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Stacey Henderson, The University of Adelaide
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***Children who are DPH: Does the law adequately take the status of child into account … and should it?***

 The increasing presence of children in conflict zones raises questions of applicable targeting law and other international humanitarian law questions. While the moral impulse is to shield children from the horrors of war, the reality is that children can, and are, taking a direct part in hostilities, presenting a direct and significant threat to opposition forces. For example, the first American soldier killed in Afghanistan was reportedly shot by a fourteen year old boy. In Sierra Leone, a squad from the Royal Irish Regiment was taken prisoner by an armed group called the West Side Boys, consisting mostly of children. It is imperative that international humanitarian law provide guidance to those faced with the reality of children who are taking a direct part in hostilities.

International humanitarian law is founded upon the dual notions that it is possible to distinguish combatants from civilians in a way that is accurate and reliable, and that civilians enjoy complete immunity from direct targeting. This immunity from targeting is conditional upon civilians refraining from taking any direct part in hostilities. Civilians may temporarily lose their entitlement to protection against targeting ‘for such time as’ they are directly participating in hostilities. The loss of immunity from targeting lasts only ‘for such time as’ the civilian is DPH. When the civilian ceases to be DPH, they regain their protected status and immunity from targeting. This is the so-called ‘revolving door’ phenomenon and applies to all civilians, child and adult, who are DPH. The revolving door phenomenon ensures maximum protection for the civilian population against arbitrary targeting decisions.

Contemporary armed conflicts are predominantly played out in civilian locations, rather than battlefields, with combatants mingled with the civilian population. The increasing reports of civilians, including children, who are DPH should therefore come as no surprise. While efforts have been aimed at reducing the number of children recruited into armed forces and criminalising the activities of their recruiters, relatively less attention has been directed at reconsidering the legal status of children participating directly in hostilities and the rules for their targeting. The issue of children who are DPH raises two distinct legal questions: first, whether children who are DPH are just like any adult civilian who is DPH and, second, if so, whether the means used to target them follow the same rules as for any adult who is DPH.

Turning first to the question of whether children who are DPH are just like any adult civilian who is DPH. The first step is to identify the child. This is not as simple as it first might appear. While the *Convention on the Rights of the Child* applies generally to anyone under the age of 18 unless the age of majority is attained earlier under the child’s national law, there is no ‘straight-18’ consensus in international law for determining childhood. For example, the *Hague Convention on Civil Aspects of Child Abduction* applies to children up to the age of 16; the *Additional Protocols to the 1949 Geneva Conventions* protect children from recruitment until the age of 15; whereas the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* raises that level of protection to the age of 18. The *Rome Statute* adopted the age limit of under 15 years of age for the purposes of the war crime of ‘conscripting or enlisting children’ or ‘using them to participate actively in hostilities’. For the purposes of this paper, a child will be considered to be anyone below the age of 15, leaving aside the legal grey zone between 15 and 18.

Having identified the child, the second step is to determine whether the child who is DPH is just like any adult who is DPH. Article 51(3) of *Additional Protocol I* and Article 13(3) of *Additional Protocol II* both state that ‘civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities’. International humanitarian law deems a civilian to be anyone who is not a combatant. Civilians who are not taking a direct part in hostilities are protected persons and may not be directly targeted. The next step is to identify when a civilian is taking a direct part in hostilities to determine whether the rules are different for children.

The ICRC *Interpretive Guidance on Direct Participation in Hostilities* indicates that there are no special allowances for children who directly participate in hostilities and that even children below the recruitment age of 15 may lose protection against direct attack. Further, the *2015 US Law of War Manual* explicitly states that ‘whether a civilian is considered to be taking a direct part in hostilities does not depend on that person’s age’ (§4.20.5.3). According to the *Interpretive Guidance w*hether conduct amounts to DPH is determined by reference to three criteria:

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

Clearly the child involved in the final execution of an action, firing a machine gun at opposition troops for example, will fall within the ‘for such time as’ window and lose their immunity from targeting. The *Interpretive Guidance* also includes any activities that prepare for the execution of the act, as well as prior geographic positioning and subsequent withdrawal as constituting an integral part of the specific hostile act and within the ‘such time as’ window. This all suggests that the rules are the same for adults and children when determining when the child is DPH. However, the child may have some additional protection, in that their clothing and obvious youthful appearance, particularly for younger children, place a heavy burden on those opposing them to verify that their actions do indeed amount to DPH before they can overcome their presumptive civilian status and be targeted. However, once it can be ascertained that their conduct amounts to DPH, they lose their immunity from direct targeting regardless of age. Once their participation ceases, just like any adult civilian, the child regains their civilian immunity, although the child will also regain the special protection afforded to children under international humanitarian law.

