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# Re-imagining the scope of children's legal protection during armed conflicts under International Law

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## Abstract

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The debate on the issue of child soldiers in international law has been mainly framed around the narrow question of whether child soldiers should be prosecuted or deemed innocent victims. This question, while essential, marginalized several considerations related to the multidimensional and intersecting identities and roles of child soldiers. Few scholars have investigated and evidenced the major gaps related to the legal protection of child soldiers in international law. While recognizing the potential related to the analysis on child soldiers' criminal liability, this research proposes to focus on the examination of their vulnerabilities and to explore the legal foundations for the strengthening of their legal protection.

Thus, this project is not a mere recognition of child soldiers as innocent victims but a careful and extensive examination of several areas of Public International Law such as International Humanitarian Law, International Criminal Law and International Human Rights Law to justify the necessity to establish a stronger and exhaustive legal protection for child soldiers. Most importantly, this research illustrates the reason why child soldiers keep their status as children, despite their status or conduct during armed conflicts, and the ensuing consequences and impacts of such findings for the principle of distinction in International Humanitarian Law.

**Key words:** child soldiers, direct participation, active participation, combatants, special protection, principle of distinction.

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## Introduction

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Children are impacted in various ways and at multiple levels during armed conflicts: some are killed, maimed, abducted to become soldiers or sexually abused, whereas others are psychologically exploited.”<sup>1</sup> This Major Research Project (MRP) acknowledges that children are not only passive victims in armed conflicts, but that some of them can display “tactical agency to cope with the concrete, immediate conditions of their lives created by their violent military environment.”<sup>2</sup>

Nevertheless, the main focus of this paper will be on the vulnerabilities of child soldiers and on the need to improve their legal protection during armed conflicts. As Drumbl notes, while “it seems fundamentally unfounded to stereotype all child soldiers as depersonalized tools of atrocity or as weapons systems industrially committing crimes against humanity”, it can no longer be seriously disputed that “where there is armed conflict, invariably, there are child soldiers.”<sup>3</sup> The 2016 International Criminal Court (ICC) *Policy on Children* has recognized that “children are present, both in armed forces of states and in non-state armed groups.”<sup>4</sup>

Despite the impossibility of assessing with precision the exact number of children recruited or used by armed groups or armed forces, there is a consistent use of the figure of 300,000 child soldiers both by humanitarian organizations, researchers and by

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<sup>1</sup> Secretary-General, *Promotion and protection of the rights of children: impact of armed conflict on children*, GA, 51<sup>st</sup> session, 1996, A/51/306 at 4 [Graça Machel Report].

<sup>2</sup> Alcinda Honwana, *Child soldiers in Africa* (Philadelphia: University of Pennsylvania Press, 2006) at 71.

<sup>3</sup> Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York: Oxford University Press, 2012) at 85, 26.

<sup>4</sup> International Criminal Court, “Policy on Children” (November 2016), The office of the Prosecutor at 20, online: <[https://www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF)>.

academics as being the most authoritative and accurate number on child soldiers.<sup>5</sup> Armed groups or governmental forces often prefer recruiting or abducting children because they are easier to manipulate and to control than adults.<sup>6</sup> In his article entitled “Generic guidelines for the use of force against ‘child soldiers’ in peace operations”, Lieutenant Colonel Leandro highlights that “children eat less, drink less, are not paid, serve as pack animals, are able to cook, can collect wood without drawing attention”, and that they normally have no next of kin to worry about them and consequently are replaceable and disposable.”<sup>7</sup> Unsurprisingly, all these reasons make children extremely coveted in the eye of belligerents. The *Canadian Forces Joint Doctrine Note (Canadian Forces JDN)* highlights that in certain areas children “form the majority of forces.”<sup>8</sup>

In 2005, the United Nations’ Secretary-General identified six grave violations that are committed against children. These violations are entrenched in the main legal instruments in International Humanitarian Law (IHL), International Human Rights Law (IHRL), and International Criminal Law (ICL), and they are listed as follows<sup>9</sup>:

1. Recruitment and use of children
2. Killing or maiming of children
3. Sexual violence against children
4. Attacks against schools or hospitals
5. Abduction of children

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<sup>5</sup> Gus Waschefort, *International Law and Child Soldiers*, (Oxford: Hart publishing, 2015) at 26-27; Drumbl, *supra* note 3 at 27.

<sup>6</sup>*Ibid* at 47; *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, *Decision on the confirmation of charges against Dominic Ongwen* (23 March 2016), at para 142 (International Criminal Court, Pre-Trial Chamber II), online: ICC <[https://www.icc-cpi.int/courtrecords/CR2016\\_02331.PDF](https://www.icc-cpi.int/courtrecords/CR2016_02331.PDF)>. [Ongwen]

<sup>7</sup> Francisco José Bernardino da Silva Leandro, “Generic guidelines for the use of force against “child soldiers” in Peace Operations”, online: (2012) *Revista Militar* 2523, <<https://www.revistamilitar.pt/artigopdf/687>>.

<sup>8</sup> Canada, Minister of National Defence, *Canadian Forces Joint Doctrine Note*, 1<sup>st</sup> edition, (2017-01 Child Soldiers) at 6, <[http://dtic.mil/doctrine/notes/doctrine\\_notes.htm](http://dtic.mil/doctrine/notes/doctrine_notes.htm)> [Canadian Forces JDN].

<sup>9</sup> Office of the special Representative of the Secretary General for Children and Armed conflicts, *The six grave violations against children during armed conflict: the legal foundation*, Working paper n°1, October 2009 (updated November 2013) at 9, <[http://www.tonyhoffmanucsc.net/caw\\_readings/SixGraveViolations.pdf](http://www.tonyhoffmanucsc.net/caw_readings/SixGraveViolations.pdf)> [Working paper updated 2013].

6. Denial of humanitarian access.<sup>10</sup>

This MRP will focus on the first grave violation related to the prohibition against the recruitment or use of children under fifteen to participate in hostilities. The analysis around this violation will highlight a disconnect between the international discourse on the prohibition against the recruitment and use of child soldiers and the continuing practice of child soldiering. This MRP will stress some gaps that exist as to child soldiers' legal protection during armed conflicts under IHL and ICL, while pointing out to the potential contribution of IHRL and military guidelines in the design of a stronger legal framework on child soldiers.

Through a multidimensional analysis combining IHL, ICL and IHRL, this research project will present two major arguments. First, it will argue that children under fifteen years old enjoy a special status in international law that is visible both through the established legal framework on the prohibition of children's recruitment or use in hostilities and through their specific status during armed conflicts, particularly their 'special protection' under IHL. As it will be explained later, the special protection is an extended protective legal regime that applies to a specific category of the population deemed vulnerable during armed conflicts such as children under fifteen years and expectant mothers.<sup>11</sup>

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<sup>10</sup> *Ibid.*

<sup>11</sup> International Committee for the Red Cross, "special protection of women and children" (October 1985), online: <<https://www.icrc.org/eng/resources/documents/article/other/57jmj2.htm>>; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3, art 77(3) [AP I]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609, art 4(3) [AP II]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, arts 23, 24, 38(5), 50 (GCIV).

Second, this MRP will highlight that neither the terms ‘direct’ nor ‘active’ participation (used respectively by IHL and ICL) properly capture the status of child soldiers. This MRP will argue that child soldiers should neither be treated as regular combatants or as civilians who are unlawfully participating in hostilities (unlawful combatants). Rather, they should be considered as child victims whose participation to hostilities is neither based “on free will aimed at a certain result” or “a conscious act of engaging in conduct of a given nature.”<sup>12</sup> In other words, this paper will argue that children’s status during armed conflicts challenges the traditional IHL principle of distinction and requires a new legal framework to better protect them.

This MRP will be structured into three main parts. The first part will explain some basic and established principles in international law on children’s protection during armed conflicts. First, it will discuss the definition of a child soldier and will situate the blanket prohibition of children’s recruitment both in international law (hard law) and soft law. This section will emphasize the scope and extent of the prohibition to recruit or use children in hostilities and will conclude that such prohibition is not only widely entrenched in international law, but most importantly, it has crystallised into customary international law (CIL).

In the second part, this paper will lay out the underpinnings of children’s special protection in IHL and will emphasize that such protection applies to all children under fifteen years, regardless of their conduct or status in hostilities. To that extent, this MRP will distinguish between ‘direct’ and ‘active’ participation in IHL’s and ICL’s legal framework, while pointing out to inconsistencies and confusions in the understanding of

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<sup>12</sup> Leandro, *supra* note 7 at 3.

these terms. To explore these two notions, this project will explain and compare the respective definitions adopted by the International Committee for the Red Cross (ICRC) and the ICC. Then, a literature review will be conducted to compare the various perspectives adopted by scholars in order to contrast and challenge the ICRC's and the ICC's views on 'active' and 'direct' participation.

In the last part, this MRP will highlight the merits of a multidimensional framework on the understanding of the scope of children's protection during armed conflicts in international law. In doing so, the project will point out some key principles from military guidelines that armed groups and forces need to consider when there is a risk to encounter child soldiers on the battlefield. In this section, the MRP will mainly rely on the Canadian Forces Joint Doctrine (JDN). This section will also clarify that, although child soldiers may be targeted when they constitute a threat for opposing force, the use of force (lethal or non-lethal) against them should always be the last option.



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## Chapter 1: Uncovering children's special status during armed conflict in international law

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### 1. International legal framework on child soldiers

Initially designed as a mechanism to foster political relations between sovereign states, public international law did not question, prohibit or codify the phenomenon of child soldiering until 1977, despite the numerous evidence of such practice.<sup>13</sup> Waschefort points out that “there are many accounts in history, theology and mythology of children’s heroism in battle”, and that despite the substantial number of children who were engaged in hostilities during the Second World War, “the Geneva Conventions of 1949 did not prohibit the recruitment and participation of children in armed conflict.”<sup>14</sup> Therefore, in 1977, IHL became the first area of international law that addressed the issue of child soldiers through the first two *Protocols Additional to the Geneva Conventions* (AP I & II).<sup>15</sup>

#### 1.1 Lack of an authoritative and binding definition of a child soldier

The issue of child soldiers is multifaceted and has been treated from various angles by a plethora of actors. Waschefort notes that “at present there are at least eight international treaties prohibiting the use and recruitment of child soldiers”, and that “the obligations created by each of these treaties are different from one another.”<sup>16</sup> In addition to such diversity, he notes that “different states have ratified different combinations of these treaties, further complicating the assessment of the exact nature of the legal obligations to

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<sup>13</sup> Waschefort, *supra* note 5 at 1.

<sup>14</sup> *Ibid.*

<sup>15</sup> AP I, *supra* note 11; AP II, *supra* note 11.

<sup>16</sup> Waschefort, *supra* note 5 at 13

which a state may be subject vis-à-vis a specific child in a concrete case.”<sup>17</sup> For instance, AP I and II have prohibited the recruitment or use of children under fifteen years<sup>18</sup>, whereas the *Optional Protocol to the CRC* has raised the standard by prohibiting such practice for all children under eighteen years.<sup>19</sup> This lack of uniformity not only blurs states’ legal obligations towards child soldiers, but it also hampers the development of a comprehensive legal protection for children living in conflict zones.

In addition, despite its prohibition to recruit or use children in hostilities since 1977, international law has never been able to codify an authoritative definition of a child soldier.<sup>20</sup> Eisentrager asserts that “the lack of laws and regulations prohibiting child-soldiering may have been a contributing factor to the recruitment and use of children in armed conflict”, since “states have been very eager to secure their own interests, rather the interests of underage individuals participating in hostilities.”<sup>21</sup> Unsurprisingly, the absence of an early established legal framework on the issue of child soldiers prevented the subsequent development of a consistent definition and approach. This research project posits that such a *lacuna* is problematic because it offers little protection to children while failing to provide a complete and uniform legal basis to courts, states, armed groups and advocates confronted with this issue at policy, decision-making or operational levels.

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<sup>17</sup> Waschefort, *supra* note 5 at 13-14.

<sup>18</sup> AP I posits the possibility to recruit children who are fifteen years and older: “In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.” (API, *supra* note 11 art 77(2)).

<sup>19</sup> *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 25 May 2000, A/RES/54/263, arts 1 & 2 (entered into force 12 February 2002) [*Optional Protocol to the CRC*].

<sup>20</sup> The Canadian Forces JDN points out that “there is no consistent universally recognized definition of a child soldier” (*Canadian Forces JDN*, *supra* note 8 at 1-3).

<sup>21</sup> Stian Eisentrager, “Exploring the Recruitment and Use of Child Soldiers” (19 April 2012) online: <<http://www.e-ir.info/2012/04/19/exploring-the-recruitment-and-use-of-child-soldiers/>>.

Moreover, this project argues that since some actors may have adopted various and conflicting positions with respect to children's protection and participation in hostilities, this complicates further developments of the law.

Despite the failure of international law to define what is a child soldier, soft law<sup>22</sup> has provided some guidance on this concept by explicating the characteristics of a child soldier and the roles or functions attributed to such position. As a matter of fact, the issue on child soldiers started to become a major theme in international politics thanks to the release of the ground-breaking report of Graça Machel in 1996.<sup>23</sup> This report examined the impact of armed conflicts on children in several countries affected by armed conflicts such as Angola, Cambodia, Colombia, Northern Ireland, Lebanon, Sierra Leone, Rwanda and some refugee camps in the former Zaire and Tanzania, and various locations in the former Yugoslavia.<sup>24</sup>

In 1997, during an international conference held in South Africa on the “prevention of child recruitment”, the *Cape Town Principles* were adopted.<sup>25</sup> This conference was aimed at developing “strategies for preventing recruitment of children, demobilising child soldiers and helping them to reintegrate into society.”<sup>26</sup> The *Cape Town Principles* clarified

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<sup>22</sup> Soft law refers to “the principles of a political, practical, humanitarian, or moral nature that can influence state behaviour, but that do not, strictly speaking, correspond to extant legal obligations or rights” (John Currie et al., *International Law: Doctrine, Practice and Theory*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2014), at 151).

