

CHAPTER I: INTRODUCTION

A. BACKGROUND OF STUDY

On 28 June 2022, The United Nations International Children's Emergency Fund (UNICEF) published a factsheet compiled from a UNICEF report based on verified data and information between 2005 and 2020 about the progress and challenges for children living in armed conflict.¹ Based on this report, between 2005 and 2020, more than 93,000 children were confirmed to be recruited and used by parties to the armed conflict, although the actual number of cases is believed to be much higher.² This data shows that non-state actors recruited and used more than 80% of those children, while state forces were responsible for approximately 51% of cases. The total number of children verified regarding their association with parties to the conflict has gradually increased to an average of 3,000 annually from 2016 to 2020, three times the average within the previous five years.³

The term that was coined for children in this situation by the International Committee of the Red Cross (ICRC) and The Paris Principles and Commitments on Children Associated with Armed Forces or Armed Groups (the Paris Principles) is Children Associated with Armed Forces or Armed Groups (CAAFAG).⁴ Children associated with Armed Forces or Armed Groups essentially encompass every child that associates themselves with armed forces or armed groups in any roles within the structure.⁵ It needs to be mentioned that not all children were coerced or even abducted into these situations. Some willingly associate themselves with armed groups or armed forces to provide food and money for their families. The term “child soldier” is generally

¹ *Progress and challenges for children living in armed conflict*, The United Nations International Children's Emergency Fund (UNICEF), 2022, Accessed on 2022 : <https://www.unicef.org/media/123091/file/25%20Years%20Children%20in%20Armed%20Conflict%20fact%20sheet%20EN.pdf>

² *Ibid.*, p.2

³ *Ibid.*

⁴ Principles And Guidelines on Children Associated With Armed Forces Or Armed Groups (The Paris Principles), the United Nations International Children's Emergency Fund (UNICEF), 2007, Accessed on November 2022: <https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf>

⁵ *Ibid.*, p. 7

used the same as Children Associated with Armed Forces or Armed Groups. Still, it is often misunderstood that it only refers to children that become part of the fighting auxiliary.⁶

Questions are often raised on whether, by doing their task within their association with Armed Forces or Armed Groups, they directly participate in hostilities (DPH), which is interpreted as them losing their civilian protection at the time they're doing their task. Often, these children are tasked with activities that contribute to the war effort but are not a part of the fighting auxiliary. Their task can include gathering and delivering military information, transporting arms and munitions, providing supplies, etc.

Often in these talks about DPH, it almost seems like it is avoided to talk about children specifically within this notion, which is understandable since children are different from normal civilians under IHL. The understanding was, of course, that it is clear to keep children under fifteen outside armed conflict, and consequently, they should not be required to perform any services for either armed forces or armed groups.⁷ But in recent cases, we see those children becoming a part of these services, and this resulted in parties to the conflicts being bewildered on how to handle them and whether it is alright to attack them when they conduct these activities.

On top of that, if the children are a part of the fighting forces, there are issues on whether their continuous, direct participation in hostilities will result on them losing their protection against direct attack. This concern relates to the theory of continuous combat function (CCF), which entails that the children continuously involved in the preparation, execution, or command of acts or operations amounting to direct participation in hostilities.⁸ It needs to be explained that the argumentation of Continuous Combat Function (CCF) is highly relevant in the situation of NIAC, especially with the topic of

⁶ This definition is used interchangeably in official documents by organizations such as ICRC, UNICEF, etc, see example : Child Soldiers and Other Children Associated with Armed Forces or Armed Groups, International Committee of the Red Cross, <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0824.pdf>

⁷ API, Art. 77 (2); AP II, Art, 4(3)(c); Convention on the Rights of the Child, UN General Assembly, Res. 44/25, 1989, Art. 38(2)

⁸ Melzer, Nils, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross, 2009, p. 27, Accessed on November 2022 : <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> (**Interpretive Guidance**)

organized armed groups. We often see children in their midst, as a part of the fighting forces operating rifles and machine guns and ready to shoot at anything that moves.

These phenomena have no shortage of debates and arguments, from whether it is right to attack them to what precautions can be taken to ensure their protection in these situations. But in regards to this topic and its relation to CCF, there is barely any mention of the discussion. It is understandable since the notion of CCF itself is rarely talked about and, in most cases, only relevant to the problems of organized armed groups in NIAC.

