

The immoral legality of targeting child soldiers
- A humanitarian dilemma

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Abstract

The thesis functions as an overview of the protection of children used in hostilities and their targetability under international law, primarily in international humanitarian law. The author questions the established presumption, that children directly participating in hostilities, shall be equally targetable as their adult colleagues and counterparts.

In times of conflicts, international humanitarian law offers children a special protection status. The prohibition against recruitment and use of children under the age of 15 illustrates two of the most relevant protective regimes. Despite these protective rules, children directly participating in hostilities remain lawful targets and their special protection status becomes severely less useful. For these reasons, the author argues, that the presumption of equal targetability hinders the Special protection of children to have the practical impact for children used on the battlefield it intended to.

The tremendous amounts of child soldiers recruited by non-state armed groups shows that the prohibition against recruitment and use aren't respected. However, the author argues that the ICC jurisprudence and national initiatives illustrate that the presumption of equal targetability can be challenged under international law. And, that the special protection for children in times of conflict, and international law as a whole does motivate differentiating rules for targeting children versus adults participating in hostilities.

For arguments presumably made on moral grounds, military personnel are willing to put themselves at greater risk to spare the life of a child soldiers forced to take part in a conflict, he or she definitely did not start. The Vancouver principles and the The Canadian Armed Forces Joint Doctrine Note shows that states are willing to follow in these footsteps by adding extra precautionary measures in the planning state of a military operation and to completely differentiate the rules for targeting children and adults.

Lastly, the author argues that the rules for targeting cultural property (set out in the 1954 Convention for the Protection of Cultural Property), could be an example on how to differentiate the rules for targeting children. In this regard the author argues that, like cultural property, children directly participating in hostilities should only be lawfully targetable, at last resort, when there is no other way to fulfill the military advantage.

Keywords: International Humanitarian Law, Rules of targeting, Child Soldiers, Direct Participation in Hostilities

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1. Introduction

International Humanitarian Law (IHL) entitles children to special protection in times of conflicts. This protection, includes the prohibition against recruitment and use of children under the age of 15 to directly participate in hostilities. A prohibition established both in treaty and customary law.

Despite these protective rules, children have become an integral part,¹ and complete reliability for some non-state armed groups in modern day conflicts.² According to the numbers presented by Unicef, 93 000 children were recruited and used by armed forces and armed groups between 2005 and 2020. These children are used to fulfill a variety of different acts and functions, such as fighters on the battlefield, but also as cooks and messengers.³ The advantages of recruiting children instead of adults remains countless, as they are easy to train and replace and lack sufficient moral judgment in comparison to their adult colleagues.⁴ By engaging and witnessing killings and torture, children apart of an armed group, experience great risk of death, torture and other forms of permanent mental and physical suffering⁵

The alarming number of children associated with armed forces and groups, leads to the following conclusions. The first conclusion being, that parties to armed conflicts do not respect the prohibition against recruitment and use and the second that the prohibition is not remotely enough to protect children the way they are entitled to.

The current understanding in international law is that since treaty law does specifically address the targetability of children, a child soldier is equally targetable to an adult soldier. In other words, there is no legal obligation in international treaty law to target adult vs child soldiers differently despite children's entitlement to protection and care. This means that the special protection is unable to protect children against direct attack.

¹ Peter Singer, 'Fighting Child Soldiers' 2003 Vol 83 issue 3, *Military Review*, <<https://www.proquest.com/docview/225310805/fulltextPDF/5CD50C350C804A0EPQ/1?accountid=8325> > accessed 5 may 2023 hereafter cited as: Peter singer,'Fighting Child Soldiers'

² Peter Singer, 'Western militaries confront child soldiers' threat, 2005 jane's Intelligence Review <<https://www.brookings.edu/wp-content/uploads/2016/06/singer20050115.pdf>> accessed 5 may 2023 hereafter cited as: Peter Singer, 'Western militaries confront child soldiers'

³ 'Children Recruited By Armed Forces Or Armed Groups' (*Unicef 22 December 2021*) <<https://www.unicef.org/protection/children-recruited-by-armed-forces>> accessed 22 april 2023 hereafter cited as 'Children Recruited By Armed Forces Or Armed Groups' *Unicef*

⁴ Peter Singer, '*Children at War*' (Pantheon Books, 2005), p. 60 hereafter cited as: Peter Singer, '*Children at War*'

⁵ 'Children Recruited By Armed Forces Or Armed Groups' *Unicef* (n 3)

As written by Happolds

'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'.⁶

The special protection for children in times of conflict, makes me question whether the presumption to target adults and child soldiers equally resembles a reasonable balance between military necessity and humanity in international humanitarian law. It also makes me question how the protection for children used in hostilities could be enhanced by changing the rules of targeting.

1.2 Research questions

The aim of the thesis is to investigate possible legal grounds in international law to question the presumption on equal rules for targeting children and adults, in order to investigate the possibility for an enhanced protection for children used in hostilities against direct attack.

To fulfill the intended purpose I will answer the following research question:

Can international law motivate differentiating rules for targeting children versus adults members of a state force or non-state armed group?

1.3 Method and materials

I will use the Legal positivism method, which is the most commonly used in international humanitarian law to study the *lege lata*.⁷ Since Oppenheim's strict interpretation of legal positivism sets little room for *de lege ferenda* argumentations and criticism of the existing law, I will use the soft legal positivism method, to be able to include *de lege ferenda* arguments as well.⁸

The relevant sources for my research project are listed in the art. 38 (1) of the statute of the international courts of Justice.⁹ The list in article 38 (1) of relevant sources includes treaties, international customary law, court decisions, general principle of law and doctrine. The Sources will be used accordingly. The core treaties of international humanitarian law are

⁶ Matthew Happold, 'Child Soldiers in International Law' (Juris Publishing, Manchester, 2005), p. 10. hereafter cited as: Matthew Happold 'Child Soldiers in International Law'

⁷ Annie-Marie Slaughter & Steven R. Ratner, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 Am J Int'l L 291

⁸ Fredrik Stenhammar, 'Hård rättspositivism i folkkräkten', SvJT, 2008 issue 1 accessed 27-02-2023.

⁹ United Nations, Statute of the International Court of Justice, 18 April 1946, available at: <https://www.refworld.org/docid/3deb4b9c0.html> [accessed 28 February 2023].

the Geneva Conventions of 1949¹⁰ and their Additional Protocols of 1977¹¹ (AP1 and AP2), The 1907 Hague Regulations (IV). The main source of international criminal law is the Rome Statute.¹² In regards for International human rights law it will solely address the Convention on the Rights of the Child and its optional protocol

¹⁰ International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, available at: <https://www.refworld.org/docid/3ae6b3694.html> [accessed 24 May 2023] hereafter cited as Geneva Convention I; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85, available at: <https://www.refworld.org/docid/3ae6b37927.html> [accessed 24 May 2023] hereafter cited as: Geneva Convention II; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <https://www.refworld.org/docid/3ae6b36c8.html> [accessed 24 May 2023] hereafter cited as: Geneva Convention III; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <https://www.refworld.org/docid/3ae6b36d2.html> [accessed 24 May 2023] hereafter cited as: Geneva convention IV

¹¹ International Committee of the Red Cross (ICRC), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 24 May 2023] hereafter cited as; Protocol 1 to the Geneva Conventions; International Committee of the Red Cross (ICRC), *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, 1125 UNTS 609, available at: <https://www.refworld.org/docid/3ae6b37f40.html> [accessed 24 May 2023] Hereafter cited as: II Protocol to the Geneva Conventions

¹² UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6 hereafter cited as: Rome Statute

1.4 outline

I will start by describing the relevant legal framework, regulating the protection of children in times of armed conflicts. Focusing on the prohibition against recruitment and use. I will also outline the rules of targeting, in particular the term continuous combat function and the concept of direct participation as the legal standards for targetability in non international armed conflict. By addressing the current legal frameworks, I intended to illustrate under which circumstances, the protection of children severely loses its practical impact. Although the primary legal framework is international humanitarian law, I will also touch upon the relevant rules in international criminal law and international human rights law.