 However, whether the child can have a continuous combat function and thus be a legitimate military target at all times is less settled. The *Interpretive Guidance* states that civilians with a continuous combat function lose their protection from targeting for as long as they remain members of the armed group and do not benefit from the ‘revolving door’ phenomenon. While continuous combat function has been subject to criticism; for adults, membership of an armed group remains a defining factor in assessing targetability, whether one takes the view that membership itself is sufficient to make an individual targetable or whether one takes the view adopted by the ICRC *Interpretive Guidance* that it is the function of the individual members within the group that makes them targetable. They are legitimate military targets at all times. This may not be the case for the child. The Pre-Trial Chamber in the 2014 *Ntaganda Decision on the Confirmation of Charges* in the International Criminal Court held that:

The mere membership of children under the age of 15 years in an armed group cannot be considered as determinative proof of direct/active participation in hostilities, considering that their presence in the armed group is specifically proscribed under international law in the first place. Indeed, to hold that children under the age of 15 years lose the protection afforded to them by IHL merely by joining an armed group, whether as a result of coercion or other circumstances, would contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities (para 78)

This suggests that for the child, membership of an armed group may be irrelevant for determining whether the child is DPH, given the prohibition on recruitment of children under 15 into armed groups. This suggests that the child cannot be subject to the continuous combat function regime and would be a legitimate military target only for such time as the child was engaged in a specific act satisfying the threshold of harm, direct causation and belligerent nexus criteria. The child retains their civilian status, protected by IHL until they are in fact directly participating in hostilities, regardless of their membership within an armed group. This approach to determining when the child is DPH is consistent with the general trend in international law toward providing special protection for the child during armed conflict. It would adequately take into account the special status of the child and the reality that in most instances the child’s recruitment would have been at the very least unlawful and at worst coerced, and that the option to truly disassociate from the armed group is fraught with complications.

Turning now to the second question - whether the means used to target children who are DPH follow the same rules as for any adult who is DPH. Some recent scholarship has suggested that there should be special rules for children who are DPH which reinforce ‘the idea that it is the duty of all responsible parties to an armed conflict to protect childhood within the bounds of military necessity’. In his recent blog piece, René Provost suggests that the fact that a target is a child can have an impact on the type and degree of force allowed. He suggests that there ought to be a duty to use the least injurious means or methods of warfare when directing an attack against the child who qualifies as either a combatant or DPH. He argues that direct targeting of child soldiers, and by inference children who are DPH, can be ‘considered permissible only to the extent that it is a necessary evil, meaning no viable alternative can be identified and that there is a tangible military necessity for the attack’, otherwise he contends the attack would violate the treaty and customary prohibition of superfluous injury and unnecessary suffering. He argues that this approach ‘reflects the multiple norms in international humanitarian law and international human rights law that demand special protection for children against harm’, and ‘speaks to the moral intuition that, even in the context of war, the intentional targeting of children is a calamity’.

While there may be moral or pragmatic reasons for avoiding targeting the child, there is no obligation under international law to treat the child differently from an adult who is DPH. No special measures are required beyond those already required in relation to military necessity, distinction and proportionality. Feasible precautions must already be taken to verify that targeted persons are legitimate military targets. An approach that also requires special measures for targeting children who are DPH would expose military personnel to an increased risk of harm and cause confusion. How is the commander in the field to distinguish between a tall 13 year old child firing a machine gun and a short adult, before ordering return fire. Such an approach treats the child as victim in need of protection and fails to acknowledge the reality that they can sometimes pose a direct and significant threat. In short, there are not and should not be any special rules for targeting the child who is DPH, although as mentioned before the test for ascertaining whether the child is DPH in the first place may be slightly different from that of an adult.

To summarise then, children cannot have a continuous combat function and can only be targetable while directly participating in hostilities regardless of membership in an armed group. A specific assessment of the child’s actual conduct is required before they may be directly targeted and the physical appearance and clothing of the child pose a higher burden on opposing forces to ensure that the child’s conduct is a direct participation in hostilities before directly targeting the child. However, once the assessment of DPH has been made, there is no legal obligation to use different means and methods of warfare if the target is a child compared to an adult who is DPH. The introduction of different rules for targeting children who are DPH would cause unnecessary confusion and expose military personnel to increased risk of harm. While there may be moral or pragmatic reasons for not targeting the child, or seeking to capture rather than kill, there is no legal obligation to do so.