These questions are important both in the context of International Armed Conflict and Non-International Armed Conflict. From the perspective of the international legal framework, even with all of the existing international law, doctrine, custom, etc., these questions still mostly remain highly argued and debated. Considering the ongoing armed conflict that appears in numerous countries between states or with an organized group and the fact that the involvement of children is a common occurrence in this situation, it is important to try to address this issue and try to find a solution.

B. PROBLEM FORMULATION

1. Whether Children Associated with Armed Forces or Armed Groups performing tasks that contribute to the war effort *ipso facto* directly participates in hostilities and also fulfil the continuous combat function requirement?
2. Whether Children Associated with Armed Forces or Armed Groups will receive protection when they are assigned as fighting auxiliaries that fulfil the requirement of direct participation in hostilities and continuous combat function, which makes them lose their protection against direct attack?

C. RESEARCH OBJECTIVES

1. To analyze the application of the notion of Direct Participation in Hostilities (DPH) on Children Associated with Armed Forces or Armed Groups (CAAFAG) deeply in regards to their legal status and protection.
2. To analyze deeply the notion of Continuous Combat Function (CCF) on Children Associated with Armed Forces or Armed Groups (CAAFAG), specifically children assigned as fighting auxiliaries in regard to their legal status and protection.

D. ORIGINALITY OF THE RESEARCH

No.	Title	Substance	Difference With This Thesis
1.	Protection of Children in International Humanitarian Law, Denise Plattner, International Review of the Red Cross, No. 240	A general explanation of the protection of children as a whole in International Humanitarian Law.	<ul style="list-style-type: none"> - Did not comprehensively discuss children that are actively participating in hostilities. - Focused on a wide range of children that are affected by armed conflicts. (Children who are displaced and/or separated, arrested, detained, or interned children, children participating in hostilities, etc.) -There is no mention of Direct Participation in Hostilities theory or its explanation. -In comparison to this journal, this thesis will focus more on the aspect of the application of DPH and CCF on children.
2.	Extrapolation of Criminal Law Modes of Liability to Target Analysis Under International Humanitarian Law: Developing the Framework for Understanding Direct Participation in Hostilities and Membership in Organized Armed Groups in Non-International Armed Conflict, Michael John Hopkins, Oxford Brookes University, 2017	Interpreting the Notion of Direct Participation on Hostilities and Continuous Combat Function, more specifically, this paper considers the systematic approaches to linking individuals to groups and their activities embodied in the international criminal law relating to modes of liability.	<ul style="list-style-type: none"> - This paper did not discuss the application of DPH or CCF on children associated (or members). - Its main point is interpreting DPH and only a few interpretations of CCF. - Focused more on International Criminal Law because this paper discusses more the application of DPH in Criminal Law Modes of Liability -Unlike this thesis, this paper only focuses on the aspect of applicability of DPH and CCF regarding the criminal modes of liability on civilians in general. It does not take into account the situation of children.
3.	Targeting Child Soldiers, Rene Provost, Blog of	Focusing on the existing	<ul style="list-style-type: none"> - Mostly focusing on the debate of the legality of attacking child

	The European Journal of International Law, 2016	international debate in regard to attacking child soldiers. Discuss numerous scenarios of children that are actively participating in hostilities and whether they are allowed to be attacked or not.	soldiers from the perspective of IHL. - Minimum discussion DPH and CCF generally mention the thoughts of the author on this phenomenon. -In comparison to this thesis, this paper explains the situation of child soldiers in a general sense. It explains more about the situation and existing regulations and does not delve into the notions of CCF and DPH.
4.	When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga, Joshua Yuvaraj, Utrecht Journal of International and European Law, 2016	This paper talks about the meaning and scope of 'direct' participation in hostilities. The author uses the commentary of ICRC based on the existing IHL and also the judges' interpretation of the previous ICC case of Lubanga, which are the basis for this journal.	- This article talks about the contradiction of the meaning of DPH from the perspective of IHL and ICL. -The main argument is the different interpretation of "Direct" participation in hostilities and "Active" participation in hostilities since there was apparently different interpretation between these two. -Does not discuss Continuous Combat Function. -In general, it gives an additional interpretation of what DPH is and whether it is different from the interpretation that is used in International Criminal Law - This paper is devoted to dissecting the ICC Lubanga case, as there is a discourse on the interpretation of "active" and "direct" participation in hostilities, as opposed to this thesis, which focuses more on the application of DPH and CCF to situations involving children in armed conflict.
5.	Exploring the "continuous combat function" concept in	This paper focuses on the notion of	- This paper tries to explain further the notion of continuous combat function.