The thesis is divided into two main parts. The first to fourth chapter addresses the research question from a *lege lata* point of view. The fifth chapter is an attempt to showcase how different legal sources about how the law aims to be interpreted or needs to change (*de lege ferenda* argumentation). The last chapter called discussion and conclusion, includes my own opinions on my findings, and my attempt to present how the rules of targeting aim to be interpreted or needs to change in order to strengthen the protection of children used in hostilities.

2. Children associated with armed forces or non state armed groups

As previously stated, there is a tremendous number of children used by belligerent parties in armed conflicts. Armed forces and non-state armed groups recruit children for a variety of reasons, one being their resources of energy in comparison to adults. By taking children at an early age, these children become perfect soldiers, due to their easy manipulation and lack of physical pain and guilt. Although armed forces and groups forcefully recruit children by kidnapping refugees and orphanages, most of these children join the armed group voluntarily, in order to leave troublesome family relations behind, as a way out of poverty or in search of revenge.¹³ Volunteer enlistment can be the best chance at survival for some children because of their individual circumstances or because of the ongoing war itself.¹⁴

Witness statements from the Lubanga case shows that the children, a part of an armed group, endorse extensive mental suffering. Especially witness P-0046, stated that the children's wellbeing, both physical and mental state, was catastrophic.¹⁵ A study has been made about the psychological consequences amongst child soldiers in EL Salvador which shows that the majority of the children involved in the study did suffer mentally leading to nightmares, bed-wetting and other forms of distress. After leaving the armed group the children also had difficulties to reintegrate into society and civilian life.¹⁶

Today, the name child soldiers has been replaced by the term child associated with an armed force or armed group. In consistent, with international law, the Paris Principles defines a child associated with an armed force or armed group as:

any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.¹⁷

¹³ 'Child Soldiers' (*Humanium* 5 October 2011) <<https://www.humanium.org/en/child-soldier/>> accessed 13 May 2023

¹⁴ UN Children's Fund (UNICEF), *The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, February 2007, available at: <https://www.refworld.org/docid/465198442.html> [accessed 24 May 2023] p. 16 hereafter cited as: The Paris Principles

¹⁵ Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, available at: <https://www.refworld.org/cases,ICC,4f69a2db2.html> [accessed 24 May 2023] para. 890 hereafter cited as: The Lubanga Case

¹⁶ Theresa Stichick Betancourt, Ivelina Ivanova Borisova, Timothy Philip Williams, Theodore H. Whitfield, John Williamson, Robert T. Brennan, Marie de la Soudiere and Stephen E. Gilman, 'Sierra Leone's Former Child Soldiers: A Follow-up Study of Psychological Adjustment and Community Reintegration', *Child Development* Vol. 81 No. 4, July 2010, pp. 1077-1095, <<https://www.jstor.org/stable/40801461?seq=1>> accessed 9 May 2023.

¹⁷ The Paris Principles (n 14)

Children's entitlement to a special protection in times of conflict can be traced back to the Second world war,¹⁸ and regulated in the Geneva Conventions.¹⁹ However, the prohibition against recruitment and use of children under the age of 15 to directly participate in hostilities, were not specifically addressed until the adoption of the Additional Protocols.²⁰ Despite the inclusion of the prohibition against recruitment and use, the Geneva Conventions do not include any specific treaty regulation about directly targeting children in hostilities. Nevertheless soldiers feel morally obliged to do so to encounter children and adults soldiers differently when faced in a combat situation. This means that bad press is not the only reason, state and military personnel find it problematic to target child soldiers.²¹ Military personnel repeatedly faced with child soldiers, suffering mental consequences.²² Some states have formed alternative strategies for soldiers to apply when encountering a child soldier.²³

McMahan describes that because children are specially vulnerable soldiers are morally bound to put themselves at greater risk if the life and health of a child soldier can be spared without putting the military advantage of the operation at stake. Meaning, morality bounds soldiers to use lesser force when encountering a child soldier.²⁴ The moral belief described by McMahan, that children and adult soldiers shall be targeted during different premises, is charred among many states and military personnel, one reason being that children weren't the ones **initiating** the conflict in the first place.²⁵

As children's vulnerability has been acknowledged, simply describing children as innocent victims does not either reflect reality. Child soldiers can be equally threatening and

¹⁸ Geraldine Van Bueren, 'The International Legal Protection of Children in Armed Conflicts', *The International and Comparative Law Quarterly* vol. 43 issue 4 pp. 809-826 hereafter cited as: Geraldine Van Bueren, 'The International Legal Protection of Children in Armed Conflicts'

¹⁹ Articles 14, 17, 23, 24, 38, 50, 68, 76, 82, 89, 94, 132, Geneva Convention IV (n 10); Geraldine Van Bueren, 'The International Legal Protection of Children in Armed Conflicts' pp. 810-812; Matthew Happold, *Child Soldiers in International Law*, pp. 54-70.

²⁰ Article 77(2), Protocol II Geneva Conventions (n 11)

²¹ Peter Singer, '*Children at War*' p. 172-176; Desirde Verweij, 'Moral Professionalism and Child Soldiers', in *The Research and Technology Organisation of NATO, Child Soldiers as the Opposing Force*, Final Report of the H FM-159/RTO Task Group, AC/323(HFM 159)TP/222, January 2011 .

²² Ibid; Peter Singer, *Children at War* pp. 3 and 7

²³ Ibid pp. 172-176; Desirde Verweij, 'Moral Professionalism and Child Soldiers', in *The Research and Technology Organisation of NATO, Child Soldiers as the Opposing Force*, Final Report of the H FM-159/RTO Task Group, AC/323(HFM 159)TP/222, January 2011

²⁴ Jeff McMahan, '*Killing in War*' (Oxford University Press, Oxford, 2009), pp.201-202; Jeff McMahan, 'An Ethical Perspective on Child Soldiers', in Scott Gates and Simon Reich (eds.), '*Child Soldiers in the Age of Fractured States*' (University of Pittsburgh Press, Pittsburgh, 2010), pp 36; Stephen Coleman, 'Case Study Section: The Child Soldier' (*Journal of Military Ethics*) pp. 317-319; Emily Kalah Gade, 'The Child Soldier: The Question of Self-Defense', (*Journal of Military Ethics* 2011 issue 4).

²⁵ Peter Singer, '*Fighting Child Soldiers*', pp. 26-31.

professional as their adult colleges and counterparts.²⁶ For this reason, it is not as simple as describing child soldiers as innocent victims. The following outlines the harsh moral dilemmas for adults facing professional child soldiers.

3. The special protection of children²⁷

International humanitarian law (IHL) offers protection to children in times of conflicts starting with the general protection and the guaranteed humane treatment for civilians not participating in hostilities. To take the special vulnerability of children into consideration in the context of an ongoing armed conflict, IHL goes beyond civilian protection, by granting children a special protection status. In addition to IHL, International Human Rights Law (IHRL) also regulates the protection of children in armed conflicts without basing their protection on the status of the individual child as a civilian or combatant.

3.1 International armed conflicts

The civilian protection afforded to children not taking part in hostilities is listed in the fourth Geneva Convention (GCIV) and the first Additional Protocol (AP1). This provision entitles civilian children to the fundamental guarantees (Art. 27-34 GCIV and Art. 75 API). Regarding the conduct of hostilities art. 48 and 51 AP1 ensures that no attack is allowed to be planned directly towards the civilian population.

Similarly to the events of an international conflict, Common article 3 and art. 4 of the second additional protocol (AP2), grants civilians not participating in hostilities with the fundamental guarantees, and the prohibition against directing an attack at a single civilian or the civilian population as a whole, art. 13 AP2.

Although GCIV does regulate the protection of children, there entitlement to a special protection status is stated in art. 77 AP1:

'Children shall be the object of special respect and shall be protected against any form of

²⁶Marten Meijer, "Transactional Analysis of Child Warriors as the Opposing Force," in North Atlantic Treaty Organisation (NATO), Research and Technical Organisation, Technical Memorandum TM-HFM159, Child Soldiers as the Opposing Force (NATO publications, 2011) pp. 2-5.

