Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities

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Abstract

Military commanders involved in international armed conflicts are faced daily with the dilemma of making defensible targeting decisions when they encounter under-aged child combatants. This problem is particularly acute in conflicts involving non-state-armed groups, who are notorious for forcibly abducting child soldiers to swell their ranks. Existing international law prohibits the recruitment of children under fifteen years of age into any armed forces. In some instances, international law sets the minimum age for recruitment at eighteen years of age, and there are growing calls for this standard to replace the fifteen-year age limit which has achieved customary international law status. Until such time as this eighteen-year limit has achieved customary international law status, these child soldiers are bound by the existing IHL regime, which affords combatant status (and immunity from prosecution) based on an ability to show membership of an armed force. It is argued that the requirements for full combatant status are probably beyond the reach of the average under-aged child soldier. As a result, they remain classified as civilians, albeit participating directly in hostilities without authorisation. As unlawful participants, these civilians are not only legitimate targets in hostilities (for so long as they participate or engage in the continuous combat function), but they also face the possibility of being criminally prosecuted for their actions once they are captured.

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INTRODUCTION

> I had a patrol that went into a village that had been wiped out. As the patrol was going through the village, the chapel doors of the small village opened and about 100 people were hidden inside … . The sergeant in charge of the patrol called my headquarters and said he needed vehicles to move these people to a safe place. As he was on the radio calling, from one side of the village there were about 30 boys, 9, 10, 12, 14 [years of age] … who opened fire on the sergeant clearly in uniform and the soldiers and the people he was protecting. As he was reeling from that attack, from the other side of the village there were about 20 girls, the same ages; some of them pregnant. They were human shields behind which other boys were shooting at the sergeant, his soldiers and the people he was protecting.[1]

This factual account from a retired lieutenant-general illustrates the stark reality facing legitimate combatants in modern-day armed conflicts across the globe.[2] While this particular narrative portrays the child soldiers as antagonists, the sad reality is that eighty per cent of the estimated 300 000 child soldiers,[3] are under fifteen years[4] of age, and are merely unwitting victims of their impoverished circumstances.[5] What can be gleaned from

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1 Lieutenant-General Dallaire (retired) 'Motion urging the repatriation of Omar Khadr' 18 June 2008 available at: http://romeodallaire.sencanada.ca/en/Vote-on-Senator-Romeo-Dallaires-motion-urging-the-repatriation-of-Omar-Khadr/ (last accessed 15 October 2012).

2 Singer *Children at war* (2005) at 16 says 'the participation of children in armed conflict is now global in scope'. See also Williams 'The international campaign to prohibit child soldiers: a critical evaluation' (2011) 15/7 *The International Journal of Human Rights* 1072–1090. 'Coalition against child soldiers' *Child Soldiers: Global Report* 2008 available at: http://www.child-soldiers.org/library/global-reports (last accessed 16 October 2012) at 22 reports that child soldiers have featured in seventy-five per cent of all armed conflicts. Udombana 'War is not child's play! International law and the prohibition of children's involvement in armed conflicts' (2006) 20/1 *Temple International and Comparative Law Journal* at 61–62 & 65 comments that children have reportedly served 'in government forces, paramilitaries, or in opposition forces … in the following states: in fifteen African states, in five South and Central American states, in seven European states, in four states in the Middle East and the Persian Gulf area, and in fourteen Asian states, see Center for Defense Information *Defence Monitor: the invisible soldier* DC-ISSN 0195–6450 (1997) XXVI/4 available at: http://www.cdi.org/dm/1997/issue4/ (last accessed 16 October 2012).

3 'Coalition against child soldiers' n 2 above at 22.

4 A study conducted in Asia estimated the average age of child soldiers at thirteen years of age, while a similar study in Africa concluded that over sixty per cent of all child soldiers in Africa were under fourteen years of age, see Singer n 2 above at 28–29.

5 'Coalition against child soldiers' n 2 above at 22; UNICEF *Impact of armed conflict in children ('the Machel Report')* 1996 available at: http://www.unicef.org/graca/ (last accessed 16 October 2012).

the limited statistical data[6] available, is that increasingly younger children (some as young as eight[7] years of age) are being recruited to perform tasks of an increasingly military nature,[8] and that the majority of those guilty of recruiting these young soldiers are non-state armed groups.[9]

The year 2012 has been a watershed year, in so far as the international criminal prosecution[10] of those charged with the unlawful recruitment of child soldiers is concerned. Thomas Lubanga Dyilo was the first accused to face prosecution at the hands of the International Criminal Court (ICC) for recruiting as many as 30 000 boys and girls under the age of fifteen, to fight with his militia.[11] Lubanga even went so far as to establish 'a special

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6 As Brett & McCallin *Children the invisible soldiers* (1998) at 19, point out, child soldiers are often 'invisible because those who employ them deny their existence. No record is kept of their number and ages, or their ages are falsified.' Moreover 'low birth registration rates' in war-torn states often means that children simply do not know when they were born or have the papers to prove their age, see: 'Coalition against child soldiers' n 2 above at 22.

7 Amnesty International 'In the line of fire: Somalia's children under attack' July 2011 available at: www.amnesty.org/en/library/info/AFR52/001/2011/en (last accessed 16 October 2012); Coleman 'Showing its teeth: the International Criminal Court takes on child conscription in the Congo, but is its bark worse than its bite?' (2007–2008) 26 *Penn State International Law Review* at 765.

8 In the Democratic Republic of Congo (DRC) most children recruited in 2010, into non-state-armed groups, were used in military operations, see the United Nations *Report of the Secretary-General to the Security Council* A/65/820–S/2011/250 (23 April 2011) available at: http://www.un.org/children/conflict/_documents/S2011250.pdf (last accessed 16 October 2012); 'Coalition against child soldiers' n 2 above at 19.

9 Singer n 2 above at 95 reports that sixty per cent 'of the non-state armed forces in the world today deliberately make use of child soldiers'. Francioni & Ronzitti (eds) *War by contract: human rights, humanitarian law and private contractors* (2011) at 266 records that even the private security industry has made use of child soldiers. The Sudan people's liberation army is reported to have recruited in excess of 20 000 child soldiers, while the Lord's resistance army (LRA) is estimated to have abducted in the region of 26 000 children, see 'South Sudan to end use of child soldiers' *BBC News* 31 August 2010 reported at: http://www.bbc.co.uk/news/world-africa-11135426 (last accessed 16 October 2012). In figures quoted by the International Criminal Court (ICC), it is estimated that 'over eighty-five per cent of the LRA's forces are made up of children', bolstering the numbers of 200 core members to 14 000 soldiers, see Udombana n 2 above at 65; Watchlist 'Sudan's children at a crossroads' available at: http://watchlist.org/reports/pdf/sudan_07_final.pdf at 23; UN n 8 above; Ayissi 'Protecting children in armed conflict: from commitment to compliance' (2002) available at www.unidir.org/pdf/articles/pdf-art1727.pdf (last accessed 16 October 2012) at 10; 'Coalition against child soldiers' n 2 above at 17 & 23.

10 ICC has already issued arrest warrants against five senior LRA members, and 'three members of Ituri-based armed groups in the DRC', on charges relating to the recruitment of child soldiers, see the 'Coalition against child soldiers' n 2 above at 110.

11 Evidence presented before the court reveals that some of Lubanga's child soldiers were as young as nine, see 'Child soldier relief "Lubanga trial: week 13 and 14 in review'" 2009 available at: http://childsoldierrelief.org/2009/05/10/lubanga-trial-week-13-in-review (last accessed 16 October 2012) and

"Kadogo Unit"… which was comprised principally of children under the age of 15'.[12] On 14 March 2012 the court found Lubanga Dyilo guilty of enlisting, conscripting and using 'children under the age of 15 … to participate actively in hostilities between 1 September 2002 and 13 August 2003'[13] … 'as soldiers and as bodyguards for senior officials, including the accused'.[14] His sentence is still to be determined, but he could face a life prison term.[15]

In another world first, the decision of the Special Court for Sierra Leone (SCSL) to prosecute Charles Taylor, marks 'the first time a former head of state has been brought to trial for the crime of recruiting children'[16] in an armed conflict. On 26 April 2012, the SCSL's Trial Chamber II handed down a guilty verdict on several counts, including that of 'conscripting or enlisting of children under the age of fifteen years into armed forces or groups, or using them to participate actively in hostilities', which qualifies as a 'serious violation of international humanitarian law pursuant to Article 4(c) of the Statute'.[17] On 30 May 2012, Taylor was handed a fifty-year prison sentence.[18]

While these international prosecutions are a significant achievement in the project of protecting the rights of children in situations of armed conflict, it is a sad reality that – with the exception of two cases in the DRC – almost no one has been 'prosecuted by national courts for recruiting and

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http://childsoldierrelief.org/2009/05/18/lubanga-trial-week-14-in-review/ (last accessed 16 October 2012).

12 *Prosecutor v Thomas Lubango Dyilo* 'Summary of the judgment pursuant to article 74 of the statute' ICC–01/04–01/06–2843 (14 March 2012) at par 31. Lubanga's defence was that these child soldiers 'volunteered to join the UPC', although the testimonies of many of the child soldiers speak of large-scale forcible abductions, see Wakabi 'Lubanga trial highlights plight of child soldiers' *Commentary trial reports* October 2010 available at: http://www.lubangatrial.org/2010/10/05/lubanga-trial-highlights-plight-of-child-soldiers (last accessed 16 October 2012); *Prosecutor v Thomas Lubanga Dyilo* Decisions on the confirmation of charges (case ICC–01/04–01/06) (29 January 2007) at par 251.

13 *Prosecutor v Thomas Lubango Dyilo* n 12 above at par 35.

14 *Ibid*.

15 Davey & Pierce 'Too young to fight: a review of the laws that protect child soldiers and children in armed conflict' available at: http://childsoldierrelief.org/child-soldiers-csr-reports-on-a-global-crisis (last accessed 16 October 2012).

16 'Coalition against child soldiers' n 2 above at 32; *Prosecutor of the Special Court v Charles Ghankay Taylor* SCSL trial chamber II: summary judgment (Case No SCSL–2003–01–T). For reasons of security, Charles Taylor is facing prosecution at the ICC, but the trial is being conducted under the SCSL's exclusive jurisdiction.

17 *Id* at pars 37–45.

18 SCSL press release 'Charles Taylor sentenced to 50 years in prison' 30 May 2012 available at: http://www.sc-sl.org/LinkClick.aspx?fileticket=wMFT32KRyiY=&tabid=53 (last accessed 16 October 2012).

using children'.[19] Moreover, as Moodrick-Even Khen correctly points out, 'most efforts are aimed at reducing the number of children recruited into armed forces and criminalising their recruiters, whereas relatively less attention has been directed at reconsidering the legal status of children participating directly in hostilities and the rules for their targeting'.[20] When all is said and done, the reality remains that non-state armed groups will continue to recruit children to fight in armed conflicts, and these child soldiers will pose difficult questions for those opposing the non-state groups. We simply cannot place all our hope in prosecution as the sole means of dealing with the reality that faces lawful combatants every day in the theatre of hostilities.

The issue I have set out to address here is: how are military commanders to make a targeting decision when faced with under-aged 'child soldiers',[21] recruited into non-state-armed groups,[22] who participate directly in international[23] armed conflicts? I will begin by briefly setting

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19 'Coalition against child soldiers' n 2 above at 32.

20 Moodrick-Even Khen 'Children as direct participants in hostilities' in Banks (ed) *New battlefields old laws: critical debates on asymmetric warfare* (2011) (Columbia studies in terrorism and irregular warfare) at 2867–74 (e-book version).