<sup>23</sup> Graça Machel is the “first post-independence” Minister of Education of Mozambique. In 1993, she was appointed by the former UN Secretary General Boutros-Boutros Gali as a UN expert to investigate the conditions and the impact of children during armed conflicts which triggered increase attention on the issue of child soldiering (UNICEF, “Impact of armed conflict on children” online: <<https://www.unicef.org/graca/graca.htm>>).

<sup>24</sup> Graça Machel Report, *supra* note 1 at 7.

<sup>25</sup> UNICEF, *Cape Town Principles*, 27-30 October 1997, <[https://www.unicef.org/emerg/files/Cape\\_Town\\_Principles%281%29.pdf](https://www.unicef.org/emerg/files/Cape_Town_Principles%281%29.pdf)> [*Cape Town Principles*].

<sup>26</sup> UNICEF, *Paris Principles: Principles and guidelines associated with armed forces or armed groups*, February 2007, at 1.2 <<https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>> [*Paris Principles*].

for the first time that a “child soldier” does not only refer to “a child who is carrying or has carried arms, but also “any person under 18 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.”<sup>27</sup> The *Cape Town Principles* asserted that “girls recruited for sexual purposes and for forced marriage” are also covered by the definition of child soldiers.<sup>28</sup> Most importantly, this instrument posited that “child soldiers retain their rights as children.”<sup>29</sup> This constitutes an unprecedented recognition and a clear confirmation that children’s participation to warfare does not eliminate their status and the special protection that they are entitled to as children. Unsurprisingly, the *Cape Town Principles* have informed and influenced the “development of international norms as well as shifts in policy at the national, regional and international levels.”<sup>30</sup>

A decade later, a new instrument, the *Paris Principles*, were adopted in 2007 as part of a global review of the *Cape Town Principles*.<sup>31</sup> This instrument coined the term “children associated with armed forces or armed groups”, which refers to “any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes.”<sup>32</sup> This definition does not only refer to a “child who is taking or has taken a direct part in hostilities” since it is aimed at emphasizing the multiple ways in which children become involved in armed conflicts.<sup>33</sup>

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<sup>27</sup> *Cape Town Principles*, *supra* note 25 at annex.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at 7.

<sup>30</sup> *Paris Principles*, *supra* note 26 at 1.2.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid* at 2.1.

<sup>33</sup> *Ibid.*

Unfortunately, the more public the issue on child soldiers became the narrower it was treated.<sup>34</sup> As a matter of fact, child soldiers were often treated by media and international politics as being only those serving at the frontlines, which dissimulated all child soldiers assigned to indirect and often invisible support functions.<sup>35</sup> Leibig points out that the major drawback of such approach is that “the issue becomes oversimplified and subgroups are marginalized.”<sup>36</sup>

This MRP agrees with the definitions posited by the *Cape Town Principles* and the *Paris Principles* which are very similar and are based on the same foundations. Both definitions have rightly clarified that the concept of child soldiers cannot only be limited to military operations or to direct participation in hostilities because the roles played by children during armed conflicts are diverse and intersecting. Although they are not legally binding, both the *Cape Town Principles* and the *Paris Principles* have succeeded in their delimitation of the complexity related to the issue of child soldiering.

By contrast, as it will be discussed in chapter 2, legal treaties such as AP I, AP II, and the *Rome Statute* have focused on a specific kind of participation (direct or active participation), thus creating a superficial and narrow distinction as to the status and legal protection of children affected by armed conflicts. According to Waschefort, “the concept of ‘child soldier’ can reasonably be interpreted as being broader than any of the relevant treaty norms or customary rules in existence.”<sup>37</sup> This assertion clearly warns against the negative tendency of hard law to codify in a narrow perspective social phenomenon such

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<sup>34</sup> Abigail Leibig, “Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection?” online: (2005) 3:1 *Northwestern Journal of International Human Rights* 6 <<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1017&context=njihr>>.

<sup>35</sup> *Ibid.*

<sup>36</sup> Leibig, *supra* note 34 at para 5.

<sup>37</sup> Waschefort, *supra* note 5 at 15.

as child soldiering. Therefore, the concept of child soldiers is still filled with confusions despite the non-binding guidance from soft law.

In the next section, this MRP will highlight the difficulties raised by the narrow approaches adopted by IHL and ICL as to the prohibition of children's participation in hostilities in international law.

### **1.2 The prohibition of children's recruitment or use in hostilities**

No discussion on the issue of child soldiers would be complete without an introduction to the core principles of IHL on the conduct of hostilities. A clear understanding of such principles will help grasp the problematic on the prohibition of children's recruitment or use in international law. In addition, such examination is important because it allows, on the one hand, for an analysis of the law related to the practice of recruiting or using children under a certain age and, on the other hand for clarification of the legal considerations that should be afforded to the consequences derived from this practice.

IHL is the first and only area of international law entirely designed around the conduct of hostilities. It balances military necessity, which gives belligerents the freedom to conduct hostilities in order to defeat the adversary, against the principle of humanity or humane treatment, which imposes "certain limits on the means and methods of warfare, and requires that those who have fallen into enemy hands be treated humanely at all time."<sup>38</sup>

According to the International Court of Justice (ICJ), the principle of humane treatment is

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<sup>38</sup> Nils Melzer and Etienne Kuster, "International Humanitarian Law, A Comprehensive introduction", (ICRC, 2016) at 17-18, <[http://icrcndresourcecentre.org/wp-content/uploads/2016/11/4231\\_002-IHL\\_WEB\\_133.pdf](http://icrcndresourcecentre.org/wp-content/uploads/2016/11/4231_002-IHL_WEB_133.pdf)>; Nils Melzer, "Interpretive guidance on the notion of Direct Participation in hostilities in IHL", (ICRC, 2009) at 11 <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>>. [ICRC Interpretive Guidance].

a “minimum yardstick” which expresses “elementary considerations of humanity that must be regarded as binding in any armed conflict, regardless of treaty obligation.”<sup>39</sup> However, this principle applies only to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’.”<sup>40</sup> This rule contained in all four Geneva Conventions constitutes “the basic minimum standards of international humanitarian law applicable in conflict situations.”<sup>41</sup>

IHL’s balancing finds its justification through the cardinal principle of distinction between combatants and civilians. This principle recognizes that civilians “enjoy immunity from direct attack unless and for such time as they take a direct part in hostilities”, whereas combatants “have the privilege under the laws of war to use force offensively without the threat of criminal liability”, as long as they respect IHL’s core principles.<sup>42</sup> Therefore, one of IHL’s aims is “to shield those who are not directly participating in the conflict from its effects”, while allowing belligerents to wage war and to use tactics that do not violate the laws of war.<sup>43</sup> As it will be illustrated later, this traditional principle of distinction between

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<sup>39</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] ICJ Rep 14 at para 218; Melzer and Kuster *supra* note 28 at 256.

<sup>40</sup> Common Article 3(1) to: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 6 U.S.T. 3114, 75 U.N. T.S. 31 [GC I]; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, 6 U.S.T. 3217, 75 U.N. T.S. 85 [GC II]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 6 U.S.T. 3316, 75 U.N. T.S. 135 [GC III]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [GC IV].

<sup>41</sup> ICRC, “Non-International Armed conflict”, Unit for relations with Armed and Security Forces, (June 2002) at 5 <[https://www.icrc.org/eng/assets/files/other/law10\\_final.pdf](https://www.icrc.org/eng/assets/files/other/law10_final.pdf)>.

<sup>42</sup> ICRC Interpretive Guidance, *supra* note 38 at 20; Charles P. Trumbull IV, “Re-thinking the principle of proportionality” online: (2015) 55:3 Virginia Journal of International at 351 <[http://www.vjil.org/assets/pdfs/vol55/VJIL\\_55.3\\_Trumbull\\_FINAL.pdf](http://www.vjil.org/assets/pdfs/vol55/VJIL_55.3_Trumbull_FINAL.pdf)>.

<sup>43</sup> Michael N. Schmitt, “The Principle of Discrimination in 21st Century Warfare”, online: (2014) 2:1 Yale Human Rights and Development Journal (1999) at 145 <<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1010&context=yhrdlj>>.

combatants and civilians is challenged both by the special protection owed to children, their lack of legal capacity and by their status under IHRL.

AP I and II were the first international legal instruments to prohibit the recruitment or use of child soldiers in armed conflicts.<sup>44</sup> AP I regulates international armed conflicts (IACs), whereas AP II focuses on non-international armed conflicts (NIACs).<sup>45</sup> Both instruments proscribe in categorical terms the recruitment or use of children under 15 years old by armed groups or armed forces as illustrated below:

**Art 77 (3) AP 1**

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

**Art 4 (3) AP 2**

3. Children shall be provided with the care and aid they require, and in particular:  
 c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.<sup>46</sup>[emphasis added]

These strict prohibitions have been extensively reproduced and developed in several legal regimes of international law throughout times. For instance, IHRL has respectively in 1989 and 1999, through the *Convention on the rights of the child* (CRC) and the *African Charter on the Rights and Welfare of the Child* (ACRWC), urged state members to “take all feasible measures” (CRC) and “all necessary measures” (ACRWC) to ensure that children under fifteen years old (CRC) and no children under eighteen years

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<sup>44</sup> Joshua Yuvaraj, “When does a child participate actively in hostilities under the Rome statute? Protecting children from use in hostilities after Lubanga” online: (2016) 32:83 *Utrecht Journal of International and European Law* at 71 <<http://www.utrechtjournal.org/articles/10.5334/ujiel.321/galley/151/download/>>.

<sup>45</sup> AP I, *supra* note 11; AP II, *supra* note 11. IACs refers to hostilities between states, whereas NIACs are characterized by hostilities between states on one side or non-state actors on both sides (Meltzer & Kuster, *supra* note 8 at 53).

<sup>46</sup> AP 1, *supra* note 11, art77 (3); AP2, *supra* note 11, art 4 (3).



old (ACRWC) have been recruited or participated directly in hostilities.<sup>47</sup> Moreover, in 2000, *Optional Protocol to the CRC* was adopted to raise the minimum age for recruitment or participation in hostilities to 18 years old.<sup>48</sup> Similarly, in 1998 and 2002, ICL, through the *Rome Statute of International Criminal Court (Rome Statute)* and the *Statute for the Special Court of Sierra Leone (SSCSL)*, declared that “conscripting or enlisting children under the age of fifteen years [...] or using them to participate actively in hostilities” was a war crime and a serious violation of IHL.<sup>49</sup>

This research project argues that the lack of uniformity in the law as to the age limit for the prohibition of children’s recruitment or use in hostilities (15 years vs 18 years) is based on “societal constructs of age and corresponding social roles”, instead of being grounded upon scientific and “psychiatric developmental data.”<sup>50</sup> This MRP recognizes that the fifteen years old cut-off is a superficial and arbitrary age-limit which should be at least extended to 18 years to match the CRC’s default age of majority. Indeed, its Article 1 defines a child as “every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier.”<sup>51</sup>

However, even such delimitation would still constitute a controversial determination in some societies such as African societies where “childhood does not correspond to the globally accepted age limit of under-18 years, but is largely influenced

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<sup>47</sup> *Convention on the rights of the child*, 20 November 1989, A/RES/54/263, art 38 (entered into force 12 February 2002) [CRC]; *African Charter on the Rights and Welfare of the Child*, 11 June 1990, CAB/LEG/24.9/49, art 22 (entered into force 2 September 1990) [ACRWC].

<sup>48</sup> *Optional Protocol to the CRC*, *supra* note 19, arts 1-4.

<sup>49</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF.183/9 arts 8(2)(b)(xvii), (e)(vii) [Rome Statute]; *Statute of the Special Court for Sierra Leone*, 16 January 2002, art 4(c) (entered into force on 12 April 2002, pursuant Security Council resolution 1315 (2000) of 14 August 2000) [SSCSL].

<sup>50</sup> *Ibid* at 49.

<sup>51</sup> CRC, *supra* note 47, art 1.

by traditional socio-cultural and even economic contexts.”<sup>52</sup> Unfortunately, the discussion on what constitutes the appropriate age limit for children’s participation is beyond the scope of this MRP. Moreover, ICL and IHL, which are the main focus of this project have both maintained the status quo for children’s protection at fifteen years, which justifies the focus on children under fifteen years in this MRP.<sup>53</sup>

In 1999, the International Labour Organization (ILO) went a step further than the previously mentioned instruments by positing in its *Worst Forms of Child Labour Convention (ILO N°182)* that “forced or compulsory recruitment of children for use in armed conflict” is a practice similar to slavery.<sup>54</sup> As it will be explained later, this declaration constitutes a strong and unprecedented assertion in international law. To that extent, this MRP reminds that slavery is a *jus cogens* norm in international law which refers to peremptory norms that are “prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status.”<sup>55</sup>

The prohibition against slavery also features an *erga omnes* obligation which triggers a legal interest from all states to protect.<sup>56</sup> Therefore, comparing the practice of child soldiering to both a *jus cogens* norm and an *erga omnes* obligation is highly indicative

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<sup>52</sup> Dr W Andy Knight, “Children and War: Impact, Protection and Rehabilitation” (January 2006), University of Alberta (faculty of arts), online: <[http://www.artsrn.ualberta.ca/childrenandwar/papers/Children\\_and\\_War\\_Phase\\_II\\_Report.pdf](http://www.artsrn.ualberta.ca/childrenandwar/papers/Children_and_War_Phase_II_Report.pdf)>.

<sup>53</sup> Any reference to ‘children’ without further details in this MRP will always refer to children under fifteen years.

<sup>54</sup>*Worst Forms of Child Labour Convention*, 17 June 1999, International Labour Organization art 3(a) (Entry into force 19 November 2000) [*ILO N° 182*].

<sup>55</sup>*The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, (Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9) (4 January 2017) at para 52 (International criminal Court, Trial Chamber VI), <[https://www.icc-cpi.int/CourtRecords/CR2017\\_00011.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_00011.PDF)> [*Ntaganda*]; Currie, *supra* note 22 at 155.