²⁷ Legal Protection of Children in Armed Conflict (ICRC, ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW, Feb. 2003)

<https://resourcecentre.savethechildren.net/pdf/2_04_ICRC_Legal+Protection+of+Children+in+Armed+Conflict.pdf/> Accessed: 19 april 2023

indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason²⁸

Art. 77 AP1 para. 3 and 4 also addresses the use of children in armed conflicts:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years 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.

If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.²⁹

With the following statements, Art. 77 para. 3 AP1, obliges the parties to the conflict to take feasible measures to hinder the recruitment and use of children to the armed forces. In addition, art. 77 para. 4 AP1, clarifies that in case children are recruited and used as members of a state force, these children keep the right to their special protection.³⁰ If a state, despite the obligation to take measures against the recruitment and use of children, do use children on the battlefield, they shall be provided with proper signs so their identification as combatant is clear for the adversary. This is particularly relevant if the child soldier is captured by the adversary so he's rightfully observed as a prisoner of war.³¹

3.2 Non international armed conflicts

The special protection is also granted to children in times of non international conflicts, art. 4 para. 3 AP2. In contrast to art. 77 AP1, AP2 heighten the protection for children in non international conflicts by explicitly referring to a prohibition against recruitment and use of children, see art. 4 para 3 c AP2

²⁸ art. 77 (1) Protocol I Geneva Conventions (n 11)

²⁹ art. 77 (3-4) Protocol I Geneva Conventions (n 11)

³⁰ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 art.

77 (3) AP1 hereafter cited as: Pictet Commentary

³¹ Ibid.

'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'³²

The prohibition against direct participation includes actions amounting to direct and indirect participation. The prohibition against recruitment is voluntary enlistment. A non state armed group allowing for children to voluntarily participate in hostilities is therefore still violating the prohibition.³³ The inclusion of voluntary enlistment is because children in comparison to adults have a lesser ability to consider the consequences of such a decision.³⁴ Similarly to international conflict, children keep their entitlement to their special protection if the prohibition is violated by the parties to the conflict. art. 4 para 3d AP2. In contrast to art. 77 para 4 AP1, art. 4 para 3d AP2 shall not be considered as an escape clause around the prohibition against the recruitment and use.³⁵ According to the Pictet commentary, including what happens if a violation is breach, tends to strengthen the protective purpose of the prohibition itself.³⁶

3.3 International Human Rights Law

The Convention on the Rights of the Child contains particular human rights obligations for children under the age of 18 whereas some are particularly relevant for children used in armed conflicts³⁷ As the protection of children clearly differs depending on their status as civilians, fighters or combatants under IHL, International human rights law (IHRL) entails no such descriptions since, children remain protected regardless of their legal status, article 2 the Convention of the rights of the Child. For these reasons, the fact that IHL protects children depending on if the functions constitute direct participation or not is considered a discriminatory under IHRL.³⁸ Article 38 obliges the state parties to refrain from the recruitment of children under the age of fifteen and ensures children entitlement to protection in times of conflict. Like art. 77 AP1, art. 38 only obliges states to refrain from recruiting

³² art. 4 para 3 c Protocol II Geneva Conventions (n 11)

³³ **pictet commentary (n 30) to AP 2 art. 4 (3c)**

³⁴ pictet commentary (n30) to AP 2 art. 4 para (3c)

³⁵ pictet commentary (n 30) to AP 2 art. 4 para)3d)

³⁶ pictet commentary (n 30) to AP 2 art. 4 para (3d)

³⁷ UN General Assembly, Convention on the Rights of the Child of 20 November 1989 (entered into force 2 September 1990), Treaty Series, vol. 1577 hereafter cited as: Convention on the rights of the child

³⁸ Ana Martin Beringola Ensuring Protection of Child Soldiers from Sexual Violence: Relevance of the Ntaganda Decision on the

child soldiers.³⁹ Like AP2, art. 38 of the convention on the rights of the child do not specifically state if the prohibition against use includes both direct and indirect participation.

The Convention of the rights of the child only refers to the legal obligation of states parties to a conflict. However, The Security Council in resolution 1564 stipulates that non-state armed groups also carry an important role in ensuring the safety and human rights of children.⁴⁰

Eleven years after the widely ratified convention of the rights of the child was adopted, an optional protocol was made in order to further strengthen the protection of children in armed conflicts. One example of the heightened protection is the prohibition of recruitment and use of children under the age of 18 instead of 15, art. 1 to 4.⁴¹

Optional Protocol article 1 to 4 includes the following statements:

art. 1 'the States Parties must take all feasible measures to ensure that members of their armed forces who have not reached the age of 18 years do not take direct part in hostilities'

art. 2 'compulsory recruitment into the armed forces of persons under 18 years of age is prohibited'

Art. 3 'The States Parties shall raise the minimum age for voluntary recruitment from 15 years. This rule does not apply to military academies'

art. 4 armed groups distinct from the national armed forces should not, under any circumstances, recruit (whether on a compulsory or voluntary basis) or use in hostilities persons under the age of 18 years, and the States Parties must take legal measures to prohibit and criminalize such practices

3.4 Statute of the International Criminal Court (Rome Statute)⁴²

The crime of recruiting and using children to actively take part in an ongoing armed conflict, is included within the list of offenses listed as a war crime in the Rome Statute. The Rome statute addresses the recruitment and use of children in international and non international conflicts separately. The offense addressing non international conflict enlisted in Art. 8, para. 2e[vii]) reads as follows:

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an

³⁹ Convention on the Rights of the Child art. 38(2-3)

⁴⁰ United Nations Security Council, Report of the Secretary-General on the Sudan, (18 September 2004), UN Doc S/RES/1564.

⁴¹ UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000, A/RES/54/263, art. 2 hereafter cited as: Optional Protocol to the Convention on the rights of the child

⁴² Rome Statute (n 12)

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 hostilities⁴³

4. The rules for targeting

4.1 International armed conflicts

After the legal protective regime has been outlined. I will now go into the legal status of children used in hostilities and their targetability.

International armed conflicts, distinguishes between combatants, members of the armed forces entitled to certain privileges and immunities, and civilians to civilian protection. Starting with armed conflicts, of international character art. 43 AP 1 para. 2 contains the following statement:

'Members of the armed forces of a party to a conflict are combatants, that is to say, they have the right to participate directly in hostilities'⁴⁴

Article 43 para. 2 means that if a child is a member of a state armed force, and that state is party to an international conflict, that child qualifies as a combatant. Combatants can not be convicted for lawful acts of war,⁴⁵ since they have the right to participate in the hostilities. The combatant status also entitled soldiers to becoming prisoners of war if they become captured by the adversary.⁴⁶ As has been described, a combatant is a military target. This means that combatants do not afford civilian protection and can be directly targeted at all times unless the soldier is hors de combat.

A civilian is negatively defined in art. 50 (1) AP1

'A civilian is any person who does not belong to one of the categories of persons referred to

⁴³ Art. 8, para. 2e[vii]) Rome Statute (n 12)

⁴⁴ Protocol I Geneva Convention (n 11) art. 43(2).

⁴⁵ Nils Melzer, 'The Principle of Distinction between Civilians and Combatants', in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, Oxford, 2014), p. 305.

⁴⁶ Article 4A, Geneva Convention I and Article 44 Protocol I (n 10- 11)

in Article 4(A)(i), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian'.⁴⁷

To summarize, International conflicts, simply distinguish between combatant with combatant immunities and privileges and civilians entitled to civilian protection. A child a part of a state armed force could therefore qualify as a combatant in an international conflict. Another views is that children who are part of a state armed force, party to an international conflict have some sort of hybrid status. The hybrid status gives them the privileges and immunities of a combatant while still remaining protected as civilians. While a hybrid function would provide child soldiers with protection, it would also give them the advantages in comparison to their adult colleges. Since IHL is based on the principle of distinction separating the combatant and civilian status it is highly doubtful that IHL would support such a view that children are eligible for both statuses at the same time. If a child would be a combatant and civilian at the same time, he would have the right to participate in hostilities, while still being protected against direct attack. Especially since a civilian is negatively defined as persons not of combatant status. The principle of distinctions simply functions as to keep the status of civilian and combatant separately which hinders the possibility of having the protection and rights of both statuses at the same time.¹⁰⁴ The part about the hybrid status that is in compliance with international law is the fact that children joining a state armed force keeps their entitlement to the special protection for children in times of conflict.