21 Reference to 'child soldiers' in this paper is defined according to the 'Cape Town Principles and best practices', adopted at the 'Symposium on the prevention of recruitment of children into the armed forces and on demobilisation and social reintegration of child soldiers in Africa', see 'Cape Town principles' 27–30 April 1997 available at www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf. (last accessed 26 October 2012). The Cape Town Principles define a child soldier as: 'any person under eighteen years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms [definitions section]'. The UNICEF *Guide to the optional protocol on the involvement of children in armed conflict* 2003 available at http://www.unicef.org/emerg/files/option_protocol_conflict.pdf . (last accessed 26 October 2012) comments that this definition is 'intentionally broadly worded so as to extend its application beyond those employed as combatants to include cooks, porters, messengers, and anyone accompanying such groups, including girls recruited for sexual purposes and forced marriage'. This definition applies to all child participants, irrespective of whether 'the authorities contend the child "volunteered" for soldiering', see Grover '"Child soldiers" as "non-combatants": the inapplicability of the refugee convention exclusion clause' (2008) 12/1 *The International Journal of Human Rights* 53–65 at 54.

22 I have chosen to focus this piece on those recruited into non-state-armed groups, because these instances are more statistically significant, and the legal regime applicable under international law to non-state-armed groups is more complicated than that applicable to recruitment into the state's armed forces.

23 IHL is divided into a body of rules that apply to international armed conflicts, and another vastly different legal regime that applies to internal armed conflicts. I have chosen to restrict my focus here to international armed conflicts, because it is within the

out the existing international legal regime applicable to under-aged child soldiers in international armed conflicts. I will then turn my attention to the peculiar legal difficulties with regard to affording combatant status, which result when these children are recruited by non-state armed groups (as opposed to the state's armed forces), after which I will unpack the issue of making targeting decisions in instances where 'civilian' child soldiers are directly participating in hostilities. Lastly, the question of whether child soldiers are likely to face prosecution for their unauthorised direct participation in hostilities is addressed.

UNDER-AGED CHILD SOLDIERS THROUGH THE LENS OF INTERNATIONAL LAW[24]

From the earliest international humanitarian law (IHL) treaties, there are references to the special protection and respect afforded children, because

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legal regime specifically applicable to international armed conflicts where one finds the legal allocation of combatant and POW status, a status that under both customary IHL and conventional IHL 'is strictly limited to international armed conflicts', see Goldman & Tittemore 'Unprivileged combatants and the hostilities in Afghanistan: their status and rights under international humanitarian and human rights law' *ASIL task force paper* 2002 available at: www.asil.org/taskforce/goldman.pdf (last accessed 16 October 2012) at 1. Common art 2, found in all four of the 1949 Geneva conventions (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 ('GC I') (1950) 75 *UN Treaty Series* 31–83; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949 ('GC II') (1950) 75 *UN Treaty Series* 85–133; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 ('GC III') (1950) 75 *UN Treaty Series* 135–285; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 ('GC IV') (1950) 75 *UN Treaty Series* 287–417), defines an 'international armed conflict' as 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties'. In 1994, when Goodwin-Gill & Cohn published their study on the role of children in armed conflict, they concluded that at the time, there were no international armed conflicts in which the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (1979) 1125 *UN Treaty Series* 3–608 'AP I was 'applied to the benefit of children', see Goodwin-Gill & Cohn *Child soldiers: the role of children in armed conflict – a study on behalf of the Henry Dunant institute* (1994) at 63 & 66. Since then Van Beuren 'The international legal protection of children in armed conflicts' (1994) 43 *International and Comparative Law Quarterly* 809–826 at 813 has pointed out that Iraqi soldiers have confirmed that 'they found Iranian child soldiers participating in the Iraqi conflict'. Singer n 2 above at 163 also notes that US special forces also faced Somali child soldiers in 1993 in Mogadishu, as did NATO forces in Kosovo in 1999. This has also proved to be the case in Afghanistan.

24 For a fuller discussion of the international legal regime applicable to children in situations of armed conflict, see Bosch 'The combatant status of 'under-aged' child soldiers recruited by non-state armed groups in international armed conflicts' submitted for publication to *African Yearbook on International Humanitarian Law* (2012).

of their youthfulness.[25] Most of this child-focused protection builds on the assumption that children should be automatically assigned civilian status, and as such they would be prohibited from participating in hostilities.[26] While there is no IHL provision stating outright that 'a child may never become a combatant',[27] most international law treaties and customary international law set the minimum age for recruitment into the armed forces or armed groups, at fifteen years of age.

So, for example, the Additional Protocols (AP I[28] and AP II[29]) to the four Geneva Conventions (GC), state that the recruitment of child soldiers under fifteen[30] years of age is contrary to IHL.[31] Moreover, states are obliged to take 'all feasible measures'[32] to ensure that children under fifteen years of age should not 'take a direct part in hostilities',[33] and that in the case of recruitment, states party to the protocol should give preference to the oldest when recruiting between the ages of fifteen and

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25 Ipsen 'Combatants and non-combatants' in Fleck (ed) *The handbook of humanitarian law in armed conflict* (1995) at 216.

26 Gasser 'Protection of the civilian population' in Fleck n 25 above at 210. Quénivet & Shah-Davis 'Confronting the challenges of international law and armed conflict in the 21st century' in Quénivet & Shah-Davis (eds) *International law and armed conflict: challenges in the 21st century* (2010) at 16.

27 Goodwin-Gill & Cohn n 23 above at 61. While GC IV n 23 above makes no mention of 'child soldiers' *per se*, it does 'afford lesser protection to children between the ages of fifteen and eighteen' years of age, see Rosen 'Who is a child? The legal conundrum of child soldiers' (2009) 25 *Connecticut Journal of International Law* 81–118 at 88.

28 Note 23 above; at present there are 171 states party to AP I.

29 Protocol additional to the Geneva conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts 1977 (AP II) (1979) 1125 *UN Treaty Series* 609–99. At present there are 166 states party to AP II.

30 In line with this directive, AP I n 23 above at art 77(2) prohibits 'all states party to the protocol from conscripting children under the age of fifteen into the armed forces'. As Udombana n 2 above at 76 points out: 'voluntary enrolment was not explicitly mentioned, an omission that probably was deliberate', and if one scrutinises the writings of the rapporteur (for the working group of committee III), we find that this was a result of the belief that 'it would not be realistic to completely prohibit voluntary participation of children under fifteen, especially in occupied territories and in wars of national liberation'.

31 ICRC *Children protected under IHL* 29 October 2010 available at: http://www.icrc.org/eng/war-and-law/protected-persons/children/overview-protected-children.htm. (last accessed 16 October 2012).

32 At the ICRC's diplomatic conference tasked with drafting AP I, the initial proposal was for states party to take 'all necessary measures' – a more mandatory demand which in the end failed to achieve state support, see Breen '"When is a child not a child?" Child soldiers in international law' (2007) January–March *Human Rights Review* at 77.

33 According to the ICRC's commentary to AP I, the prohibition found in art 77(1–3) also precludes children under fifteen years of age from 'voluntarily signing up to gather information, transmit orders, deliver ammunition and food, or participate in acts of sabotage', see Breen n 32 above at 78.

eighteen.[34] This prohibition against the recruitment of children under fifteen years of age, is restated in the UN Convention on the Rights of the Child (UNCRC) article 38 (the sole provision dealing with children in situations of armed conflict).[35] Despite the fact that UNCRC defines 'a child' as 'every human being below the age of eighteen years', article 38 excludes 'children' between fifteen and eighteen years of age from the full ambit of its protections in times of armed conflict, and restates the legal position adopted in 1977, and expressed in AP I. More recently, the Rome Statute,[36] which established the ICC in 2002, stipulates that 'conscripting or enlisting[37] children under fifteen[38] years [of age] into any armed forces, or using them to participate actively in hostilities' (in both international and internal conflicts), is a prosecutable war crime.[39]

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34 AP I n 23 above at art 77(2); Breen n 32 above at 78. The ICRC has continued to seek to raise the minimum age for participation in hostilities from fifteen to eighteen years. In 1991, the ICRC requested that the Henry Dunant institute 'undertake a study … on the recruitment and participation of children as soldiers in armed conflicts, and on measures to reduce and eventually eliminate such recruitment and participation', see Udombana n 2 above at 91 & 92. The result of the study was the book by Goodwin-Gill & Cohn, n 23 above.

35 (1989) 1577 *UN Treaty Series* at 3.

36 UN doc S/25704 (3 May 1993) at 36–40. At present there are 139 states signatory, and 119 states that have ratified the Rome Statute.

37 The words 'conscripting or enlisting' were substituted for the initial proposal, which read merely 'recruiting', so that it would be possible to prosecute someone who did 'not provide for safeguards and inquire the age of the child even though the child's age appears close to the protected minimum age'. Consequently, under this new wording 'evidence of the accused's willful blindness of the child's age should be sufficient to establish liability under the ICC statute', see Udombana n 2 above at 86.

38 With the domestic legislation of many nation states (*eg* the United Kingdom, Australia, India, Canada and China) still permitting the armed forces to recruit children under eighteen years of age, it is understandable why the drafters of the Rome Statute could not garner support for a straight-eighteen ban, see UNICEF (2011) Database on age of child (on file with author).

39 Articles 8bxxvi & 8evii. Out of the proposed options put to the participants at the Rome Diplomatic Conference, which drafted the Rome Statute, this variation was adopted to 'appease the United States, which had argued that the criminalisation of children's involvement in armed conflicts did not reflect customary international law, and that it was a human rights, rather than a criminal law, provision', see Udombana n 2 above at 86. However, the ICC did adopt a very 'broad interpretation' of what acts would amount to 'direct participation of children in hostilities', including the use of children in 'active participation in military activities linked to combat such as scouting, spying, sabotage, and the use of children as decoys, couriers, or at military checkpoints'. Similarly, the use of children in 'direct' support functions such as carrying supplies to the front line or activities at the front line itself, all satisfy the definitional criteria for direct participation in hostilities, see UNICEF n 21 above at 14.

These legal measures, aimed at protecting children in situations of armed conflict, have also been endorsed in soft law,[40] international refugee law,[41] and international labour law.[42] It is apparent that the prohibition against the recruitment of children under fifteen years of age, reflects a recognised principle of customary international law, applicable to any recruiters (be they state or non-state actors), in instances of both forcible conscription and voluntary recruitment.

In 1994, Graça Machel (tasked with conducting a study into the impact of armed conflict on children) 'recommended eighteen years as the minimum age for recruitment into armed forces or groups, and for participation in hostilities'.[43] Drawing on the findings of the Machel Report, as well as

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40 The international concern around the plight of children in conflict situations, led to the drafting of the non-binding 'Paris commitments to protect children from unlawful recruitment or use by armed forces or armed groups' 2007 available at: http://www.un.org/children/conflict/_documents/pariscommitments/ParisCommitments_EN.pdf (last accessed 16 October 2012) and the 'Paris principles and guidelines on children associated with armed forces or armed groups' 2007 available at: http://www.un.org/children/conflict/_documents/parisprinciples/ParisPrinciples_EN.pdf (last accessed 16 October 2012). Both documents exhort states to adopt a 'straight-eighteen' ban on recruitment into the armed force, as well as initiatives aimed at 'demobilisation, disarmament and reintegration of child soldiers', see the 'Coalition against child soldiers' n 2 above at 151. Since 1994, thirty-four formal demobilisation processes have been carried out, twenty-two of them in Africa. According to the 'Coalition against child soldiers' n 2 above at 151, they cost an average of US$1 565 per child.

41 The UN High Commissioner for Refugees (UNHCR) 'Policy on refugee children and the guidelines on refugee children' August 1988 available at: http://www.unicef.org/violencestudy/pdf/refugee_children_guidelines_on_protection_and_care.pdf (last accessed 16 October 2012) which was updated in 1993 with the 'UNHCR Policy on refugee children' EC/SCP/82 (6 August 1993) available at: http://www.unhcr.org/refworld/docid/3f9e6a534.html (last accessed 16 October 2012), defines the prohibited recruitment of children from refugee camps, in par 26(e), to include 'not only forced recruitment but also voluntary participation in armed attacks'. Moreover par 26(e) states that 'support functions, such as carrying arms and ammunition and acting as scouts for military patrols is as unacceptable as more direct functions, such as active combat duty'.

