

Protecting Education in Insecurity and Armed Conflict

An International Law Handbook

Second Edition



التعليم | education
فوق | above
الجميع | all



British Institute of
International and
Comparative Law

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Preface

This publication is the second edition of the first in a series of legal research documents commissioned by Education Above All Foundation ('EAA'), on the protection of education during insecurity and armed conflict. Since the publication of the first edition of the International Law Handbook on the Protection of Education in Insecurity and Armed Conflict, a number of advancements have been made within the relevant international law frameworks, such as the adoption of the Safe Schools Declaration, the entering into force of the protocols to human rights treaties allowing individuals to complain of alleged violations of their right to education, or the International Criminal Court's decisions which have formally recognised educational harm. Therefore, EAA and the British Institute of International and Comparative Law ('BIICL') are pleased to offer an updated versions of the Handbook, first published in 2012.

EAA is an independent non-profit organisation chaired by Her Highness Sheikha Moza Bint Nasser of Qatar, UNESCO Special Envoy for Basic and Higher Education and a UN SDG Advocate. Protect Education in Insecurity and Conflict (PEIC), a policy, research and advocacy programme of EAA, is concerned with the protection of education during insecurity and armed conflict. PEIC contributes to such protection through the strategic utilisation of international and regional law. Its legal research papers are authored by international legal academics and/or practising lawyers. They are aimed at a varied audience, including international and national lawyers, non-legally trained education experts and policy-makers within governments, political, social and cultural bodies, and civil society.

BIICL is one of the leading independent research centres for international and comparative law in the world, and is the only organisation of its type in the United Kingdom. Since its foundation in 1958, the Institute has brought together a diverse community of researchers, practitioners and policymakers who are committed to the understanding, development and practical application of international and comparative law. Its high quality research projects and events encompass almost all areas of international law (both public and private) and comparative law, and it is at the forefront of discussions on many contemporary issues. Further information on the Institute and its activities can be found at www.biicl.org.

All webpages in this document are current at 31 May 2019. An electronic version of this Handbook is available at both:

<https://educationaboveall.org>

<https://www.biicl.org/projects/protecting-education>

Further information and research material are also available on the above-mentioned webpages, including teaching material (notes and presentation slides), which can be used by law professors and lecturers to teach international law through the lens of the protection of education.

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Foreword to the First Edition by Her Highness Sheikha Moza Bint Nasser

In the tumult and brutality of insecurity and conflict, which can persist for a generation or longer, education—its systems, facilities, personnel, young students and scholars—is at its most vulnerable. Educational facilities are looted, destroyed and abandoned, teachers assassinated, scholars threatened, and students stopped from going to school.

When students and scholars alike are denied an education, they are denied hope for a better future. Without teaching colleges there are no teachers. Without teachers there is no school, there is no literature, no art. Without universities there are no doctors, scientists and civil servants. Without education there is no vibrant, stable and prosperous nation.

This is why I believe that every person in the world—every individual in every nation during times of peace, insecurity and conflict—has a right to an education and, importantly, to an education of quality.

Fortunately, there exists a large body of international law pertinent to the right to, and protection of, education. Through its unique compilation and analysis of these laws, this Handbook is a vital contribution to strengthening protection of education and to increasing accountability. It presents a potentially powerful body of international law to guide those responsible for the protection of education in times of insecurity and conflict and provides the basis for holding to account those who fail to do so.

Each one of us shares the responsibility of fulfilling its potential, of translating this text into action. Each one of us shares the responsibility of fulfilling our promise of an education for all.

Sheikha Moza bint Nasser

Chair, Education Above All Foundation

UNESCO Special Envoy Basic and Higher Education [since 2003]

UN SDG Advocate [since 2016]

Foreword to the First Edition by Dame Rosalyn Higgins DBE QC

This is an unusual and important Handbook.

It is unusual in that the right to education—designated a human right in Article 13 of the International Covenant on Economic, Social and Cultural Rights—receives very little attention in the literature. Education is identified as a legal entitlement (with all the heavy overtones that so frequently attach to this category of rights) and little more insight is provided.

Of course, the periodic examinations of States by the Committee under the Covenant on Economic, Social and Cultural Rights has developed the concept to a certain extent, with the issuance of General Comment No.13 in 1999. But the scholarly literature is exceedingly sparse as regards education, especially when the focus is protection of the right in times of insecurity and armed conflict. Food, water and medical care, among other economic and social rights, have attracted much more attention.

As well as being unusual, this Handbook is important, because of the intellectually sophisticated methodology that has been chosen to study the right to education, both generally and in the context of insecurity and armed conflict.

The methodology chosen is to examine the availability and protection of education in times of conflict—international and non-international—and insecurity by reference to three bodies of law that have relevance: international human rights law (IHRL); international humanitarian law (IHL); and international criminal law (ICL). The focus is on the component elements involved in the protection of education in situations of insecurity and armed conflict under each of these regimes. The constitutive parts are examined in detail, and for every element concerned there is an examination, in considerable depth, by reference to IHRL, IHL and ICL. This study brings flesh and reality to these concepts—which in practice interact and overlap—in a rigorous but accessible way.

The result of this methodology is that the reader, while learning about the right to education in times of insecurity and armed conflict, also learns much about international law more generally. Treaty law, reservations, derogations, occupation, *jus cogens*, regional judicial and monitoring schemes; all this is the fabric into which the story of education in times of insecurity and armed conflict is woven. In short, there is a depth and contextual clarity to the study here published.

Attractive also is that the protection of the right to education is never regarded as an abstract thing: it affects teachers, students, materials and buildings.

The guaranteeing of education, in this broad sense, is not usually a priority for those engaging in conflict. In so far as they think at all of the need to protect legal rights, other rights come much higher in the list. But the right to education is an extraordinarily important right. Like freedom of expression, it is an enabling right. Without education, it is virtually impossible to know of other entitlements in times of insecurity and armed conflict, let alone how to go about realizing them. Education is also, of course, the key to everything.

This Handbook is a ready tool for all involved in education (governments, teachers, students, NGOs) and in the perpetration of violence (governments, non-governmental groups, individuals). With the publication of this Handbook, it cannot now be claimed that the subject is too remote or too vague to merit their attention.