4.2 Targetability in non international armed conflicts

Unlike conflicts of international character, it's much more complex to distinguish between targetable and non-targetable persons in non international armed conflicts. In conflicts with non international characters a fighter is not offered any official combatant privileges or immunities.⁴⁸ Additionally to the complexity is the fact that Non state armed groups do not necessarily wear uniforms or have official membership procedures. Moreover, people joining a non state armed group perform a great variety of functions where some have solely civilian

⁴⁷ art. 50 (1) Protocol 1 Geneva Conventions (n 11)

⁴⁸ Charles Garraway, 'Direct participation and the principle of distinction: squaring the circle' in C. Harvey, J. Summers and N.D. White (eds.), *Contemporary Challenges to the Laws of War Essays in Honour of Professor Peter Rowe* (Cambridge University Press, Cambridge, 2014), p. 175 Hereafter cited as: Charles Garraway, 'Direct participation and the principle of distinction: squaring the circle'

responsibilities without engaging in any combat.⁴⁹

The notions of membership in a non-state armed group and the term of direct participation laid out in common art 3 to the Geneva Conventions (Common art. 3) sets the legal standards for targetability in a non-international armed conflict.

Starting with the term direct participation. Direct participation is a concept within IHL, found in the International Committee of the Red Cross (ICRC) Interpretive Guidance⁵⁰ and in the *Ntaganda* case.⁵¹ The concept means that civilians can only be a lawful target for the duration of time they directly participate in the hostilities.

In regards to membership, as the determining factor to distinguish between lawful and non-lawful targets, a few different approaches have been developed.⁵²

I will now describe three different approaches.

The first membership approach, (with great inspiration from the rules of targetability in international conflicts), is that a member of a non-state organized group is targetable at all times. This membership approach takes no consideration to the exact function or role undertaken by each and every member.⁵³ All thought, the membership approach does not cover the complexity that is that members of a non-state armed group undertake a great variety of acts and functions,⁵⁴ It has been favored by the ICC in the *Katanga* case.⁵⁵ In *Katanga*, the ICC reasoned that article 3 common to the four Geneva Conventions and article 1 and 13 of AP2 stipulates that the determining factor, when an individual becomes a lawful target is when becoming a member in a non-state armed group.

A second approach regarding the targetability of members of a non-state armed group

⁴⁹ Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law p. 32-33 (n 49)

⁵⁰ International Committee of the Red Cross (ICRC), Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law, May 2009, available at: <https://www.refworld.org/docid/4a670dec2.html> [accessed 25 May 2023] p. 16 hereafter cited as: Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law

⁵¹ The Prosecutor v. Bosco Ntaganda, (Pre-Trial Chamber) Document Containing the Charges, ICC 01/04-02/06-203-AnxA, 10 January 2014, para. 78 hereafter cited as: *Ntaganda* Decision

⁵² Jann Kleffner, 'From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities- on the Principle of Distinction in Non-International Conflicts One Hundred Years after the Second Hague Peace Conference', 54(2) *Netherlands International Law Review* (2007) 315-336, at pp. 330-332 hereafter cited as: Jann Kleffner, 'From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities- on the Principle of Distinction in Non-International Conflicts One Hundred Years after the Second Hague Peace Conference'

⁵³ *Ibid.* p. 330

⁵⁴ Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (n 40) p. 33

⁵⁵ *Katanga* Prosecutor v Germain Katanga, Trial Judgment, ICC-01/04-01/07, 7 March 2014 para. 788 hereafter cited as: *Katanga* case

is that their members are only targetable when directly participating in hostilities.⁵⁶ The interpretative Guidance of the ICRC qualifies an act as direct participation if it fulfills the following three cumulative criterias:

- 1) The threshold of harm: the act will adversely affect the military operation
- 2) Direct causation: there must be a link between the act and the harm which is likely to result from the act
- 3) Belligerent nexus: the act must be committed with the intention of causing harm to one party to the conflict.⁵⁷

The approach that members of a non-state armed group can only become lawful targets when directly participating in hostilities has been criticized because it gives non-state armed groups an advantage in comparison to a state belligerent party. With this approach members of a non-state armed group would have the advantage of not being targetable at all times unlike the combatants in a state party counterpart.⁵⁸

A third approach presented by the ICRC in the interpretive guidance takes the specific task and functions performed by the people enrolled in a non-state armed group into consideration when determining the individuals' targetability. According to this approach, a person can not gain membership in a non-state armed group unless he or she fulfills a continuous combat function. This means that not every function lead to membership nor targetability at all times. The ICRC defines the a continuous combat function with the this statement:

Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly

⁵⁶ Jann Kleffner, 'From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities- on the Principle of Distinction in Non-International Conflicts One Hundred Years after the Second Hague Peace Conference' p. 331 (n 53)

⁵⁷ Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (n 40) p. 46; Article 51(3), Protocol I Geneva Conventions and Article 13(3) Protocol II (n 11).

⁵⁸ Charles Garraway, 'Direct participation and the principle of distinction: squaring the circle' (n 51) p. 176; Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (n 40) p. 28; Jann Kleffner, 'From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities- on the Principle of Distinction in Non-International Conflicts One Hundred Years after the Second Hague Peace Conference' p. 332 (n 53)

participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she carries out a hostile act.⁵⁹

Consequently, it is the continuous combatant function that make them targetable and deprives them of the protection against direct attack. Persons involved in the non-state armed group not fulfilling continuous combatants functions remain unlawful targets unless they directly participate in hostilities.⁶⁰

To summarize the targetability of persons in conflicts, it is clear to state that the rules differ depending on the classification of conflict. In IAC, a combatant remains a military objective and targetable all the time unless rendered hors de combatant. Article 43 para. 2 AP1, means that if a child is a member of a state armed force, and that state is party to an international conflict, that child qualifies as a combatant.

In conflicts, not of international character, the membership approach is an attempt to adhere to IACs by stating that membership in a non-state armed group deprives that person of protection against direct attack. The second approach gives non-state armed groups the advantage of only being lawfully targetable when directly participating in hostilities.

The third approach, takes the task performed by each and every individual involved in the non-state armed group into consideration when making the decision on that person's targetability. In this manner, the ICRC guidance stipulates that only those individuals fulfilling a continuous combatant function shall be targetable at all times, or more precisely as long as they are fulfilling the continuous combat function. This take on the membership approach, protects those individuals supporting the non-state armed group with purely civilian tasks from direct attack. In my opinion, this approach raises the bar for determining who's targetable at all times versus who's targetable only when directly participating in hostilities. After that determination has been made the adversary must take the presence of people not fulfilling a continuous combat function into consideration when launching an attack on the non-state armed group.

⁵⁹ Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (n 40) p. 34

⁶⁰ Jann Kleffner, 'From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities- on the Principle of Distinction in Non-International Conflicts One Hundred Years after the Second Hague Peace Conference' p. 332 (n 53); Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (n 40) p. 28-35

5. De lege ferenda: Can the presumption of equal targeting of children versus adult soldiers be challenged under international law?

Now that the special protection for children and the rules for targeting have been presented. I intend to present a variety of different legal sources that challenge the presumption of equal rules for targeting children and adults. I argue that the International Criminal Court (ICC) questions this assumption in the Ntaganda Decision.

5.1 The *Ntaganda* Decision ⁶¹

In the Ntaganda Decision the Pre-Trial Chamber made the following statement:

The mere membership of children under the age of 15 years in an armed group cannot be considered as determinative proof of direct/active participation in hostilities, considering that their presence in the armed group is specifically proscribed under international law in the first place. Indeed, to hold that children under the age of 15 years lose the protection afforded to them by IHL merely by joining an armed group, whether as a result of coercion or other circumstances, would contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities.⁶²

This means that the ICC argues that the first membership approach is not applicable to children under the age of 15. An adult who becomes a member to a non-state armed group, becomes targetable at all times. But in this regard, the ICC states that membership as such can not make a child a lawful target. For these reasons a child associated with a non-state armed group, can not be targetable at all times.⁶³ If a child remains protected from direct attack after becoming a member to the non-state armed group, this means that the child only becomes targetable when directly participating in hostilities. In this manner, the Pre-trial chamber presents different rules for targeting members of non-state armed forces depending on their age. Therefore, age is a deceiving criterion whether a person can be considered as a military target at all times.