<sup>56</sup>*Ibid.*

of the seriousness and severity of such crime in international law.<sup>57</sup> The *Worst Forms of Child Labour Convention (ILO N°182)* is a core treaty among ILO fundamental instruments and is meant to address the ILO's objectives on the effective abolition of child labour.<sup>58</sup>

Interestingly, in 2004, the Special Court for Sierra Leone was asked in the *Prosecutor v Sam Hinga Norman* to pinpoint the moment at which the prohibition against children's recruitment and use in hostilities became part of customary international law.<sup>59</sup> The Court examined state practice and *opinio juris* relating to child recruitment, and confirmed that "[p]rior to November 1996, the prohibition on child recruitment had [...] crystallised as customary international law."<sup>60</sup> This conclusion was supported, on the one hand, by the numerous occurrences of domestic legislation which illustrated that "almost all states prohibit (and have done so for a long time) the recruitment of children under the age of 15."<sup>61</sup>

Moreover, the Court examined the ratification of legal instruments prohibiting such crimes, and concluded that the "widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the CRC provides compelling evidence that the conventional norm entered customary international law well before

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<sup>57</sup> Alexandre Andrade Sampaio, Matthew McEvoy, "Little weapons of war: reasons for and consequences of treating child soldiers as victims", online : (2016) 63 :1 Netherlands International Law Review at 62-63 <<https://link.springer.com/article/10.1007/s40802-016-0054-1>>.

<sup>58</sup> ILO, "the International Labour Organization's Fundamental Conventions", (2005) at 7, online: <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_095895.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf)>.

<sup>59</sup> *Prosecutor v Sam Hinga Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (31 May 2004) at paras 17-23 (Special Court for Sierra Leone, Appeals Chamber), <<http://www.sierralii.org/sl/judgment/special-court/2004/18>>.

<sup>60</sup> *Ibid* at para 17.

<sup>61</sup> *Ibid* at para 18.

1996.”<sup>62</sup> Finally, the Court clarified that despite some variations in the wording of the prohibitions articulated by AP I on IACs and AP II on NIACs, “children are protected by the fundamental guarantees, regardless of whether there is an international or internal conflict taking place.”<sup>63</sup> This conclusion was reaffirmed in 2009 and in 2013 by the Office of the Special Representative of the Secretary-General on Children and Armed Conflict in its Working Paper on the “The Six Grave Violations Against Children During Armed Conflict.”<sup>64</sup> Thus, since the prohibition of the recruitment or use of children under fifteen years to participate in hostilities is widely entrenched in international law and has also crystallized into customary international law, this MRP argues that it “can be enforced against all parties to a conflict”, and that it is aimed at proscribing all kinds of children’s participation in armed conflicts.<sup>65</sup>

### **1.3 Recognizing children’s vulnerabilities through the special protection**

The *Canadian Forces JDN* on child soldiers highlights that “vulnerable populations are those individuals or groups who have a greater probability than the population as a whole of being harmed and experiencing an impaired quality of life because of social, environmental, health or economic conditions or policies.”<sup>66</sup> Kuper argues that children’s vulnerability is visible through many signs of child soldiering. For instance, she notes that

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<sup>62</sup> *Ibid* at para 20.

<sup>63</sup> *Ibid* at para 18.

<sup>64</sup> Working paper updated 2013 *supra* note 9 at 11; Office of the special Representative of the Secretary General for Children and Armed conflicts, *The six grave violations against children during armed conflict: the legal foundation*, Working paper n°1, October 2009 at 4, <https://www.crin.org/en/docs/SixGraveViolationspaper.pdf> [Working paper 2009].

<sup>65</sup> Shannon Bosch, “Targeting and prosecuting ‘under-aged’ child soldiers in international armed conflicts, in light of the IHL prohibition against civilian participation in hostilities”, online: (2012) 43:3 *The Comparative and International Law Journal of Southern Africa* at 336, <<https://journals.co.za/content/cilsa/45/3/EJC133834>>; In this MRP, belligerents or ‘all parties’ during armed conflicts refers to both armed groups (rebel or militia groups) and armed forces (governmental army).

<sup>66</sup> *Canadian Forces JDN*, *supra* note 8 at 1-1.

usually when children participate in armed conflicts, “they operate with little or no training and are often fed with a diet of alcohol and drugs”<sup>67</sup>

Unsurprisingly, the *Declaration of the rights of the child* posited that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection.”<sup>68</sup> Similarly, the *Universal Declaration of Human Rights* declared that “motherhood and childhood are entitled to special care and assistance.”<sup>69</sup> Consequently, children have been placed in the most vulnerable category of the population, and have been granted more legal protections than adults both in domestic and international law as a result of their vulnerabilities, “particularly in time of armed conflict.”<sup>70</sup> Therefore, Kuper points out that children are entitled to a special treatment which grant them “additional assistance and protection.”<sup>71</sup> Similarly, Cohn and Goodwill-Gill support that “in recognition of their particular needs and vulnerability, children benefit from specific provisions of the Fourth Geneva Convention, so-called *special protection*.”<sup>72</sup>

Interestingly, the ‘special protection’ is not only found in the GC IV but also in AP I and II. The provisions of GC IV, which protect civilians “not taking active part in hostilities”, relate mainly to children’s basic needs such as “the provision of food, clothing and tonics, care of children who are orphaned or separated from their families, treatment

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<sup>67</sup> Jenny Kuper, *Military training and children in armed conflict: Law, policy and Practice*, (Leiden: Martinus Nijhoff Publishers, 2005) at 259.

<sup>68</sup> *Declaration of the rights of the child*, 20 November 1959, A/RES/14/1386, preamble (Proclaimed by General Assembly Resolution 1386(XIV)).

<sup>69</sup> *Universal Declaration of Human Rights*, GA Res 217 A (III) UNGAOR, 3<sup>rd</sup> Sess, Supp N<sup>o</sup> 13, UN Doc A/810 (1948), art 25(2).

<sup>70</sup> Sandesh Sivakumaran, *The law of non-international armed conflict*, 1<sup>st</sup> ed (Oxford: Oxford University Press, 2012) at 315.

<sup>71</sup> Kuper, *supra* note 67 at 263.

<sup>72</sup> Ilene Cohn & Guy S. Goodwin-Gill, *Child soldiers: The Role of Children in armed Conflict*, (Oxford: Clarendon Press, 1994) at 122.

during deprivation of liberty and the distribution of relief consignments.”<sup>73</sup> Such protection is in line with IHL’s principle of distinction, which is aimed at protecting those who are not directly involved in hostilities from direct attacks.

However, this protection was extended to children who take a direct part in hostilities through AP I and II. Indeed, AP I posits that children who take a direct part in hostilities “shall continue to benefit from the special protection”, “whether or not they are prisoners of war”, whereas AP II highlights that “the special protection [...] remains applicable” to children under fifteen years “if they take a direct part in hostilities [...] and are captured.”<sup>74</sup> Therefore, under AP I belligerents are reminded that “children shall be the object of special respect and shall be protected against any form of indecent assault”, whereas AP II urges parties to provide children “with the care and aid they require.”<sup>75</sup> Moreover, AP I emphasizes that when “arrested, detained or interned for reasons related to the armed conflict”, these children “shall be held in quarters separate from the quarters of adults.”<sup>76</sup> Similarly, both AP I and II strictly prohibit the death penalty against any person who was under 18 years at the time the offence was committed, even if this crime is related to acts committed during the armed conflict.<sup>77</sup>

Extending the special protection to children who are directly participating in hostilities is positively surprising and unexpected given IHL’s traditional perspective. As mentioned earlier, IHL is based on the inherent distinction between actors who are

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<sup>73</sup> GC IV, *supra* note 11 arts 14, 23, 24, 38, 50, 76, 89; ICRC, “Customary IHL: Rule 135”, (2017) online: <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule135](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule135)>.

<sup>74</sup> AP I *supra* note 11 art 77(3).

<sup>75</sup> AP I *supra* note 11 art 77; AP 2 *supra* note 11 art 4(3).

<sup>76</sup> AP I *supra* note 11 art 77(4).

<sup>77</sup> AP I *supra* note 11 77(5), AP II *supra* note 11 art 6(4). ICL seems to have embraced the spirit of this principle by refusing to prosecute individuals who were under 18 years at the time “of the alleged commission of the crime” (*Rome Statute*, *supra* note 49, art 26).

participating in hostilities (combatants) and thus, who are not protected from direct attack, and actors who are not participating in warfare (civilians) and, consequently who are protected from such attacks.<sup>78</sup> Both categories were traditionally kept distinct and separate in terms of rights and obligations under IHL.<sup>79</sup> Van Bueren supports that “the majority of children become caught up in armed conflicts as civilians”, and that all of them they suffer from direct and indirect consequences of war.<sup>80</sup> Consequently, this research project posits that such extended protection to child soldiers is justified.

Therefore, the fact that two distinct categories of actors under IHL (child civilians and child direct participants in hostilities) benefit from the same protection stresses that what they share (childhood, vulnerabilities, immaturity) is given more weight than what sets them apart (their conduct or status in hostilities). This MRP argues that the special protection granted to children under fifteen years refers to an exceptional and broad legal regime aimed at offering the best legal protection to children whether they are participating in hostilities or not.

Furthermore, this project states that such protection is based on children’s acknowledged vulnerabilities, their legal incapacity and their lower maturity, instead of being derived from their conduct (direct participation) or their status (combatant) in hostilities. Unsurprisingly, such protection means that children’s presence on the battlefield will justify the application of stricter rules of conduct and, as will be discussed in chapter 2,

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<sup>78</sup> Melzer and Kuster, *supra* note 38 at 83-84.

<sup>79</sup> Sassòli, Marco, Bouvier, Antoine A& Quintin, Anne, *How does law protect in war: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, (Geneva: ICRC, 2006), chapter 5, “The Fundamental Distinction Between Civilians and Combatants”, at 1-2.

<sup>80</sup> Geraldine Van Bueren, “The international legal protection of children in armed conflict”, online: (1994) 43:4 *International and Comparative Law Quarterly* at 817  
<[https://journals.scholarsportal.info/details/00205893/v43i0004/809\\_tilpociac.xml](https://journals.scholarsportal.info/details/00205893/v43i0004/809_tilpociac.xml)>.

will require additional assessments from opposing armed forces or groups before any attack.

Thus, it is clear that the principles contained in the special protection call for higher standards of protection while advocating for a differentiated treatment towards children. Moreover, the fact that the special protection does not explicitly protect child soldiers from being targeted does not make the study of their legal protection irrelevant. Rather, the understanding of this legal regime which applies to all children can help both lawmakers and belligerents to adapt approach towards child soldiers.

### **Conclusion**

This first chapter has presented the legal framework on child soldiers by highlighting, on the one hand, a lack of an authoritative and binding definition for the term ‘child soldier’, while pointing out to some issues resulting from this gap in international law. Moreover, this chapter has referred to the essential guidance provided by soft law through three documents, namely the *Graça Machel report*, the *Cape Town Principles* and the *Paris Principles*. These instruments clarified that a child soldier is not only a child who is participating in military operations contrary to the narrow understanding of hard law under IHL and ICL. Rather, soft law posited that a child soldier refers to a wide range of roles and functions undertaken by children during hostilities for the advantage of armed groups or forces.

After laying down the foundational elements of the term ‘child soldier’, this chapter discussed the codification of the prohibition against the recruitment or use of children in hostilities in several areas of international law. To that extent, this chapter illustrated that



such prohibition has crystallized into customary international law and that it constitutes a highly-prohibited act under international law.

Finally, chapter 1 concluded its analysis by paying a closer attention to the concept of the special protection which has been granted to both children civilians and child soldiers. This MRP argued that granting the same protection to child civilians and to children who are involved in hostilities is a justifiable departure from the traditional IHL's principle of distinction since IHL has traditionally kept the rights and obligations of both categories separate and somehow opposed. Such deviation is a clear sign from IHL that calls for a special treatment for children who are affected by armed conflicts. Thus, as mentioned earlier, the special protection, applies to all children under fifteen whether or not they are participating in hostilities.

The next chapter will distinguish between 'direct' and 'active' participation through a dialogue between IHL and ICL. This chapter will present and compare the conflicting and narrow approaches adopted by the ICC and the ICRC.<sup>81</sup> Moreover, these approaches will be further explored through a literature review which will compare these approaches with other positions adopted by scholars or courts as to the concepts of 'direct' or 'active' participation in hostilities. This chapter will argue that both the ICC and the ICRC have failed to properly define the legal status of child soldiers by adopting ambiguous and opposed approaches.

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<sup>81</sup> The ICC is the only permanent international criminal court. It has the jurisdiction to prosecute the "most serious crimes of concern to the international community" and constitutes a major source of ICL. (Rome Statute, *supra* note 49, preamble). The ICRC is the only international humanitarian organization which was explicitly named and mandated under the four *1949 Geneva Conventions* and thus, represents an authoritative source of IHL. (Melzer & Kuster, *supra* note 38 at 313).

A multidimensional analysis, which incorporates IHL principles will be conducted to highlight their potential contributions on the designing of an effective legal framework on the protection of child soldiers.

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## Chapter 2: Investigating a multidimensional scope for child soldiers' legal protection

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### 2. Combining IHL, ICL and IHRL

Adopting a multidimensional scope for the study of the legal protection of child soldiers is not only necessary but also pressing because the problematic on child soldiering cannot be effectively analyzed and remedied by only focusing on a single area of law.<sup>82</sup> Interestingly, Buck clarifies that “children’s rights can be properly understood only in the context of the wider human rights framework.”<sup>83</sup> Likewise, Waschefort notes that “today, international human rights law (IHRL) and international criminal law (ICL) are as important to the prohibition of child soldiering as IHL.”<sup>84</sup> Furthermore, he posits that “in taking an ‘issues-based approach’ to child soldier prevention, it is imperative not to view the contribution of a single sub-regime of international law, such as IHL, in isolation.”<sup>85</sup>

In order to lay out a multidimensional legal framework of child soldiers’ legal protection, it is important to know and understand “not only the contribution of regimes such as IHL, IHRL and ICL to the problem at hand”, but also “the interaction of these regimes.”<sup>86</sup> Consequently, this section will define and distinguish between IHL, ICL and IHRL by highlighting their commonalities and divergences, and by demonstrating their potential contributions and impacts in the codification of the legal protection of child soldiers.