42 International labour organisation (ILO) Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour' 1999 available at: http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182 (last accessed 16 October 2012), which concludes that forced or compulsory recruitment of children (under eighteen years of age) for use in armed conflict is among the worst forms of child labour, and calls for programs of action to eliminate child soldiering, see art 3(a). Also, the ILO Convention 138 on Minimum Age 1973 available at: http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138 (last accessed 16 October 2012), establishes eighteen years as 'the minimum age for admission to employment for work which by its nature … is likely to jeopardise the health, safety or morals of young persons', see Brett & McCallin n 6 above at 167.

43 Udombana n 2 above at 93.

significant pressure from the UN Security Council,[44] UNICEF, many regional organisations,[45] the International Committee for the Red Cross (ICRC), the UN High Commissioner for Human Rights, and NGO groupings like The Coalition to Stop the Use of Child Soldiers,[46] the UNCRC Committee drafted the Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict (OP-AC),[47] and opened it for ratification in 2000. The driving purpose behind OP-AC was to increase the minimum age for recruitment from fifteen to eighteen years of age, and to 'explicitly include non-state actors under its coverage'.[48] Although the negotiations on the OP-AC failed to establish a 'straight-eighteen' ban across the board, states are obliged to refrain from *compulsory* recruitment (or conscription) of under-eighteens into their armed forces,[49] and to

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44 The UN Security Council have frozen assets and imposed travel bans on the leaders of armed groups suspected of recruiting child soldiers in Côte d'Ivoire, Rwanda and the DRC, see the 'Coalition against child soldiers' n 2 above at 14; UN *A world fit for children* 2002 available at: www.unicef.org/specialsession/wffc/ (last accessed 16 October 2012) part III B3 par 22). The UN Secretary-General has requested that UN peacekeepers preferably be twenty-one years of age, but certainly no younger than eighteen, see UNICEF n 21 above at 14. Moreover, the following Security Council resolutions: 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009) and 1998 (2011) – all call for countries to criminalise child recruitment, and the national legislation and military manuals in numerous countries do indeed reflect this stance, see the UN Office of the Special Representative of the Secretary-General on Children Affected by Armed Conflict 'The six grave violations against children during armed conflict' 2009 available at: www.un.org/children/conflict (last accessed 16 October 2012) (working paper no 1).

45 Organisation of African Unity (OAU) Resolution on the Plight of African Children in Situation of Armed Conflicts 1996; European Parliament Resolution on Child Soldiers 1998; Declaration by the Nordic Foreign Ministers Against the Use of Child Soldiers 1997; Berlin Declaration on the Use of Children as Soldiers 1999; Montevideo Declaration on the Use of Children as Soldiers 1999; Maputo Declaration on the Use of Children as Soldiers 1999; Organisation of American States Resolution on Children and Armed Conflict 2000); and the Amman Declaration on the Use of Children as Soldiers 2001.

46 This umbrella organisation was formed in 1998, and comprised Amnesty International; Human Rights Watch; Save the Children; Jesuit Refugee Service; the Quaker UN Office – Geneva; and the International Federation *Terre des Hommes*, see Singer n 2 above at 142.

47 Doc A/RES/54/263 (2000) 2173 *UN Treaty Series* at 222. OP-AC currently has 142 states party to it (including many African states where child soldier recruitment is rife), and it entered into force on 12 February 2002. It is interesting to note that in 2002, the US was pressurised into ratifying its signature to OP-AC, despite the fact that the US had not yet ratified its signature of the UNCRC or either of the Aps, see Happold 'Child soldiers: victims or perpetrators?' (2008) 29 *University of La Verne Law Review* at 56. Interestingly, Afghanistan acceded to the OP-AC in September 2003. The main thrust of the Protocol was to increase the minimum age for compulsory recruitment and participation in hostilities of children, from fifteen to eighteen years of age.

48 Singer n 2 above at 143.

49 Article 2.

undertake to raise the minimum age for voluntary recruitment into their armed forces from fifteen to eighteen.[50] Moreover, OP-AC exhorts states to take 'all feasible measures' to ensure that under-eighteens who volunteer in the states' armed forces 'do not take a direct part in hostilities'.[51]

This drive to increase the minimum age for the recruitment of child soldiers, has also been championed at a regional level, with the African Charter on the Rights and Welfare of the Child (ACRWC)[52] leading the way in 1999. The ACRWC is notable for being the first international law treaty that imposes a more stringent and straight, across-the-board eighteen ban on child recruitment and direct participation in hostilities.[53]

The legal regime applicable to recruitment into non-state-armed groups

Historically there has been a tendency in international law to apply more stringent legal demands to those non-state armed groups recruiting child soldiers. So for example, when the wording of AP II (applicable to non-international armed conflicts) was debated, states opted for article 4(3)(c) to be worded as follows: 'children ... shall *neither* be recruited in the armed forces or groups, *nor* allowed to take part in hostilities … regardless of whether the participation is of a direct or indirect nature'.[54] The resultant effect of this article was to impose an absolute ban on the involvement of any children under fifteen years of age, in situations of

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50 Article 3(1). Of the 142 states party to the OP-AC, two thirds of states party 'have committed themselves to setting a minimum voluntary recruitment age at eighteen or higher', see the 'Coalition against child soldiers' 'Facts and figures on child soldiers' 2009 available at: http://www.childsoldiersglobalreport.org/content/facts-and-figures-child-soldiers (last accessed 16 October 2012). OP-AC art 3(3) demands that states obtain informed consent from legal guardians, fully reveal the duties involved in military service, and only permit voluntary sign-up once proof of age is provided..

51 Article 1. Notably, OP-AC did not adopt the language found in AP II art 4(3)(c), 'which prohibits *any* participation in hostilities' (even indirect participation), see Udombana n 2 above at 94.

52 OAU 'African charter on the rights and welfare of the child' ('ACRWC') CAB/LEG/24.9/49 (11 July 1990) available at: http://www.unhcr.org/refworld/docid/3ae6b38c18.html (last accessed 16 October 2012). The ACRWC currently has 37 African states party, see: http://www.au.int/en/sites/default/files/96Welfare_of_the_Child.pdf (last accessed 16 October 2012).

53 Article 22(2): 'States Party to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.'

54 According to Goodwin-Gill & Cohn n 23 above at 64, 'voluntary or indirect participation of those under fifteen is equally ruled out'.

internal conflicts. States involved in the drafting process of AP II were motivated to include this article in order to deny rebel groups the perceived advantage that they enjoyed, by being able to recruit child soldiers.[55] Similarly, when OP-AC was drafted, it imposed the straight-eighteen ban to non-state armed groups, even in cases of voluntary recruitment.[56] Moreover, OP-AC dictated that states party to the Protocol are to criminalise the recruitment, by non-state-armed groups, of children under eighteen years of age by way of the states' domestic legislation.[57]

The aspiration to raise the age for recruitment from fifteen to eighteen years of age is indeed laudable, given how extensive the practice of recruiting under-aged child soldiers is amongst non-state armed groups. However, where this prohibition finds its expression in human rights treaties[58] like ACRWC and OP-AC, it suffers from the same limitations in that non-state armed groups cannot legally ratify these treaties,[59] these obligations do not bind non-government agencies without further domestic legislation on the part of states where these non-state armed groups are operating. Consequently, the effectiveness of any attempt to raise the age for recruitment from fifteen to eighteen years of age, is heavily reliant on a state's ability to legislate and enforce a more stringent legal framework.

While this limitation – peculiar to international treaty sources of law – might cripple attempts to impose stricter legal requirements for

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55 Rosen n 27 above at 92; Ipsen n 25 above at 217.

56 Article 4(1).

57 Article 4(2); Coleman n 7 above at 775.

58 According to Goodwin-Gill & Cohn n 23 above at 65 non-state entities may become bound by the provisions, in for example AP I 'if it is recognised as enjoying a sufficient measure of "personality" and had made a valid unilateral declaration of intent to respect the rules of IHL'. Besides two Sudanese groups, most of these non-state-armed groups have not attempted to make any declaration of acceptance of the UNCRC, see Goodwin-Gill & Cohn n 23 above at 65.

59 International treaty law, 'as a body of rules operates primarily between states and has only indirect effect on non-state actors', see Fontana 'Child soldiers and international law' (1997) 6/3 *African Security Review* available at: http://www.iss.co.za/pubs/asr/6no3/fontana.html (last accessed 16 October 2012). When a state ratifies a treaty, the Vienna convention on the law of treaties (1969) 1155 *UNTS* at 331 (which entered into force on 27 January 1980), and the principle of *pacta sunt servanda*, demand that states act in good faith and ensure that they promulgate the necessary domestic legislation in accordance with their treaty obligations, so that the treaty can be incorporated into their domestic law. This is the 'traditional approach to the implementation of international human rights instruments in many states' and is necessary in all instances where the 'treaties are not self-executing', see Udombana n 2 above at 98, Goodwin-Gill & Cohn n 23 above at 56.

recruitment into non-state armed groups, the same is not true for customary sources of law. Once an IHL principle can be said to have achieved customary international law status, those customary provisions can be enforced against all parties to a conflict.[60] In effect this means that all actors in the theatre of hostilities, including non-state actors, are bound by the customary rule, irrespective of whether they have made a declaration or are subject to subsequent domestic legislation. As the Marten's clause states in AP I:

> In cases not covered by this Protocol or by other international agreements, civilians and combatant remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[61]

In 2005, the ICRC published a study on the IHL principles which could be said to have achieved customary international law status. The study confirmed that the principle that children under fifteen years of age 'must not be recruited into armed forces or armed groups',[62] and must not be allowed to participate in hostilities[63] – had crystallised into a norm of customary international law (a position which has been endorsed by the ICC and the SCSL).[64]

At present, however, the same cannot be said of aspirations to raise the recruitment age from fifteen to eighteen years of age. In essence this means that, without specific domestic legislation[65] in place to prohibit the recruitment of children under eighteen years of age by non-state-armed groups, these groups will not be in breach of international law for recruiting children over fifteen years of age. Since non-state-armed groups are the main culprits when it comes to recruiting child soldiers, it is

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60 'A treaty rule may bind non-parties if it becomes a part of international custom', unfortunately, at present the OP-AC has not attained customary law status, although it might attain such status in the future, see Udombana n 2 above at 103–4.

61 AP I n 23 above, art 1(2); Goodwin-Gill & Cohn n 23 above at 56.

62 Henckaerts & Doswald-Beck *Customary international humanitarian law* (volume 1: rules) (2005) at rule 136.

63 *Id* at rule 137.

64 *Prosecutor v Norman* Decision on preliminary motion based on lack of jurisdiction: child recruitment (SCSL–2004–14–AR72(E)) (31 May 2004) pars 44–45; UN n 44 above at 7; Rosen 'Social change and the legal construction of child soldier recruitment in the special court for Sierra Leone' (2010) 1/2 *The Institute for the African Child* at 50.

65 Unless the state adopts the monist approach to international law, in which further domestic law is not required for international treaty obligations to be applicable to individuals in the state's jurisdiction.

worrying that only twenty states have domestic legislation in place to criminalise the recruitment of child soldiers.[66] Sadly, this suggests that those engaged in hostilities in international armed conflicts, will continue to grapple with the dilemma of assessing combatant status and making targeting decisions when faced with child soldiers.

THE COMBATANT STATUS OF UNDER-AGED CHILD SOLDIERS RECRUITED INTO NON-STATE-ARMED GROUPS IN INTERNATIONAL ARMED CONFLICTS[67]

Military commanders are expected to assess the combatant or civilian status of actors in the theatre of armed conflict, and, on the basis of their assessment, to make targeting decisions. What is already a demanding task, is made all the more challenging when military commanders are faced with defending themselves and those in their care, against ten-year-old children concealing their weapons whilst in civilian dress.