However, The trial chambers are free to make their own interpretation, Article 21(2) of the Rome Statute. For this reason, it is still uncertain whether or not the Trial Chamber will agree with the Pre-trial chamber's decision. It's also important to note that

⁶¹ Ntaganda Decision (n 52)

⁶² Ibid. para. 78.

⁶³ Ibid., paras. 78 and 79.

the Pre Trial Chamber decision is about whether child soldiers could be considered as victims of alleged war crimes. It could therefore be argued that the decision solely interprets IHL in a ICL context which makes it debatable whether the ICL interpretation on the status of the child soldiers as potential victims affects their targetability. In order to discuss the possible impact of the Ntaganda case for the targeting of children, the interplay between ICL and IHL needs to be addressed.

5.2 The interplay between ICL and IHL and there distinctive purposes

Since IHL and ICL are related to each other, the ICC jurisprudence does matter, for the interpretation and understanding of IHL.⁶⁴ However, IHL and ICL have different aims and purposes. IHL functions as regulation for the conduct of hostilities whereas ICL concerns the individual criminal responsibility for war crimes and other offenses. The distinctive purpose leads to different interpretations of IHL, whereas some cases have not been deemed as clarifiers for the interpretation for IHL.⁶⁵ Moreover, the cases put before the ICC all concern different contexts and do not necessarily apply in every situation. The Lubanga case being one example.⁶⁶ As has been highly debated, the ICC in the Lubanga case about the war crime of using children to actively participate in hostilities, distinguished between active participation in hostilities, under article Article 8(z) (e) (vii) of the ICC Statute and the term direct participation used in IHL. The Lubanga judgment has been heavily criticized since the wider interpretation of active participation, if interpreted in an IHL context, makes children even more targetable than adults.⁶⁷

In contrast, the Appeals Chamber found that the offense of actively using children under the age to participate in hostilities, covered in Article 8(z)(e)(vii), has a different meaning then determining who's directly participating and therefore targetable under IHL.

The Appeals chamber later explained that the war crime of actively using children to

⁶⁴ Robert Cryer, 'The Relationship of International Humanitarian Law and War Crimes: International Criminal Tribunals and their Statutes, in C. Harvey, J. Summers and N.D. White (eds.), *Contemporary Challenges to the Laws of War Essays in Honour of Professor Peter Rowe* (Cambridge University Press, Cambridge, 2014), p. 117-146; *Prosecutor v Tadic, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-T, 2 October 1995*, paras 96-136.

⁶⁵ Rogier Bartels, 'Discrepancies between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law During International Criminal Trials' in M. Matthee et al (eds.), *Armed Conflict and International Law: In Search of the Human Face, Liber Amicorum in Memory of Avril McDonald* (TMC Asser Press, The Hague, 2013), p. 339-378

⁶⁶ The Lubanga Case (n 15)

⁶⁷ Natalie Wagner, 'A Critical Assessment of Using Children to Participate Actively in Hostilities in Lubanga, Child Soldiers and Direct Participation', 24(2) *Criminal Law Forum* (2013) p. 145-203

participate, in article 8(2)(e)(vii) of the Rome Statute, do not need and shall not be interpreted exactly like the term active or direct like in common art. 3 to the Geneva Conventions. Despite the use of similar terminology, the purpose of article 8(2)(e)(vii) of the Statute and common article 3 of the Geneva Conventions varies. In the context of the principle of distinction, common article 3 distinguishes between when someone can be lawfully targeted or not. In contrast, article 8(2)(e)(vii) of the Statute aims to protect children from being used by armed groups. Each article shall be interpreted within the context and purpose of the relevant legal framework.⁶⁸

It's important to take the differentiating purposes of war crimes offenses included in the Rome statute, and the rules of targeting in IHL in consideration when interpreting the articles. It's relevant to notice that international criminal law can't always be directly implemented or transposed into an international humanitarian law context. Since the purpose of article 8(2)(e)(vii) is to protect children from the consequences of participating in hostilities, the expansive interpretation of the term active clearly intends to widen the scope of uses of children covered by the offense. As previously noted, making the same interpretation in IHL would absolutely not strengthen the protection of children, but rather make them more targetable.

5.3 The Vancouver Principles⁶⁹

The Vancouver Principles is a further attempt, after the Paris Principles, to address the protection of children in times of conflict. The Vancouver Principles are applicable to PeaceKeeping Operations. The purpose of the Vancouver principle is to prevent the recruitment and use of children in armed conflicts.⁷⁰ Article 2 requires that the prevention of recruitment and use of child soldiers shall be an integrated part, in both the planning stage and operational part of all peacekeeping missions.

The Vancouver principles specifically address the importance of training peacekeepers before they go abroad on mission. This training shall among other things include how to interact with a child associated with armed forces or armed groups, article 5. Article 7 of the principles, primarily states that children whom the peacekeepers encounter during their

⁶⁸ Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber Judgment, i December 2014 ICC 01/04-01/o6 A5 p. 324

⁶⁹ Vancouver principles on peacekeeping and the prevention of the recruitment and use of child soldiers: 15 November 2017, Vancouver, Canada hereafter cited as: The Vancouver Principles

⁷⁰ Ibid. Preamble

mission shall be treated according to their special protection and care they are entitled to in international law. To ensure this legal responsibility, peacekeepers shall communicate the needs of these children to the Head of missions, article 7. In regards to the actual conduct, article 8 simply states that peacekeepers are required to withhold the highest standard of conduct. The last article which I want to mention, is article 13, which describes the importance of recognizing the emotional trauma it is for peacekeepers, to meet and fight against child soldiers.

In reaction to UN SC resolution 1261⁷¹, the Canadian Armed Forces have developed an instrument specifically, addressing the issue of encountering child soldiers on Peacekeeping missions.⁷² The instruments called The Canadian Forces JDN, regulates how the peacekeeping missions needs to be planned and carried out in order to ensure the special protection afforded to children. The instrument covers the importance of investigating whether the encounter with child soldiers will be a common issue in the area where the peacekeeping mission is going to operate. In addition, the Canadian Force JDN requires the peacekeepers to undergo training about child soldiers before leaving on the mission

5.4 Military necessity in relation to the targeting of child soldiers

5.4.1 Targeting children, a necessary evil in humanitarian law?⁷³

Provost to contribute to the sparse legal scholar about child soldiers and the rules of targeting in humanitarian law. Provost, suggest that there should be differentiating rules for targeting children in relation to adult soldiers.

Provost acknowledges that the targeting of children in armed conflict raises two main questions. The first one being: if the child is targetable and the second: what means and methods could be used to target that child. Provost goes on to reflect about what uses of means and methods of war used in a direct attack against a child, reflecting a reasonable balance between military necessity and humanity. Especially in relation to the special

⁷¹ UN Security Council, *Security Council resolution 1261 (1999) [on children in armed conflicts]*, 25 August 1999, S/RES/1261 (1999)

⁷² Department of National Defence. Canadian Forces Joint Doctrine Note 2017-01 – Child Soldiers (Ottawa: DND Canada, 2017) hereafter cited as: Canadian Forces JDN

⁷³ René Provost, *Targeting Child Soldiers*, 2016 <ejiltalk.org/targeting-child-soldiers/> accessed: 22 may 2023

protection children are entitled to in international law.

As has been previously established, a child member of a state armed force party to an international conflict, qualifies as a combatant entitled to the combatant privileges and immunities. In contrast, a child member of a non-state armed group remains civilian and thus only targetable when directly participating in hostilities. This means that a child can become a lawful target, both in the context of an international or non international armed conflict. After having established a child's potential targetability, Provost addresses the distinction between the lawful methods and means of war when targeting a child versus an adult. Provost argues that after having established that the encountered soldier is underage, it will reflect how that person may be targeted.