Dame Rosalyn Higgins DBE QC

Former President, British Institute of International and Comparative Law

Former President, International Court of Justice

Acronyms

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACommHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AP ACHR	Additional Protocol to American Convention
AU	African Union
ArabCHR	Arab Charter on Human Rights
BIICL	British Institute of International and Comparative Law
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on International Economic, Social and Cultural Rights
CDE	Convention Against Discrimination in Education
CFR	EU Charter of Fundamental Rights
CRC	United Nations Convention on the Rights of the Child
CRCI	Covenant on the Rights of the Child in Islam
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons and Disabilities
DRC	Democratic Republic of the Congo
EAA	Education Above All
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights

ESC	European Social Charter
EU	European Union
GCPEA	Global Coalition to Protect Education from Attack
HRC	United Nations Human Rights Council
HR Committee	United Nations Human Rights Committee
IAC	International Armed Conflict
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
MDG	Millennium Development Goals
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict
OAS	Organisation of American States
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
OIC	Organisation of Islamic Cooperation
PCIJ	Permanent Court of International Justice
POW	Prisoner of War
SCSL	Special Court for Sierra Leone
SDG	Sustainable Development Goal

STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHCR	United Nations High Commission for Refugees
UNSG	United Nations Secretary General
VCLT	Vienna Convention on the Law of Treaties
WGEID	Working Group on Enforced or Involuntary Disappearances
WHO	World Health Organization

1

Introduction

1.1 CONTEXT

Education can provide a sense of normality for those living in situations of insecurity or armed conflict.¹ As it is a key concern of communities, including children and their caretakers in crisis situations, education has been construed as a humanitarian need.² In addition, ‘education is the single most vital element in combating poverty, empowering women and promoting human rights and democracy’ in situations of insecurity and armed conflict.³ It can contribute to increasing people’s income, lifting entire societies out of poverty, while the education of women and girls has been linked to substantially lower rates of child mortality.⁴ Education also ‘has an important role in promoting the rule of law and a culture of lawfulness’, and it ‘provides an important protective function by strengthening learners’ abilities to face and overcome difficult life situations’.⁵ In order to fulfill these functions, it is important that children have access to schools and also a high quality of learning during insecurity and armed conflict, as ‘being in school isn’t the same thing as learning’.⁶ Underpinning this Handbook, and noting the complex legal and practical issues it tackles,

¹ ICRC, ‘Framework for Access to Education’ (ICRC, July 2017) <www.icrc.org/en/document/framework-access-education>, 4

² *ibid* (ICRC), 3; See also Save the Children, ‘What do Children Want in Times of Emergency and Crisis? They Want an Education’ (*Save the Children*, June 2015) <www.savethechildren.org/content/dam/global/reports/education-and-child-protection/what-children-want.pdf>, 1, 11, and 16

³ UNICEF, ‘Rebuilding Hope in Afghanistan’ (UNICEF, November 2003) <<https://www.unicef.org/publications/files/e0973unicef.pdf>>, 2

⁴ ICRC, (n1), 4; See also UNESCO, ‘Education Counts: Towards the Millennium Development Goals’ (UNESCO, 2011) <<http://unesdoc.unesco.org/images/0019/001902/190214e.pdf>>, 7: ‘One extra year of schooling increases an individual’s earnings by up to 10%’: International Commission on Financing Global Education Opportunity, ‘The Learning Generation: Investing in Education for a Changing World’ (*International Commission on Financing Global Education Opportunity*, 2016) <http://report.education-commission.org/wp-content/uploads/2016/09/Learning_Generation_Full_Report.pdf>, 99

⁵ UNESCO, ‘Strengthening the Rule of Law through Education: A Guide for Policymakers’ (UNESCO, 2019) <<https://unesdoc.unesco.org/ark:/48223/pf0000366771>>, 2

⁶ The World Bank ‘The Education Crisis: Being in School is Not the Same as Learning’ (*The World Bank*, January 2019) <www.worldbank.org/en/news/immersive-story/2019/01/22/pass-or-fail-how-can-the-world-do-its-homework>

is the foundational view that education is not only an important end in itself. It is an enabling right, empowering access to other human rights, to meaningful participation in society, and to the promotion of universal respect for the dignity of all.⁷ It is a right deserving of protection by all of us.

Situations of insecurity and armed conflict affect education in many ways, such as through threats or physical harm inflicted on students and education staff, the forced displacement of populations whether within or outside the boundaries of their respective States, the recruitment of children into the militaries of States and non-State armed groups, and the destruction of educational facilities or their use as training grounds. Education itself is affected when it is used as a tool for war propaganda or a vehicle for discrimination or incitement to hatred between various groups. Education may also be discontinued entirely as a result of insecurity or armed conflict.

Since the first edition of this Handbook was published, attacks on education have continued worldwide, underlining the persistent relevance of this publication.⁸ As examples of attacks can be found in Africa, the Americas, Asia, Europe, and the Middle East, the problem is global.⁹ Between 2013 and 2017, attacks against students, education personnel, and educational facilities, were reported in 74 States.¹⁰ Not long after the publication of the first edition of the Handbook, a school bus was stopped in Pakistan on 9 October 2012, and fifteen year old schoolgirl Malala Yousafzai was shot in the head and critically wounded because she had spoken out against the Taliban banning girls from attending classes and their bombing of schools.¹¹ On 14 April 2014, a group of fighters from Boko Haram abducted more than 270 girls from a secondary school in Chibok, Nigeria. They also destroyed the school. More than two hundred girls remained captive for years. While approximately one hundred girls were

⁷ See generally, UNICEF/UNESCO, 'A Human Rights-Based Approach to Educational for All' (UNICEF, 2007) <www.unicef.org/publications/index_42104.html>, Chapter 2

⁸ The Handbook was first published in 2012. For a global analysis see Global Coalition to Protect Education from Attack (GCPEA), 'Education Under Attack: 2014' (*Global Coalition to Protect Education from Attack* 2014) <www.protectingeducation.org/sites/default/files/documents/eua_2014_full_0.pdf>; Global Coalition to Protect Education from Attack (GCPEA), 'Education Under Attack: 2018' (*Global Coalition to Protect Education from Attack* 2018) <www.protectingeducation.org/sites/default/files/documents/eua_2018_full.pdf>; which document education-related violations around the globe between 2009 and 2013 and 2013 and 2017, respectively.