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<sup>82</sup> Waschefort, *supra* note 5 at 54.

<sup>83</sup> Trevor Buck, *International Child Law*, 2<sup>nd</sup> edition (New York: Routledge, 2011) at 20.

<sup>84</sup> Waschefort, *supra* note 5 at 54

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid* at 74.

As mentioned in chapter 1, IHL is the legal regime that applies to the conduct of hostilities between states or armed groups and is characterized by the core principle of distinction.<sup>87</sup> Unfortunately, this area of law has not been very proactive in the efforts to develop strong principles aimed at eliminating the practice of child soldiering. Waschefort notes that “legal development within IHL is rather stagnant”, whereas “associated fields of international law” such as ICL and IHRL “have proven more agile.”<sup>88</sup> Consequently, it is important to analyze these areas of law in order to better grasp what may be their respective contributions to the legal protection of child soldiers.

ICL “aims to deter and prohibit certain categories of conduct and impose criminal liability on individuals in retribution for such conduct.”<sup>89</sup> Its purpose is to “create a universal legal consciousness” on certain types of crimes which are considered as inhumane, egregious or shocking for the humanity.<sup>90</sup> In other words, ICL is focused on the punishment of proscribed behaviours, and, its approach will be characterized by a broad interpretation of prohibited conducts. Waschefort points out that “developments within ICL are the most recent, and this branch of law is most active in relation to prohibiting child soldiering.”<sup>91</sup>

However, it is worth noting that ICL and IHL, despite their different mandates, are interconnected.<sup>92</sup> To that extent, it is crucial to remember that war crimes prohibited by ICL “are essentially IHL norms, the violation of which results in criminal responsibility on the international plane.”<sup>93</sup> As highlighted in chapter 1, the *Rome Statute* considers that

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<sup>87</sup> AP I, *supra* note 11 art 77(2), AP 2 *supra* note 11 art 4(3)c); Yuvaraj, *supra* note 44 at 75.

<sup>88</sup> Waschefort, *supra* note 4 at 54.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* at 76.

<sup>93</sup> *Ibid* at 54.

conscripting, enlisting or using children under fifteen years old is a war crime and thus, a serious violation of IHL.<sup>94</sup>

IHRL is a far-reaching legal regime which establishes some core human rights norms. Such norms apply on states, both in times of peace and war, and are meant to protect individuals “from the abuse of power by states.”<sup>95</sup> Therefore, there are some human right norms that can never be derogated from, regardless of whether there is an applicable *lex specialis* regime such as IHL during armed conflicts.<sup>96</sup> These rights or prohibitions include “the right to life, prohibition of torture or cruel, inhuman or degrading treatment or punishment, prohibition of slavery and servitude and the prohibition of retroactive criminal laws.”<sup>97</sup> As highlighted earlier, the connection between child soldiers and the prohibition against slavery is found in the *ILO N°182*.

This instrument posited that the forced or compulsory recruitment of children has been identified by the ILO as a practice similar to slavery.<sup>98</sup> According to Sampaio and McEvoy, the *ILO N°182* is a significant treaty both in international law and towards the

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<sup>94</sup> *Rome Statute*, *supra* note 49, arts 8(2)(b)(xvii), (e)(vii).

<sup>95</sup> Waschefort, *supra* note 5 at 79.

<sup>96</sup> ICRC, “International Humanitarian Law and International Human Rights Law” (January 2003), online:<<https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj-orOQ28rUAhXH7YMKHaKNDkkQFggiMAA&url=https%3A%2F%2Fwww.icrc.org%2Fen%2Fdownload%2Ffile%2F1402%2Fihl-and-ihrl.pdf&usq=AFQjCNHew61mhzk2y4XPl-doBM4fQ8qhzg>>. [ICRC on IHL &IHRL]

<sup>97</sup> *Ibid.*

<sup>98</sup> *ILO N° 182*, *supra* note 54, art 3(a). This Convention is among the eight ILO conventions that form the “core labour standards” having been recognized as “fundamental to the rights of human beings at work, irrespective of the level of development of individual member States.” ([http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_095895.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf)) Thus, the connexion between the issue of child soldiers and the ILO principles is found in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work* which identified the effective abolition of child labour as one of the preconditions for the “improvement of individual and collective conditions of work.” Moreover, the 1998 *ILO principles* apply to “all States belonging to the ILO, whether or not they have ratified the core Conventions”. (ILO fundamental Conventions *supra* note 58 at 7-8).

issue of child soldiers because it “is binding on all UN Member States, even those few which have yet to ratify.”<sup>99</sup>

Thus, while using a different lens, IHL and IHRL are complementary in their protection of children during armed conflicts, through their aim “to protect the lives, health and dignity of individuals.”<sup>100</sup> The ICRC points out that, although “IHL and IHRL have historically had a separate development, recent treaties include provisions from both bodies of law” such as the CRC, the *Optional Protocol to the CRC* and the *Rome Statute*. It is not a coincidence that all these instruments, which incorporate both IHL, ICL and IHRL norms, have actively codified the prohibition against children’s recruitment and use in armed conflicts, as developed in chapter 1. This MRP posits that such overlap should be aimed at offering a strong and complementary legal framework for the protection of child soldiers, instead of confusing the applicable threshold. Unfortunately, each of these areas has designed their own standards and principles<sup>101</sup> which has created “a gap [...] in the protective regime”, as noted by Drumbl.<sup>102</sup>

In the next section, this MRP will argue that both IHL and ICL, while based on some valid and legitimate principles, may trigger contradictory effects towards children’s protection during armed conflicts, especially due to their diverging standards and applications of the concept of “direct” and /or “active” participation in hostilities.

## 2.1 “Direct” vs “active” participation under IHL and ICL

Both IHL and ICL have limited the scope of their prohibition to a specific kind of participation in hostilities, whereas IHRL through soft law adopted a broader approach by

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<sup>99</sup> Sampaio & McEvoy, *supra* note 57 at 62.

<sup>100</sup> ICRC on IHL & IHRL *supra* note 96.

<sup>101</sup> Such as the different age limit between ICL, IHL and IHRL as discussed in see chapter 1.

<sup>102</sup> Drumbl, *supra* note 3 at 135.

prohibiting all kinds of children's involvement (whether direct or active) in armed conflict.<sup>103</sup>

As presented in chapter 1, soft law has not limited its definition of child soldiers to their 'direct' or 'active' participation in military operations. Rather, it pointed out to the variety of roles and functions undertaken by children in armed groups, ranging from "cooks, messengers, spies" to sexual slaves.<sup>104</sup> Such a broad delineation indicates that the prohibition on the recruitment and use of child soldiers does not only refer to children who are serving on the front lines of battlefield, but rather, any type of action that children perform in order to advance the collective interest of an armed group or force, or the personal interests of members of such group. This MRP asserts that such broad demarcation is positive because it offers a full and stronger protection to child soldiers due to its inclusiveness. In addition, such a large scope, represents an effective protection that diverges from the superficial and flawed distinction derived from the 'active' and 'direct' participation, as it will be presented in this section.

The best way to illustrate IHL's and ICL's approach is to reproduce the relevant provisions of AP I, II and the *Rome Statute*:

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

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

**AP II - Article 4 — *Fundamental guarantees***

2. Children shall be provided with the care and aid they require, and in particular:
  - c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

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<sup>103</sup> Soft Law's approach is reflected in the broad definitions of child soldiers in the *Cape Town Principles* and the *Paris Principles*. Both definitions were presented in this MRP, in chapter 1.

<sup>104</sup> *Cape Town Principles*, *supra* note 18; *Paris Principles*, *supra* note 19.

*d)* the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph *c)* and are captured<sup>105</sup>;

### ***Rome Statute - Article 8 — War crimes***

For the purpose of this Statute, ‘war crimes’ means:

(b) [...]

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

(e) [...]

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; [...].<sup>106</sup>  
[emphasis added]

It is clear that the prohibition against children’s participation has to satisfy the threshold of either ‘direct’ or ‘active’ participation in order to be considered as a violation of IHL or ICL. This requirement from hard law is distinct from the broader scope of soft law, as described earlier. Under IHL, ‘active’ and ‘direct’ participation have been interpreted as synonymous terms, whereas ICL has interpreted them as distinct concepts and applied them differently.<sup>107</sup>

This section will present and analyse the approaches adopted by IHL and ICL as to both terms, before comparing them to the positions of other scholars in the literature review.

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<sup>105</sup> There are some controversies as to the scope of AP I which prohibits children’s ‘direct’ participation as opposed to AP II which seems to prohibit a larger scope of participation by not including the term ‘direct’ and by prohibiting the recruitment or voluntary participation of children in hostilities. (The *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, (Judgment pursuant to Article 74 of the Statute), (14 March 2012) (International criminal Court, Trial Chamber I) at para 627 <[https://www.icc-cpi.int/CourtRecords/CR2012\\_03942.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF)>; Nathalie Wagner “A Critical Assessment of Using children to Participate Actively in Hostilities in Lubanga: Child Soldiers and Direct Participation”, online: (2013) 24:2 Criminal Law Forum at 166 <<https://rd.springer.com/article/10.1007/s10609-012-9194-0?no-access=true>>).

<sup>106</sup> *Rome Statute*, *supra* note 49, arts 8(2)(b)(xxvi), (e)(vii), AP I *supra* note 11, art 77(2), AP III *supra* note 11, art 4(3)c. Art 8(2)(b)(xxvi) refers to IACs whereas Art 8(2)(e)(vii) deals with NIACs.

<sup>107</sup> ICRC Interpretive Guidance, *supra* note 38 at 43, Yuvaraj *supra* note 44 at 71, *Lubanga*, *supra* note 105 at paras 621, 627-628.



### 2.1.1 ‘Direct’ participation in hostilities under IHL

Under IHL, the concept of “direct participation in hostilities” (DPH) stems from the principle of distinction and has been adopted to grant protection to civilians.<sup>108</sup> Schmitt posits that “one of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants.”<sup>109</sup> Accordingly, during armed conflicts, belligerents have to distinguish between civilians who cannot be targeted, and combatants who are subject to attacks. Moreover, IHL recognizes that the protection of civilians from direct attack will cease “for such time as they take a direct part in hostilities.”<sup>110</sup>

Nevertheless, IHL has never explicitly defined what constitutes ‘direct’ participation. To clarify this concept, the ICRC published in 2009 the *Interpretive Guidance On The Notion of Direct Participation Under International Humanitarian Law* (ICRC Interpretive Guidance), which developed three constitutive elements for the finding of direct participation in hostilities (DPH). The ICRC emphasized that the notion of direct participation in hostilities is composed of two elements: that of “hostilities”, which “refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy”, and that of “direct participation” which captures the “(individual) involvement of a person in these hostilities.”<sup>111</sup>

This MRP will present the three constitutive elements and will closely examine the third element by highlighting its inadequacy and inapplicability as to the specific context of child soldiers. First of all, the ICRC Interpretive Guidance stated that “the notion of direct participation in hostilities does not refer to a person’s status, function or affiliation,

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<sup>108</sup> ICRC Interpretive Guidance, *supra* note 38 at 4.

<sup>109</sup> Schmitt, *supra* note 43 at 509.

<sup>110</sup> Yuvaraj, *supra* note 34 at 20.

<sup>111</sup> *Ibid* at 43.

but to his or her engagement in specific hostile acts.”<sup>112</sup> In other words, DPH refers to specific acts or conduct, whether they are “spontaneous, sporadic, or unorganized” or even when they are regular acts derived from a continuous combat function.<sup>113</sup> Accordingly, it is not the status but the conduct that determines if someone is directly participating in hostilities. Unsurprisingly, the ICRC asserts that “under IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians suspend their protection against the dangers arising from military operations.”<sup>114</sup>

Therefore, the ICRC has established that in order for an act to qualify as a DPH, three conditions must be met cumulatively. First of all, “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.”<sup>115</sup> In other words, the act must “reasonably be expected to cause harm of a specifically military nature, or “in the absence of such military harm” the act must be likely “to cause at least death, injury, or destruction.”<sup>116</sup>

Secondly, 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”.<sup>117</sup> This second condition focuses on the proximity between the act and the harm expected. As a matter of fact, the ICRC emphasizes that “the concept of direct participation in hostilities is restricted to specific acts that are so closely related to

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<sup>112</sup> *Ibid* at 44.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid* at 12.

<sup>115</sup> *Ibid* at 16.

<sup>116</sup> *Ibid* at 49.

<sup>117</sup> *Ibid* at 46.

the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities.”<sup>118</sup>

Finally, to satisfy the last condition which is the belligerent nexus, it has to be demonstrated that the act was “specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”<sup>119</sup> The ICRC highlighted that if the act was not specifically designed in support of a party to an armed conflict and to the detriment of another, such act “cannot amount to any form of “participation” in hostilities taking place between these parties.”<sup>120</sup> Furthermore, the ICRC has emphasized that the belligerent nexus “should be distinguished from concepts such as subjective intent and hostile intent”, since both notions “relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act.”<sup>121</sup> The ICRC emphasizes that such “purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual.”<sup>122</sup>

However, how can a certain act be “specifically designed” to support a party to the conflict without involving subjectivity and intent? The ICRC’s position is even harder to defend after comparing several definitions of the verb “to design” as illustrated below:

To conceive and plan out in the mind.<sup>123</sup>

Do or plan (something) with a specific purpose in mind.<sup>124</sup>

To decide how something will be made, including how it will work and what it will look like, and often to make drawings of it.<sup>125</sup> [emphasis added]

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<sup>118</sup> *Ibid* at 58.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid* at 59.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid*.

<sup>123</sup> Merriam-Webster dictionary, *sub verbo* “to design” <<https://www.merriam-webster.com/dictionary/design>>.

<sup>124</sup> The Oxford English Dictionary, *sub verbo* “to design”, <<https://en.oxforddictionaries.com/definition/design>>.

<sup>125</sup> Macmillan Dictionary, *sub verbo* “to design”, <[http://www.macmillandictionary.com/dictionary/british/design\\_2](http://www.macmillandictionary.com/dictionary/british/design_2)> .

