (ICC) findings regarding the distinction between “active” and “direct” participation in hostilities. In this section, the paper will develop arguments that illustrate why the current approach and understanding of “active” or “direct” participation under both IHL and ICL is narrow and inappropriate for the purposes of child soldiers.

This paper concludes by examining the underpinnings of the Special Protection as an alternative to the narrow and ambiguous approaches adopted by IHL and ICL. In this section, the paper will argue that the Special Protection is a broader and exceptional legal regime that challenges the traditional principle of distinction. Therefore, this part will provide some insights that support an evolution or clarification of the law about the legal status of children under fifteen years of age who are used to participate in hostilities.

I. INTERNATIONAL LEGAL FRAMEWORK ON CHILD SOLDIERS

Initially designed as a mechanism to foster political relations between sovereign states, public international law did not question, prohibit, or codify child soldiering until 1977, despite the ample evidence of such practice.\(^8\) Indeed, Gus Waschefort points out that “there are many accounts in history, theology, and mythology of children’s heroism in battle” and that, despite the substantial number of children who were engaged in hostilities during the Second World War, “the Geneva Conventions of 1949 did not prohibit the recruitment and participation of children in armed conflict.”\(^9\) In 1977, IHL became the first area of international law to address the issue of child soldiers through the first two Protocols Additional to the Geneva Conventions of 12 August 1949 (AP I and II).\(^10\)

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\(^7\) Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2009) at 11 [*ICRC Interpretive Guidance*].

\(^8\) Waschefort, *supra* note 5 at 1.

\(^9\) *Ibid*.

\(^10\) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 Jun 1977, 1125 UNTS 3 (entered into force 7
The Prohibition of Children’s Participation or Use in Hostilities

No discussion on the issue of child soldiers would be complete without an introduction to the core principles of IHL on the conduct of hostilities. Indeed, IHL is the first and only area of international law entirely designed around the conduct of hostilities. International humanitarian law balances, on the one hand, military necessity (giving belligerents the freedom to conduct hostilities in order to defeat the adversary) and, on the other hand, the principle of humanity (imposing “certain limits on the means and methods of warfare, and [requiring] those who have fallen into enemy hands be treated humanely at all times”).11 Michael Schmitt highlights that this latter principle “seeks to limit the suffering and destruction incident to warfare.”12

Such balancing between military necessity and the principle of humanity finds its justification through the cardinal principle of distinction between combatants and civilians. International humanitarian law recognizes that civilians “enjoy immunity from direct attack unless and for such time as they take a direct part in hostilities,” whereas combatants “have the privilege under the laws of war to use force offensively without the threat of criminal liability,” so long as they respect core principles under IHL (such as the principle of distinction).13 Therefore, one of IHL’s aims is “to shield those who are not directly participating in the conflict from its effects,” while allowing belligerents to wage war and to use tactics that do not violate the laws of war in order to gain victory.14

AP I and II were the first international legal instruments to rule on the practice of recruitment or use of child soldiers in armed conflicts.15 According to the International Committee of the Red Cross (ICRC), both instruments “were adopted by States to make international humanitarian law more complete and more universal, and to adapt it better to modern conflicts.”16 AP I deals with international armed conflicts which refer to hostilities between states, whereas AP II focuses on non-international

December 1978) [AP I]; 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 Jun 1977, 1125 UNTS 609 (entered into force 7 December 1978) [AP II].
armed conflicts which involve non-state governmental actors.\textsuperscript{17} Both instruments categorically prohibit the recruitment or use of children under 15 years old by armed groups or armed forces as illustrated below:

\textbf{Art 77 (3) AP I}

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.[…]

\textbf{Art 4 (3) AP II}

3. Children shall be provided with the care and aid they require, and in particular:

\[c)\] 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.\textsuperscript{18}