⁹ Human Rights Watch, 'Protecting Schools from Military Use: Law, Policy, and Military Doctrine' (*Human Rights Watch* May 2019), 1

¹⁰ In Afghanistan, Bangladesh, Burundi, Cameroon, Central African Republic, Colombia, DRC, Egypt, Ethiopia, India, Iraq, Israel/Palestine, Kenya, Libya, Mali, Myanmar, Nigeria, Pakistan, the Philippines, Somalia, South Sudan, Syria, Thailand, Turkey, Ukraine, Venezuela, and Yemen, there were at least 20 instances of attacks against education: GCPEA 2018 (n8), 8, 25, 29–30

¹¹ Following her recovery, Malala has helped bring the world's attention to the issues affecting the education of girls around the world. She has addressed the UNGA on the importance of education in July 2013, helped establish the Malala Fund, a charity dedicated to ensuring girls education, and she became the youngest (joint) recipient of the Nobel Peace Prize for her fight for the right of all to education in December 2014: Ibid (GCPEA 2014), 4; See also 'Malala Fund' <www.malala.org/malalas-story>

released in 2016 and 2017, many remain missing at the time of writing.¹² In Pakistan, on 16 December 2014, one of the deadliest attacks on educational institutions occurred. The Taliban stormed the Army Public School in Peshawar, killing at least 141 people, including 132 children, as well as teachers and educational personnel. At least another 133 were injured, the vast majority of whom were children. As a result of the attack, the government closed all educational institutions across Pakistan for three to four weeks.¹³ It was also reported that schools or universities have been used militarily in 29 States between 2013 and 2017.¹⁴ In South Sudan, between December 2013 and 2016, armed forces and non-State armed groups are reported to have used at least 161 schools for military purposes. The military use of 31 schools occurred in the Philippines between the end of 2012 and the end of 2016.¹⁵ During the same period, child recruitment at, or en route to or from, school, was also documented in at least 16 States.¹⁶ In addition, sexual violence occurred at, or en route to or from, schools or universities in at least 17 States.¹⁷ Mass displacement caused by insecurity and armed conflict is another factor that continues to negatively impact access to education. For example, in 2015, it was estimated that approximately 708,000 Syrian refugee children were residing in Turkey, more than 400,000 of which were not attending schools.¹⁸

Alone and/or combined, these attacks diminish greatly the likelihood of an educational environment that encourages or allows sustained recovery after situations of insecurity or armed conflict. It can also restrict the ability of a society to be aware of the need to protect and ensure human rights.

Effective protection of human rights requires education about human rights and humanitarian protection. Specifically, it requires education, through example and in the ‘classroom’, regarding the need and obligation to protect civilians and others, during insecurity and armed conflict. This implicates the education of governments, of opposition movements, of civil society, and of all groups and individuals. If all are aware of the nature of human rights and of the protection requirements of international humanitarian law and of the potential consequences under international criminal law,

¹² GCPEA 2018 (n8), 6; See also Human Rights Watch, ‘Nigeria: Victims of Abductions Tell Their Stories - Horrific Abuses by Boko Haram, Lack of Government Protection’ (*Human Rights Watch*, October 2014) <www.hrw.org/news/2014/10/27/nigeria-victims-abductions-tell-their-stories>: which reported that numerous attacks were conducted by Boko Haram, including their abduction of 276 schoolgirls in Chibok in April 2014.

¹³ GCPEA 2018 (n8), 35, 188-189; See also, ‘How Pakistan school massacre unfolded’ *BBC* (16 December 2014) <www.bbc.co.uk/news/world-asia-30502873>

¹⁴ This was the case in Afghanistan, Burundi, CAR, Cameroon, Colombia, Côte d’Ivoire, DRC, Ethiopia, India, Iraq, Israel/Palestine, Kenya, Lebanon, Libya, Mali, Myanmar, Niger, Nigeria, Pakistan, the Philippines, Saudi Arabia, Somalia, South Sudan, Sudan, Syria, Turkey, Ukraine, Yemen, and Zimbabwe: GCPEA 2018 (n8), 39

¹⁵ GCPEA 2018 (n8), 41

¹⁶ This was the case in Afghanistan, Colombia, DRC, Iraq, Kenya, Mali, Nigeria, Pakistan, the Philippines, Somalia, South Sudan, Syria, Thailand, Turkey, Ukraine, and Yemen: GCPEA 2018 (n8), 42

¹⁷ This was the case in Afghanistan, Burundi, Cameroon, CAR, Colombia, DRC, Egypt, Ethiopia, India, Iraq, Mali, Myanmar, Nigeria, the Philippines, South Sudan, Venezuela, and Yemen: GCPEA 2018 (n8), 45

¹⁸ Human Rights Watch, ‘When I Picture my Future, I See Nothing: Barriers to Education for Syrian Refugee Children in Turkey’ (*Human Rights Watch*, November 2015) <www.hrw.org/sites/default/files/report_pdf/turkey1115_brochure_web.pdf>

then the long-term protection of everyone will be significantly increased, which will enhance considerably the possibility of creating a more stable post-conflict society.¹⁹

Given the continued attacks on education committed worldwide, and the importance of education, the protection of education in insecurity and armed conflict continues to deserve global attention, including from the legal community. The second edition of the Handbook incorporates all of the relevant developments which have occurred since 2012, including the Safe Schools Declaration, adopted in 2015, but also steps taken in the development sector such as the adoption of Sustainable Development Goal ('SDG') 4 on education. It also includes relevant case law like the case of *Prosecutor v Thomas Lubanga Dyilo*²⁰ ('Lubanga') at the International Criminal Court ('ICC'), which led to a recognition of missed educational opportunities for those children that were recruited into armed forces. It thus supports the further advancement of the protection of education in insecurity and armed conflict by international law, building on the steps already taken since 2012.

1.2 AIMS AND METHODOLOGY

There has been very little examination of the different areas (or regimes) of international law and their intersection on issues concerning education-related violations during insecurity and armed conflict. Such examination is essential both for the protection of education itself and for the benefits that derive from it. It is also essential to ensure the education of all those involved in insecurity and armed conflict about the obligation to protect education, so as to reduce education-related violations.