Therefore, “designing something” clearly involves subjectivity and intent of someone in the planning of an action. Such act can only be conducted by a commander or a chief who has some power or authority to plan military operations. Furthermore, adding the adjective “specifically” to the verb “to design” reinforces the necessity to demonstrate a certain degree of someone’s personal decision, commitment and involvement in the planning and conduct of an action. Although the ICRC admitted that in exceptional circumstances the mental state or the intent of an individual will be taken into consideration, such concession is still not enough to account for the meaning behind the belligerent nexus.<sup>126</sup>

In the next sections, this MRP will argue that intent is an important element that has to be considered in the assessment of DPH and that, children’s incapacity to form an intent to DPH negates their ability to be considered as combatants who are directly participating in hostilities and who can be targeted.<sup>127</sup> As a matter of fact, Sampaio and McEvoy support that “international law [...] calls for young children and those aged 15 and above to be regarded as devoid of intent and unaware of their role in the conduct of hostilities.”<sup>128</sup> Consequently, both authors argue that “children cannot be considered legally capable of directly participating in conflicts.”<sup>129</sup> This MRP argues that any targeting of child soldiers is illegal, even if the use of force against them is possible and accepted

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<sup>126</sup> ICRC Interpretive Guidance *supra* note 38 at 60.

<sup>127</sup> The issue of children’s intent for the purpose of determining their capacity to DPH is distinct from the issue of *mens rea* with respect to the assessment of children’s criminal liability for war crimes. Children’s lack of intent to DPH does not necessarily equate to their lack of *mens rea*. Kuper notes that the extensive protection of child soldiers during armed conflicts does not shield them from prosecutions for crimes that they may have committed. (Kuper, *supra* note 67 at 181-182) However, the question of child soldiers’ liability is beyond the scope of this MRP. As stated in the introduction, this MRP is aimed at illustrating children’s vulnerabilities and the inability of the current legal regime to protect them. In this section, the author will focus on the question of children’s intent for DPH.

<sup>128</sup> Sampaio & McEvoy, *supra* note 57 at 63.

<sup>129</sup> Sampaio & McEvoy, *supra* note 57 at 63.

when child soldiers are used as frontlines and constitute a threat for opposing armed forces.<sup>130</sup>

### 2.1.2 ‘Active’ participation under ICL

Both the *Rome Statute* and the SCSL prohibit three specific actions related to children’s involvement in hostilities: their conscription, their enlistment and their use for active participation in hostilities.<sup>131</sup> After clarifying the distinction between those three terms, this section will focus on the last concept related to children’s use for ‘active’ participation.

In the *Prosecutor v. Thomas Lubanga Dyilo*, the Trial Chamber highlighted that conscripting, enlisting and using children for DPH constitutes three “separate offences” which can be charged separately or cumulatively.<sup>132</sup> To reach this conclusion, the Chamber analyzed each of the three offences and pointed out that a child can be “used” to participate actively in hostilities “without evidence being provided with respect to his or her earlier “conscription” or “enlistment” into the relevant armed force or group.”<sup>133</sup> Therefore, the Chamber posited that ‘enlisting’ refers to the act of “enrol[ing] on the list of a military body”, whereas “conscripting” is defined as “to enlist compulsorily.”<sup>134</sup>

Consequently, the distinction between these two actions is found in the “added element of compulsion” of the term “conscription.”<sup>135</sup> Sivakumaran warns against a narrow interpretation of both terms and notes that “conscription” and “enlistment” are both different ways to unlawfully recruit children.<sup>136</sup>

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<sup>130</sup> Canadian Forces JDN, *supra* note 8 at 2-12, Kuper, *supra* note 67 at 269.

<sup>131</sup> *Rome Statute*, *supra* note 39, arts 8(2)(b)(xxii), (e)(vii); SCSL *supra* note 39 art 4 c).

<sup>132</sup> *Lubanga*, *supra* note 105 at para 609.

<sup>133</sup> *Ibid* at para 620.

<sup>134</sup> *Ibid* at para 608.

<sup>135</sup> *Ibid*.

<sup>136</sup> Sivakumaran, *supra* note 70 at 319.

As for children's use for 'active participation', the Chamber noted that the *Rome Statute* drafters adopted the expression 'using' children to 'participate actively in hostilities' "in order to cover both direct participation in combat and also active participation in military activities."<sup>137</sup> Therefore, the Trial Chamber posited that "the use of the expression 'to participate actively in hostilities', as opposed to the expression 'direct participation' (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities."<sup>138</sup>

As a result, the Trial Chamber concluded that 'active' participation covers both 'direct' and 'indirect' participation, and 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."<sup>139</sup> Therefore, the Chamber acknowledged that "those who participate actively in hostilities include a wide range of individuals, from those 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."<sup>140</sup> Accordingly, to determine whether a specific role qualifies as active participation, it must be proven that "the child concerned is, at the very least, a potential target."<sup>141</sup>

Such interpretation has been criticized because it extended "the scope of persons who may be legitimately targeted by an adverse party."<sup>142</sup> Sivakumaran emphasized that

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<sup>137</sup>*Lubanga, supra* note 105 at para 621.

<sup>138</sup> *Ibid* at para 627.

<sup>139</sup> *Ibid* at para 628.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> Yuvaraj *supra* note 44 at 79.

the ICC's approach is problematic because it does not provide any guidance as to what constitute a 'real danger' or a 'potential target.'<sup>143</sup> His position and other similar positions of scholars will be developed in the literature review to demonstrate the extent to which the ICC's approach is ambiguous and unhelpful for children's protection in armed conflicts.

Unsurprisingly, both IHL and ICL encapsulate important norms on the prohibition of child soldiers. Nevertheless, analyzing the issue on child soldiers using only one of these approaches can be limiting and narrow without paying a closer attention to soft law and human rights instruments. The next section will explore the literature to highlight how the ICRC's and the ICC's tests have been received, contrasted, or confirmed in international law through the use of IHL, ICL and IHRL. This part will aim to highlight the strength and limitations of the arguments posited by scholars about the scope of active and direct participation, while highlighting the advantages to including IHRL in the discussions related to the prohibition of the practice of child soldiering.

## **2.2 Literature review**

Much has been written on the terms 'active' and 'direct' participation in the literature. However, so far, a consensus on the meaning of both terms has not been reached, except a redundant observation from scholars on the ambiguity of either one or these terms as it will be discussed in this section. This MRP has selected articles and book chapters which have closely examined the nature of the prohibition against civilians' direct participation and children's participation in hostilities. Some authors such as Sivakumaran, Sampaio and McEvoy have aligned with, contrasted or rejected the ICRC's guidance on

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<sup>143</sup> Sivakumaran *supra* note 70 at 318.

the notion of DPH, while others such as Wagner and Yuvaraj have investigated the ICC's definition of 'active' participation and evidenced its weaknesses or positive inputs.

Through a dialogue between scholars, this literature review will investigate whether child soldiers would be better protected by a broad or narrow scope of the prohibition against children's 'direct' or 'active' participation. In other words, this section will examine the pros and cons of using an extensive or narrow codification of children's participation in armed conflicts by highlighting its advantages and drawbacks for children's protection. To support its findings, this literature review will distinguish between two main approaches: the conservative approach, which focuses on IHL principles and adopts a one-sided analysis, and the multidimensional approach, which goes beyond the mere principles of IHL and ICL by bringing some notions of IHRL.

### **2.2.1 Conservative approach**

This approach is supported by Schmitt, Naqvi, Bianchi and Wagner, and is characterized by its essential focus on IHL's traditional principles, and by its radical rejection of human rights principles when dealing with the finding of 'direct' participation.

In his article entitled "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", Michael Schmitt examines the scope of the various roles undertaken by government civilian employees or private contractors in the war in Iraq.<sup>144</sup> He notes that such participation is highly problematic due to their lack of accountability in the case of misconduct.<sup>145</sup> He concludes that government employees or

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<sup>144</sup> Michael N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", online: (2005) 5 Chicago Journal of International Law 2 <<http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1602&context=cjil>>. [Schmitt on private contractors].

<sup>145</sup> *Ibid* at 286.



private contractors do not satisfy the threshold to become lawful combatants under IHL.<sup>146</sup> This analysis is relevant in the context of civilians undertaking roles that are traditionally reserved for combatants such as child soldiers who are illegally deployed on the battlefield.

Nevertheless, Schmitt asserts that, despite the lack of a lawful status as a combatant, “a civilian who participates in hostilities remains a valid military objective until unambiguously opting out through extended nonparticipation or an affirmative act of withdrawal.”<sup>147</sup> While interesting, this alternative constitutes a risky exercise for the unlawful combatant because he or she will continue to assume the risk of being targeted, particularly in the case where “the other side is unaware of such withdrawal”, as pointed out by Schmitt himself.<sup>148</sup> Similarly, Sivakumaran rightly notes that this approach “suffers from the evidential difficulty that would be required for such a showing.”<sup>149</sup>

To assess civilians’ participation in hostilities, Schmitt argues that, there has to be a “but for” causation, which evidences the connexion between the act and its consequences, a “causal proximity” as to the ensuing consequence, and, “a mens rea of intent.”<sup>150</sup> Based on this framework, it is clear that child soldiers under 15 would not qualify as military objective due to their recognized lack of intent.<sup>151</sup> As a matter of fact, McEvoy and Sampaio claimed that “children are, irrespective of their age, too immature to choose to perform such a hazardous occupation as directly participating in an armed conflict.”<sup>152</sup>

Both authors also support the idea that child soldiers lack the necessary intent to be considered as combatants who can be legitimately targeted. In addition, Schmitt supports

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<sup>146</sup> *Ibid* at 296, 301.

<sup>147</sup> *Ibid* at 306.

<sup>148</sup> *Ibid* at 510.

<sup>149</sup> Sivakumaran, *supra* note 70 at 367.

<sup>150</sup> Schmitt on private contractors, *supra* note 144 at 303.

<sup>151</sup> *Lubanga*, *supra* note 105 at para 617.

<sup>152</sup> Sampaio & McEvoy, *supra* note 57 at 63.

a liberal interpretation of the notion of ‘direct participation’ and emphasizes that such finding should occur even in case of doubt on whether civilians’ actions amount to direct participation in hostilities.<sup>153</sup> He declares that “the methodology that best approximates the underlying intent of the direct participation notion is to interpret the term liberally, in other words in favor of finding direct participation.”<sup>154</sup> He justifies this position by the fact that IHL requests belligerents to distinguish themselves from civilian population at all times.<sup>155</sup>

Finally, he argues that “while broadly interpreting the activities that subject civilians to attack might seem counterintuitive from a humanitarian perspective, it actually enhances the protection of the civilian population as a whole by encouraging distance from hostile operations.”<sup>156</sup>

However, Schmitt’s interpretation is not supported by IHL. Articles 50 and 51(3) of AP I stipulate the opposite. Article 50 declares that “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”<sup>157</sup> Similarly, Article 51(3) posits that “in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”<sup>158</sup> Thus, it is clear that IHL’s priority remains the protection of civilian from military operations. Consequently, in all cases of uncertainty as to the status of an individual, IHL supports that his or her civilian status shall be presumed. The preservation of this status is

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<sup>153</sup> Michael N Schmitt, “Deconstructing direct participation in hostilities: the constitutive elements”, online: (2010) New York University Journal of International Law and Politics <<http://nyujilp.org/wp-content/uploads/2012/04/42.3-Schmitt.pdf>> [Schmitt on deconstructing DPH]

<sup>154</sup> Schmitt on private contractors, *supra* note 144 at 534.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid* at 535.

<sup>157</sup> AP I, *supra* note 11 arts 50(1),

<sup>158</sup> AP I, *supra* note 11, art 51(3).

important because it will grant a protection from unlawful targeting.<sup>159</sup> This MRP argues that this important principle should be enforced even more vigorously in the specific case of child soldiers. As a matter of fact, Schmitt's claim is also flawed if applied in the specific context of children's participation where more protections have been granted or recognized.

In the same vein as Schmitt, Bianchi and Naqvi seek to clarify the applicable law that governs the conduct of hostilities by exploring the concept of direct participation in the specific context of terrorism and counter-terrorism.<sup>160</sup> Bianchi and Naqvi highlight that the "exact scope of the notion of direct participation in hostilities remains a question of controversy" in the literature due to the fact that such term has been traditionally interpreted as only referring to hostile acts directed against enemy forces. Both authors regret that DPH has never been considered as also referring to hostile acts against civilians.<sup>161</sup> Naqvi and Bianchi note that according to this narrow interpretation of DPH, "a terrorist attack against civilians, which did not harm the personnel or equipment of the enemy forces, would not be considered direct participation in hostilities", unless it is concluded that the civilian population is a "center of gravity" in asymmetrical warfare, and a valid target that enables the achievement of victory or the disadvantage of enemy forces.<sup>162</sup>

Interestingly, based on the finding of the necessity to have a "causal relationship between the act and its immediate consequences", Naqvi and Bianchi note that "mere membership of a terrorist organization would not suffice to render a person liable to

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<sup>159</sup> Melzer and Kuster, *supra* note 28 at 18.

<sup>160</sup> Andrea Bianchi and Yasmin Naqvi, "Conduct of Hostilities and Terrorist and Counter-terrorist Acts" in *International humanitarian law and terrorism* (Oxford: Hart Publishing, 2011).

<sup>161</sup> *Ibid* at 179.

<sup>162</sup> *Ibid*.

attack”, unless the person engage in “an act that by its nature or purpose was likely to cause real damage to enemy forces.”<sup>163</sup> This MRP supports that even in the context of terrorism, international law should not allow the targeting of child soldiers based on their status or conduct, unless they constitute a threat as it will be presented in chapter 3.

However, contrary to the ICRC guidance on the notion of DPH, Schmitt, Bianchi and Naqvi did not address the issue of intent which, in the case of the issue on child soldiers is crucial because it constitutes a major argument against the finding of their DPH.<sup>164</sup> Therefore, it is unclear whether both authors would consider the participation of children in terrorist activities as amounting to direct participation in the case where there is enough proximity between their acts and consequences, despite the absence of children’s intent. In addition, it is uncertain whether both authors would align with Schmitt’s proposition related to the finding of DPH in case of doubt as to the nature of the act committed by the civilian.