This strict prohibition has been extensively reproduced and developed in several legal regimes of international law. For instance, IHRL has, through the Convention on the Rights of the Child (CRC) in 1989 and the African Charter on the Rights and Welfare of the Child (ACRW) in 1999, urged member states to “take all feasible measures” (CRC) and “all necessary measures” (ACRW) to ensure that no children under fifteen years old (CRC) and no children under eighteen years old (ACRW) have been recruited or participated directly in hostilities.\textsuperscript{19} Moreover, in the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, the minimum age for recruitment or participation in hostilities has been raised to 18 years old.\textsuperscript{20} Similarly, in 1998 and 2002, ICL, through the Rome Statute of International Criminal Court (Rome Statute) and the Statute for the Special Court of Sierra Leone, posited that “conscripting or enlisting children under the age of fifteen years […] or using them to participate actively in hostilities” was a war crime and a serious violation of IHL.\textsuperscript{21}

\begin{thebibliography}{99}
\bibitem{17} AP I and AP II, supra note 10; ICRC, “Non-International Armed Conflict” Unit for Relations with Armed and Security Forces (June 2002) at 5 <www.icrc.org/eng/assets/files/other/law10_final.pdf>.
\bibitem{18} AP I, supra note 10, art 77 (3); AP II, supra note 10, art 4 (3) [emphasis added].
\end{thebibliography}
Finally, in 1999, the International Labour Organization took a step further than the previously mentioned areas of law by recognizing in its *Worst Forms of Child Labour Convention* that “forced or compulsory recruitment of children for use in armed conflict” is a practice similar to slavery.\(^{22}\) This assertion is essential because under international law the prohibition of slavery is a *jus cogens* norm, which refers to peremptory norms that are “prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status.”\(^{23}\) The prohibition against slavery also features an *erga omnes* obligation, which triggers a legal interest that all states are obliged to protect.\(^{24}\)

Therefore, the prohibition of the recruitment or use of children under fifteen years old to participate in hostilities is widely entrenched in international law and has crystalized into customary international law. As a result, this customary principle “can be enforced against all parties to a conflict” whether or not they are governmental forces or non-state actors without any further need for domestic or international consultation, codification, or ratification.\(^{25}\)

Furthermore, it is important to clarify that, according to the ICC, children under fifteen years old do not have the legal capacity to consent to their recruitment.\(^{26}\) Thus, the alleged consent of such children to participate in hostilities cannot be used to justify their participation or to alleviate the liability of the recruiters.\(^{27}\) Consequently, this paper posits that in all situations where children under fifteen years old participate in hostilities, there shall always be the presumption that international law has been violated through the crimes of conscription, enlistment, or use of children to participate actively in hostilities.

It is important to note that, in its early stages on the issue of child soldiers, international law has framed the discussion in terms of age limit, with two different thresholds: children under fifteen years of age; and, children under eighteen years of age. Such a narrow understanding of the issue of child soldiers is problematic because there is no universal definition of a child and, thus, there is no universal delimitation of

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\(^{22}\) *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 17 June 1999, ILO No 182, art 3(a) (entered into force 19 November 2000).


\(^{24}\) Ibid.


\(^{26}\) *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, (Judgment pursuant to Article 74 of the Statute), (14 March 2012) at para 572 (International criminal Court, Trial Chamber I) [Lubanga].

\(^{27}\) Ibid.
childhood in international law. Ilene Cohn and Guy S. Goodwill-Gill assert that “the age of majority is a social, religious, cultural or legal device by which societies acknowledge the transition to adulthood; and there is no necessary correlation between any of the levels.”

However, “[i]nternational law exists to create a minimum threshold of norms to which all states are bound, and in so doing creates a degree of uniformity among states.” Therefore, international law cannot afford to develop specific legal categories of age limit to satisfy the social, religious, cultural, or legal norms of each community or country. Unfortunately, the lack of a general agreement in international law on the age limit for recruitment and participation in hostilities has created “a gap […] in the protective regime.” Such discrepancy in the law may leave the door open for armed groups who recruit or use children to choose the most convenient legal regime (either the prohibition to recruit or use children under fifteen years old or children under eighteen years old).

This paper argues that there is a stagnation of the law in ICL and IHL concerning the age standard for recruitment or participation in hostilities. Contrary to IHRL which attempts to make eighteen years “the new normal” age limit for recruitment and participation in hostilities. Nonetheless, for reasons of convenience, and due to the “status quo” of fifteen years for the prohibition of children’s recruitment or participation in hostilities within both ICL and IHL, this paper will frame the discussion around this specific category.