With this in mind, this Handbook aims to draw together those aspects of international law that are relevant to education-related violations in situations of insecurity and armed conflict.²¹ Education is the focus of this Handbook and runs throughout each of its chapters, linking legal provisions from various regimes in a novel way: through their relevance to education; and their potential utility to those seeking to protect education from violation.

To achieve this, this Handbook will consider the relevant aspects of the following regimes:

- international human rights law (IHRL);
- international humanitarian law (IHL); and
- international criminal law (ICL).

¹⁹ Jo Boyden and Paul Ryder, 'Implementing the Right to Education in Areas of Armed Conflict' (Department of International Development University of Oxford 1996) <www.essex.ac.uk/armedcon/story_id/000454.pdf>, 10

²⁰ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012

²¹ The Council of Delegates of the ICRC Movement emphasised 'the importance of the rules of international law, including international human rights law, international refugee law, and IHL, as applicable, in ensuring access to and protecting education': The Council of Delegates of the ICRC Movement, 'Education: Related Humanitarian Need' (*The Council of Delegates of the ICRC Movement*, November 2017) <http://rcrcconference.org/wp-content/uploads/2017/08/CD-17-R6_education_adopted_en.pdf>, 2

Within this canvas, the Handbook will explore in detail the right to education and related rights, the protection of students and education staff, and the protection of educational facilities. It identifies areas in which these legal regimes operate and how compliance with them might better protect education in situations of insecurity and armed conflict.

The methodology adopted involves an analysis of relevant case law at the international and regional level, as clarified from time to time by international courts and tribunals, and international materials—such as multilateral treaties and other agreements, customary international law, international and regional documents of legal importance, and statements and practices by States, inter-governmental bodies, non-governmental bodies (such as the International Committee of the Red Cross ('ICRC')), non-State actors, and international experts—as well as a close review of the academic literature (such as books, articles, and commentaries).

This Handbook should be read as a legal resource on which others may base their own work to protect education, tailoring its content to fit their own situation. In light of its purpose as a legal resource, it is not necessary for this Handbook to examine in detail the adequacy of the law pertaining to the protection of education in insecurity and armed conflict.²² Rather the focus of this Handbook is on what the law is, as opposed to what it should be. The intention is that it will be used primarily as a resource for lawyers, at both the domestic and international levels, seeking to understand better how international law protects education. It is intended to be a useful tool for domestic lawyers, who may not be familiar with the rules and mechanisms of international law, and for international lawyers who may not have considered how the legal regimes dealt with here operate in relation to education. It should enable a lawyer appearing before a court, and the judge before whom they appear, to refer to the relevant international law with confidence.

This Handbook is also useful to non-legally trained education experts and policy-makers within governments, political, social and cultural bodies, and civil society to understand the legal framework. For example, it should assist a government official drafting new legislation or devising legal practice, and the non-governmental body commenting on that legislation or practice, to be aware of the relevant international legal obligations of a State in relation to education. It can be used as part of training for political, social and cultural bodies, and for international organisations, seeking to provide for a better future for a State and its educational system, including through the realisation of the SDGs. It should also assist those working in fragile contexts transitioning from conflict to peace, which are at risk of returning to a state of war unless comprehensive peacebuilding strategies incorporating education are put in place. All of them should find here a range of international and comparative tools that they can use in their activities within national legal systems, while recognizing that national systems deal with international and comparative laws and practices in diverse ways.

This Handbook reflects the law as at May 2019. As laws and practices change and develop, this book should remain the starting point of information. Education Above All Foundation ('EAA')

²² For an in-depth analysis of the adequacy of the norms relevant to children and education in insecurity and armed conflict, and for suggestions as to how international law should be developed going forward, see Shaheed Fatima (ed), *Protecting Children in Armed Conflict* (Hart Publishing 2018)

and the British Institute of International and Comparative Law ('BIICL'), the independent research body that has authored this Handbook, hope that it will be bolstered by further resources and by training sessions over time.

1.3 SCOPE

The focus of this Handbook is on education-related violations in situations of insecurity and armed conflict. It explores the international legal protection afforded to both the right to education as a human right, and education more generally under IHRL, IHL, and ICL. It is restricted to considering issues in the context of situations of insecurity and armed conflict and, therefore, only a limited range of other rights will be considered. This restriction is of particular relevance as, while the right to education has been considered in depth by a number of IHRL lawyers, the focus on situations of insecurity and armed conflict and the interaction with other international legal regimes have not been dealt with in such depth. Accordingly, this Handbook examines those rights affecting education that are likely to be at particular risk during situations of insecurity and armed conflict. As a consequence, more civil and political rights are considered here than economic, social and cultural rights, while recognizing that the latter are at constant risk of lack of protection, especially in developing and post-conflict societies.

In order to undertake this examination, it is first necessary to set out the key terms used in, and the meaning attributed to each term within this Handbook. This clarification is important because some of the terms used here are legally defined and must be precisely understood. Other terms suffer from inconsistent use across various fields. This section identifies the meaning of each key term used and, through this, sets out the factual and legal scope examined.

1.3.1 Education

Education is a broad term that 'comprise[s] all deliberate and systematic activities designed to meet learning needs [and] involve[s] organized and sustained communication designed to bring about learning'.²³ For ease of use, the term 'education' considered in this Handbook encompasses all education from pre-school, through primary, secondary and tertiary education, to adult education (often called formal and non-formal education).²⁴ It not only refers to all types

²³ UNESCO, 'International Standard Classification of Education' (UNESCO, 1997) <www.unesco.org/education/information/nfsunesco/doc/iscled_1997.htm>; For detailed discussion of the levels of education and what each level should entail, see also UNESCO, 'International Standard Classification of Education' (UNESCO, 2011) <<http://uis.unesco.org/sites/default/files/documents/international-standard-classification-of-education-iscled-2011-en.pdf>>

²⁴ Note that the Committee on Economic, Social and Cultural Rights ('CESCR'), which considers compliance with the International Covenant on Economic, Social and Cultural Rights has commented that '[S]tates parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1) [being the right to education in the Covenant]': CESCR, *General Comment No 13, The Right to Education (Art 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 ('CESCR General Comment 13')

and levels of education but also includes ‘access to education, the standard and quality of education, and the conditions under which it is given’.²⁵

Under international law, as will be seen, governments have the obligation not only to provide for education but also to ensure that the education provided is appropriate, accessible and adequate. For example, the education provided cannot be contrary to the cultural identity of the persons concerned or contrary to human rights in general.