It is safe to say, given the extensive legal authority already discussed, that a child under fifteen years of age, who is recruited to participate in hostilities, would necessarily have been unlawfully recruited in terms of the existing treaty and customary IHL. While the unlawfulness of the recruitment might result in the prosecution of their recruiters, it does not preclude them from enjoying combatant status provided they can meet the IHL criteria for combatant status. As Rogers explains, despite the fact that the 'recruitment of children might be a breach of the law of war, the rules on combatant status apply equally to adults and children … it is only on capture that special rules for their treatment apply to children'.[68]

Traditional IHL has maintained that if an individual can qualify as a member of the 'armed forces' as defined in AP I article 43(1), he acquires the authorisation to participate in hostilities, which is reserved solely for combatants.[69] Combatant status brings with it the benefit of immunity

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66 Australia; Azerbaijan; Bangladesh; Belarus; Canada; Colombia; Congo; Georgia; Germany; Ireland; Jordan; Malawi; Malaysia; Netherlands; New Zealand; Norway; Philippines; Spain; Ukraine; and the United Kingdom. See also the draft legislation of Argentina; Burundi and Trinidad and Tobago, see Henckaerts & Doswald-Beck n 62 above at 484. Notably absent are the African states, which the persistent violators make their hunting ground for prospective child soldiers, see Rosen n 27 above at 98.

67 For a fuller analysis on the issue of combatant status in so far as child soldiers are concerned, see Bosch n 24 above.

68 Rogers 'Unequal combat and the law of war' (2004) 7 *Yearbook of International Humanitarian Law* 3 at 17.

69 Ipsen n 25 above at 66–67.

from prosecution, for 'participating in hostilities',[70] but it also comes with the reality that as a combatant one constitutes a legitimate military target.[71] Some have argued that an under-aged child soldier can never be afforded combatant status.[72] However, as Ipsen correctly points out, AP I article 77 affords captured child soldiers POW status, and that this can only occur 'if they have previously attained the primary status of combatants by being unlawfully recruited into the armed forces of one of the parties to the conflict'.[73] This confirms that in principle there is no obstacle to awarding children combatant status, even though their recruiters will be found to be in violation of IHL, and could face prosecution for involving under-aged children in hostilities.

Where an individual does not fulfil the requirements for membership of the armed forces, he will by default be classified as a civilian.[74] While civilians enjoy immunity from attack, this protection is contingent upon their not participating directly in the hostilities.[75] Civilians who participate directly in hostilities, do so without authorisation and consequently might face criminal prosecution for their actions.[76] This begs the question then – is it possible for these under-aged soldiers, who are recruited into non-state-armed groups, to acquire full combatant status with the attendant privileges? Or do they remain classified as civilians (albeit participating directly in hostilities without authorisation.

Unreachable combatant status

In the rare instances where IHL does address the question of children participating in hostilities, we see that it focuses on children who are 'enrolled in the armed forces' (meaning the states' armed forces) or who take 'part in a mass uprising of the population (*levée en masse)*'.[77] Furthermore, in these two instances, it is argued that these child soldiers

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70 *Id* at 67. That is provided they comply with the laws and customs of war.

71 Dinstein *The conduct of hostilities under the law of international armed conflict* (2ed 2010) at 34.

72 Grover n 21 above at 53–65.

73 Ipsen n 25 above at 73.

74 AP I n 23 above at art 50(1).

75 Ipsen 'Combatants and non-combatants' in Fleck (ed) *The handbook of humanitarian law in armed conflict* (2008) at 107.

76 Dinstein n 71 above at 37; Goldman & Tittemore n 23 above at 4; Green *The contemporary law of armed conflict* (2ed 2001) at 347; AP I n 23 above at art 45.

77 Goodwin-Gill & Cohn n 23 above at 63; Dutli 'Captured child combatants' (1990) 278 *International Review of the Red Cross* available at: http://www.icrc.org/eng/resources/documents/misc/57jmea.htm (last accessed 16 October 2012).

'do in fact have combatant status and are *ipso facto* entitled to prisoner-of-war status if captured'.[78]

Now, another question which begs asking, is whether combatant privilege is also afforded to under-aged children, recruited into non-state armed groups? Initially GC III article 4A(2) set out six criteria[79] required of the members of these non-state armed groups, before they could be afforded primary combatant and secondary POW status.[80]
These are that they must:

- belong to an organised group;[81]
- belong to a party to the conflict;[82]
- be commanded by a person responsible for his subordinates;[83]
- the group must ensure that its members have a fixed, distinctive sign recognisable at a distance;[84]

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78 Goodwin-Gill & Cohn n 23 above at 63; Dutli n 77 above. Since the injunction contained in AP I n 23 above at art 77(2) (against recruiting children under fifteen years of age), is aimed at the state and not the child, 'children under fifteen years of age who, are recruited or are enrolled as volunteers in the armed forces, also have combatant status and will if captured have prisoner-of-war' status since there is no minimum age limit for awarding POW status', see Goldman & Tittemore n 23 above at 4.

79 If the members generally (*ie* as a collective) 'meet all 6 conditions all of the time then individual members who fail to observe any of the 4–6 [requirements] will not lose their privileged combatant or POW status upon capture', see Goldman & Tittemore n 23 above at 14.

80 Henckaerts & Doswald-Beck n 62 above at 15.

81 This requirement is normally characterised 'by discipline, hierarchy, responsibility and honour', see Pictet *ICRC commentary on GC III* (1960) at 58. Moreover this requirement, can be 'filled by the most rudimentary elements of military organisation', see Mallison & Mallison 'The juridical status of irregular combatants under the international humanitarian law of armed conflict' (1977) 9 *Case Western Journal of International Law* 39 at 50.

82 Put another way, they must fight on behalf of a state party that is engaged in an international armed conflict as per GC common art 2, as there is still a 'customary law proscription against individuals or groups engaging in "private warfare" against a state party involved in an armed conflict', see Goldman & Tittemore n 23 above at 12. 'Tacit authorisation for example by delivery of weapons to the irregulars, or a *de facto* relationship between the resistance organisation and the state is sufficient', see Goldman & Tittemore n 23 above at 12.

83 'The leader's qualifications or authority to lead are not prescribed, all that is required is that the leader must discipline his members who violate IHL, and as a leader he or she must bear ultimate responsibility for the actions taken on his or her orders', see Goldman & Tittemore n 23 above at 12.

84 Members of irregular armed groups need not wear traditional military dress: 'a helmet, headdress, cap, coat, shirt, badge, armlet, brassard or a coloured sign worn on the chest', provided it is worn constantly, in all circumstances and is 'visible during daylight and detectable at a distance by the naked eye' will suffice, see Goldman & Tittemore n 23 above at 13; US Department of the Army 'Field manual 27–10: the law of land warfare' at 27 par 64(b) available at: www.aschq.army.mil/gc/files/fm27-10.pdf (last accessed 16 October 2012); Pictet n 81 above at 60.

- the group must ensure that its members carry their arms openly; and
- the group must ensure that its members conduct their operations in accordance with the laws of war.[85]

In 1977, these stringent requirements were softened by AP I, which introduced a new definition of 'armed forces' that aimed to place all members of armed groups on an equal footing.[86] Subsequent to AP I, all those armed forces (be they state forces or non-state forces) 'fulfilling the conditions in Article 43 of Additional Protocol I are armed forces',[87] and entitled to combatant status. Article 43 (1) requires only that the individuals are 'under a command responsible to that Party for the conduct of its subordinates … subject to an internal disciplinary system, which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict'.

While the more relaxed definition of 'armed forces' has made it easier for non-state actors to qualify for combatant privilege, it still poses difficulties when a belligerent is faced with child soldiers. It is a very big ask for a child soldier to appreciate what is expected of him by AP I, and to comply with those expectations. Certainly, for a child under fifteen years of age, it is probably an impossible ask. Often children have been recruited precisely because they can so easily feign civilian status.[88] In order to take advantage of their civilian appearance, their recruiters often dress these child soldiers in civilian attire, wearing no distinctive emblem of the armed group. In a fundamental way these child soldiers are compromising their chances of satisfying the article 43(1) requirements for combatant status on a daily basis: they are failing to observe the minimum requirements of distinction which forms the foundation of IHL.

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85 Where these non-state armed groups are found directing attacks at the civilian population, 'causing disproportionate civilian casualties, or otherwise causing unnecessary suffering and destruction', they would lose their right to claim combatant status, see Goldman & Tittemore n 23 above at 14. This last requirement raises an interesting conundrum. Non-state armed groups who forcibly abduct children under fifteen years of age from civilian communities, to be trained as child soldiers, would be violating IHL and would consequently compromise any claim that the armed group would have to combatant status. The same could be said of those groups who enlist children under the age of fifteen, even if they maintain that the children joined voluntarily. Moreover, if the straight-eighteen ban ever crystallises into customary IHL, and is applicable in international armed conflicts, then it is plausible that the very act of enlisting child soldiers would compromise the entire group's claim to combatant status under GCIII, including the child's right to claim combatant status.

86 AP I n 23 above at art 43(1).

87 Henckaerts & Doswald-Beck n 62 above at 16.

88 'Coalition against child soldiers' n 2 above at 22; Brett & McCallin n 6 above at 95.

The particular difficulty facing under-aged combatants is that their youthfulness contradicts any attempts that they might be making to distinguish themselves from civilians. It is as if their age speaks louder than any distinguishing emblem (whatever that might be in the given circumstance), or the weapon that they carry. In short, in many instances, acquiring combatant status is simply out of the reach of the ten year-old child recruited into a non-state armed group.

Compromised civilian status

It is not surprising that an examination of IHL reveals that children are often immediately categorised as a subset of the group of those afforded civilian status, and protected against the effects of international armed conflicts by GC IV and AP I.[89] However, as with the special protections extended to any civilians, these are conditional upon them preserving their primarily civilian status. The full enjoyment of these privileges is necessarily restricted the moment the child elects to compromise his civilian status by participating directly in hostilities.[90] As Goodwin-Gill puts it, 'to conscript or recruit soldiers, of whatever age, is necessarily to change their status; to convert them from civilians … to fighters who can be personally attacked on that account alone'.[91] The legal consequence of a decision to participate in hostilities, can result in the loss of their 'inviolability as non-combatants', and can make child soldiers a legitimate military target.[92] The only way these child soldiers can preserve their

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89 GC IV 'contains numerous provisions benefiting or protecting children both as civilians and in their own right', see Goodwin-Gill & Cohn n 23 above at 121. 'Children shall be the object of special respect and shall be protected against any form of 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 reason' , see AP I art 77 opening paragraph. More especially, children have enjoyed preferential treatment in situations of armed conflict owing to their special developmental needs (this includes: 'free passage of assistance intended for children under fifteen), see GC IV n 23 above at art 23; requiring the occupying power to facilitate the good functioning of institutions for the care of children in occupied territory, see GC IV n 23 above at art 50(1); provision of food supplements to interned children, see GC IV n 23 above at art 81(3). Moreover, there are several provisions dealing with the protection of the family unit which afford special protections to children, see AP I n 23 above at arts 77(4) & 74, holding detained children in special facilities, see AP I n 23 above at art 77(4), and lastly the prohibition against imposing the death penalty for infringements committed by children, see AP I n 23 above at art 77(5).

90 Breen n 32 above at 73.

91 Goodwin-Gill & Cohn n 23 above at 70.

92 ICRC *Interpretive guide on the notion of direct participation in hostilities under IHL* May 2009 available at: http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 (last accessed 16 October 2012) (*Interpretive guide* at 12). A 'legitimate military target' is defined as any 'individuals whose death or disablement results in that weakening of the armed forces of the enemy which is the only legitimate aim in war', see 1968 Declaration of St Petersberg (1970) 1 *American Journal*

protected civilian status, is to ensure that their actions do not amount to unlawful direct participation in hostilities.