II. “DIRECT” VS “ACTIVE” PARTICIPATION UNDER IHL AND ICL

The second step that was undertaken in the understanding of the issue on child soldiers revolves around the nature of the roles they occupy. The clearest way to illustrate IHL and ICL’s approach is to reproduce the relevant provisions from AP I, II, and the Rome Statute that prohibits children’s participation or use in hostilities:

**AP I - Article 77 — Protection of children**

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. […]

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29 Waschefort, *supra* note 5 at 11.
30 Drumbl, *supra* note 1 at 135.
31 *Ibid*.
32 The absence of the mention of the age category should not be interpreted as referring to another category of children (i.e., children under 18 years of age).
AP II - Article 4 — Fundamental guarantees
3. Children shall be provided with the care and aid they require, and in particular:

c) 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;

d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph c) and are captured;

Rome Statute - Article 8 — War crimes
For the purpose of this Statute, ‘war crimes’ means:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; […]

At first glance, AP II seems to be formulated in broader terms than AP I (no mention of “direct” as in AP I in sub-paragraph (3)(c)). However, read in conjunction, sub-paragraph (3)(c) and (d) clearly indicate that AP I, AP II, and the Rome Statute do not prohibit all kinds of participation. Rather, their proscription only applies to a certain degree of participation that must satisfy the threshold of “direct” or “active” participation. Under IHL, “active” and “direct” participation have been treated as synonymous terms, whereas ICL has highlighted some distinctions and maintained their

33 Rome Statute, supra note 21 arts 8(2) (b)(xvii), (c)(vi); AP I, supra note 10 art 77(2); AP II, supra note 10 art 4(3) (c), (d) [emphasis added].
34 Nathalie Wagner, “A Critical Assessment of Using Children to Participate Actively in Hostilities in Lubanga: Child Soldiers and Direct Participation” (2013) 24:2 Crim LF 145 at 166. In the Lubanga case, the Trial Chamber has also noted that AP II “does not include the word ‘direct’” but the Chamber did not comment on sub-paragraph (3)(d) which seems to contradict such narrow understanding: Lubanga, supra note 27 at para 627.
difference.\textsuperscript{35}

**Gaps and Inconsistencies in the Law: “Direct” vs “Active” Participation**

No legal instrument under IHL has attempted to define or clarify the term “direct participation” before the ICRC in 2009.\textsuperscript{36} The *ICRC Interpretive Guidance* states that “the notion of direct participation in hostilities does not refer to a person’s status, function or affiliation, but to his or her engagement in specific hostile acts.”\textsuperscript{37} In other words, direct participation in hostilities (DPH) refers to specific acts or conduct, whether they are “spontaneous, sporadic, or unorganized” or even when they are regular acts derived from a continuous combat function.\textsuperscript{38} Therefore, the status of the individual committing specific hostile acts is not relevant to the conclusion of DPH. According to the ICRC, “[u]nder IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations.”\textsuperscript{39} Although this guidance is not a binding legal instrument, it has, for the first time, provided the constitutive elements for DPH in international law.

**Challenging the ICRC’s Interpretation of the Belligerent Nexus**

Three conditions must be met cumulatively for an act to qualify as DPH according to the ICRC. This paper will closely examine the three constituent elements of DPH to better capture the underpinnings of DPH.

First, “[t]he 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.”\textsuperscript{40} In other words, the act must “reasonably be expected to cause harm of a specifically military nature,” or “[i]n the absence of such military harm” the act must be likely “to cause at least death, injury, or destruction.”\textsuperscript{41}

Second, 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.”\textsuperscript{42} This second condition focuses on the proximity between the act and the harm expected. Indeed, the ICRC points out that “the concept of direct participation in hostilities is restricted to specific acts that are so closely related to the

\textsuperscript{35} ICRC Interpretive Guidance, supra note 7 at 43; Yuvaraj, supra note 15 at 71; Lubanga, supra note 26 at paras 621, 627 – 28.

\textsuperscript{36} ICRC Interpretive Guidance, supra note 7.