	<p>armed conflicts: Time for an extended application? Sabrina Henry, International Review of the Red Cross, 2018</p>	<p>“continuous combat function” and proposes to extend its application. Since CCF are mostly pertinent to the situation of NIAC, more specifically to organized armed groups, the author proposes that this notion should be applied to certain individuals engaged by PMSCs and irregular members of the armed forces.</p>	<ul style="list-style-type: none"> - It is more focused on the extended application of CCF, for example, in the case of organized armed groups that are neither a party to an IAC nor other entities that have a questionable status under IHL. - Unlike this thesis, this paper does not discuss the situation of children who are part of the fighting auxiliary, whether the concept of CCF applies to them, or whether there are any special considerations or exceptions for children when attempting to apply this concept to them.
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E. DEFINITION OF TERMS

1. **Armed Forces:** The armed forces of a party to the conflict consist of all organized armed forces, groups, and units that are under a command responsible to that party for the conduct of its subordinates.⁹ This term is applicable in situations of international armed conflicts. This definition covers all who fight on behalf of a party to an armed conflict and who subordinate themselves to its command.¹⁰
2. **Armed Groups:** An “organized armed group” is the armed wing of a non-state party to a non-international armed conflict.¹¹ The term organized armed group refers

⁹ *Rule 4. Definition of Armed Forces*, International Humanitarian Law Customary Rules, International Committee of The Red Cross, Accessed on October 2022: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4; Additional Protocol I, Article 43 (1)

¹⁰ *Ibid.*

¹¹ *How Does Law Protect in War: Armed Groups*, International Committee of The Red Cross, Accessed on 18 October : <https://casebook.icrc.org/glossary/armed-groups>

exclusively to the armed or military wing of a non-state party to a non-international armed conflict. It does not include those segments of the civilian population that are supportive of the non-state party, such as its political wing.¹²

3. Children: Based on the Convention on the Rights of the Child, a child means every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier.¹³ This definition is reaffirmed within the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which stated that individual under the age of 18 years do not take a direct part in hostilities.¹⁴ The GCs and APs have different age limits for various child protection measures. However, "children under 15" is the most prevalent age restriction.¹⁵
4. Children Associated with an Armed Group or an Armed Forces (CAAFAG): A 'child associated with an armed force or armed group' 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. It does not only refer to a child who is taking or has taken a direct part in hostilities.¹⁶
5. Direct Participation in Hostilities (DPH): The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.¹⁷ Direct participation in hostilities entails specific acts that must meet the criteria that are cumulative: threshold of harm, direct causation, and belligerent nexus.¹⁸

¹² *Ibid.*

¹³ Convention on the Rights of the Child, 1989, Art. 1

¹⁴ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000, Art. 1

¹⁵ *Child Soldiers*, International Humanitarian Law, American Red Cross, 2011, p. 2, Accessed on April 2023:

https://www.redcross.org/content/dam/redcross/atg/PDF_s/Family_Holocaust_Tracing/IHL_ChildSoldiers.pdf

¹⁶ Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007.

¹⁷ Interpretive Guidance, p. 17

¹⁸ *Ibid.*

6. Continuous Combat Function (CCF): A decisive criterion for individual membership in an organized armed group when a person assumes a continuous function for the group involving his or her direct participation in hostilities.¹⁹

F. THEORETICAL REVIEW

When it comes to the conflict of war, there's a specific field of international law that regulates the conduct of war. This law contains rules for various situations that often occur in the situation of war, such as the protection of fighters who are injured or have surrendered and the protection of civilians who are caught up in an armed conflict, and also the action that might be used to gain an advantage in war, such as the use of weapons, personnel, and methodology that are permissible in an armed conflict.