As a legal basis, the lawful methods and means of warfare is limited, see for example the prohibition against superfluous injury and unnecessary suffering (art. 35 AP1). The limitation of lawful methods and means, is illustrated through a variety of different prohibitions, abandoning or limiting the use of certain weapons. Overall, the limitation of necessary suffering entails the belligerent right to injury the enemy, does not go beyond what is necessary to fulfill the military advantage of the operation. This means that when possible, belligerent parties are required to use lesser means when conducting a military operation to limit the causes of suffering. In this manner, the principle functions as a balancing between military necessity and humanity.

To illustrate how the decision to use lesser means can be carried out in reality, Provost described two very distinct situations. In the first scenario a child soldier is sleeping against a tree, with his gun placed next to him. In the second scenario a child soldier comes running towards the adversary with the gun in his hands ready to fire. To counter these two very different situations, the adversary encountering the sleeping boy probably would be able to capture him as a prisoner of war. In the second example, the boy running and shooting, would probably need to be stopped with the use of lethal force. These two examples illustrate how the measures of necessary evil are highly dependant on each and every targeting situation. In the first scenario, a sleeping child does not necessarily need to be stopped by lethal force. In contrast, the second example illustrates when lethal force might be the only available option to stop the running and shooting child.

An obligation to choose the lesser means if possible is also supported by art. 52(2) AP1, which states the responsibility to solely conduct military operations against military objects, which would generate a definite military advantage. The specific issue of whether belligerents are legally bound to capture instead of killing the adversary is highly debated.

However, due to the limitation of lawful methods and means of war, the right of a belligerent party to conduct lawful acts of war, can not be preserved as a license to kill, without considering, the actual military advantage it would generate, and whether lesser means could be used to generate the same advantage.

Although it remains debated whether the principle to only use necessary force entails an obligation to capture instead of killing the adversary, Provost argues that there is such legal responsibility when directing an attack against a child. To conclude, Provost does not neglect that the use of force, used in a direct attack against a child soldier, can outline a military necessity. However, when possible, the belligerent parties are legally obliged to use lesser means available, an obligation which in relation to adult soldiers is uncertain.

5.4.2 Immoral and illegal to deliberately target a child soldier? Megrets view on targeting children⁷⁴

The lawful killing of child soldiers in humanitarian law really questions the humanitarianism in the laws of war. For these reasons, Frédéric Mégret, argues that the lawful notion to deliberately target child soldiers, is pushing the privilege of belligerency too far. Megret, exclusively addresses international armed conflicts. To begin with, Megret states the facts, that humanitarian law does not require the belligerent parties to know, or try to know, the age of each and every individual soldier in the adversary army or under what circumstances (forceful or voluntarily) these soldiers have joined the army in the first place. Meaning, when faced with a soldier, a part of the adversary, the rules of targeting, in international armed conflicts, take no consideration to if the soldier is a victim of unlawful recruitment and use of children to participate in hostilities. Under humanitarian law, children remain perpetrators and victims at the same time.

To enhance the protection of children recruited by state forces, Megret proposes that children shall not be given the status of combatants. Similarly to medical personnel, children shall be classified as non combatants members of a state force, only targetable during the duration of time they directly participate in hostilities. In this manner, children members of a state armed force in an international armed conflict, would be non combatants, only directly targetable through the same regulations as civilians, child soldiers would be granted a heightened protection against direct attack. Magrets argues that his proposal on the status of child soldiers in international armed

⁷⁴ Mégret, Frédéric, Targeting Child Soldiers (February 24, 2013) <<https://ssrn.com/abstract=2223619>> accessed: 20 may 2023 hereafter cited as: Mégret, Frédéric, Targeting Child Soldiers

conflicts reflects a narrow interpretation of military necessity and offers a child specific approach for the rules of targeting.

5.4.3 A comparison to the rules of targeting child soldiers to the rules of targeting cultural property

This section serves as my own idea, to compare the rules of targeting cultural property to the rules for targeting children. In part, I try to make the argument that if the rules of targeting cultural property were to be applied in the context of targeting child soldiers, it could generate a child specific approach to the rules of targeting. By applying the same standards for targeting cultural property to child soldiers, the protection of children used in hostilities would gain an enhanced protection against direct attack.

The preamble of the 1954 Hague convention⁷⁵ assures that the restoration of cultural bouldings is of universal interest. People all over the world contribute to the makings of cultural property, and a damage to one cultural building is a loss to all mankind. In my opinion, there are similarities between the intention to protect cultural buildings, as described in the preamble, and the purpose behind the special protection to children in times of conflict. Just like cultural buildings, children remain of universal interest to care for and the loss of children is a loss for all mankind.

The treaty law obligation, regulating the protection of cultural property in times of conflict, began during the nineteenth century, and was codified in the Second Hague Conventions of 1907⁷⁶, with the obligation to spare boulding used for certain purposes, like historical and religious buildings. After the second world war, the protection of cultural property, became more specifically regulated, with the ratification of the 1954 Hague Convention for the Protection of Cultural Property in the Events of Armed Conflicts, and the first protocol. Article 1(a) defines cultural property as properties of importance to the cultural herrigage.

The preamble addresses that the protection of cultural property must be internationally protected and entails the obligation for belligerent parties to respect and protect the properties falling within the definition of article 1 a.

The obligation to respect cultural property is outlined in article 4:

1. The High Contracting Parties undertake to respect cultural property situated within their own

⁷⁵ UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954

⁷⁶ International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907

territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.

Additionally, article 4 (2) regulates when the obligation in article 4 (1) can be forseen:

2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

Article 4 (1) and (2) shall be understood in the way that cultural property may only be targeted at last resort, when there's no other identified option to fulfill the military advantage. As described in article 19, the obligation to ensure respect for cultural property also covers conflict of non international character.

Under Geneva law, a cultural boulding is classified as a civilian object, which means that a targeting decision to destroy a cultural building is not just a violation of the 1954 Hague Convention but also a grave breach of the Geneva Conventions (AP1) and considered a war crime.

There are two situations which could resort to the targeting of cultural property in times of conflict. Either, the cultural property becomes collateral damage or the property becomes directly targeted, because the adversary has started to use the building for military purposes. For the sake of my argumentation, I will focus on the intentional targeting of cultural property. A decision to directly target a cultural property and to invoke the exception in article 4 (2) of the 1954 Hague Convention, is deemed a military necessity when the adversary uses the building for military purposes. In other words, the adversary has to violate the prohibition in article 4 (1) in order for the counterpart to invoke article 4 (2). This means that a building or object falling within the protection of cultural property can l become a lawful target. In this case, the intentional targeting of a cultural building must be an absolute military necessity. If the military purpose of an operation can be achieved without attacking and destroying the cultural building, the property remains an unlawful target.

To summarize, the intention behind the protection of cultural property; to preserve the makings of all mankind, clearly reflects the purpose of the protection of children, to adhere to their special vulnerability in times of conflict. In addition, it could be argued that a destroyed cultural building is only a loss for the local population in that area, unlike the loss of a child, which, as previously has been described, also have direct negative mental consequences for the

other belligerent party who encountered the child. For these reasons, the care and protection for children is clearly of universal interest. Just like the direct targeting of a cultural building must be an absolute military necessity. I argue that the intentional targeting of child soldiers should be regulated in the same manner. That the decision to directly target a child soldier, can only be lawful, if it's an absolute military advantage.

6. Discussion and Conclusions

Reconnecting to the intended purpose, established in the first chapter:

The aim of the thesis is to investigate possible legal grounds in international law to question the presumption on equal rules for targeting children and adults, in order to investigate the possibility for an enhanced protection for children used in hostilities against direct attack.

To fulfill the intended purpose I will answer the following research question:

Can international law motivate differentiating rules for targeting children versus adults members of a state force or non-state armed group?

6.1 Initial thoughts

The current norm in international humanitarian law, is that the rules of targeting treat every soldier similarly, without consideration to the person's age. This assumption, that the lack of a specific treaty obligation on targeting children, implies that children are equally targetable as their adult colleagues and counterparts.