\textsuperscript{37} Ibid at 44.

\textsuperscript{38} Ibid.

\textsuperscript{39} Ibid at 12.

\textsuperscript{40} Ibid at 16.

\textsuperscript{41} Ibid at 49.

\textsuperscript{42} Ibid at 46.
hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities.”

Finally, to satisfy the last condition (the “belligerent nexus”), it must be demonstrated that the act was “specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”

The ICRC Interpretive Guidance highlights that if the act was not specifically designed in support of a party to an armed conflict and to the detriment of another, such an act “cannot amount to any form of “participation” in hostilities taking place between these parties.” Furthermore, the ICRC emphasized that the belligerent nexus “should be distinguished from concepts such as subjective intent and hostile intent” since these notions “relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act.” The ICRC pointed out that “[such] purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual.”

This last condition requires the act to be specifically designed to inflict harm to the enemy. The ICRC mentions that “to amount to direct participation in hostilities, an act must not only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another.” However, one can wonder how a certain act can be “specifically designed” to support a party to the conflict without involving subjectivity and intent. The ICRC’s position is even harder to defend after comparing several plain meanings of the verb “to design” as illustrated below:

To conceive and plan out in the mind.
Do or plan (something) with a specific purpose in mind.
To decide how something will be made, including how it will work and what it will look like, and often to make drawings of it.

Therefore, “to design” clearly involves subjectivity as well as the intent of someone in the planning of an action. Furthermore, adding the adjective “specifically” to the verb “to design” reinforces the necessity to demonstrate a certain degree of personal decision, commitment, and involvement in the planning and conduct of an

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43 Ibid at 58.
44 Ibid.
46 Ibid.
47 Ibid.
48 Ibid at 58 [emphasis in original].
50 The Oxford English Dictionary, sub verbo "to design" <en.oxforddictionaries.com/definition/design>.
51 Macmillan Dictionary, sub verbo "to design" <www.macmillandictionary.com/dictionary/british/design_2>.
action. To nuance its position, the ICRC recognized that in exceptional circumstances the mental state or the intent of an individual will be taken into consideration. The ICRC posited that when “civilians are totally unaware of the role played in the conduct of hostilities” or when “they are completely deprived of their physical freedom of action” there should be a proportionality assessment before any military operation. According to the ICRC, this may happen in the case of involuntary human shields or in the case of a “driver unaware that he is transporting a remote-controlled bomb.”

Nevertheless, the ICRC clarified that “even […] children below the lawful recruitment age may lose protection against direct attack.” It is not clear why the ICRC recognized that involuntary human shields, who are deprived of their physical freedom cannot be a “lawful military target,” whereas child soldiers who do not have the legal capacity to be recruited or to participate in hostilities may be targeted in the same manner as combatants. Alexandre Sampaio and Matthew McEvoy disagree with the ICRC’s reasoning and they posit that such an assertion is problematic and arbitrary because it seems to “dismiss the importance of the intent of children for the sake of the effectiveness of military operations.” Both authors point out that if the ICRC argues that “actions carried out under coercion or without knowledge” cannot amount to direct participation in the case of involuntary human shield, then the ICRC should recognize that “the element of intent is […] central for direct participation” and not merely exceptional.

Furthermore, Sampaio and McEvoy posit that the prohibition against the recruitment or participation of children is justified by the fact that children under fifteen are not “considered mature enough to choose to join belligerent parties to a conflict, let alone to participate in combat operations in favor of these parties.” Both authors argue that, similar to “involuntary human shields,” children under fifteen years of age lack the intent to participate in hostilities particularly “due to their presumed absolute legal incapacity to choose to do so under international law.” According to Sampaio and McEvoy, a child soldier’s actions “should be equally taken as lacking the necessary element of intent in order to be classified as direct participation in hostilities.” In the same vein, Geraldine Van Bueren argues that “armed conflicts are inherently brutalizing
and [children’s] very nature makes it impossible for those under eighteen to give free
and informed consent.”  