This field of international law is called International Humanitarian Law (IHL), which is also usually referred to as the law of war or *jus in bello*. It is essentially a set of rules with the main purpose of limiting the humanitarian consequences of armed conflicts. Its main purpose is to restrict the means and methods of warfare that parties to a conflict may employ and to ensure the protection and humane treatment of persons who are not, or no longer, taking a direct part in the hostilities.²⁰

Similar to other fields of international law that refer to Article 38 (1) of the ICJ Statute, IHL sources can be found in treaties, customs, and general principles of law. Meanwhile, doctrines and case law are important sources that are used to interpret individual rules of IHL. IHL is one of the most densely codified branches of international law.²¹ Therefore, generally, the most relevant sources of IHL are treaties applicable to the armed conflict in question.²²

The Geneva Conventions of 1949 and its two Additional Protocols of 1977 are the most applicable treaties in a situation of armed conflict, both international and non-international. In international armed conflict, the four 1949 Geneva Conventions and Additional Protocol I would be the most applicable. It contains numerous regulations regarding the situations that usually occur in International Armed Conflict, from the

¹⁹ *Ibid.*, p.33.

²⁰ *International Humanitarian Law: A Comprehensive Introduction*, Nils Melzer, 2016, p. 17

²¹ *Ibid.*, p.21.

²² *Ibid.*

protection of combatants –which is a term that is applicable to the fighting forces in International Armed Conflict– whether the conflict is occurring on the land or on the sea,²³ the protections of captured combatants or what is known as Prisoners of War,²⁴ and the protection of Civilians²⁵ in a situation of International Armed Conflict. Lastly, even though most of the contemporary issues of international humanitarian law usually materialize in the realms of non-international armed conflict or NIAC, the existing source is significantly less developed, the most important sources being Common Article 3 and Additional Protocol II. To surmise, in relation to this final paper, the author will explain the notions or theories that is impertinent to international humanitarian law, specifically in relation to the legal status and protection of children associated with armed forces or armed groups.

1. The Principle of Distinction within International Humanitarian Law

In an advisory opinion given by the International Court of Justice, it is stated that the Principle of Distinctions is a “cardinal principle” constituting a fabric of International Humanitarian Law.²⁶ Parties to the armed conflict must understand who and what may be targeted, as well as who and what may not be, and what protection to provide based on the category to which a person belongs. Indeed, the basic dictum underlying IHL is that even in an armed conflict, the only acceptable action is to weaken the enemy's military potential. It implies that IHL must define who that potential is deemed to constitute and also who, as a consequence, may be attacked and directly participate in hostilities but may not be punished under ordinary domestic law. Based on the Principle of Distinction, all parties involved in an armed conflict must distinguish between combatants (or the fighting forces) and civilians. Combatants must distinguish

²³ The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (**GC I**), 12 August 1949; The Second Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (**GC II**), 12 August 1949

²⁴ The Third Geneva Convention Relative to the Treatment of Prisoners of War (**GC III**), 12 August 1949

²⁵ The Fourth Geneva Convention Relative to the Protection of Civilian Persons (**GC IV**), 12 August 1949

²⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, ICJ Rep. 1996, p. 226, Accessed on January 25 : <https://casebook.icrc.org/case-study/icj-nuclear-weapons-advisory-opinion>

themselves (i.e., allow their adversaries to identify them) from all other individuals (civilians) who may not be attacked or directly participate in hostilities.²⁷

This principle emphasizes the critical concept that certain people and objects are immune to attacks because of their civilian status. During armed conflict, it seeks to protect civilians and civilian objects. By implication, the principle forbids indiscriminate attacks, as well as indiscriminate techniques and means of warfare that may result in attacks on innocent civilians.

But in recent times, problems have arisen within the ambit of the principle of distinction. For example, the IHL of Non-international Armed Conflicts (NIAC) does not refer specifically to the concept of combatants. This lack of definition usually arises from States' interest since it is in the interest of States to not want to confer on anyone the right to fight government forces.²⁸ Nonetheless, if IHL is to be respected in such conflicts, a distinction must be made: civilians can and will only be respected if government soldiers and rebel fighters can expect those who appear to be civilians not to attack them. This issue is highly important with the notions of Direct Participation in Hostilities (DPH) and Continuous Combat Function (CCF), which will be explained further below.

2. The Protection of Children within International Humanitarian Law

The legal protection of children was first introduced to the ambit of international humanitarian law after the Second World War. Relating to the explanation above about the principle of distinction, the experience of that conflict highlighted the urgent need to develop an instrument of international law to protect civilians in times of war. The results of the ICRC's efforts in this area led to the passage of the Fourth Geneva Convention for the Protection of Civilians in Times of War in 1949. From that moment on, children, as members of the civilian population, were entitled to benefit from the application of this Convention. In addition, the first norms of international humanitarian law relating to non-international armed conflicts were drafted at the Diplomatic

²⁷ *The Principle of distinction between civilians and combatants*, Nils Melzer, *The Oxford Handbook of International Law in Armed Conflict*, Oxford, 2014, pp. 296-332.