CHILD SOLDIERS AS CIVILIANS PARTICIPATING DIRECTLY IN HOSTILITIES

Civilian 'persons who are taking no part in the hostilities and whose weakness makes them incapable of contributing to the war potential of their country; … appear to be particularly deserving of protection'.[93] All 'civilians', be they minors or not, are protected against the effects of war and are prohibited from participating directly in hostilities.[94] However, IHL also states that the moment a civilian participates directly in hostilities; he loses his civilian immunity from targeting, and can be prosecuted for his unauthorised participation in hostilities.[95] It is only when child soldiers engage in these 'specific hostile acts',[96] which amount to direct participation in hostilities, that they compromise their otherwise presumptive civilian status, with its consequent 'protection against direct attack'.[97] Their direct participation in hostilities does not result in the loss of their primary civilian status.[98] However, as a consequence of their

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of International Law (Supplement 95–6 Eng). During such time as they persist in their unauthorised participation in hostilities, these child soldiers may be legitimately targeted and 'killing them within the context of combat is not murder', see Brough 'Combatant, non-combatant, criminal: the importance of distinction' (2004) 11 *Ethical Perspectives* 176 at 178.

93 Mann 'International law and the child soldier' (1987) 36 *International and Comparative Law Quarterly* 32–57 *at* 35.

94 Gasser n 26 above at 210; Quénivet & Shah-Davis n 26 above at 16. This is based on the 'fundamental principle of the laws of war that those who do not participate in the hostilities shall not be attacked', see Schmitt 'Deconstructing direct participation in hostilities: the constitutive elements' (2010) 42 *International Law and Politics* 697–739 at 715.

95 Ipsen n 25 above at 211.

96 Determining what activities amount to direct participation in hostilities is not dependant on one's 'status, function, or affiliation', see ICRC n 92 above at 10. Moreover the scope of what constitutes 'direct participation in hostilities' does not change whether it is carried out by civilians or members of the armed forces 'on a spontaneous, sporadic, or unorganised basis or as part of a continuous function assumed for an organised armed force or group belonging to a party to the conflict', see ICRC n 92 above at 10.

97 ICRC n 92 above at 12 & 70. According to the ICRC's study into the customary international law status of IHL, no 'official contrary practice was found', and on the whole, the principle that civilians lose their immunity from prosecution when they participate in hostilities, is seen as a 'valuable reaffirmation of an existing rule of customary international law', see Henckaerts & Doswald-Beck n 62 above at 23.

98 ICRC n 92 above at 70.

actions, they then become 'a legitimate target, though for only as long[99] as they take part in hostilities'.[100]

Although the phrase 'direct participation in hostilities' can be found in many IHL treaties,[101] up until 2009 there was no clear guidance on exactly what actions might amount to 'direct participation in hostilities'.[102] To this end, the ICRC undertook a study and consequently published an Interpretive Guide[103] to assist in determining when actions might amount to unlawful 'direct participation in hostilities'.[104] The Guide makes it clear that the guidance speaks only to the notion of 'direct participation in hostilities' in so far as it impacts on decisions regarding 'targeting and military attacks', and it does not propose to deal with issues of 'detention[105] or combatant immunity'.[106] It is in this vein that I have relied upon the Guide to assist in determining when the actions of a child soldier might expose them to direct targeting.

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99 The ICRC Commentary on AP I art 51(3) 'allows that this would include preparation for combat and the return from combat', but then adds 'once he ceases to participate, the civilian regains his right to the protection under this section … and he may no longer be attacked', see Jensen 'Direct participation in hostilities' in Banks (eds) *New battlefields old laws: critical debates on asymmetric warfare* (2011) at 2003–2012 (ebook version).

100 Jensen n 99 above at 1995–2003; ICRC n 92 above at 70. Since the 'loss is temporary', Melzer suggests that it is 'better described as a "suspension" of protection', see Melzer *Targeted killing in international law* (2009) at 347.

101 GC I–IV n 23 above at common art 3; AP I n 23 above at art 51(3).

102 ICRC n 92 above at 12 & 41. The ICRC's study into customary international law confirms that 'a precise definition of the term "direct participation in hostilities" does not exist', see Henckaerts & Doswald-Beck n 62 above at 22. However, the most commonly held opinion is that direct participation in hostilities refers to 'combat-related activities that would normally be undertaken only by members of the armed forces', see Rogers n 68 above at 19.

103 While not legally binding, it was hoped that the interpretive guide may be accepted 'as a secondary source of international law … analogous to writings of the "most highly qualified publicists"', see ICRC n 92 above at 10; Van der Toorn '"Direct participation in hostilities": a legal and practical evaluation of the ICRC guidance' (2009) available at: http://works.bepress.com/damien_van_der_toorn/1 (last accessed 16 October 2012) at 22.

104 The interpretive guide was not without its critics. For more on this issue see Schmitt n 94 above; Boothby '"And for such time as": the time dimensions to direct participation in hostilities' (2010) 42 *International Law and Politics* 741–768; Watkin 'Opportunity lost: organised armed groups and the ICRC "direct participation in hostilities" interpretive guide' (2010) 42 *International Law and Politics* at 641–695.

105 '[I]ts conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty', see Watkin n 104 above at 670.

106 Goodman & Jinks 'The ICRC interpretive guidance on the notion of direct participation in hostilities under international humanitarian law: an introduction to the forum' (2010) 42 *International Law and Politics* 637–640 at 638.

Specific hostile acts which amount to direct participation in hostilities on the part of civilians[107]

According to the ICRC Interpretive Guide, in order to qualify as direct participation in hostilities, 'a specific act must meet three cumulative criteria:[108]

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).[109]

I shall now examine each of these requirements.

The threshold of harm requirement

The first criterion, the 'threshold of harm' determination, would be satisfied if the actions of child soldiers were reasonably expected to result in the infliction of harm[110] of a specifically military nature,[111] or[112] of harm to a protected person or object.[113] In short, if a child soldier were found committing 'acts of violence against human and material enemy forces,' or causing 'physical or functional damage to military objects, operations

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107 It is important to remember that this rule is only intended to be applicable to those who qualify as civilians, and it is the means of determining when their actions result in the loss of their otherwise protected civilian immunity. As Boothby explains 'until the civilian in question again engages in a specific act of direct participation in hostilities, the use of force against him or her must comply with the standards of law enforcement or individual self-defence', see Boothby n 104 above at 755–756.

108 ICRC n 92 above at 46.

109 *Id* at 47.

110 The degree of harm includes 'not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict', see ICRC n 92 above at 47.

111 *Ibid*. The term 'military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict'.

112 From a cursory examination of the criteria, it is apparent that the test is framed in the alternative 'that is, the harm contemplated may either adversely affect the enemy or harm protected persons or objects', see Schmitt n 94 above at 713.

113 ICRC n 92 above at 47.

or capacity';[114] this would satisfy the threshold of harm requirement necessary for a finding of 'direct participation in hostilities'.[115] Moreover, any actions on the part of child soldiers which sabotage military capacity, or restrict military 'deployments, logistics and communications',[116] would also satisfy the threshold of harm criterion. Similarly, exercising any form of control over 'military personnel, objects and territory to the detriment of the adversary' also satisfies the required level of harm.[117]

Even when no military harm results, the actions of child soldiers might still constitute direct participation in hostilities when child soldiers attack,[118] and inflict 'death, injury or destruction' upon protected persons or objects[119] (such as 'civilians and civilian objects').[120] In both instances (military harm or harm to protected persons), all that is required is the 'objective likelihood[121] that the act will result in such harm', and not necessarily the actual 'materialisation of harm'.[122]

During the drafting of the Interpretive Guide, experts were able to agree on a myriad of activities which they felt satisfied either the military harm requirement, or the requirement of harm in the form of death or destruction directed at protected persons.[123] If we look at the activities

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114 *Id* at 48.

115 ICRC n 92 above at 47.

116 *Id* at 48.

117 *Ibid*.

118 The interpretive guide relies on the definition of attack in AP I art 49, which 'does not specify the target, but the *belligerent nexus* of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities', see Schmitt n 94 above at 723. Legal precedence for this position can be found in the jurisprudence emerging from the International Criminal Tribunal for the former Yugoslavia (ICTY), where it was concluded that 'sniping attacks against civilians and bombardment of civilian villages or urban residential areas' constitutes an 'attack' in the IHL sense, see Schmitt n 94 above at 723.

119 ICRC n 92 above at 47.

120 *Id* at 49; Melzer 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities' (2010) 42 *International Law and Politics* at 862.

121 All that is required is 'harm which may reasonably be expected to result from an act in the prevailing circumstances', see ICRC n 92 above at 47.

122 *Ibid*. Schmitt n 94 above at 724 concedes that this is a sensible requirement, since it would be 'absurd to suggest that a civilian shooting at a combatant, but missing, would not be directly participating because no harm resulted'.

123 'Acts of violence against human and material enemy forces'; causing 'physical or functional damage to military objects, operations or capacity'; 'sabotaging military capacity and operations'; 'restricting or disturbing military deployments, logistics and communications'; exercising any form of control or denying the military use of 'military personnel, objects and territory to the detriment of the adversary'; 'sabotage or other unarmed activities qualify, if they restrict or disturb logistics or communications of an

which child soldiers are reportedly[124] carrying out: fighting; scouting; spying;[125] acting as couriers and porters;[126] transporting detonators; cooking;[127] participating in sabotage activities; clearing and laying landmines; acting as decoys or human shields;[128] and assisting at military checkpoints and providing logistical support – some of these activities feature in the prohibited list of 'specific hostile acts' which satisfy the threshold of harm requirement for direct participation in hostilities.

Certainly, participating in sabotage activities; relaying tactical targeting information; laying or clearing the oppositions' landmines; and acting as human shields – would certainly rise to the threshold of harm required under the first criterion. Furthermore, child soldiers are often used to 'restrict military deployments' on the basis of the IHL principle of distinction and the perception that they are protected civilians. According to the ICRC, 'where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cross the threshold of harm required for a qualification as direct participation'.[129] In a survey conducted into the activities carried out by child soldiers, it was revealed that ninety-one per cent of these child soldiers had seen active combat.[130] This alone, however, is not sufficient to arrive at a determination of direct participation in hostilities – the action must be linked to the resulting

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opposing party to the conflict'; 'clearing mines placed by the opposition', 'guarding captured military personnel to prevent them being forcibly liberated'; 'wiretapping the adversary's high command or transmitting tactical targeting information for an attack'; 'violent acts specifically directed against civilians or civilian objects, such as sniper attacks or the bombardment of civilian residential areas, satisfy this requirement', see ICRC n 92 above at 47–49. Schmitt n 94 above at 715 adds electronic interference and exploitation or attacks on 'military computer networks' to the ICRC's list, while Melzer n 120 above at 859 adds 'building defensive positions at a military base certain to be attacked' and 'repairing a battle-damaged runway at a forward airfield so it can be used to launch aircraft'.

124 UNICEF n 21 above at 3; 'Coalition against child soldiers' n 2 above at 22; UN n 8 above.

125 'Coalition against child soldiers' n 2 above at 22. According to Brett & McCallin n 6 above at 95, 'many of the case studies refer to a special preference for using children as look outs, messengers and for intelligence work'.

126 It is not uncommon for children to be, for example, used to transport contraband items through checkpoints where they are less likely to be searched, see the 'Coalition against child soldiers' n 2 above at 22.

127 Udombana n 2 above at 61.

128 Feigning protected civilian status to shield military targets from attack.

129 ICRC n 92 above at 56.

130 Singer n 2 above at 77.

harm/benefit so as to satisfy the direct causation requirement, and lastly there must be a *belligerent nexus*.[131]

The direct causation requirement

The second leg of the test for direct participation in hostilities (that of direct causation), was formulated to exclude 'general war effort'[132] and activities aimed at sustaining war,[133] which would amount to direct participation in hostilities, were it not for the direct causation requirement of the test.[134] While these activities are indispensable to the war effort, which in effect does harm the adversary, the concern raised during the drafting of the ICRC's Interpretive Guide, was that these functions are frequently carried out by the protected civilian population.