Therefore, this paper argues that direct participation cannot be demonstrated
unless the participant can display agency, knowledge, and intent. This is particularly
relevant in the context of child soldiers. Consistent with international criminal law
jurisprudence and international law principles, the ICC has acknowledged that children
do not have the legal capacity to consent to their participation in hostilities. The Trial
Chamber posited that “the consent of a child to his or her recruitment does not provide
an accused with a valid defence.”

Moreover, the ICC has emphasized in *The Prosecutor v Bosco Ntaganda* that
“there is a duty not to recognise situations created by certain serious breaches of
international law.” Unsurprisingly, children’s recruitment or use in hostilities is one
such breach and should never be considered as a regular way to conduct hostilities
under IHL. Therefore, this paper argues that the mere presence of children on the
battlefield signals a serious breach of international law and justifies the necessity to take
further precautions instead of mechanically applying traditional principles of IHL such
as the principle of distinction. This paper contends that the lack of intent characteristic
of children’s participation in hostilities is sufficient to dismiss their belligerent nexus
and, thus, their capacity to be considered as lawful military targets who are directly
participating in hostilities.

**Questioning the ICC’s Understanding of Children’s Participation in Hostilities**

Contrary to IHL, ICL prohibits “active participation” and has recognized the
distinction between “active” and “direct participation.” In *The Prosecutor v Thomas
Lubanga Dyilo*, the ICC highlighted that the drafters of the Rome Statute adopted the
expression *using children to participate actively in hostilities* “in order to cover both
direct participation in combat and also active participation in military activities.”
Therefore, the Trial Chamber posited that

The use of the expression ‘to participate actively in hostilities’, as opposed to the
expression ‘direct participation’ (as found in Additional Protocol I to the Geneva
Conventions) was clearly intended to import a wider interpretation to the
activities and roles that are covered by the offence of using children under the
age of 15 actively to participate in hostilities.

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64 Lubanga, supra note 26 at para 617.
65 Ibid.
66 Ntaganda, supra note 23 at para 53.
67 Lubanga, supra note 26 at para 621.
68 Ibid at para 627.
As a result, the Trial Chamber concluded that active participation covers both “direct” and “indirect” participation and that “[t]he decisive factor, […], in deciding if an ‘indirect’ role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.”\(^{69}\) In other words, the ICC decided that the most important examination that must be conducted to determine whether a child has been illegally used to participate in hostilities was to determine if the task performed by that child “exposed him or her to real danger as a potential target.”\(^{70}\) This paper posits that such a narrow and ambiguous position may worsen the precarious conditions of child soldiers.

Sandesh Sivakumaran emphasizes that the ICC’s approach is problematic because it does not provide any guidance as to what constitutes a “real danger” or a “potential target.”\(^{71}\) Sivakumaran highlighted that the ICC’s approach “suggests that certain activities, at a certain point in time, would not amount to active participation in hostilities because the child is not exposed to danger as a potential target, but the same activities at a different point in time may well amount to active participation.”\(^{72}\)

Thus, the ICC has adopted an ambiguous and unhelpful approach to children’s protection in armed conflicts. For instance, if an assessment must occur every time a child soldier is used in hostilities about whether the role assigned to the child exposed him or her to a real danger, “by the time it is realized that the child may be in real danger, it may well be too late.”\(^{73}\) Moreover, such an approach undermines the harm faced by children whose role is neither connected to military operations nor likely to place them in the position of potential target by opponent groups. This is particularly true for female soldiers who are sexually exploited and perform chores that are inherently removed from the battlefield and not connected military operations.

Dissenting in Lubanga, Justice Benito emphasized that “it is crucial to determine that, regardless of the specific task carried out by that child, he or she can suffer harm inflicted by the armed group that recruited the child illegally (for example, for the purposes of supporting the combatants through the use of their bodies for sexual violence).”\(^{74}\) Justice Benito contended that the prohibition of children’s recruitment and participation in hostilities is not only due to the potential risks and attacks that may come from enemy groups, but because children “will be at risk from their ‘own’ armed group who has recruited them and will subject these children to brutal trainings, torture and ill-treatment, sexual violence and other activities and living conditions that

\(^{69}\) Ibid at para 628.

\(^{70}\) Ibid.


\(^{72}\) Ibid.