‘Educational institutions’—or institutions dedicated to education—may be divided into instructional and non-instructional education institutions. Instructional educational institutions, which includes schools and higher education institutions, ‘provide educational programmes (for students that fall within the scope of education statistics)’, and non-instructional educational institutions provide ‘education-related administrative, advisory or professional services for individuals or other education institutions’, such as ministries administering education institutions or entities providing student loans.²⁶ This Handbook focuses primarily on instructional educational institutions but is not limited to consideration of schools and universities alone, it will examine the broader base of non-instructional education when appropriate.

‘Students’ is a term used in this Handbook in a broad sense: it includes pupils at primary educational facilities, students at both secondary and higher educational facilities, and people of all ages benefiting from education. The term ‘education staff’ is not used in the relevant treaties but reference is made to ‘teachers and other staff’, thus recognizing the existence of education staff not classified as teachers.²⁷ This term also includes ‘staff employed in both public and private schools and other educational institutions’,²⁸ including those who work as maintenance and technical staff at educational institutions, and those who are teaching assistants. The Handbook also encompasses those individuals active in higher education institutions, including those involved in the act of teaching, as well as those conducting research or scholarship.²⁹

The term ‘facilities’ in relation to education has been used not only in reference to classrooms themselves but also to ‘sanitation facilities for both sexes, safe drinking water...libraries, computer facilities and information technology’.³⁰ Under the definition used in the Handbook, ‘education facilities’ may include all structures and installations used by an education institution in furtherance of its mission. Furthermore, educational facilities do not need to be permanent

²⁵ UNESCO Convention Against Discrimination in Education, 14 December 1960, Art 1(2)

²⁶ UNESCO, ‘UoE Data Collection on Education Systems: Volume 1 – Manual – Concepts, Definitions and Classifications’ (UNESCO, 2005) <www.cedefop.europa.eu/files/UOE2005manual_-_volume_1_-_final_formatted.pdf>, 41

²⁷ Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Mozambique*, 3 April 2002, CRC/C/15/Add.172, 57(b)

²⁸ UNESCO-UIS/OECD, *Education Trends in Perspective: Analysis of the World Education Indicators* (UNESCO-UIS/OECD 2005)

²⁹ However it does not in principle refer to those individuals working in the education sector for the purposes of policy and planning with no teaching or research responsibilities.

³⁰ CESCR General Comment 13, para 6(a)

structures.³¹ While the Committee on the Rights of the Child refers to ‘informal educational settings, including in the home’,³² this Handbook is not intended to apply to home schooling and similar activities or educational setting due to their potentially vast and unstructured nature, other than when they may be relevant, such as for education of those recovering from direct participation in conflict.

1.3.2 Education-related Violations

This Handbook examines the areas where education and international law intersect. In particular, it is concerned with the laws which prohibit actions that seek to attack and undermine education,³³ and the laws which seek to protect students, education staff, and educational facilities from such attacks. For this reason, it focuses on ‘education-related violations’, a concept which incorporates the *legal aspects* of actions attacking education during situations of insecurity and armed conflict. An attack on education refers to an act against education, students and education staff, and educational institutions, and considers the application of IHRL, IHL and ICL to each of those actions.

Education and international law intersect in two ways—revealing two facets to the concept of ‘education-related violation’:

- Where education is expressly recognised by IHRL as a human right in itself. It is necessary to consider what this right means, how IHRL, IHL and ICL might ensure this right, and what can be done if the right is violated. This concept is referred to here as ‘the right to education’. Where the law seeks to protect this ‘right to education’ the phrase ‘protection of the right to education’ will be used.
- The international legal protection of the conditions necessary for education, or legal provisions that prohibit certain conduct that interferes with education. Where reference is made to the laws that seek to protect these more general aspects of education in this Handbook, the phrase ‘protection of education’ will be used. The reference to protection here is not a reference to the specific legal obligation to protect under IHRL, unless so stated in this Handbook, rather it refers to the wider general protection of education under IHRL, IHL, and ICL.

Under this understanding, education-related violations are those acts which attack and undermine the conditions necessary for education. For example, engaging in torture, systemic attacks

³¹ The Committee on the Rights of the Child has, for example, used the term ‘mobile facilities’ as part of its recommendation to Sudan regarding improving access to education for nomadic children: Committee on the Rights of the Child, *Concluding Observations: the Sudan*, 31st Session, 9 October 2002, CRC/C/15/Add.190, para 54(e)

³² Committee on the Rights of the Child, *General Comment 1: The Aims of Education (Article 29)*, 17 April 2001, CRC/GC/2001/1, para 10

³³ See for example the UN Security Council’s Presidential Statement of 29 April 2009, S/PRST/2009/9, which called upon parties to armed conflict ‘to refrain from actions that impede children’s access to education, in particular attacks or threats of attack on school children or teachers as such, the use of schools for military operations, and attacks on schools that are prohibited by applicable international law’.

on students or education staff, recruiting children into the armed forces or shelling educational facilities are all education-related violations. The laws that prohibit these education-related violations are essential to protecting education.

Owing to the fragility of education in insecurity and armed conflict, almost any illegal interference with the lives and livelihoods of students or education staff can impact negatively on education and, therefore, constitute an education-related violation. Using the lens of education, many of the general effects of insecurity and armed conflict on communities can be viewed as education-related violations: the death or serious injury of family and community members; disruptions to electricity, water, heating and food supplies; damage to infrastructure; and restrictions of freedom of movement in the area of hostilities. While the intention is to promote greater understanding of the education-related consequences of all aspects of insecurity and armed conflict, it is not possible to address all these effects here. Thus the education-related violations that have been selected are those that the authors consider interfere with education most directly and detrimentally. Nevertheless, it is the hope of the authors that the legal provisions and analysis contained here may be adapted and used by those seeking to protect education from other education-related violations which are not directly addressed in this Handbook.

1.3.3 The Situations Considered

This Handbook considers education and education-related violations occurring in situations of insecurity and armed conflict. This means that it is concerned with the impact and challenges that insecurity and armed conflict may have on education. It is concerned with identifying and addressing how international law responds, or might be used to prevent, education related-violations arising from situations of insecurity and armed conflict.