²⁸ *How Does Law Protect in War : Principle of distinction* , International Committee of the Red Cross, Accessed on January 25 : <https://casebook.icrc.org/law/principle-distinction>

Conference of 1949, contained in Article 3, common to the four Geneva Conventions of 1949. Here, too, children are protected, as are all “persons not actively involved in combat operations.”²⁹

During international armed conflicts, children are among those protected by the Fourth Geneva Convention on the protection of civilians in times of war. As a result, they benefit in particular from all provisions pertaining to the treatment of protected persons, which state the fundamental principle of humane treatment, including respect for life and physical and moral integrity, and forbidding, among other things, coercion, corporal punishments, torture, collective penalties, and reprisals. Children benefit from the rules of international humanitarian law governing the conduct of hostilities because they are civilians. These rules, which develop the principles for distinguishing between civilians and combatants and prohibiting attacks on civilian populations, are expressed in Protocol I of 1977 insofar as they refer to international armed conflicts. Children are protected in non-international armed conflicts by the fundamental guarantees relating to the treatment of persons not actively participating in hostilities, as outlined in article 3 of the four Geneva Conventions. Under this article, children have the right to be treated humanely during these often-brutal conflicts. There should be no violence against their lives, persons, or dignity. Protocol II of 1977 also codifies the principles under which the civilian population as a whole, as well as individual civilians, are not to be attacked.

Additionally, children who participate in hostilities are regulated in both Protocols.³⁰ This is one of the impacts of the evolution of conflict nature, namely the assimilation of civilians and combatants. Children's participation in hostilities, which can range from indirectly assisting combatants to actually fighting or even being inducted into the armed forces, results in the need for IHL to regulate this issue. It would have been unrealistic, if not impossible, to prevent children from participating in

²⁹ *Protection of Children in International Humanitarian Law*, 1984, International Review of the Red Cross, No. 240, Denise Plattner, Accessed on June 13 : <https://www.icrc.org/en/doc/resources/documents/article/other/57jmat.htm#:~:text=International%20humanitarian%20law%20provides%20general.in%20hostilities%20are%20also%20protected>.

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (**AP I**); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (**AP II**).

hostilities. However, the Protocols seek to limit their ability to do so as much as possible, particularly by prohibiting the recruitment of minors under the age of fifteen.³¹ Furthermore, Protocol I encourage the parties to enlist the oldest first if they recruit individuals between the ages of fifteen and eighteen.³² If even after the Protocols' provisions, children under the age of fifteen take direct part in hostilities and are caught, they would also continue to benefit from the Protocols' special protection.³³

3. The Notion of Direct Participation in Hostilities (DPH)

As briefly mentioned previously, this notion, along with CCF, is pertinent to this thesis. Direct Participation in Hostilities (DPH) is a notion or concept, or theory that refers to specific actions carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.³⁴ This notion essentially comprises two elements, which are “hostilities” and “direct participation.”³⁵ It is understood that “hostilities” based on IHL interpretation refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy,³⁶ and the “participation” element refers to an (individual) involvement in these hostilities.³⁷ Depending on the act, individual participation in hostilities may be described as “direct” or “indirect.”

In IHL conventions and treaties, conducts that are performed individually, constituting part of the hostilities, are described as DPH, notwithstanding whether the individual is a civilian or a member of the armed forces. Whether individuals conducted DPH in a spontaneous, sporadic, or unorganized way as part of a continuous function assumed for an organized armed force or group belonging to a party to the conflict may be significant for their status as civilians but, in general, has no effect on the scope of conduct that constitutes direct participation in hostilities.³⁸ Above all, the concept of

³¹ AP I, Article 77 (2); AP II, Articles 4, 3 (c).

³² AP I, Article 77 (2)

³³ AP I, Article 77 (3); AP II, Articles 4, 3 (d).

³⁴ Interpretive Guidance, p. 43.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*, p.44.

hostilities could be described as the summation of all hostile acts conducted by individuals directly participating in hostilities.