In her article entitled “a critical assessment of using children to participate actively in hostilities in *Lubanga*: child soldiers and direct participation”, Wagner focuses her analysis on the letter of the law.<sup>165</sup> She examines the findings of the Trial Chamber in the *Lubanga* case, particularly the one related to the distinction between ‘active’ and ‘direct’ participation. Wagner posits that “the meaning of active participation in hostilities under sub-paragraph 8(2)(b)(xxvi) and (e)(vii) is not ambiguous or obscure, but is the same as that of direct participation in hostilities under international humanitarian law.”<sup>166</sup> She

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<sup>163</sup> *Ibid* at 183.

<sup>164</sup> As discussed earlier, the CRC, the ICC and several authors have recognized children’s lack of intent, which, following the three elements defined by the ICRC Interpretive Guidance on DPH excludes any possibility to find that children are DPHing.

<sup>165</sup> Wagner, *supra* note 105.

<sup>166</sup> *Ibid* at 150.

affirms that the trial chamber in *Lubanga* has introduced a superficial distinction between ‘active’ and ‘direct’ participation that is not supported by the letter of the law.<sup>167</sup>

To demonstrate her reasoning, Wagner highlights that the absence of the term “direct” under article 4(3)(c) of APII should have not been given much weight by the court.<sup>168</sup> Accordingly, she posits that “article 4 of APII, sub-paragraph 3(c), when read in conjunction with sub-paragraph 3(d) appears to prohibit the direct participation of children under the age of 15 in hostilities.”<sup>169</sup> Therefore, Wagner argues that the omission of the term ‘direct’ or ‘active’ “in a certain part of an article should not be taken to mean that the prohibition is one other than direct.”<sup>170</sup> Accordingly, she argues that the law has only prohibited the ‘direct’ participation of children in both provisions.

Moreover, she emphasizes that “any difference in the text of article 77(2) of AP I and article 4(3)(c) of AP II, is in fact, negligible.”<sup>171</sup> She refers to Professor Doswald-Beck who asserted that “not much should be read into this difference”, since “the final version of the text of Protocol II was a simpler version of Protocol I presented in the last days of the conference without extensive discussion.”<sup>172</sup> However, such argumentation is misleading insofar as it juxtaposes the ordinary meaning of a term against the context of its codification. Brantingham and Solomon posit that “all solid treaty interpretation begins with the words of a provision itself, as they are commonly understood”, and that the contextual interpretation of a treaty has been relegated to a secondary position.<sup>173</sup> Thus,

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<sup>167</sup> *Ibid*

<sup>168</sup> *Ibid*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid* at 168.

<sup>171</sup> *Ibid* at 169.

<sup>172</sup> *Ibid.*

<sup>173</sup> International Judicial Monitor, “Treaty interpretation” (September 2006) <[http://www.judicialmonitor.org/archive\\_0906/generalprinciples.html](http://www.judicialmonitor.org/archive_0906/generalprinciples.html)>.

one may refer to contextual meaning “only where the text is ‘ambiguous or obscure,’ or when the plain meaning of the text leads to a “manifestly absurd or unreasonable” result.<sup>174</sup> None of the above supports Wagner’s claim. Thus, it seems legitimate to assert that the lack of the term ‘direct’ in article 4(3)(c) may reflect a larger protection under AP II contrary to AP I, as argued by the *Lubanga* case, Sivakumaran and Yuvaraj.<sup>175</sup>

After presenting the three constitutive elements of DPH from the ICRC’s Interpretive Guidance, Wagner posits that these elements highlight a key difference between “participation in the war effort” and “participation in hostilities.”<sup>176</sup> She points out that “active participation in the war effort (e.g., civilians who supply food to the army or other such war sustaining activities) does not itself constitute participation in hostilities.”<sup>177</sup> Therefore, “in order for preparatory activities to fall within the scope of direct participation, such activities must be of a “specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act.”<sup>178</sup>

Accordingly, “preparatory activities that are merely designed to “establish general capacity to carry out unspecified hostile acts”, including general training, for example, do not fall within the scope of direct participation in hostilities.”<sup>179</sup> Wagner points out that the prohibition related to participation in hostilities is only focused on the ‘direct’ participation and does not include “indirect acts of participation by children such as gathering and

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<sup>174</sup> *Ibid.*

<sup>175</sup> Sivakumaran, *supra* note 70 at 317; Yuvaraj *supra* note 44 at 75, *Lubanga*, *supra* note 105 at 627.

<sup>176</sup> Wagner *supra* note 105 at 172.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

transmission of military information, transportation of arms and munitions, provisions of supplies, etc.”<sup>180</sup>

Wagner emphasizes that the broad definition of “active participation” in *Lubanga* “risks reducing the protection for children and for civilians in general” because it allows more activities to be considered as hostile acts, which justifies their targetability.<sup>181</sup> The author points out that under IHL and ICL there was a consistent interpretation of ‘direct’ as being synonymous to ‘active’ participation, contrary to the findings of *Lubanga*.<sup>182</sup> Put simply, Wagner argues that “those not directly participating cannot be targeted and thus, cannot be potential targets.”<sup>183</sup>

This position seems to be aimed at protecting child soldiers who perform support functions or who are used to participate indirectly in hostilities. However, such understanding is problematic because it does not criminalize the indirect use of children who are also exposed to violence and abuse despite their absence or visibility from the battlefield.<sup>184</sup> Van Bueren insists that children’s indirect participation is equivalent to “specific forms of exploitation”, which justifies the prohibition of all kinds of children’s participation in armed conflicts.<sup>185</sup> She also points out that during the codification of the CRC, the “ICRC has opposed the insertion of the word “direct” because it would appear to exclude indirect acts of participation which are capable of being as life-threatening and dangerous as direct combat.”<sup>186</sup> Leibig points out that “the focus on children serving in

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<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid* at 178.

<sup>182</sup> *Ibid* at 179.

<sup>183</sup> *Ibid* at 179.

<sup>184</sup> Sivakumaran (*supra* note 70 at 317) and Yuvaraj (*supra* note 44 at 75) point out that indirect use of children is also prohibited under IHL.

<sup>185</sup> Van Bueren, *supra* note 80 at 817.

<sup>186</sup> *Ibid* at 815.

combat positions overshadows the experiences of many children who are abducted or recruited into armed forces and then forced into serving as domestic and sexual slaves.”<sup>187</sup>

Therefore, it is clear that to protect effectively children from being recruited or used in armed conflicts, the law has to set a blanket prohibition against all types of children’s participation, and such prohibition must not distinguish between ‘direct’ and ‘indirect’ acts of participation.<sup>188</sup> This MRP argues that international law needs to reach a consensus on such a blanket prohibition to offer an exhaustive and stronger protection to children affected by armed conflicts.

### 2.2.2 Multidimensional approach

This approach is advocated by Sivakumaran, Yuvaraj, Sampaio and McEvoy and is aimed at establishing a dialogue between various areas of international law such as IHL, ICL and IHRL.

Sivakumaran investigates the rules and principles related to the protection of civilians and *Person Hors de Combat* which incorporates the principle of non-discrimination and certain prohibitions against physical and psychological abuses.<sup>189</sup> Sivakumaran examines specific categories of individuals who benefit from particular protections such as the wounded, sick and shipwreck, the medical and religious personnel, the interned and detained persons, children or child soldiers. With respect to the protection of child soldiers, Sivakumaran points out to the wider prohibition of AP II and asserts that “the customary prohibition is on all forms of [children’s] participation in hostilities”, at least for NIACs, whereas uncertainty persists as to the scope of the prohibition for IACs.<sup>190</sup>

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<sup>187</sup> Leibig, *supra* note 34 at para 1.

<sup>188</sup> Yuvaraj, *supra* note at 74.

<sup>189</sup> Sivakumaran, *supra* note 70 at 255.

<sup>190</sup> *Ibid* at 317



Yuvaraj disagrees and argues that children enjoy the same protection both under IACs and NIACs.<sup>191</sup>

Moreover, the author notes that, although some statutes such as the *Rome Statute* have undermined the “existing standards” by adopting “the weaker prohibition” of ‘active participation’, “states that are parties to both Additional Protocol II and the *Convention on the Rights of the Child* remain subject to the stricter standards of the Protocol”, which proscribes both the recruitment and the participation of children under fifteen in hostilities.<sup>192</sup>

Sivakumaran regrets the limited scope adopted by IHL’s and ICL’s prohibitions, which are respectively focused on the ‘direct’ and ‘active’ participation. According to the author, such terms are problematic because they raise “difficulty in drawing a distinction between acts that constitute direct or active participation in hostilities and those that do not.”<sup>193</sup> This MRP agrees with Sivakumaran’s point as to the lack of clarity and effectiveness since both terms are still controversial or ambiguous.

Moreover, Sivakumaran rejects as Wagner does the broad interpretation of ‘active’ participation from the *Lubanga* judgement and emphasizes the lack of clarity of the threshold adopted by the ICC. As a matter of fact, he argues that the ICC’s approach “suggests that certain activities at a certain point in time would not amount to active participation in hostilities as the child is not exposed to danger as a potential target, but the same activities at a different point in time may well amount to active participation.”<sup>194</sup> This

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<sup>191</sup> Yuvaraj, *supra* note at 77. This argument echoes with Wagner’s position as to the lack of a real difference between the prohibition of AP I and II, and the call to not give an unfounded meaning to a statute due to the lack of the terms such as ‘direct’ or ‘active’ (Wagner, *supra* note 105 at 169).

<sup>192</sup> Sivakumaran, *supra* note 70 at 317.

<sup>193</sup> *Ibid.*

<sup>194</sup> Sivakumaran, *supra* note 70 at 317.

is due to the fact that the court did not clarify what kind of danger is a real danger for a child. Does the danger only refer to situation where the child can be killed, recognised by enemy forces or kidnapped and used by armed groups? What about the danger faced by child soldiers who have been or are at risk of being sexually abused by their own groups as highlighted by the *Ntaganda* case<sup>195</sup>?

According to Sivakumaran, the ICC's position is unclear and ambiguous because "by the time it is realized that the child may be in real danger, it may well be too late."<sup>196</sup> Moreover, the *Lubanga* case seems to have acknowledged the confusion of its approach by stating that a case-by-case analysis should be conducted every time to determine if 'active' participation happened.<sup>197</sup> Contrary to the ICC, Sivakumaran clarified that such case-by-case determination should only be reserved for grey areas.<sup>198</sup> This is due to the fact that such individualized assessment may prove perilous and uncertain for child soldiers as it "may be subject to varying viewpoints", while triggering "a dramatic effect upon the conclusion with regard to the legality of a particular target."<sup>199</sup>

Dissenting Judge Benito claimed that refusing "to enter a comprehensive legal definition of a crime" by leaving it "open to a case-by-case analysis or to the limited scope of the charges brought against the accused" is failing to protect the life and integrity of child soldiers, while constituting a "step backwards in the progressive development of international law."<sup>200</sup> This position is also shared by Sivakumaran who supports the

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<sup>195</sup> *Ntaganda*, *supra* note 55 at paras 50-53.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Lubanga*, *supra* note 105 at 628.

<sup>198</sup> Sivakumaran, *supra* note 70 at 318.

<sup>199</sup> Andrea Bianchi and Yasmin Naqvi, "Conduct of Hostilities and Terrorist and Counter-terrorist Acts" in *International humanitarian law and terrorism* (Oxford: Hart Publishing, 2011) at 182.

<sup>200</sup> *Lubanga*, *supra* note 105 at para 7(dissenting opinion Justice Odio Benito).

establishment of a general framework of protection which would allow some exceptions or further analysis in case of unclear or ambiguous situation.<sup>201</sup>

In addition, Sivakumaran points out that in the case that they do not reach the threshold of ‘active participation’, “many of these activities would, however fall within the notion of [direct] participation in hostilities and would thus be prohibited under the law of non-international armed conflict.”<sup>202</sup> This nuance clearly shows that Sivakumaran does not automatically equate ‘direct’ participation to ‘active’ participation since he sees in the latter concept a default regime which can be used as a catch-all category.

Therefore, this MRP argues that more effort should be focused on the creation of a clear and operational framework of analysis which would encompass both ‘direct’ and ‘indirect’ participation. Unfortunately, Sivakumaran does not clarify if he would opt for another definition of ‘active participation’ as an alternative to the ICC’s broad interpretation nor did he provide elements to distinguish between ‘active’ and ‘direct’ participation. Moreover, it remains unclear whether Sivakumaran considers child soldiers who are participating in hostilities as combatants, unlawful combatants or civilians.

Yuvaraj investigates the scope of children’s activities which amount to ‘direct’ or ‘active’ participation in hostilities under IHL and ICL. The author examines the terms ‘direct’ and ‘active’ under the Additional Protocols, the CRC and the *Lubanga* case. As highlighted by Sivakumaran, Yuvaraj notes that, under AP II, there is a blanket prohibition against all kinds of children’s participation in hostilities, contrary to AP I which only prohibits children’s “direct” participation.<sup>203</sup> In addition, Yuvaraj notes that “the degree of

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<sup>201</sup> *Ibid.*

<sup>202</sup> Sivakumaran, *supra* note 70 at 318.

<sup>203</sup> Yuvaraj, *supra* note 44 at 75, Sivakumaran *supra* note 70 at 317.

this difference is unclear given the lack of certainty of the scope of activities covered by “direct” in article 77(2) of AP I.”<sup>204</sup> Furthermore, he examines article 38 of the CRC on the prohibition of children’s participation in hostilities and notes the use of the same wording as in AP I.<sup>205</sup> Interestingly, Yuvaraj points out that “it was felt that [this] provision could undermine IHL because it was inconsistent with the level of protection offered in article 4(3) of APII.”<sup>206</sup> Yuvaraj agrees with Sivakumaran by emphasizing that the term “direct” should not have been incorporated in article 38 of the CRC “because it allows children to be used to indirectly participate in hostilities.”<sup>207</sup> He suspects that this incorporation was due to the lack of a consensus on the necessity to adopt a blanket prohibition against children’s participation (direct and indirect participation) among the CRC’s drafters.<sup>208</sup>

In addition, Yuvaraj points out that the criticisms of the *Lubanga* case result mainly from the fact the court made children more targetable by recognizing that ‘active’ participation encompasses both ‘direct’ and ‘indirect’ participation.<sup>209</sup> To address these criticisms, Yuvaraj points out that the ICC should clarify the scope of the term “active” towards IHL and IHRL to avoid any overlap or confusions.<sup>210</sup> Thus, Yuvaraj claims that the use of the term “active” in the *Rome Statute* is strictly to be understood in the specific context related to the protection of children’s recruitment and use, whereas the term “direct” is a generic term used by IHL in order to achieve its core principle of distinction.<sup>211</sup>

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<sup>204</sup> Yuvaraj, *supra* note 44 at 75.