In order to prevent any of these 'supportive functions' amounting to direct participation in hostilities, the direct causation test requires 'a sufficiently close causal relation between the act and the resulting harm', for it to amount to direct participation in hostilities.[135] In other words: the 'harm (which already satisfies the threshold enquiry) must be brought about in one causal step'.[136] Clearly excluded from the definition of 'acts, which

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131 ICRC n 92 above at 50.

132 *Id* at 53. This includes all activities 'objectively contributing to the military defeat of the adversary'. For example 'design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations'.

133 *Ibid*. As the ICRC interpretive guide n 92 above at 52 points out: 'both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities, in fact … some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause the required harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm. 'War sustaining activities' reach beyond general war effort to include 'political, economic or media activities supporting the general war effort', for example 'political propaganda, financial transactions, production of agricultural or non-military industrial goods', providing 'finances, food and shelter to the armed forces and producing weapons and ammunition'.

134 During the expert meetings, emphasis was placed on the idea that direct participation in hostilities is: 'neither synonymous with 'involvement in' or 'contribution to' hostilities, nor with 'preparing' or 'enabling' someone else to directly participate in hostilities, but essentially means that an individual is personally 'taking part in the ongoing exercise of harming the enemy' and personally carrying out hostile acts which are 'part of' the hostilities, see ICRC n 92 above at 52 & 53.

135 *Ibid*.

136 Melzer n 120 above at 866. The act must not only be causally linked to the harm, but it must also cause the harm directly. For example 'the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal

amount to direct participation in hostilities', are activities that only indirectly cause harm; and mere 'geographic or temporal proximity',[137] which on their own are insufficient without this direct causation.[138] Having said that, the drafters of the Interpretive Guidelines wanted to include under the banner of 'direct participation', those acts which are part of a tactical operation, and aimed at causing harm. The ICRC interpretive Guide recognises that in the case of collective operations, the resulting harm does not have to be directly caused (*ie* in one causal step) by each contributing person individually, but only by the collective operation as a whole.[139] In these instances the requirement of direct causation would still be fulfilled, and the civilians would lose their immunity from attack, where their 'act constitutes an integral part of a concrete and coordinated tactical (or collective) operation that directly causes such harm'.[140]

In short, child soldiers will fall foul of the second leg of the test for unlawful direct participation in hostilities, if their actions (either alone or as part of a coordinated military operation) may 'reasonably be expected to directly – in one causal step – cause harm that reaches the required threshold'.[141] According to the ICRC's Interpretive Guide, there are a number of activities which will satisfy the direct causation aspect in the three-pronged analysis of direct participation in hostilities.[142]

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chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly', see ICRC n 92 above at 54 & 55.

137 ICRC n 92 above at 54 & 55.

138 Watkin n 104 above 707 cites the following activities as insufficient to satisfy the direct causation test: 'civilians driving military transport vehicles'; 'participating in activities in support of the war or military effort'; 'selling goods to one of the parties to the conflict'; 'expressing sympathy for the cause of one of the parties to the conflict'; 'accompanying and supplying food to one of the parties to the conflict'; 'gathering and transmitting military information'; 'transporting arms and munitions'; 'providing supplies'. To this list Schmitt n 94 above at 708 & 710 adds: 'selling food or medicine to an unlawful combatant'; providing 'logistical, general support, including monetary aid'; 'distributing propaganda supporting those unlawful combatants'; 'working in canteens', and 'working in factories producing munitions'.

139 Melzer n 120 above at 865–6; ICRC n 92 above at 55.

140 ICRC n 92 above at 55; Kalshoven & Zegveld *Constraints on the waging of war: an introduction to international humanitarian law* (4ed 2011) at 102.

141 ICRC n 92 above at 58.

142 The ICRC's Interpretive guide n 92 above at 55 cites the following as instances which satisfy the direct causation requirement: 'a coordinated tactical operation that directly causes such harm'; 'the identification and marking of targets'; 'the analysis and transmission of tactical intelligence to attacking forces', and the 'instruction and assistance given to troops for the execution of a specific military operation'. Melzer n 120 above at 867 and Ricou-Heaton 'Civilians at war: re-examining the status of civilians accompanying the armed forces' (2005) 57 *Air Force Law Review* at 177–8 add to that list 'gathering tactical intelligence on the battlefield'. Watkin n 104 above at 707

Certainly participating in the following activities, often linked to child soldiers,[143] such as sabotage activities, laying landmines, spying which results in gathering and relaying tactical information to attacking forces, actual combat activities, transporting arms to the frontlines, and guarding functions, would rise to the threshold of harm required of the first criterion. In particular, the ICRC's Interpretive Guide warns that civilians (which include children) must be cautious that they do not divulge tactical information regarding combatants, or be used as lookouts.[144] Indeed, child soldiers used to scout information or act as spies, would be seen to satisfy the direct causation test.

The belligerent nexus requirement

The third and final leg of the test for direct participation, termed the '*belligerent nexus* test', requires that 'an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict, and to the detriment of another'.[145] In other words, 'in order 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'.[146]

The nexus is sometimes very difficult to assess, in that, during armed conflicts, gangsters can often engage in criminal activities, which are 'merely facilitated by the armed conflict', while not being 'designed to support one party to the conflict, by directly causing the required

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includes 'bearing, using or taking up arms'; 'taking part in military or hostile acts, activities, conduct or operations'; 'armed fighting or combat'; 'participating in attacks against enemy personnel, property or equipment'; transmitting military information for immediate use'; 'transporting weapons in proximity to combat operations'; 'serving as guards, intelligence agents, lookouts, or observers on behalf of military force'; and 'civilians manning an antiaircraft gun engaging in sabotage of military installations'. Ricou-Heaton *id* at 177–8 adds 'performing mission-essential work at a military base' and 'providing logistical support' to the list. Furthermore, Schmitt n 94 above at 708, cites 'a person who collects intelligence on the army'; 'a person who transports unlawful combatants to or from the place where the hostilities are taking place'; 'a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may'; 'delivering ammunition to combatants'; 'a person who gathers military intelligence in enemy-controlled territory'; 'conducting attacks'; 'capturing combatants or their equipment', and 'sabotaging lines of communication.

143 UNICEF n 21 above at 3; 'Coalition against child soldiers' n 2 above at 22; UN n 8 above.

144 Watkin n 104 above at 707.

145 Melzer n 120 above at 872; ICRC n 92 above at 64.

146 ICRC n 92 above at 64; Kalshoven & Zegveld n 140 above at 102.

threshold of harm to another party'.[147] As Rogers points out, in 'the case of children throwing petrol bombs or stones at enemy military patrols', members of the patrol will have to assess carefully whether it is merely 'criminal activity', or whether the children have forfeited their 'civilian immunity' – thereby entitling the military to 'use necessary force in self-defence'.[148]

As recruits of non-state-armed groups, these child soldiers will most often be inflicting harm in support of the non-state-armed group that recruited them, to the detriment of the opposing force (be it a state force or another non-state group).[149] It is important that the harmful action is 'in some way connected to the armed conflict',[150] or, as Melzer puts it, the actions are an 'integral part of armed confrontations'.[151] However, the Guidelines go on to provide that if child soldiers are found causing harm in: '(a) individual self-defence or defence of others; (b) in exercising power or authority over persons or territory; (c) as part of civil unrest against such authority; or (d) during inter-civilian violence, these acts lack the *belligerent nexus* required for a qualification as direct participation in hostilities',[152] and must be dealt with by means of the regular law-enforcement mechanisms.[153]

Also important to questions involving the participation of children in hostilities, is the understanding that 'the *belligerent nexus* is generally not influenced by factors such as personal distress or preferences, or by the

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147 ICRC n 92 above at 63 & 64; Melzer n 120 above at 873.

148 Rogers n 68 above at 19.

149 Solis *The law of armed conflict: international humanitarian law in war* (2010) at 204–205 cites the following as examples of activities which satisfy the *belligerent nexus* test: 'preparatory collection of tactical intelligence'; 'the transport of personnel'; 'the transport and positioning of weapons and equipment'; and 'the loading of explosives in a suicide vehicle'.

150 For example, a 'prison guard may kill a prisoner for purely private reasons' without his actions amounting to direct participation in hostilities, but were he to engage in 'a practice of killing prisoners of a particular ethnic group during an ethnic conflict [that] would meet the standard', see Schmitt n 94 above at 723.

151 Melzer n 120 above at 861.

152 ICRC n 92 above at 64. 'For example, although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another. If individual self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimising a previously unlawful attack. Therefore, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities', see ICRC n 92 above at 61,

153 Melzer n 120 above at 873.

mental ability or willingness of persons to assume responsibility for their conduct'.[154] Consequently, according to the ICRC's Interpretive Guide, 'even children below the lawful recruitment age may lose protection against direct attack'.[155] In Schmitt's words, 'the question is not whether the participants wanted (*ie* had subjective intent) to harm the enemy, but instead whether their actions were of a nature to do so,' wherefore even 'civilians impressed into fighting or children under the age of fifteen can be treated as direct participants even though their participation is, as a matter of fact or law, involuntary'.[156] Having said that, an element in the *belligerent nexus* requirement is an appreciation that 'when civilians are totally unaware of the role they are playing in the conduct of hostilities',[157] or when they are completely deprived of their physical freedom of action',[158] the individual 'remain[s] protected against direct attack despite the *belligerent nexus* of the military operation in which they are being instrumentalised'.[159] This is because they cannot be said to be 'acting' in a meaningful and voluntary sense of the word.

The temporal scope of the loss of civilian immunity on the part of child soldiers: the 'for such time as' or the 'continuous combat function' test

Once it has been determined that a civilian is carrying out a specific hostile act which amounts to direct participation in hostilities, the next level of enquiry must address when the loss of civilian immunity starts and ends.[160] The notion that direct participation has a temporal limitation has a long history[161] in IHL, and the ICRC's study into the customary international law status of the phrase 'and for such time as', concluded that it was widely recognised as constituting customary international law.[162]

While the 'for such time' criterion might reflect customary international law, its practical implementation has not been without controversy. For

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154 ICRC n 92 above 59–60.
155 *Ibid*.
156 Melzer n 120 above at 869.
157 For example, a driver unaware that he is transporting a remote-controlled bomb, see ICRC n 92 above at 60.
158 For example, when involuntary human shields are physically coerced into providing cover in close combat, see ICRC n 92 above at 60.
159 *Id* at 60.
160 ICRC n 92 above at 65.
161 Boothby n 104 above at 774.
162 Melzer n 120 above at 885 & 886.

the most part, the controversy lies in that fact that when such a civilian is no longer engaged in direct participation (and consequently no longer poses a threat to the opposition), they regain their full civilian immunity[163] from direct attack. This gives rise to the so-called 'revolving door' of civilian protection.[164] Under the ICRC's Interpretive Guide, the scope of the 'for such time' window will include 'measures preparatory to the execution of a specific act … as well as the deployment to and the return from the location of its execution'.[165] This was done in order to take account of 'the collective nature and complexity of contemporary military operations', where some activities only result in harm 'in conjunction with other acts'.[166]

The ICRC Interpretive Guide justifies the revolving door position as necessary in order to protect the civilian population from 'erroneous or arbitrary attack'[167] at times when they do not constitute 'a military threat'.[168] That said, it is worth noting that even when they regain full civilian immunity from attack, these civilians may nevertheless still face 'prosecution for violations of domestic and international law they may have committed'.[169]

There is, however, always the potential for the 'revolving door of protection' to be abused by non-state actors,[170] giving these 'farmers by day and fighters by night … a significant operational advantage'[171] and 'endangering innocent civilians'.[172] In response to this concern, the Interpretive Guide mandates that the temporary nature of the suspension of a civilian's immunity from attack is only afforded civilians who participate in hostilities on a 'spontaneous, unorganised or sporadic basis'.[173] As soon as a civilian is found to be participating in hostilities in

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163 'Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct', see ICRC n 92 above at 71.