It may be tempting to conclude that civilians engaging in hostile acts on a persistently recurrent basis will continue to carry out unspecified hostile acts in the future. This will raise the question of whether they lose their status as civilians, thus allowing the adverse party to direct an attack against them or even make them into a new status outside of civilians or a fighting force to armed forces or armed groups. But, any extension of the concept of DPH beyond specific acts would blur the distinction made between *temporary, activity-based loss of protection* (due to direct participation in hostilities) and *continuous, status or function-based loss of protection* (due to combatant status or continuous combat function).³⁹

In order to qualify as DPH, the act must meet these cumulative criteria:⁴⁰

i. Threshold of Harm

This requires specific actions to reach the threshold of harm required to qualify as DPH. It must be expected to unfavorably affect the military operations or military capacity of a party to an armed conflict. But, in the case that military harm is non-existent, the threshold can also be reached where an act is to be expected to inflict death, injury, or destruction on persons or objects protected against direct attack.

ii. Direct Causation

This criterion requires the specific act in question to directly – in one causal step – cause harm that reaches the required threshold. Individual conduct that solely builds up or maintains the capacity of a party to harm its adversary or that otherwise only indirectly causes harm is not covered by this concept.

iii. Belligerent Nexus

In order to meet this requirement, an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another. Belligerent nexus relates to the objective purpose of the act. Mainly the main objective of the act is to support a party to the conflict. So simply, this criterion relates to the intent of a person to support a party to an armed conflict.

³⁹ *Ibid.*, pp.44-45

⁴⁰ *Ibid.*, pp. 47-64

When applying this to a real-life assessment, the three requirements of a threshold of harm, direct causation, and belligerent nexus enable a reliable distinction between activities amounting to DPH and activities that, although happen in the context of an armed conflict, are not part of the conduct of hostilities and, subsequently, do not entail the loss of protection against direct attack. Even where a specific act amounts to DPH, it needs to be remembered that the kind and degree of force used to respond to that said act must comply with the rules and principles of other applicable international laws.⁴¹

4. The Notion of Continuous Combat Function (CCF)

This term of art is usually used in the scope of Non-International Armed Conflict (NIAC), especially in regard to organized armed groups. Because organized armed groups generally cannot qualify as regular armed forces under national law, it is often assumed that membership in these groups is simply a continuous act of direct civilian participation in hostilities. But in common practice and interpretation, membership of individuals to an organized armed group must depend on whether the continuous function performed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict.⁴² Accordingly, IHL required that the criteria to decide an individual membership in an organized armed group is decided when a person assumes a continuous function for the group involving his or her direct participation in hostilities.

As there are no real reasons for members of armed groups to distinguish themselves, it is necessary to look for patterns of their conduct in order to determine whether an individual can be considered to belong to an armed group under the principle of distinction in NIAC.⁴³ Continuous Combat Function (CCF) theory has the purpose of explaining further the conduct of hostilities to some individuals engaged by private military and security companies (PMSCs) and to irregular members of the armed

⁴¹ *Ibid.*

⁴² *Ibid.*, p. 33.

⁴³ Corn, G. and Jenks, C., *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, University of Pennsylvania Journal of International Law, Vol. 33, No. 2, 2011, p. 338.

forces.⁴⁴ CCF is a concept that helps to determine the circumstances in which individual members of an armed group are deemed legitimate targets in NIAC, even if they are not directly participating in hostilities at the moment of attack. In NIAC, the interpretation of the principle of distinction is more ambiguous because treaty law does not explain who can be qualified as a member of an organized armed group. As previously explained before, the continuous acts of individuals conducting acts of hostilities are not sufficient to determine whether they lost their protection against direct attack and declare them fulfilling the CCF requirement.

The ICRC Interpretive Guidance refers to an “organized armed group exclusively to the armed or military wing of a non-State party.”⁴⁵ As previously mentioned, the determination of membership in an armed group does not depend on domestic legislation or the wearing of uniforms or distinctive signs but is rather expressed through the performance of a certain function within the group.⁴⁶ In the case of organized armed groups, membership must be based on a functional criterion and not on abstract affiliation or family ties. This distinction in the law of NIAC is critical as it allows us to differentiate between members of the fighting force of a non-State party, civilians who perform a non-combatant function in an armed group, and civilians who take a direct part in hostilities on a spontaneous and sporadic basis.⁴⁷ The Interpretive Guidance states that people who accompany or support an organized armed group but do not have the function where they’re involved in direct participation in hostilities must be considered civilians and, as such, are entitled to protection from attacks unless they start to participate directly in hostilities.⁴⁸

Meanwhile, members of armed groups performing a CCF will stop being civilians and lose protection for as long as they continue to carry out that function. The limit of this loss of protection cannot be the same for members of armed groups carrying out a CCF as it is for civilians taking a direct part in hostilities since it will be highly

⁴⁴ Henry, S., *Exploring the “continuous combat function” concept in armed conflicts: Time for an extended application?*, International Review of the Red Cross, 2018, p. 270.