Insecurity

‘Insecurity’ is a non-legal term. It is used here to describe situations of disturbance and tension within a State that disrupt the normal functioning of key political, social and legal institutions, including those that are used to facilitate education. Insecurity may refer to ‘national insecurity’, which is a territorial concept, or to ‘human insecurity’, which is a people-centred concept. ‘Insecurity’ does *not* include situations of intense violence that reach the threshold of armed conflict (which is defined below).

The following are situations of insecurity:

- Internal disturbances: where a State uses armed force to maintain law and order during a confrontation between a State and those within its territory and where the violence has not resulted in an ‘open struggle’ between an organised armed group and a State.³⁴

³⁴ Claude Pilloud (ed), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987), paras 1351–1355. Examples might include the uprisings in 2011 and 2012 in Tunisia and Egypt.

- Internal tensions: sporadic political, religious, social or economic tensions that may require the use of armed force by a State to maintain order. Typically, these situations are characterised by large-scale arrests, ‘political’ prisoners, and suspension of large judicial guarantees and allegations of disappearances.³⁵
- Situations of fragility:³⁶ ‘fragility’ describes a situation where a State lacks the will and/or capacity to provide basic services to the people within its jurisdiction and is at high risk of lacking the following key aspects:
 - authority: the State lacks the authority to protect its citizens from violence of various kinds.
 - service: the State fails to ensure that all inhabitants have access to basic services typical of the region or of past provision.
 - legitimacy: the State lacks legitimacy as it enjoys only limited support among the people within its jurisdiction.³⁷

Therefore, ‘insecurity’, as used in this Handbook, covers those situations where there is significant disturbance, tension or fragility and which do not amount to an armed conflict.

Note that natural disasters and terrorism may both be factors that disrupt the functioning of the State and may cause situations of insecurity.³⁸ While terrorists may directly seek to subvert educational facilities,³⁹ education itself has been recognised as a tool to prevent terrorism and violent extremism.⁴⁰

Armed Conflict

‘Armed conflict’ is used in this Handbook to describe the legal concepts of both ‘international armed conflict’ (‘IAC’) and ‘non-international armed conflict’ (‘NIAC’) and to distinguish them from situations of insecurity. IHL applies only in situations of armed conflict and not to situations of insecurity.

³⁵ *ibid*

³⁶ See Inter-Agency Network for Education in Emergencies, ‘Note from the Working Group on Education and Fragility on Terminology’ (*Inter-Agency Network for Education in Emergencies*, 2009) <http://s3.amazonaws.com/inee-assets/resources/Note_from_the_Working_Group_on_Education_and_Fragility_Terminology_final.pdf>

³⁷ Frances Stewart and Graham Brown, ‘Overview—Fragile States’ (*Centre for Research on Inequality, Human Security and Ethnicity*, 2010), <<https://assets.publishing.service.gov.uk/media/57a08b17ed915d3cfd000b1c/CRISE-Overview-3.pdf>>, 6

³⁸ See, for example, UNGA Resolution 72/246 of 24 December 2017, A/RES/72/246, preamble; Security Council Resolution 2427 of 9 July 2018, S/RES/2427, para 18; UNGA Resolution 72/284 OF 26 June 2018, A/RES/72/284, preamble

³⁹ Security Council Resolution 2170 of 15 August 2014, S/RES/2170, para 6. HRC Resolution 34/8 of 23 March 2017, A/HRC/RES/34/8, para 6; HRC Resolution 35/34 of 23 June 2017, A/HRC/RES/35/34, para 2; Note that while undertaking counter-terrorism activities, States must continue to respect their international obligations: UNGA Resolution 72/284 of 26 June 2018, A/RES/72/284, para 39

⁴⁰ See, for example, UNGA Resolution 72/284 of 26 June 2018, A/RES/72/284, para 12

Different rules of IHL apply in IAC and NIAC, although there has been some convergence in the applicable legal rules in recent years. IHRL continues to apply in both types of armed conflict (subject to the restrictions discussed in Chapter 2). Many provisions of ICL also apply to crimes committed during an armed conflict, although, like IHL, different provisions apply in relation to IAC and NIAC. When, where, and to whom IHRL, IHL, and ICL apply is discussed in detail in Chapter 2.

International Armed Conflict

‘IAC’ describes situations of violence which involve the use of armed force *between* States.⁴¹ Where force is used against a State there is no minimum threshold for intensity or amount of force,⁴² no minimum number of casualties, and no time limit⁴³ necessary to qualify a situation as an IAC.⁴⁴ Although the use of force between States is uncontroversially an IAC, it is not always clear that a State is using force against another State when it acts ‘by proxy’ through a non-State armed group. This situation is discussed in Chapter 2. Further, some armed conflicts involving non-State actors have been deemed to be examples of IAC by IHL treaty law.⁴⁵ IAC does not depend on a formal declaration of ‘war’⁴⁶ and the existence of an armed conflict is a separate issue from whether the use of force between States is legal under the law regulating the use of force between States (the *jus ad bellum*).⁴⁷

IAC also includes situations of belligerent occupation, whether partial or total, regardless of whether such occupation meets with any armed resistance.⁴⁸ ‘Belligerent occupation’ is where

⁴¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (‘Geneva Convention I’); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949 (‘Geneva Convention II’); Geneva Convention relative to the Treatment of Prisoners of War 1949 (‘Geneva Convention III’); Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (‘Geneva Convention IV’), Common Art 2

⁴² Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949: Volume 1* (International Committee of the Red Cross 1952–1960), 32. See also ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (2nd edn, ICRC 2016), paras 236–244

⁴³ See for example the case of Juan Carlos Abella v Argentina (La Tablada case) Case 11,137, 18 Nov 1997, OEA/Ser.L/V/II, which involved a 30-hour armed conflict to which the Inter American Commission of Human Rights held IHL applied.

⁴⁴ This broad definition of IAC was confirmed by the ICTY in *Prosecutor v Zdravko Muci et al*, IT-96-21-T, 16 November 1998, para 184.

⁴⁵ Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (‘Protocol I’), Art 1(4), as discussed in Chapter 2.