164 *Id* at 70.

165 ICRC n 92 above at 65.

166 Melzer n 120 above at 882.

167 Boothby n 104 above at 757; Melzer n 120 above at 886.

168 Jensen n 99 above at 2235–41.

169 ICRC n 92 above at 83. The mere fact that they participated in hostilities without the requisite 'combatant privileges', exposes them to potential prosecution even if during their participation they observed the laws of war regarding the means and methods of warfare, see Melzer n 100 above at 329.

170 Van der Toorn n 103 above at 45.

171 *Id* at 19; Rogers n 68 above at 19.

172 Van der Toorn n 103 above at 19.

173 ICRC n 92 above at 71.

a more permanent and organised manner, he is treated as a member of an organised armed group. At the Expert Meeting, which gave rise to the ICRC's Interpretive Guide, 'the distinction between civilians and members of organised armed groups … was generally agreed to by participants in the expert process'.[174] Accordingly, the actions of 'members of organised armed groups belonging to a non-state party to an armed conflict', are not afforded the same protection as the spontaneous and unorganised acts of participation by civilians.[175] While this category of participant also loses immunity from direct attack, in the case of a civilian, they however 'cease to be civilians[176] … for as long as they assume their continuous combat function',[177] and for the duration of their membership of the group.[178] In other words, the 'revolving door' of protection operates on a basis of membership,[179] and the individual once again becomes a protected civilian only once his membership in the group has terminated.

Those engaging in continuous combat functions, cease to be civilians and lose their civilian immunity against attack, once it is clear that they have been part of a continuous combative matter.[180] The 'functional membership' focus of the provision allows for the fact that not all of the members of such organised armed groups can be targeted. Targeting is limited to 'those serving in a continuous combat function'.[181] This functional membership 'requires a lasting integration[182] into the armed group',[183] and 'includes those who have repeatedly directly participated in hostilities in support of an organised armed group in circumstances indicating that such conduct constitutes a continuous function rather than

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174 Fenrick 'ICRC guidance on direct participation in hostilities' (2009) 12 *Yearbook of International Humanitarian Law* at 289.

175 ICRC n 92 above at 71.

176 Melzer n 100 above at 337.

177 ICRC n 92 above at 70. The term 'continuous combat function' was conceived at the expert discussions, which gave rise to the ICRC's interpretive guide. Prior to this, the term was not 'found in treaty law', see Watkin n 104 above at 655.

178 ICRC n 92 above at 71; Melzer n 120 above at 883.

179 ICRC n 92 above at 72.

180 Melzer n 120 above at 837–838.

181 Jensen n 99 above at 2141–49.

182 Van der Toorn n 103 above at 28–29 proposed the following 'objectively verifiable indicia' of the necessary integration: 'regular physical association with other individuals affiliated with the group, acting under orders or the command of senior figures, and any other conduct that demonstrates they are seeking to advance the common purpose of the group'.

183 Van der Toorn n 103 above at 7.

a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation'.[184]

Those, who while affiliated with an organised armed group, fail to undertake a continuous combat function, are excluded[185] from the loss of protection on account of their failure to participate directly in hostilities. These 'members of an organised armed group who do not regularly perform combat duties continue to enjoy full civilian protection from attack unless they directly participate in hostilities'.[186]

In terms of the Interpretive Guide:

> once a member has affirmatively disengaged from a particular group, or has permanently changed from its military to its political wing,[187] he can no longer be regarded as assuming a continuous combat function and must be considered a civilian protected against attack unless and for such time as he directly participates in hostilities.[188]

As to how this disassociation from the group should be manifested, the Interpretive Guide states 'disengagement from an organised armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function'.[189] Accordingly, an assessment as to whether an individual has disengaged from an organised armed group 'must be made in good faith, and based on a reasonable assessment of the prevailing circumstances, presuming entitlement to civilian protection in case of doubt'.[190]

In short, we can conclude from an examination of the ICRC Guidelines, that the concept of 'direct participation' extends beyond active participation in combat and military activities to include many of the

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184 Jensen n 99 above at 2141–49.

185 Included in this exempted group are 'political and administrative personnel, as well as other persons not exercising a combat function', see Van der Toorn n 103 above at 7.

186 Schmitt n 94 above at 704.

187 However, Melzer n 98 above at 891 warns that 'a member of an organised armed group who changes his function within that group will remain a legitimate military target for as long as the current function at least partially involves his direct participation in hostilities'.

188 Melzer n 120 above at 891.

189 ICRC n 92 above at 72.

190 *Id* at 73.

direct support functions which child soldiers traditionally perform.[191] Taking cognisance of the ICRC's Guidelines on what amounts to direct participation in hostilities, it is apparent that many child soldiers will find themselves in breach of the prohibition on specific hostile acts which amount to civilian participation in hostilities. Moreover, as these child soldiers are recruited into full-time membership of organised armed groups, it is very possible that their performance of these specific prohibited hostile acts will amount to evidence of a continuous combat function. As a consequence of these two factors, these child soldiers will likely 'lose their entitlement to protection against direct attack'[192] which would normally apply to civilians. Therefore, those who perform 'a continuous combat function' will remain lawful targets 'even when they put down their weapons and walk home for lunch with their family',[193] and their loss of protection against direct attack endures for the duration of their membership and, while they 'assume their continuous combat function'.[194]

It is interesting to note that in a bid to increase the courts' prospects of prosecuting those found recruiting child soldiers (under fifteen years of age), the drafters of the Rome Statute adopted a much broader interpretation of 'what acts would amount to direct participation of children in hostilities'.[195] According to the *travaux préparatoires* of the Rome Statute, when children 'active[ly] participat[e] in military activities linked to combat such as scouting, spying, sabotage, and [are used as] as decoys, couriers, or at military checkpoints' or the 'use of children in "direct" support functions such as carrying supplies to the front line or activities at the front line itself'[196] will be sufficient to justify prosecuting their recruiters under articles 8(b)(xxvi) and 8(e)(vii). Clearly, the purpose of this extended interpretation was to make it easier to prosecute the recruiters, and this interpretation should not be used to deny children under fifteen years of age their civilian immunity from attack. A similarly

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191 UNICEF n 21 above at 14. Alston 'Study on targeted killings' *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, A/HRC/14/24/Add 6 (28 May 2010) par 65. In regard to this point I wish to acknowledge Gus Waschfort of the University of Pretoria for his insightful comments on earlier drafts of this piece.

192 ICRC n 92 above at 73.

193 Solis n 149 above at 206.

194 ICRC n 92 above at 73 & 83.

195 UNICEF n 21 above at 14.

196 'It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation', see Henckaerts & Doswald-Beck n 62 above at 487; 'Coalition against child soldiers' n 2 above at 375.

'liberal' interpretation was adopted by the SCSL in *Prosecutor v Brima*,[197] where it was concluded that 'any labour or support that gives effect to or helps maintain operations in a conflict constitutes active participation'. Hence 'carrying loads for the fighting faction, finding or acquiring … ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are examples of active participation as much as fighting and combat'.[198] The trial chamber in the Lubanga case even went so far as to state that the 'offence of using children under the age of fifteen to participate actively in hostilities … includes a wide range of activities, from those children on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants'.[199] Moreover, the Chamber concluded that 'the 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'.[200] This means that 'although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them' if his support exposed him to consequent risk.[201]

I would argue that in order to determine the loss of civilian status for under-aged child soldiers, it would be in the best interests of the child and in keeping with IHL to apply the more conservative interpretation proposed by the ICRC Guidelines, rather than the more far-reaching definition set out in the Rome Statute. I would argue that it is justifiable to conclude that under-aged child soldiers/civilians, carrying out activities which satisfy the three-pronged test for direct participation in hostilities, will lose their civilian immunity from attack. The ICRC Guidelines make it clear that no special allowances are made for children, and 'even children below the lawful recruitment age may lose protection against direct attack'[202] when they participate in hostilities. This single statement by the ICRC in its Interpretive Guide, published in 2009, puts pay to the argument that Grover proposed in 2008 – that unlawfully recruited child soldiers would always maintain their civilian inviolability in situations of armed conflict.

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197 *Armed Forces Revolutionary Council* trial chamber II judgment SCSL–2004–16–T (20 June 2007).
198 *Prosecutor v Thomas Lubanga Dyilo* n 12 above at par 624.
199 *Id* at par 24.
200 *Id* at par 24.
201 *Ibid*.
202 ICRC n 92 above at 50.

This viewpoint, that children be treated like any other participants in IHL, supported by the ICRC, applies irrespective of whether the particular child soldier is obviously under fifteen years of age – and therefore in terms of IHL below the lawful recruitment age and prohibited from lawfully participating in hostilities. Moreover, there doesn't appear to be any relaxation of the principle to account for the fact that some of these child soldiers may have been conscripted against their will. Obviously, evidence of under-age or forcible conscription will aggravate a case for prosecuting their recruiters, and will be also be a compelling consideration in their defence or mitigation of sentence where they were captured and prosecuted for war crimes or unauthorised participation in hostilities.

Opposition forces faced with under-aged child 'soldiers' will have to conduct an on-the-spot analysis to ascertain whether the child's specific activities amount to direct participation in hostilities, thereby compromising their presumptive civilian status and render them potential and legitimate military targets for so long as they remain associated with the group's continuous combat functions. Sadly, in conflicts where under-aged child soldiers are used, the net effect is to increase 'risk for other children in the conflict zone' who are viewed with suspicion, and subjected to interrogation and harassment.[203]

PROSECUTING UNDER-AGE CHILD SOLDIERS RECRUITED INTO NON-STATE-ARMED GROUPS

The topic of prosecuting children captured while participating directly in hostilities (without the requisite authorisation) is not often dealt with in academic writing. Instead, the spotlight falls predominantly on the criminal prosecution of the war lords indicted for recruiting these under-aged child soldiers.[204] There is value in publicising the indictments and criminal trials of those like Taylor, Lubanga, Ntaganda, Kony, Katanga and Chui, as a warning to others engaging in these prohibited activities. That alone, however, is not the only side of the story, regardless of how uncomfortable it may be to entertain the notion of putting a child on trial who may have committed some of his crimes when he were nine years old.

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[203] Singer n 2 above at 103.

[204] For more on this aspect of child soldiering, see Bosch & Easthorpe 'Africa's toy soldiers, non-state armed groups and "voluntary" recruitment: anything but child's play' (2012) 21/2 *African Security Review* June 4–19.