⁴⁵ Interpretive Guidance, p. 32.

⁴⁶ *Ibid.*, pp. 32-33

⁴⁷ Henry, Sabrina, *supra* note 36, p. 272.

⁴⁸ Interpretive Guidance, p. 34

disadvantageous for the adverse party—mostly for members of armed forces—if members of armed groups keep losing and regaining protection as civilians each time they participate in a hostile act.⁴⁹ Thus, members of armed groups participating in hostilities on a continuous basis must be permitted to be targeted in the same way as State armed forces are.⁵⁰

G. RESEARCH METHOD

1. Research Typology

The research was conducted using the normative method. Normative legal research is a scientific research procedure to find the truth based on scientific logic from the normative side.⁵¹ The normative side here is not limited to laws and regulations, which in the case of this thesis, it will rely heavily on the interpretive guidance by ICRC on Direct Participation in Hostilities. Apart from that, the research will mostly be based on the treaty interpretation and studies of the four Geneva Conventions and its Additional Protocol. Furthermore, it will also dissect the legal opinion on IHL by prominent legal scholars and previous court cases from the ICC.

2. Research Approach

In regards to the use of normative research as research typology, there are several approaches that will be used. The first one is a statutory research approach (*pendekatan penelitian perundang-undangan*). This is done by analyzing international treaties such as International Humanitarian Law treaties regarding Children Associated with Armed Forces or Armed Groups (CAAFAG) on the notions of Direct Participation in Hostilities (DPH) and Continuous Combat Function (CCF).

The second one is, of course, will be a conceptual research approach (*pendekatan penelitian konseptual*), which is an approach that departs from the views and doctrines that have developed in the science of law. Since this thesis heavily relies on the ICRC interpretation of Direct Participation in Hostilities, which explains

⁴⁹ Henry, Sabrina, *supra* note 36.

⁵⁰ *Ibid*, p. 272.

⁵¹ *Teori dan Metode Penelitian Hukum Normatif*, Johnny Ibrahim, Bayumedia Publishing, 2005.

the notions of DPH and CCF, this approach will be highly important for the entirety of this thesis.

Additionally, this thesis might also use the case study approach by comparing it with the previous legal opinion and court decision. For example, the case of ICC Lubanga⁵² and ICC Ntaganda⁵³ since it discusses the interpretation of children's direct participation in hostilities.

3. Research Object

The research object in this thesis will be the official interpretation of IHL treaties in regard to children associated with armed groups or armed forces, especially in relation to the notion of DPH and CCF, such as the interpretation of ICRC or The Committee on the Rights of Children. Furthermore, the object will also involve cases of armed conflicts, such as children associating themselves with armed groups or armed forces, or more specifically, in relation to the problem formulation, children participating in the hostilities which will be related to IHL. Examples: ICC Lubanga Case, Child Soldiers in Sierra Leone, Taliban Child Soldiers, etc.

4. Research Data Source

- a. The primary data sources in this study are data obtained from various international treaties from IHL that are related to this research, such as:
 - i. The Geneva Conventions of 1949 and its two Additional Protocols of 1977.
 - ii. The Interpretative Guidance by International Committee of the Red Cross (ICRC).

The interpretative guidance is neither a treaty nor a form of hard law, but considering that the topic of DPH and CCF are mostly based on the interpretation of the treaties in regards to the real-life situations in an

⁵² *The Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, ICC-01/04-01/06

⁵³ *The Prosecutor v. Bosco Ntaganda*, International Criminal Court, ICC-01/04-02/06

armed conflict, The Interpretative Guidance by ICRC always play a pivotal role in the study and discussion of this topics.

- b. The secondary data sources in this study were data obtained from legal books about IHL, legal opinions, court cases (which are mostly under the International Criminal Court), and also news coverage of children in armed conflict.