⁴⁶ Geneva Conventions 1949, Common Art 2

⁴⁷ Christopher Greenwood ‘Scope of Application of Humanitarian Law’ in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn, OUP 2009), 51

⁴⁸ Geneva Conventions 1949, Common Art 2. The existence of ‘IAC’ is a question of fact, not law: Committee on the Use of Force, ‘Final Report on the Meaning of Armed Conflict in International Law’ in International Law Association *Report of the Hague Conference* (ILA, 2010). Further, the ICRC commentary to the Geneva Conventions makes it clear that not defining the concept was a deliberate decision by the

the armed forces of one State have effective control over the territory of another.⁴⁹ The definition of belligerent occupation is discussed in more detail in Chapter 2.

Non-international Armed Conflict

‘NIAC’ is a situation of violence between a State and a non-State armed group on its territory, or a situation of violence between non-State armed groups on the territory of a State. In both situations the violence used must be ‘protracted’. This means that the violence must reach a level of intensity in order for the situation to be one of NIAC - as opposed to a situation of internal disturbance or tension that amounts to insecurity,⁵⁰ to which IHL does not apply. This definition of NIAC is found in customary international law and is used in this Handbook. Although IHL treaty law sets out other thresholds for NIAC, their relevance has been lessened by this customary definition. These thresholds are discussed further in Chapter 2.

It can be extremely difficult in practice to identify when a situation of violence has reached the required intensity for it to be classified a NIAC, triggering the application of those rules of IHL which apply to NIAC. A number of different, although converging, definitions of NIAC exist in IHL treaties and in jurisprudence of international criminal tribunals, which are often required to analyse provisions of IHL. These definitions, including the definition of ‘non-State armed group’ will be discussed in more detail in Chapter 2.

1.3.4 Legal Regimes

As outlined above, this Handbook will consider the issue of education and education-related violations under three international legal regimes: IHRL, IHL, and ICL. Throughout this Handbook these regimes are examined in turn. The relationship between IHRL and IHL is theoretically complex and can be difficult to apply in practice. The application of these regimes and their relationship to one another are discussed in Chapter 2, which also examines how different mechanisms, including international and regional human rights bodies, have attempted to reconcile the distinct legal regimes.

IHRL is examined first because it applies at all times, including in situations of insecurity and armed conflict. This broad application means that it is the most general of the three regimes in terms of its scope and objects. This also means, however, that its provisions can often not be specific enough to address all the education related issues raised by, for example, situations of armed conflict.

drafters in order to avoid a restrictive and overly technical interpretation: Jean Pictet (ed) *Commentary on the Geneva Conventions of 12 August 1949: Vol. 1* (International Committee of the Red Cross 1952–1960), 32. See also ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (2nd edn, ICRC 2016), 236–244

⁴⁹ Eyal Benvenisti, ‘Belligerent Occupation’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press 2008)

⁵⁰ Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art 1(2)

IHL, on the other hand, applies only in situations of armed conflict. Although it applies alongside IHRL, the two areas do not always overlap in their substance and many areas of IHRL remain unaffected by the operation of IHL, such as IHRL anti-discrimination provisions. These two regimes developed as distinct legal systems and only recently has their concurrent application been recognised. Where the two regimes do overlap, including in cases regarding the protection of the lives of students and education staff or the protection of educational facilities in armed conflict, the relationship between the two areas is complex. These issues are addressed throughout the IHL sections of this Handbook.

ICL is considered after the examination of IHRL and IHL because, although there is overlap with some of its substantive aspects, it is distinct from the two regimes in its mechanisms. ICL is a regime that identifies the circumstances that attract *individual* criminal responsibility. It also establishes a process by which this liability might be determined. Unlike IHL and IHRL, ICL sets out a self-contained procedural system to attain its internal objectives and many of those are set out in humanitarian and human rights treaties. The relationship between ICL and IHRL is rarely, if ever, considered by IHRL treaty bodies, although the rules and procedures of IHL and IHRL are frequently considered by ICL bodies, including the ICC.

Although these three legal regimes are distinct, each contains rules that protect education directly, or protect the conditions necessary for education to exist, such as the protection of the lives of students and education staff, and the protection of educational facilities. The structure of this Handbook recognises that the protection of education cuts across each regime and the subject matter of its chapters reflect this. However, within each chapter, the three legal regimes are examined separately. It is important to understand the origin of a particular rule, its nature and its application, as each of which requires consideration of the regime to which the rule belongs. The conclusions of each chapter highlight how the interaction between IHRL, IHL, and ICL can impact upon the overall protection of education.

1.3.5 Content

This Handbook sets out the international legal protection of education from education-related violations in situations of insecurity and armed conflict. Chapter 2 explores the three international legal regimes applicable in insecurity and armed conflict: IHRL, IHL, and ICL. The scope of application and features of each area of law will be outlined, including where they apply concurrently and the interaction between them. Chapter 2 provides an essential legal foundation for the rest of the Handbook. The application and interaction of these three regimes of international law are crucial to the understanding of how education is protected in insecurity and armed conflict.

Chapter 3 presents the core aspects of the human right to education. The content of the right and the obligations as to its protection are explored. Chapter 3 emphasises that the right to education is directly applicable in situations of both insecurity and armed conflict, subject to any general permissible restrictions. IHL also contains provisions that directly address education in particular circumstances in armed conflict, such as occupation, internment of civilians, where children are separated from their parents or orphaned by conflict, and in NIAC. While

ICL does not contain the protection of education *per se*, this Chapter discusses the possibility of considering the violation of the protection of education as a crime against humanity.

Chapter 4 and Chapter 5, which should be read together, set out how the law protects education indirectly by examining the international legal protection of other rights that are necessary for the full and effective realisation of the right to education, within the particular scope of this Handbook (see above). Chapter 4 addresses the legal protection of the physical and mental well-being of students and education personnel in both insecurity and armed conflict and Chapter 5 examines the international legal protection of educational facilities. Both Chapters 4 and 5 first examine the IHRL protection of education-related rights relevant to the protection of students and education personnel, and educational facilities, respectively. The particular protection afforded by IHL is then addressed and the relationship between the two regimes in armed conflict is then considered. The relevant application and protection afforded by ICL is set out at the end of each chapter.