\(^{73}\) Ibid.

\(^{74}\) Lubanga, supra note 26 (Separate and Dissenting Opinion of Judge Odio Benito, attached to the Judgment at para 18) [emphasis added].
are incompatible and in violation to these children’s fundamental rights.”75

Therefore, per Justice Benito, it is misleading to neglect the risks that may come from the same armed group when assessing the war crime of conscription, enlistment, or use of children. Such findings seem to have been validated by the January 2017 Ntaganda case, where the ICC posited that the protection against “sexual violence under international humanitarian law is not limited to members of the opposing armed forces, who are hors de combat, or civilians not directly participating in hostilities.”76 Indeed, the Trial Chamber asserted that all persons, including members of the same armed groups, were protected against sexual violence such as rape or sexual slavery, and it clarified that “there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable or targeted and killed under international humanitarian law.”77

Despite the clarifications brought by the reasoning of Justice Benito and the findings from Ntaganda case, the ICC’s approach towards the prohibition of children’s recruitment or use is still based on the types of activities performed by child soldiers and on the risks involved in performing such activities. This restrictive approach cannot successfully delineate the issue on children’s participation in hostilities.

Joshua Yuvaraj points out that the criticisms of the Lubanga case result mainly from the fact that the court made children more targetable by recognizing that “active” participation encompasses both “direct” and “indirect” participation.78 To address these criticisms, Yuvaraj notes that the ICC should clarify the scope of the term “active” as it pertains to IHL and IHRL to avoid any overlap or confusions.79 He proposes that the use of the term “active” in the Rome Statute should be strictly understood in the specific context related to the prohibition against children’s recruitment and use, whereas the term “direct” should only be considered as a generic term used by IHL in order to achieve its core principle of distinction.

Similarly, Sampaio and McEvoy argue that “active” and “direct” participation have distinct purposes and thresholds. This distinction justifies the necessity of contextualizing each of these terms. The authors contend that “the purpose of ‘direct participation in hostilities’, is normally to serve as a pillar to the principle of distinction, which protects victims of armed conflicts while determining that only combatants can be lawfully targeted.”80 They claim, on the one hand, that “direct participation in hostilities is, therefore, usually a concept that is used for the protection of civilians,
limiting the conduct of belligerent parties vis-à-vis their targeting operations.” 81 On the other hand, the authors support the idea that “the concept of direct participation in conflicts, when used in relation to children, does not have any connection with the principle of distinction.” 82

To reach this conclusion, Sampaio and McEvoy examine several provisions such as Articles 77(2) in AP I, and 4(3) c) and 38(2) in the CRC. They observe that, in all these provisions, the law not only prohibits children’s recruitment and participation in hostilities but also puts the burden on states, armed groups and any other actor who may be involved in the involvement of children in hostilities. 83 According to the authors, such language clearly demonstrates that “the international community has utilized the words ‘direct participation in hostilities’ in multiple instruments in relation to children solely to make it illegal for belligerent forces to use children in combat rather than aiming to establish the circumstances when children can be targeted in accordance with the principle of distinction.” 84 This paper acknowledges that when child soldiers constitute an immediate threat to opposing forces, the use of a lethal force may be considered only as a last resort self-defence strategy. Lieutenant Colonel Leandro supports that even in such extreme cases, opposing forces should not have a “lethal intent” towards child soldiers. 85

Moreover, this paper points out that the direct participation of a non-combatant or a civilian in hostilities should trigger the consequences codified by IHL once the belligerent nexus clearly demonstrates that such an individual had the appropriate mental state, and thus the maturity, to understand the consequences of his or her actions. These nuances highlight that the law has not been drafted to allow the targeting of child soldiers but to prohibit their recruitment and use. This paper posits that the ICC and the ICRC should both reform their interpretation of “direct” and “active” participation to better reflect the blanket prohibition in international law on the recruitment or use of children under fifteen years of age in hostilities.