<sup>205</sup> *Ibid* at 74-75.

<sup>206</sup> *Ibid* at 74.

<sup>207</sup> *Ibid* at 75, Sivakumaran, *supra* note 70 at 317-318.

<sup>208</sup> Yuvaraj, *supra* note 44 at 74.

<sup>209</sup> *Ibid* at 79.

<sup>210</sup> *Ibid*.

<sup>211</sup> *Ibid* at 79-80.

Consequently, Yuvaraj asserts that “the interpretation of ‘active’ for the purpose of protecting children is likely not to affect the interpretation of ‘active’ or ‘direct’ for the purpose of distinguishing between combatants and civilians.”<sup>212</sup> Yuvaraj’s position is in harmony with Sampaio’s and McEvoy’s arguments on the necessity to distinguish the concepts of “direct” in IHL and “active” in ICL.

Indeed, in their article entitled “Little Weapons of War: Reasons for and Consequences of Treating Child Soldiers as Victims”, Sampaio and McEvoy investigate the legal framework on children’s protection in international law.<sup>213</sup> They assert that both ‘active’ and ‘direct’ participation have distinct purposes and thresholds, which justifies the necessity to contextualize each of these terms. The authors support that “the purpose of ‘direct participation in hostilities’, is normally to serve as a pillar to the principle of distinction, which protects victims of armed conflicts while determining that only combatants can be lawfully targeted.”<sup>214</sup> They claim, on the one hand that “direct participation in hostilities is, therefore, usually a concept that is used for the protection of civilians, limiting the conduct of belligerent parties vis-à-vis their targeting operations.”<sup>215</sup> On the other hand, the authors support that “the concept of direct participation in conflicts, when used in relation to children, does not have any connection with the principle of distinction.”<sup>216</sup>

To reach this conclusion, Sampaio and McEvoy examine several provisions such as Articles 77(2) in AP1, 4(3) c) and 38(2) in the CRC. They observe that in all these

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<sup>212</sup> Yuvaraj, *supra* note 44 at 80.

<sup>213</sup> Sampaio & McEvoy, *supra* note 57.

<sup>214</sup> *Ibid* at 54.

<sup>215</sup> *Ibid*.

<sup>216</sup> *Ibid* at 55.

provisions, the law not only prohibit children’s recruitment and participation in hostilities, but also puts the burden on states, armed groups and any other actor who may be involved in the involvement of children in hostilities.<sup>217</sup> According to the authors, such language clearly demonstrates that “the international community has utilized the words “direct participation in hostilities” in multiple instruments in relation to children solely to make it illegal for belligerent forces to use children in combat rather than aiming to establish the circumstances when children can be targeted in accordance with the principle of distinction.”<sup>218</sup>

In addition, the authors examined art 51(3) which posits that “civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”<sup>219</sup> Sampaio and McEvoy notice that in this provision there is no burden put on belligerents to ensure the absence of civilians from the battlefield, contrary to the previous provisions.<sup>220</sup> Consequently, the authors argue that only civilians who violate this provision will face the direct consequence of being targeted.

Moreover, the authors examine the three constitutive elements of DPH from the ICRC Interpretive Guidance and they observe that in order to satisfy the belligerent nexus<sup>221</sup> there has to be a certain intent, contrary to the ICRC’s position.<sup>222</sup> Sampaio and McEvoy disagree with the ICRC’s reasoning, and they question the ICRC’s choice to find relevant the intent of involuntary shield and not child soldiers’ intent.<sup>223</sup> Interestingly, Van

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<sup>217</sup> Sampaio & McEvoy *supra* note 57 at 54-55.

<sup>218</sup> *Ibid.*

<sup>219</sup> AP I, *supra* note 11 art 51(3).

<sup>220</sup> Sampaio & McEvoy, *supra* note 57 at 55.

<sup>221</sup> As detailed earlier, this act must be specifically designed to cause the harm in support of a party to the conflict (ICRC Interpretive Guidance *supra* note 38 at 58).

<sup>222</sup> Sampaio & McEvoy *supra* note 57 at 56-60.

<sup>223</sup> *Ibid* at 61.

Bueren argues in the same way by noting that “armed conflict are inherently brutalising and [children’s] very nature makes it impossible for those under 18 to give free and informed consent.”<sup>224</sup>

Sampaio and McEvoy posit that the prohibition against children’s recruitment or participation who are under fifteen is justified by the fact that children under fifteen are not “considered mature enough to choose to join belligerent parties to a conflict, let alone to participate in combat operations in favor of these parties.”<sup>225</sup> In other words, both authors argue that children under fifteen years lack the intent to participate in hostilities “just as involuntary human shields”, particularly “due to their presumed absolute legal incapacity to choose to do so under international law.”<sup>226</sup> Consequently, Sampaio and McEvoy seem to agree with this MRP that children can never constitute legitimate target, contrary to adults civilians unlawfully participating in hostilities or adults regular combatants.

### ***Conclusion on the literature review***

This literature review compared several approaches and positions on the question of children’s legal protection during armed conflicts and analyzed whether children would be better protected with a large or narrow interpretation of the terms ‘direct’ or ‘active’. To answer this question, this literature review presented two main approaches: the conservative and the multidimensional approach. The conservative approach was supported by Schmitt, Naqvi, Bianchi and Wagner and was reflected by the scholars’ attempt to address the issue on child soldiers by solely focusing their analysis on IHL’s traditional principles and by their full rejection of the broadening of concepts or terms

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<sup>224</sup> Van Bueren *supra* note 80 at 816.

<sup>225</sup> Sampaio & McEvoy *supra* note 57 at 61.

<sup>226</sup> *Ibid.*

related to the prohibition against child soldiering. The main answer from this approach was a categorical refusal to broaden the concept of 'direct' or 'active' participation, which were limited to military operations. However, only Schmitt has explicitly supported the finding of DPH in case of doubt, thus contradicting IHL principles.

Unfortunately, this approach proved narrow and incomplete. For instance, Schmitt's proposition as to the finding of direct participation even in case of doubt runs counter the principles of IHL which are aimed at the protection of civilians, especially in case of doubt as to the scope of their liability during hostilities. Naqvi's and Bianchi's attention to the proximity between the act and its consequence in the context of terrorist activities left some gaps as to the relevance of the assessment of the intent of the combatant, especially in the case of a children's participation. Wagner's design of a test aimed at finding direct participation in case where not only there is a proximity between the act and the consequence, but also when the act is inherently of a military nature missed all non-military and indirect acts committed by children which are also prohibited by CIL and soft law.

By contrast, the multidimensional approach as the one advocated by Sivakumaran, Yuvaraj, Sampaio and McEvoy favoured a dialogue between several areas of international law such as IHL, ICL and IHRL. This rich and diversified analysis has been able to clearly demonstrate the weaknesses of IHL and ICL when tackling the issue of children's participation in isolation. All scholars belonging to this approach recognized that 'direct' and 'active' are both unclear and ambiguous concepts, which in the absence of a better and consistent definition in international law, will only serve to blur the lines of the prohibition against children's participation in armed conflicts.



Contrary to the conservative approach, Sivakumaran, Sampaio and McEvoy recognized that ‘direct’ and ‘active’ participation are not synonymous. Sivakumaran, compared IHL, ICL and IHRL and regretted that the *Rome Statute* undermined the existing norms by only prohibiting children’s ‘active’ participation. However, he asserted that in the absence of the finding of children’s ‘active’ participation, the court could still recognize their ‘direct’ participation which is also prohibited in international law. Yuvaraj, as well as Sampaio and McEvoy, agreed as to the necessity to distinguish between the use of the term ‘direct’ to refer to the general context of the principle of distinction and the term ‘active’ to point out to the specific context of children’s participation. This MRP agrees that such distinction may constitute an interesting alternative to protect children from all kinds of participation, while preserving the protection afforded to civilians who are not unlawfully participating in armed conflicts.

In the next section, this MRP will provide its reasoning in support of the multidimensional approach by emphasizing its potential contributions for the legal protection of child soldiers, while highlighting some precautionary principles that armed groups or forces need to respect when dealing with child soldiers.

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## Chapter 3: Re-imagining children's protection through IHRL and military guidance

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### 3. Relevance of a broader scope for children's legal protection

At this stage, this MRP has already clarified that child civilians and child soldiers are considered as children who are victims of the brutality and abuse of adults during armed conflicts. In addition, this MRP demonstrated that children share the same vulnerability and immaturity, and that these inherent commonalities have justified the establishment of a special protection for all children under fifteen affected by armed conflicts, regardless of their conduct or status. In this part, the author will build her arguments by contrasting or validating some of the claims posited in the literature review by scholars, and will emphasize the relevance of IHRL and military guidelines on the specific context of child soldiers.

#### 3.1 Justification for an extensive application of human rights norms in the codification of child soldiers' protection

Sampaio and McEvoy examined the concept of direct participation by comparing IHL and IHRL, and they pointed out that “human rights law [...] determines that, when children are specifically concerned, all actions must be taken with their best interest as the primary consideration.”<sup>227</sup> As a matter of fact, the CRC has codified the principle of children's best interests which advocates that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary

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<sup>227</sup> Sampaio & McEvoy *supra* 57 at 58.

consideration.”<sup>228</sup> Similarly, Waschefort points out that “the best interest of the child is a trite principle of international law” which requires “a higher threshold” of legal protection.<sup>229</sup>

Children’s best interests have been defined by the United Nations’ High Commissioner for Refugees (UNHCR) as relating to the “well-being of a child” and is determined “by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child’s environment and experiences.”<sup>230</sup> It is clear that the experience of violence and fear during armed conflicts by child soldiers is a relevant factor that affects their best interests.

However, Wagner asserts that, during armed conflicts, IHL has priority over other legal regimes such as IHRL, which are supposed to apply “only in the absence of definition under the laws of armed conflict.”<sup>231</sup> Thus, she states that the “IHL rule of direct participation in hostilities prevails over human rights rule in a situation of armed conflict.”<sup>232</sup> Nevertheless, it is unfounded to exclude or to minimize the application of IHRL during armed conflicts since IHL has also recognized the importance of human rights through the principle of humanity.<sup>233</sup> To that extent, Melzer and Kuster note that “IHL comprises those rules of international law which establish minimum standards of humanity that must be respected in any situation of armed conflict.”<sup>234</sup> In the same vein, Waschefort points out that “IHL is generally, though not always, the *lex specialis* during armed

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<sup>228</sup> CRC *supra* note 47, art 3(1).

<sup>229</sup> Waschefort *supra* note 5 at 49.

<sup>230</sup> UNHCR, “UNHCR Guidelines on Determining the Best Interests of the Child” (May 2008) at 14 <<http://www.unhcr.org/4566b16b2.pdf>>.

<sup>231</sup> Wagner, *supra* note 105 at 194.

<sup>232</sup> *Ibid* at 194.

<sup>233</sup> Melzer and Kuster, *supra* note 38 at 17.

<sup>234</sup> *Ibid*.

conflict.”<sup>235</sup> Moreover, he argues that “IHL is theoretically applicable at all times, although derogation from some provisions is permitted during states of emergency.”<sup>236</sup> Thus, this author highlights that it is a mistake to consider that “during armed conflict, IHL supplants IHL totally.”<sup>237</sup> Most importantly, Waschefort notes that “IHL has developed child protection with respect to prohibiting the recruitment of child soldiers significantly in that child soldier recruitment is prevented during times of peace as well.”<sup>238</sup> This MRP agrees with this observation and asserts that IHL may contribute to design a better frame for the codification and application of the legal protection of child soldiers when combined with IHL and ICL.

Therefore, this project argues that each time that an action or a decision involving child soldiers has to be taken, child soldiers’ experience of violence and fear on a daily basis should be considered. Lieutenant Colonel Leandro specified that “children remain children even if they are carrying out intelligence activities or aiming a loaded weapon at a peacekeeper.”<sup>239</sup> In addition, he posits that “a child soldier is always a victim to be looked after and is never to be held accountable.”<sup>240</sup> Thus, despite the ambiguity on the concept of child soldiering, the preservation of the status of children for child soldiers should remain the priority of international law.

Since the involvement of children in armed conflicts trigger not only additional legal considerations but also the application of human rights principles such as children’s best interests, it is not unusual to import such principles in the specific context of child

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<sup>235</sup> Waschefort, *supra* note 5 at 89.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*

<sup>238</sup> Waschefort, *supra* note 5 at 89.

<sup>239</sup> Leandro, *supra* note 7 at 6.

<sup>240</sup> *Ibid* at 1.

soldiering. To that extent, Sivakumaran points out that according to European human rights, “lethal force may not be used against fighters in situations in which it is feasible to arrest them” because “to kill fighters when it would have been feasible to capture them constitutes a violation of human rights law.”<sup>241</sup> This author recognizes that such developing principle, though constituting “an important divergence from the position under international humanitarian law” has started to influence IHL.<sup>242</sup>

As a matter of fact, the ICRC has asserted that “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”<sup>243</sup> In other words, despite the permissive character of IHL, belligerents do not have “*carte blanche* to wage unrestricted war” due to the application of some foundational human right norms, which belongs to the principle of humanity.<sup>244</sup> This MRP argues that this principle should be enforced vigorously in the specific context of children’s participation in hostilities and that every child soldier should be given an opportunity to surrender when possible.