As written by Happold:

'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.'⁷⁷

To begin with, I do argue that the Special Protection afforded to children in IHL and international law as a whole, does motivate differentiating rules for targeting children and adults in times of conflicts. I think that there are legal bases in support of different rules for targeting children in contrast to their adult colleagues.

⁷⁷ Matthew Happold 'Child Soldiers in International Law' (n 6) p.10

When initially planning to write about the protection or lack of protection for child soldiers, I thought that there must be a gap in the protective regime in the Geneva conventions. But I have come to the conclusion that child soldiers are protected, however due to the rules of targeting, that protection becomes worthless when these children constitute lawful targets. Or in other words, the special protection afforded to children can't stop the legality of targeting a child. Children used in hostilities are protected, but not against the possibility of being lawfully targetable. However, as I later will address, their entitlement does impact the necessary uses of necessary means and methods of war.

Since treaty law does not specifically concern the targeting of children in armed conflict, the presumption that children shall be equally targetable as adults remains the legal standpoint in international law. However in this thesis, I have through a variety of different sources of international law, tried to challenge this presumption. As a whole, I argue that the special protection afforded to children does motivate the implementation or enforcement of differentiating rules for targeting child soldiers.

There is not a lot written on the topic of targeting child soldiers, the legal debate has mostly been concerned with criminal responsibility for alleged war crimes committed by child soldiers. As Frédéric Mégret presumes, maybe the topic of targeting child soldiers is too much of a dilemma in humanitarian law.⁷⁸ Since, recruiting and using children in hostilities is considered a war crime and a grave breach of the Geneva Conventions, it seems unreasonable that there is no explicit regulation on the targeting of children. Specifically targeting child soldiers who constitute lawful targets remains unaddressed in treaty law. The presumption of equal targeting rules means that humanitarian law takes no consideration of if the soldier has been illegally recruited.

⁷⁸ Mégret, Frédéric, Targeting Child Soldiers (n 75)

6.2 Conclusions on the legal framework

Both international humanitarian law and human rights law covers the protection of children associated with the armed forces and non state armed groups. AP1 and the convention of the rights of the child only oblige the state parties to refrain from recruitment and use of children under 15. AP2 raises the bar by completely prohibiting the recruitment and use of children under the age of 15. Although, the main focus point of this thesis is the protective rules granted in IHL, the protective regime enlisted in the Convention of the rights of the child and the optional protocol has also been included because of its relevance in times of conflict. In contrast to IHL, IHRL does not consider the level of protection afforded to a child depending on their status as a combatant or civilian. The convention of the rights of the child, and its optional protocol grant's children the same level of protection independent of their status under IHL. The optional protocols serves as a development for the protection of children by stating that its prohibited to recruit and use children under the age of 18. Parties to a conflict, who have adopted the optional protocol are therefore hindered from the recruitment and use of children under the age of 18 under IHRL.

When interpreting international law, one must have the intended purpose and object behind the specific treaty obligation in mind in order to properly apply the law (see Tadic case). In addition, the classification of conflict and the status of the individual child is highly relevant when determining the relevant protection against direct attack afforded to that child. For children members of a state armed force, they are entitled to the combatant status and immunities while keeping their protective rights under the special protection status as children.

For non international armed conflicts, the situation becomes far more complex. To begin with, children remains, like the rest of the members of a non state armed group civilians, and their targetability varies depending on the chosen Membership approach. In this regard three main approaches have been described; The first membership approach, highly influenced by the rules governing international conflicts, states that a member to a non-state armed group is at all times unless placed hors de combat. The second approach states that members of a non-state armed group are targetable only when directly participating in hostilities. The third and last approach states, that only those members fulfilling continuous combat functions within the can be targetable at all times, or as long as they keep the continuous combat function.

In non international armed conflicts, the concept of direct participation and continuous combatant functions sets the legal framework for targetability. Addressing the concept of direct participation in relation to children associated with the armed groups, children performing acts not amounting to direct participation remain unlawful targets, whereas children directly participating in hostilities become lawfully targetable during that time. It can therefore be concluded that

children directly participating in hostilities are more or less stripped of the special protection they are entitled to while children only indirectly participating at least remain unlawful targets.

In addition to the risk of becoming a lawful target. The material also shows that children associated with the armed forces or groups also become victims of abuse, leading to physically and mentally suffering of such severities, that it breaches the freedom of torture, degrading and illtreatment. For these reasons, children constituting lawful targets is not the only danger for children associated with the armed forces or groups, as their own superiors treat them with horrendous violence. To conclude, children associated with armed forces or groups do not only risk being lawfully targeted by the adversary, they also risk being illtreated, tortured by their superiors in their own armed group, or in other words victims of a variety of war crimes and human rights violations.

6.3 Megret's proposal, children as non combatants in international armed conflicts?

Megret proposes that children shall not be given the status of combatants. Similarly to medical personnel, children shall be classified as non combatants members of a state force, only targetable during the duration of time they directly participate in hostilities. In this manner, child soldiers who are part of a state force will be offered an enhanced protection from direct attack. However, the conclusion made by Megret has no bearing in international law for the regulation of international conflicts. Similarly to the discussion about if children could enjoy the belligerent privileges and immunities and the civilian protection at the same time, such a hybrid status would neglect and hinder the purpose of the principle of distinction. Nevertheless, children classified as combatants remain entitled to their special protection as children. However, such an approach would reflect the situation in non international conflicts, where children (nevertheless the rest of the fighters) remain civilians.

6.4 Is the Ntaganda decision relevant in an IHL context?

If the Lubanga case and the ICC's interpretation of the term active participation in Article 8(2)(e)(vii) of the ICC Statute does not affect children's targetability under common article 3, where does this put the Pre Trial Decision in the case of Ntaganda?

As previously noted, the Pre Trial Chamber deemed that membership in a non-state armed group does not on its own constitute direct participation in hostilities for children under the age of 15. The court's reasoning in this regard was not about an offense covered in the Statute but rather if the victims were protected under the Common article 3 and Article 4(1) of Additional Protocol II at the time of the offense. Therefore, the Pre-trial decision in Ntaganda was about IHL directly which makes the court's decision applicable or relevant for the determination of children's targetability under IHL.

Going back to the discussion about the relevancy to acknowledge the distinctive purposes of rules in the Rome Statute versus the Geneva Convention and Additional Protocols. As previously stated, the wide interpretation of the term active participation in the case of Lubanga was meant to widen the scope of acts and functions covered in the Rome Statute. The court's wide interpretation of active participation would if transformed into an IHL context have devastating consequences for the targetability of children. If the court's interpretation would have been incorporated in an IHL context, children would become more targetable than adults since active participation as understood in article 8, the Rome Statute covers more acts and functions than direct participation under common art. 3. The following illustrate the importance of distinguishing the ICC's interpretation of IHL and ICL. Only once the protective purposes of common art 3 and article 8 of the Rome Statute is kept separated, children can be protected the way IHL and ICL intended them to be.

As previously discussed, the membership approach distinguishes between targetable and non-targetable persons in conflict of non-international character. The Pre-Trial Chamber deemed that all members of non-state armed groups are targetable at all times unless hors de combat. However, the ICRC in its guidance takes the complexity of non-international armed conflicts into consideration by acknowledging that people involved with non-state armed groups fulfill a great variety of different roles and functions. The ICRC, in its Guidance stipulates that a person can not become an official member in a non-state armed group unless he or she is fulfilling a continuous combat function. The ICRC therefore makes the distinction between members of the armed group and targetable at all times and those not fulfilling a continuous combat function, only targetable when directly participating in hostilities. The decision by the Pre-Trial Chamber in Ntaganda means that children can never gain a continuous combat function. This means that the

Ntaganda Decisions questions the presumption that the same rules of targeting apply both to adult and child soldiers in non international armed conflicts.