III. EXPANDING THE SPECIAL PROTECTION OF CHILDREN INVOLVED IN HOSTILITIES

As previously demonstrated, both ICL and IHL have adopted problematic and narrow approaches with respect to the prohibition of children’s participation in hostilities that justify an evolution or revolution of the law. This paper has argued that

81 Ibid.
82 Ibid.
83 Sampaio & McEvoy, supra note 56 at 54 – 55.
84 Ibid.
children enjoy a special status that challenges the traditional distinction between combatants and civilians. It has further argued that this status requires a reform of IHL’s and ICL’s interpretation of “active” and “direct” participation. Unfortunately, despite the blanket prohibition on the recruitment or use of children in armed conflicts, international law has never attempted to clarify the status of children involved in hostilities. Joanna Nicholson notes, “the traditional view is that while international law prohibits the recruitment and use of children to participate actively in hostilities, this has no bearing upon the status of the children involved and their targetability under IHL.”

Such an understanding renders the law on the prohibition children’s recruitment or use ineffective and merely rhetorical. Therefore, international law must urgently evolve by resolving the question of the status of child soldiers.

The evolution or revolution of the law towards children’s protection during armed conflicts may be facilitated by a thorough analysis of the Special Protection afforded to children through AP I and II. This paper has argued that since children enjoy Special Protection status under IHL, and since they lack the intent to participate directly to hostilities, they can never be considered as lawful military targets, unlike combatants. The recent Canadian Forces JDN on child soldiers highlights that “vulnerable populations are those individuals or groups who have a greater probability than the population as a whole of being harmed and experiencing an impaired quality of life because of social, environmental, health, or economic conditions or policies.”

This paper outlined that children, as part of the most vulnerable category of the society, have been granted more legal protections than adults both in domestic and international law “particularly in time of armed conflict.” These legal protections are more than relevant for children, since child soldiers are mostly encountered at the frontlines where the probability of being targeted or killed is very high. The Canadian Forces JDN noted that child soldiers’ targetability is still a complex question to be clarified by the law.

This paper argues that a clear understanding of the underpinnings of the extent and limit of the Special Protection may allow international law to overcome and resolve the impasse related to children’s participation in hostilities. Both AP I and II posit that the Special Protection remains applicable for children who “take a direct part in hostilities […] and are captured” or who are made “prisoners of war.” Therefore,

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87 AP I, supra note 10, art 77(3); AP II, supra note 10, art 4(3) (d).
89 Sivakumaran, supra note 71 at 315.
90 Canadian Forces JDN, supra note 88 at 1 – 6.
91 Ibid.
92 Ibid.
extending the Special Protection of children to the context of capture illustrates that such children cannot be treated merely as either combatants who have the right to directly participate in hostilities or as civilians who do not have such right and can be punished for their participation. Therefore, the blanket prohibition against children’s participation in hostilities, and their lack of a legal intent to participate, clearly demonstrates that children can never qualify as combatants or as illegal direct participants in hostilities.

CONCLUSION

This paper has argued that the Special Protection is a legal regime which calls for a differentiated treatment for children. Such a legal regime challenges the traditional distinction between combatants and civilians under IHL because it applies regardless of the status or conduct of children contrary to other IHL regimes. Moreover, such protection does not require children to have stopped their participation in hostilities or to comply with the requirements of the status of combatant.

The Canadian Forces JDN is a pioneering instrument that has attempted to develop a comprehensive approach to provide guidance towards Canadian Forces intervening in areas where child soldiers are used. This instrument insisted on the necessity to “first identify the presence, or likely presence, of child soldiers in the projected mission area,” while efforts have to be made in order to understand “how child soldiers are employed in the region.” Furthermore, this document has brought attention to the importance of identifying the locations “where child soldiers are likely to be encountered so that commanders may take mitigating action” while ensuring that “appropriate warning and targeting mechanisms are in place.”

It is plausible that this original approach will influence the practice of states since the conduct of hostilities under IHL, and that it may lead other countries to adopt a similar instrument. Nevertheless, such a development, despite being a positive move towards children’s protection, must be complemented and supported by international law, through binding treaties and effective tools to enforce these instruments.

94 AP I, supra note 10, art 77; AP 2 supra note 10, art 4(3).
95 Ibid.
96 Canadian Forces JDN, supra note 88 at 2 – 4.
97 Ibid.