Consequently, a multidisciplinary analysis of the issue on child soldiers’ protection highlights that both IHL, IHRL and ICL are in favour of a strong legal framework to enforce the prohibition against children’s participation in hostilities, although they use different approaches. IHL protects children through the ‘special protection’ which grants specific rights and privileges to children affected by armed conflicts. IHRL confirms this principle and adds the necessity to preserve children’s best interests every time that a decision involving a child has to be taken. ICL criminalised the use of children in armed

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<sup>241</sup> Sivakumaran, *supra* note 70 at 367.

<sup>242</sup> Sivakumaran, *supra* note at 370.

<sup>243</sup> ICRC Interpretive Guidance, *supra* note 28 at 82.

<sup>244</sup> Melzer and Kuster *supra* note 28 at 17-18.

conflict by raising such prohibition to the rank of a war crime and by confirming the lack of legal capacity for children under fifteen years and their inability to consent to their participation in hostilities. This MRP posits that a framework combining all these three areas of law, while taking into considerations the knowledge and *savoir-faire* from military guidelines can help strengthen children’s legal protection during armed conflicts.

### **3.2 Regulations for the use of force against child soldiers**

This MRP argues that the legal protection of children, due to their acknowledged vulnerabilities and immaturity requires a different methodology or approach than the one applied to adults.<sup>245</sup> Waschefort argues that it is a serious error to treat children and adults with the same standards, because children do not have “the same decision-making and cognitive abilities as adults.”<sup>246</sup> Similarly, Kuper emphasizes that “additional restraints should be exercised when soldiers are aware that child soldiers are present in an opposing force.”<sup>247</sup> As a matter of fact, she points out that even soldiers on the ground with low level of literacy and training must be aware that “IHL and human rights rules for the protection of adults apply equally to children, and arguably should be applied to children with particular diligence, due to their vulnerability and entitlement to ‘special treatment’.”<sup>248</sup>

The Canadian Forces JDN clarified that “given the complexities that will exist in a given theatre if child soldiers are encountered, robust legal principles and guidance need to be in place to ensure that CAF are aware of their legal obligations.”<sup>249</sup> Furthermore, this instrument points out that “legal review will be required on all mission-specific order

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<sup>245</sup> Sivakumaran, *supra* note 70 at 315.

<sup>246</sup> Waschefort, *supra* note 5 at 47.

<sup>247</sup> Kuper, *supra* note 67 at 269.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

addressing circumstances where there is potential involvement of child soldiers.”<sup>250</sup> This is a clear indication that there is a heavy legal burden on opposing forces who are aware of the presence of child soldiers, and this burden requires them to adopt or consider additional legal obligations of international law. For instance, this Doctrine notes that one of these constraints “may be the requirement to report the Six Grave Violations [...]” or “the requirement to not keep detained child soldiers in the same detention location as adult detainees.”<sup>251</sup>

Similarly, Lieutenant Colonel Leandro asserts that “targeting and self-defense require an extensive application of the International Humanitarian Law principles” and that “the minimum use of force and the proportionality principle are to be used together and combined with non-lethal options in case of direct engagement” against child soldiers.<sup>252</sup> Moreover, he points out that “the discrimination principle, in addition to its regular legal application, should also be used to discriminate inside the military target, between regular soldiers and child soldiers, or at least to avoid/reduce collateral damages on child soldiers.”<sup>253</sup> Consequently, it is clear that opposing forces who are confronted with child soldiers need to take additional precautions that are usually not required when dealing with regular combatants such as the consideration of the principle of proportionality.<sup>254</sup>

However, the Canadian JDN recognizes that child soldiers who serve on the frontlines can be targeted if they pose a threat for the opposing forces provided that the necessary precautions and additional assessments have been conducted before any

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<sup>250</sup> *Ibid.*

<sup>251</sup> Canadian Forces JDN, *supra* note 8 at 2-6

<sup>252</sup> Leandro, *supra* note 7 at 8.

<sup>253</sup> *Ibid.*

<sup>254</sup> This principle requires belligerents who are preparing to conduct an attack which may also impact on civilians or civilians object to ensure that such consequences are not “excessive in relation to the concrete and direct military advantage anticipated.” (Melzer & Kuster *supra* note 38 at 19)

attack.<sup>255</sup> This Doctrine supports that the Canadian Armed Forces (CAF) “will retain the right to use force, to protect themselves from the threat of serious injury of death, even from a child soldier” since “a child soldier with a rifle or grenade launcher can present as much of a threat as an adult soldier carrying the same armament.”<sup>256</sup> Furthermore, the Canadian JDN highlights that such use of force will be selected after all other options to protect child soldiers have been considered. As a matter of fact, this Doctrine posits that “if forced to engage child soldiers”, opposing forces should always “seek to engage adults within the group first” because usually “the adult leadership of a unit of child soldier will often represent the tactical centre of gravity”, and the “loss of such authority figures will often result in a loss of cohesion” in this unit.<sup>257</sup>

Likewise, Singer argues that “the leader’s control is the center of gravity” which justifies the fact that armed forces should “engage adult targets first if possible.”<sup>258</sup> Moreover, Singer posits that “if the adult leader is killed or forced to take cover, the whole organization often breaks down.”<sup>259</sup> Therefore, this MRP argues that the use of lethal force against child soldiers should only be considered as a self-defence strategy when there is no other viable option. Lieutenant Colonel Leandro points out that in the case where child soldiers constitute a threat to peacekeeping operations, they are “a legitimate target to detain, to keep in custody, to neutralize, to separate from adult dominance, and as a last resort to use lethal fire with non-lethal intent.”<sup>260</sup>

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<sup>255</sup> Canadian Forces JDN, *supra* note 8 at 2-1, 2-2.

<sup>256</sup> *Ibid* at 2-10.

<sup>257</sup> *Ibid* at 2-13.

<sup>258</sup> P. W. Singer, “Caution: children at war”, online: (2001-2002) Parameters Winter <<https://www.brookings.edu/wp-content/uploads/2016/06/20011203singer.pdf>>.

<sup>259</sup> *Ibid*.

<sup>260</sup> Leandro *supra* note 7 at 15.



## **Conclusion**

In this chapter, this MRP argued that international law cannot address, in a satisfactory way, the issue on child soldiers by focusing on a narrow and incomplete understanding of children's participation in armed conflicts. Rather, a multidimensional framework has to be developed to touch upon the various nuances and subtlety of this problematic. Thus, this chapter opened a dialogue between IHL, ICL and IHRL by underlining their shared principles and characteristics and by pointing out how such principles may be used as foundational norms in the design of a new framework which would also combined operational knowledge from armed forces such the Canadian Forces and its recent Joint Doctrine. This research project posited that such need for interdisciplinarity is justified by the massive and conflicting codification of the prohibition against children's participation in hostilities by several areas of law, but also by the very specific status of children in international law.

Furthermore, this chapter addressed the flawed and narrow scope of IHL and ICL through their use of the terms 'direct' and 'active'. Thus, it highlighted that the term 'direct' is inappropriate for the assessment of children's participation due to lack of intent as a relevant constitutive element. In addition, it pointed out that 'active' participation, although allowing a larger prosecution of perpetrators using children in hostilities, is problematic due to the high and unclear threshold of 'potential target' and 'real danger' adopted by the ICC. As a matter of fact, this MRP demonstrated that treating children's rights in a standardized and generic fashion as adults' rights is a serious mistake, especially during the context of armed conflicts because the law exceptionally granted children with an

extensive protective legal regime (special protection), which applies to all children regardless of their conduct or status.

Thus, this project clarified that children, due to their vulnerabilities benefit from the maximum protection during hostilities. In fact, this project posited that every time that children's interests are at stake, especially during armed conflicts, international law needs to adapt its methods to better reflect children's vulnerabilities and lower maturity. Therefore, this MRP stated that children's legal status during armed conflicts challenges IHL's traditional principle of distinction and justifies a departure from the traditional concepts of 'direct' or 'active' participation, while calling for a new legal framework based on interdisciplinarity and military experience from armed forces.

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## Overall conclusion

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The continuing practice of child soldiering constitutes a delicate issue in international politics where the morality and the law meet with economic, social, cultural, historical and political factors. This MRP highlighted that this interaction complicates the discussions on the required conditions and standards for the establishment of a strong and broad legal regime of protection of all children affected by armed conflicts, and especially those exploited and abused by armed groups such as child soldiers.

Despite its reluctance to tackle promptly the issue of child soldiers, Public International Law has progressively and massively codified the prohibition against child soldiering in several areas of law. Unfortunately, such massive codification, though positive for contributing to the increase of the awareness on the issue of child soldiering has created some ambiguity and uncertainty with respect to the exact scope of the prohibition against child soldiering since several and conflicting standards were adopted.

This MRP emphasized numerous gaps as to the issue of child soldiering such as the lack of a consensus on the meaning behind the term ‘child soldier’ and the inability to reach strong and shared standards of protection in international law. To improve child soldiers’ legal protection, this MRP proposed to consider child soldiers as children in terms of their rights and obligations, despite their conduct or status during hostilities. To assert that, this MRP discussed the definition of child soldiers and the nuances derived from soft law such as the *Graça Machel report*, the *Cape Town Principles* and the *Paris Principle*. All these instruments have successfully drawn the parameters of the issue of child soldiering through their inclusive definition and description of the context of child soldiering. This MRP noted

that these instruments, though not binding, have approached the analysis of the practice of child soldiering in very broad terms, thus illustrating that such issue cannot only be limited to the examination of military roles or to the rigid principle of distinction. As explained earlier, the *Cape Town Principles* have also recognized that child soldiers retain their status as children no matter what their conduct or status is during armed conflicts. This MRP argued that such important principle clarifies that child soldiers never lose their status and protection as children, despite their participation in hostilities.<sup>261</sup>

This MRP has also elaborated on the concept of children's special protection which has been established to recognize children's vulnerabilities and to protect them during extreme conditions of violence such as armed conflicts, where children cannot count on the usual protection and support of adults. Moreover, this project highlighted that the extension of such protection towards children who participate in hostilities is a clear indication that being involved in hostilities does not equate to lesser protection for children. Thus, this MRP argued that since child soldiers are entitled to the same special protection as child civilians, the elaboration of a new framework which deviates from IHL's traditional principle of distinction is justified.

To that extent, this MRP argued that the category of child soldiers collapses these two categories (civilians and combatants) and requires its own framework and approach. To reach this conclusion, this MRP also examined the concept of 'active' and 'direct' participation following the ICRC's guide on the notion of DPH and the ICC's findings from the *Lubanga* case and it illustrated that both the ICRC and the ICC have failed to define children's participation and to delineate the scope of the prohibition against the

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<sup>261</sup> Lieutenant Colonel Leandro, *supra* note 7 at 1.

practice of child soldiering. As explained earlier, the ICRC failed to do so by not considering the relevance of children's lack of intent in the assessment of their participation, whereas the ICC designed a broad and ambiguous definition of 'active' participation, which instead of protecting child soldiers may place them in a more dangerous situation.

In addition, this MRP clarified that when there are children involved in armed conflicts, whether they are civilians or direct participants, IHL can never mechanically apply without consulting with IHRL principles such as children's best interests and the military guidelines. This research project also evidenced that when some principles are designed to protect adults such as the principle of humanity or the principle of proportionality, they apply with even more power towards children.<sup>262</sup> Therefore, this MRP posited that only a broader scope of analysis on the issue of child soldiers involving IHL, ICL, IHRL and military guidelines can help establish a stronger and more complete protection of child soldiers. Finally, this MRP agreed with military guidelines that when there is no other viable options, opposing forces can target child soldiers who are armed or who constitute a threat, with lethal or non-lethal forces although they should not have a "lethal intent".<sup>263</sup>

This MRP supports that the law itself without military support cannot succeed in the eradication of the continuing practice of child soldiering. Lieutenant Colonel Leandro notes that "an essential aspect of dealing with child soldiering is indeed breaking the recruitment chain" although such task "is not a typical military function."<sup>264</sup> Similarly, the

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<sup>262</sup> Kuper, *supra* note 67 at 269.

<sup>263</sup> Leandro, *supra* note 7 at 6.

<sup>264</sup> *Ibid* at 9.

Canadian Forces JDN argues that there should be an “effort to break the cycle of exploitation and employment of children as child soldiers” which can take “a variety of roles, from supporting local organizations, NGOs, and IOs, to directly delivering information effects via military assets.”<sup>265</sup>

Thus, this MRP asserted that the issue of child soldiering is not limited to the legal question of the prohibition against their recruitment, enlistment, use or the modalities for targeting children involved armed conflicts, but also on how to put an end to the practice of child soldiering. It is clear that only the latter question will allow the design of an effective approach to tackle this alarming issue, especially with the current rise of terrorism and extremism around the world.

While this MRP makes a strong case for the strengthening of the legal protection of child soldiers during hostilities by using IHL, ICL, IHRL and soft law principles, there are some limitations to this project. As indicated in his title, this MRP focused its research on international law and did not study the principles and positions from domestic jurisdictions related to child soldiers. Such study would have required a distinct research and an informed selection of countries or regions to allow a comparison and a finding of some shared patterns. Such research is beyond the scope of this MRP. Furthermore, as confessed in its introduction, this MRP did not explore child soldiers’ criminal liabilities and it did not discuss the possibility to prosecute them when they become perpetrators. This is due to the fact that this project focused on child soldiers’ vulnerabilities and on the existing gaps related to their legal protection. Finally, due to its limited scope, this MRP did not clearly set out the underpinnings of the new framework of protection for child

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<sup>265</sup> Canadian Forces JDN *supra* note 8 at 2-11.

soldiers, and has briefly pointed out some major principles that would characterize such framework.

Future research may compare the position of domestic jurisdictions to the one of international courts and tribunals as to the issue of child soldiers' criminal liability and vulnerabilities. For that purpose, it would be interesting to discuss the future findings of the *Ongwen* case<sup>266</sup> in light of IHL, ICL and IHRL principles.

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<sup>266</sup> *Ongwen supra* note 6. This case represents the very first prosecution of a former child soldier at the International Criminal Court level. Its future finding may impact the understanding of the protection and criminal liability of child soldiers in international law.

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