Since the Ntaganda Decision stipulates that children recruited by non-state armed groups keep their protection against direct attack (unless they directly participate in hostilities) their presence has to be taken into consideration when planning and launching an attack. If a non-state armed group has many child soldiers present, an attack against the armed group might violate the prohibition against indiscriminate attack.⁷⁹ The number of child soldiers present must therefore be accounted for when determining the proportionality of an attack.⁸⁰

In non international armed conflicts, considering the risk of being directly targeted, child soldiers are offered way more protection from direct attack, if they cant gain a continuous combat function. In international armed conflict, a child entitlements to the combatant status and privileges remains unprotected from direct attack but he will have the right to directly participate in the hostilities and a prisoner of war status. A child soldier in a state force, preserved as a civilian in an international armed conflict, can't gain immunity from prosecution for lawful acts of war. In conclusion: depriving children of the combatant status in international armed conflicts, also deprives them from a variety of protection specifically entitled to combatants.

Is differentiating rules for targeting children and adults a reflection of state practice? From one perspective no, how can one argue that state practice can be used as legal grounds for an heightened protection against direct attack granted to children members of a non state armed group, when the numbers presented by the UNICEF, clearly shows that the prohibition against using children to directly participate is not complied with in the first place.

Nevertheless, As I previously shown, state practice (see for example The Vancouver Principles) does show steps towards implementing differentiating rules of targeting children versus adult soldiers. In addition to the moral argumentation for questioning the presumption on equal rules of targeting, The Pre-Trial Chamber Decision in Ntaganda shows that jurisprudence supports such a shift in international law in order to protect children and question the presumption of equal targetability of children and adults. In conclusion, the statement made by the ICC in the Ntaganda Decision might be more than an attempt of judicial activism because of the support shown to such a view in political agreements and military manuals (The Canadian Force JDN). Despite the fact that the outcome in the case of Ntaganda can change, it's an example towards a shift in international law towards differentiating the targetability of children and adults to enhance

⁷⁹ Article 51(2), Protocol I and Article 13(2) Protocol II Geneva Conventions (n 11)

⁸⁰ Article 51 (5) (b) and Articles 57(2)(a)(iii) and (2)(b), Protocol I Geneva Conventions (n 11); Rules 14 and 15, International Committee of the Red Cross (ICRC), Customary International Humanitarian Law , 2005, Volume I

the protection against direct attack for children recruited by armed forces or groups.

6.5 Would differentiating targeting rules for children and adults inflict the principle of distinction in common article 3?

I do not think that the Ntaganda decision, that children can not gain continuous combat functions, violates the principle of distinction in common art 3. However if we were to change the rule to, only allowed to use self defense against child soldiers. I think it potentially could be conflicting with the purpose of the principle of distinction. In my opinion, it should be easy to distinguish between lawful and unlawful people to target. Differentiation rules for targeting children should not contribute to making the distinction between unlawful and lawful targets much more complicated. For example, if it was only allowed to target child soldiers in self defense, it requires the individual soldier's ability to see if the adversary is for example 15 or 16 years old, a determination which is difficult or even impossible to do in the midst of hostilities. Although it's obviously hard to distinguish between people in their early or late teens it's possible or even expected of soldiers to be able to distinguish between a person clearly underage. Although there might be a moral motivation for military personnel not to directly target children if it's possible, it would undermine the principle of distinction and hinder the conduct of hostilities if it were only allowed to use force against children in self defense.

For these reasons, this conclusion made by the ICC in the Ntaganda case does not inflict the principle of distinction nor put the adversary at greater risk when facing a child soldier. My conclusion: The best way to enhance the protection for children used in hostilities, in conformity with the Ntaganda Decision, is to observe children as only targetable when directly participating in hostilities.

Now that the first issue as described by Provost has been addressed, I will move on to how the lawful means and methods for the conduct of hostilities, to discuss what uses of means and methods of war reflects a reasonable balance between military necessity and humanity. Especially in relation to the special protection children are entitled to in international law. After a child has been determined a lawful target, the special protection might hinder the adversary to attack him with the same measures of force, as the child soldiers adult colleagues. The limitation of necessary suffering in international humanitarian law, regulates and limits the belligerent right to injure the enemy. A belligerent party can not use more force beyond what is necessary to fulfill the military advantage of the operation. This means that when possible, belligerent parties are required to use

lesser means when conducting a military operation to limit the causes of suffering. Although it remains debated whether the principle to only use necessary force entails an obligation to capture instead of killing the adversary, Provost argues that there is such legal responsibility when directing an attack against a child. To conclude, the recourse to lethal force used in a direct attack against a child soldier, might be military necessity. However, when possible, the belligerent parties are legally obliged to use lesser means available, an obligation which in relation to adult soldiers is uncertain. This means that the lawful means and methods of war, depends on the age of the soldier whom the attack is aimed against.

6.6 The rules for targeting children in comparison to cultural property

Lastly, I will address my comparison with the rules for targeting cultural property. If the rules of targeting cultural property were to be applied in the context of targeting child soldiers, it could generate a child specific approach to the rules of targeting. By applying the same standards for targeting cultural property to child soldiers, the protection of children used in hostilities would gain an enhanced protection against direct attack.

From my understanding, the rules of targeting a cultural building sets the legal requirement to only target such property, when there is no other available option, art. 4 (2) Hague convention of 1954. In this manner, a cultural building only loses its protection against direct attack, if the destruction of such a building is an absolute military necessity. In comparison, the rules for targeting persons, does not stipulate such a requirement. A child soldier does not need to be an absolute military necessity for the military operation to be lawfully targetable.

If the Hague convention of 1954 is respected, I argue that cultural buildings are offered greater protection against direct attack than children used in hostilities, a part of a state force or non-state armed group. If a child, direct participation in hostilities, would not be a lawful target unless it was an absolute military necessity to directly target that individual, these children would enjoy a far greater protection against direct attack. The making of a child specific approach to the rules of targeting, with inspiration from the 1954 Hague Convention, and in particular, article 4, would contribute to a much more effective protection for children used on the battlefield.

6.7 Summary

The thesis functions as an overview of the protection of children used in hostilities and their targetability under international law, primarily in international humanitarian law. The purpose of the thesis has been to question the established presumption, that children directly participating in hostilities, shall be equally targetable as their adult colleagues and counterparts.

In times of conflicts, international humanitarian law offers children a special protection status. The prohibition against recruitment and use of children under the age of 15 illustrates two of the most relevant protective regimes. Despite these protective rules, children directly participating in hostilities remain lawful targets and their special protection status becomes severely less useful. For these reasons, I argue that the presumption of equal targetability hinders the Special protection of children to have the practical impact for children used on the battlefield it intended to.

The tremendous amounts of child soldiers recruited by non-state armed groups shows that the prohibition against recruitment and use aren't respected. However, I mean, that the ICC jurisprudence and national initiatives illustrate that the presumption of equal targetability can be challenged under international law. And, that the special protection for children in times of conflict, and international law as a whole does motivate differentiating rules for targeting children versus adults participating in hostilities.

For arguments presumably made on moral grounds, military personnel are willing to put themselves at greater risk to spare the life of a child soldier forced to take part in a conflict, he or she definitely did not start. The Vancouver principles and the The Canadian Armed Forces Joint Doctrine Note shows that states are willing to follow in these footsteps by adding extra precautionary measures in the planning state of a military operation and to completely differentiate the rules for targeting children and adults.

The rules for targeting cultural property (set out in the 1954 Convention for the Protection of Cultural Property), could be an example on how to differentiate the rules for targeting children. In this regard the author argues that, like cultural property, children directly participating in hostilities should only be lawfully targetable, at last resort, when there is no other way to fulfill the military advantage.

Lastly, whether or not the presumption on equal targetability can be questioned under international law, is dependent on the classification of conflicts. In international armed conflicts, children with a combatant status are targetable according to the same rules as their adult colleagues. However, the special protection they are entitled to, will affect the lawful methods and means of warfare. For these reasons, the adversary must resort to lesser uses of

force when encountering a child in comparison to an adult soldier. This applies both to international and non international conflicts. For non-international armed conflicts, the Ntaganda decision ensures that children used by a non-state armed group never can gain a continuous combat function. This means that the rules for targeting adult and child members of a non state armed group do vary.

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