Criminal prosecution

It is a fundamental principle of IHL that civilians who participate in hostilities without authorisation, can face criminal prosecution.[205] The spectre of criminal prosecution also awaits the captured combatant who is found in breach of the laws of war (in particular for feigning civilian status).[206] If we are to apply these two principles to the reality of child soldiers – (whether they have achieved combatant status or whether they remain classified as civilians), they could face the prospects of being criminally prosecuted for participating in hostilities or their feigning protected civilian status. That said, the drafters of the AP I attempted to soften the application of this general IHL consequence for unauthorised participation in hostilities, in instances where children under fifteen years of age have been recruited to participate in hostilities and are captured. AP I article 77(3) states:

> if, in exceptional cases, despite the provisions in 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.[207]

In essence these special protections[208] include the entitlement to be held in 'separate quarters' from adult detainees,[209] and not to be subjected to the death penalty in respect of any offence committed before they turn eighteen.[210] What we glean from this provision, is that IHL endorses the position that it is entirely possible that under-age child soldiers can legally face prosecution (albeit with the guarantee that they will not face the death penalty for their crimes). Moreover, neither the UNCRC nor the OP-AC (the two international treaties dealing specifically with the rights of children in conflict situations), contain a provision dictating 'a universal minimum age of criminal culpability for committing conflict-related international crimes'.[211] Neither does either of these treaties contain directives on when child soldiers should be 'prosecuted for having

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205 Solis n 149 above at 207.
206 *Ibid*.
207 Ipsen n 25 above at 74; Henckaerts & Doswald-Beck n 62 above at 487.
208 AP I art 77(3) flowed from the ICRC's investigation into all the IHL principles which grant children special protections, but nowhere did the ICRC observe state practice revoking those special protections in the event that children are found taking part in hostilities, see Henckaerts & Doswald-Beck n 62 above at 487.
209 AP I n 23 above at art 77(4).
210 AP I n 23 above at art 77(5); Ipsen n 25 above at 87.
211 Grover n 21 above at 55.

committed conflict-related international crimes, or having been part of any armed groups that did so'.[212]

For the most part, states set the minimum age for full criminal responsibility in their domestic legislation at eighteen years.[213] In light of this virtually universal position, Grover argues that children under eighteen years of age who are involved in armed conflicts, should enjoy a blanket immunity from criminal prosecution.[214] He argues that this same principle of guiltlessness should apply to child soldiers who were 'compulsorily recruited or recruited by non-state armed forces (as both also constitute breaches of international law)'.[215] Certainly, any practice that favours the non-prosecution of child soldiers younger than fifteen years of age, endorses the IHL aim of shielding children from the horrors of war. Dutli argues that the rationale for this special allowance made for children under fifteen years of age, stems from the fact that 'a child combatant under age fifteen who is captured cannot be sentenced for having borne arms' as the breach of AP I article 77(2) lies at the door of the recruiting party, not on the shoulders of the under-aged child.[216] As Grover argues, it would be unjust to prosecute children under fifteen years of age for their participation in hostilities, given that IHL prohibits the recruitment of under-fifteens, and as civilians the state is obliged to protect these children against involvement in the conflict.[217]

In examining recent judicial practice, we find that neither the International Criminal Tribunal for the former Yugoslavia (ICTY), nor the International Criminal Tribunal for Rwanda (ICTR), prosecuted any individual under eighteen years of age, despite the fact that there was no provision precluding the prosecution of under eighteens in their statutes. The statute of the SCSL allowed for the prosecution of child soldiers over fifteen years of age. However, the prosecution for the SCSL 'announced that child soldiers would not be prosecuted, as they were not legally liable for acts committed during the conflict'.[218] Instead, these types of case were referred to the Sierra Leone Truth and Reconciliation Commission (TRC), because it was felt that a rehabilitative focus was more in tune with the

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212 *Ibid*.
213 UNICEF n 21 above.
214 Grover n 21 above at 57.
215 *Ibid*.
216 Dutli n 77 above.
217 Grover n 21 above at 57.
218 Crane 'Prosecuting children in times of conflict: the West African experience' (2008) 15/3 *Human Rights Brief* at 15.

prevailing international legal norm.[219] This 'rehabilitative' focus is favoured in the Paris Principles which maintain that 'children accused of crimes under international law, allegedly committed while they were associated with armed forces or armed groups, should be considered primarily as victims of offences against international law, not only as perpetrators',[220] and 'they must be treated in accordance with international juvenile justice standards and norms and within a framework of restorative justice and social reintegration'.[221] The ICC, for its part, has specifically limited its jurisdictional reach to those over eighteen years of age, as 'those who are universally accepted as not being children under international law'.[222]

No international criminal tribunal established under the laws of war, from Nuremberg forward, has prosecuted a former child soldier for violating the laws of war.[223] The existing jurisprudence from the ICTY, ICTR, SCSL and ICC, suggests 'that children under eighteen years of age can expect to avoid criminal responsibility before international tribunals for grave violations of international humanitarian law'.[224] Moodrick-Even Khen argues that this trend is 'owing to the belief that the factors which influence a child's participation in hostilities mitigate the requisite *mens rea* necessary for criminal culpability'.[225] The ICC and the SCSL have both insisted that children under fifteen years of age are unable to opt out of the international law protection afforded them against recruitment.[226] In

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219 *Id* at 14.

220 UNICEF n 5 above at 76; Francioni & Ronzitti (eds) n 9 above at 267.

221 UNICEF n 5 above at 76.

222 Freeland 'Mere children or weapons of war – child soldiers and international law' (2008) 29 *University of La Verne Law Rev*iew at 51.

223 University of Toronto (Law Faculty) 'Omar Khadr as child soldier' available at: http://www.law.utoronto.ca/documents/Mackin/Khadr_ChildSoldier.pdf (last accessed 16 October 2012).

224 UNICEF n 5 above at 203 & 205.

225 Moodrick-Even Khen n 20 above at 3036–44.

226 In *Prosecutor v Fofana* Appeal chamber judgment SCSL–04–14–A (28 May 2008) par 140, it was stated that 'where a child under the age of fifteen years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence to those facing prosecution for unlawful enlistment'. See also Rosen n 27 above at 110. Coomaraswamy (the UN Secretary-General's Special Representative for children and armed conflict) '*Amicus curiae* submission in Lubanga trial' ICC–01/04–01/06–1229–AnxA 18–03–2008 1/10 CB T, available at: http://www.un.org/children/conflict/_documents/AmicuscuriaeICCLubanga.pdf (last accessed 16 October 2012) at par 10 notes that for those facing prosecution before the ICC under the Rome statute, 'the line between lawful recruitment and unlawful recruitment is drawn based solely on age'…'all "voluntary" acts or statements or other indications or interpretations of consent by children under the legal age for recruitment are legally irrelevant'. In *Prosecutor v Thomas Lubanga Dyilo* n 12 above at par 617, it

light of the circumstances in which child soldiers are frequently 'enlisted' into non-state-armed groups, to 'accept consent as a defence would be to negate the whole policy behind such prohibitions'.[227] In the words of Radhika Coomaraswamy, the UN Secretary-General's Special Representative for Children and Armed Conflict, 'leaders of armed groups could not hide behind the excuse of a child having joined their groups voluntarily',[228] and 'failure to refuse the voluntary enlistment of children to the armed force is thus a war crime'.[229]

Despite this historic leniency shown towards children under eighteen years of age caught up in conflict situations, there is no explicit IHL provision which would legally 'exclude penal proceedings in respect of serious breaches of international humanitarian law committed by children'.[230] Unfortunately this legal leniency has also made child soldiers the ideal type of combatant – their age allows them to feign protected civilian status, and they have little incentive to observe the laws of war if they are unlikely to face prosecution. Brett and McCallin argue that the 'greater suggestibility of children and the degree to which they can be normalised into violence means that child soldiers are more likely to commit atrocities then adults'.[231] Those fighting child soldiers can expect little respect for IHL from these children. Instead they should expect 'false surrenders, hiding among civilians, and POW executions'.[232] Singer reports that child soldiers often fail to observe the legal protections afforded *hors de combat*, and they have been known to target humanitarian workers and journalists.[233] In fact, Amnesty International argues that where child soldiers have been voluntarily recruited and satisfy the state's domestic requirements for criminal culpability, they should in fact face criminal prosecution for their unlawful actions. [234]

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was held that '[T]he consent of a child to his or her recruitment does not provide an accused with a valid defence'.

227 Coomaraswamy n 226 above at par 10.

228 Wakabi n 12 above; Coomaraswamy n 226 above at par 10.

229 Dinstein n 71 above at 158.

230 Cataldi & Briggs 'Child soldiers' *Crimes of War* available at: http://www.crimesofwar.org/a-z-guide/child-soldiers (last accessed 16 October 2012); Dutli n 77 above.

231 Brett & McCallin n 6 above at 25.

232 Singer n 2 above at 168.

233 *Id* at 102.

234 Grover n 21 above at 54.

Special protection for detained children

While child-rights advocates may disagree on whether to prosecute or not, there is generally agreement that in the event of such prosecutions, child soldiers 'should always be evaluated according to their age, and as a general rule educational measures, rather than penalties, [should] be decided on'.[235] There is no doubt that if children involved in military operations are captured, they must receive the special treatment and protection[236] appropriate to their age, meaning that such children should be 'treated with pity rather than detestation'.[237] Even if children take part in hostilities and fall foul of the IHL requirements for combatant status,[238] AP I article 75 sets out the basic minimum humanitarian guarantees and fair judicial procedures, to which they are entitled upon capture.[239] Despite these guarantees, in a number of countries (including Burundi, the DRC and Myanmar) child soldiers, some as young as nine years of age, have been arbitrarily detained, tortured and sentenced to death for participating in hostilities.[240]

CONCLUSION

At present, customary international law prohibits the recruitment of children under fifteen years of age, and this customary obligation binds non-state actors even without domestic legislation, in the case of both international and non-international armed conflicts. That said, there is not outright prohibition against a child becoming a combatant.

As a role player in the theatre of hostilities, the military commanders giving orders must determine the IHL status of these child soldiers. Children who are recruited into an 'armed force' as defined in IHL, are granted presumptive POW status upon capture and the right to have their POW status adjudicated on before a judicial tribunal.[241] However, while IHL does afford special protections to children involved in conflict situations, it does still require these young combatants to meet, at a minimum, the more relaxed criteria under AP I in order to ensure that they

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235 Cataldi & Briggs n 230 above; Dutli n 77 above.

236 IHL specifically precludes the imposition of the penalty on anyone under the age of eighteen at the time of the offences, see GC IV n 23 above at art 68; AP I n 23 above at art 77(5); Cataldi & Briggs n 230 above.

237 Udombana n 2 above at 76 & 77.

238 Ipsen n 25 above at 68.

239 AP I n 23 above at art 75; GC III n 23 above at arts 99–108; Ipsen n 25 above at 68.

240 'Coalition against child soldiers' n 2 above at 18.

241 AP I n 23 above at arts 45(1) and (2) and 43(2); Goldman & Tittemore n 23 above at 18.

do not forfeit their POW status for failing to distinguish themselves from the civilian population.

Where these child soldiers are recruited into a non-state armed group which does not satisfy the IHL requirements for an armed group, they are classified as civilians, albeit participating in hostilities. This is a very likely occurrence in light of the fact that one of the defining requirements of an 'armed force' is proof that they have distinguished themselves from the civilian population. When these non-state armed groups employ eight and nine-year-old children specifically so that their civilian appearance can be used so as to attack the opposition, they are clearly in breach of this requirement.

Once classified as 'civilians', these children are not authorised to participate directly in hostilities. In applying the ICRC Guidelines on what activities amount to 'direct participation', it is apparent that the criteria extend beyond active participation in combat and military activities, and include many of the direct support functions[242] which child soldiers traditionally carry out. Engaging in any of these prohibited functions will result in the child compromising his civilian immunity from attack. This unfortunate consequence will apply 'even [to] children below the lawful recruitment age',[243] and even in cases of involuntary recruitment. As civilians who have compromised their immunity from direct attack, these child soldiers may be legitimately targeted for so long as they participate directly in hostilities, and until they disassociate themselves from the group's continuous combative function.

If these child soldiers fall into enemy hands and it is discovered that their actions did fulfil the three-pronged test for direct participation in hostilities, they could face criminal prosecution for their unauthorised participation in hostilities. There is a pattern of historic leniency shown towards children under eighteen years of age who are caught up in conflict situations, in so far as their prosecution is concerned. However, the special treatment afforded[244] to children in armed conflicts, does not 'exclude penal proceedings in respect of serious breaches of international humanitarian law committed by children'.[245]

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242 UNICEF n 21 above at 14.
243 ICRC n 92 above at 50.
244 AP I n 23 above at art 77(3).
245 Cataldi & Briggs n 230 above; Dutli n 77 above.

The sad reality is that conflict is never in the best interests of the child. As the evidence before the ICC in the Lubanga case reveals:

> Some would cry for their mother when they were hungry. They would whine at night, and during the day they were playing games, children's games, even if they had their weapon next to them. So you would see that these children weren't even adolescents yet. Their voice hadn't yet broken, so they were children […] still.[246]

[246] *Prosecutor v Thomas Lubango Dyilo* n 12 above at par 681.