How the law set out in Chapters 3, 4 and 5 might be enforced, and how remedies for its violations might be obtained, are examined in Chapter 6. This chapter introduces an outline of the international mechanisms, remedies and reparations for education-related violations. It considers what types of reparation may be most appropriate to these violations, followed by an introduction to the various mechanisms that can be used to obtain reparation, whether within a judicial or quasi-judicial system. The relevant mechanisms of the international human rights framework are briefly presented, as are those within regional mechanisms. Chapter 6 is completed by an examination of the ICL system and considers its role in bringing justice to victims of education-related violations.

The concluding comments draw together the key themes of the Handbook and some ways forward. Relevant Appendices are found at the end and include a list of relevant treaties and instruments, a list of cases and a bibliography.

2

International Legal Framework

This chapter outlines the various legal regimes that apply in situations of insecurity and armed conflict. It discusses the legal scope of international (including regional) human rights law and its application to situations of insecurity and armed conflict. It also examines the scope and application of IHL, and the scope and application of ICL. It aims to answer the questions of when these bodies of law apply (i.e. their temporal application), where they apply (i.e. their jurisdictional application) and to whom they apply (i.e. their personal application).

2.1 INTERNATIONAL LAW

This section sets out the primary, basic principles of international law that are essential to understanding how education is protected by international law. There are some fundamental matters of international law, especially treaty law, that are necessary to clarify before proceeding to set out the legal scope and application of the rest of the book, especially for non-international lawyers.

While treaty law is the main focus of this Handbook, there are aspects of each of the three regimes that can apply to a situation by virtue of customary international law. This is even more clearly the case when a right or protection is a matter within a peremptory norm of international law (known as *jus cogens*), from which no State can lawfully disapply. Each of these principles will be briefly defined and summarised below.

2.1.1 Treaty Law

A treaty is a legally binding agreement between States.⁵¹ The treaties that will be considered here are all multilateral treaties, in that there is more than one State that has agreed to them, whether they are intended to cover all States (i.e. are global or universal) or are intended to deal with only States in a region. Note that a treaty may be called a number of different names, such as ‘Covenant’, ‘Convention’ or ‘Charter’, and that a ‘Protocol’ is a treaty that is added on to the original treaty. For example, some of the treaties discussed in this Handbook include the

⁵¹ Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 311

Charter of the United Nations, the Geneva Convention for the Protection of War Victims, and the International Covenant on Economic, Social and Cultural Rights; each of which is a treaty, although they have different names.

A treaty is legally binding on a State only if:

- *The State has ratified or acceded to the treaty.* Ratifying a treaty means that the State has agreed to the treaty, and has done more than signing the treaty—as signing by itself is normally not enough to make the State a party to the treaty⁵²—usually by that State making a statement that it is legally bound by the treaty. The State is then a ‘party’ to the treaty. Acceding to a treaty is where the State did not originally sign the treaty, but agrees to be legally bound by the treaty at a later date. Whether a State is a party to a treaty can usually be discerned by looking at, for example, the website of the UN or the regional organisation behind the treaty, or by finding out from the State itself. Note that ratifying or acceding to a treaty is *not* the same as making the treaty part of the national law of the State, nor does it indicate that the State is complying with the treaty.
- *The treaty is in force for the State.* Many multilateral treaties require a certain number of States to be parties to them before they become legally binding on all the States who have become party to it. For example, the International Covenant on Civil and Political Rights required 35 States to be parties to it before it came into force⁵³ so, while it was finalised and agreed in 1966 (hence its date), it did not come into force until 1976. Any State which accedes to the treaty after it has already come into force is bound as from the date when their ratification comes into effect. This latter date can, therefore, vary between States, so the date of ratification must be made clear by the State when acceding to the treaty.⁵⁴ It is assumed in this Handbook, unless otherwise stated, that the relevant treaty is in force.
- *There is no relevant and valid reservation or derogation to the treaty.* A State may limit its obligations under a treaty if it makes a lawful reservation or derogation to it. This is discussed below. Note that all the major human rights treaties considered here allow reservations (either by express or implied term), unless the contrary is indicated at that point in the Handbook. This, and the position of derogations, are considered further below.

Treaties may also include procedural requirements. For example, most human rights treaties make clear who is able to bring a claim under the treaty and who is protected by the treaty. There may be procedural restrictions that require, for example, that a claim first to be considered within the national legal system (called an ‘exhaustion of (effective) domestic remedies’) before an international court or tribunal can consider it.

⁵² A State which has signed a treaty, but not yet ratified or acceded to it, should not act contrary to the object and purpose of the treaty: see VCLT, Art 18

⁵³ International Covenant on Civil and Political Rights, 16 December 1966, Art 49

⁵⁴ There are many specific procedural and other matters about entry into force of a treaty for a State that are not dealt with in this Guide but for which information can be found elsewhere—see, for example, Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, University of London 2007).

Also, no limitation to the application of the right in question must be in place. In certain circumstances, it is possible to limit the application of a right if there is a legal basis to do so in the pursuit of a legitimate aim, and in accordance with the principle of proportionality. For example, freedom of movement is a human right that can be curtailed following a court sentence that followed due process.

Finally, while this may seem obvious, it is crucial to make sure that the right or protection being considered is enshrined within the relevant treaty. For example, the American Convention on Human Rights does not have a right to education within it, and some protections of IHL are within the Additional Protocols to the Geneva Conventions and are not within the original Geneva Conventions.

2.1.2 Customary International Law

A State will be legally bound to uphold a right or protection if that right or protection is a matter of customary international law. Customary international law is created by a combination of State practice (i.e. where States follow a particular action) and where States consider that they have a legal conviction (in contrast to a diplomatic feeling) to follow that particular action (called '*opinio juris*').⁵⁵ While a State must give explicit consent to be legally bound by a treaty by ratifying or acceding to the treaty, if a right or protection is a matter of customary international law, then all States are legally bound by it, even if a State has not ratified the relevant treaty, except in the rare situation where a State has persistently objected to a particular practice.⁵⁶ Note that where there is a rule of customary international law, States are not bound by the treaty terms where that right or protection may be set out (and so, for example, would not have to submit to the treaty monitoring body) but are bound by the principles underpinning those terms.

Throughout this Handbook, where possible and appropriate, there will be indications where a particular right or protection is considered to be customary international law. For example, it is considered that the content of the Geneva Conventions reflect customary international law.

⁵⁵ Brian D Lepar (n55), 9; See also *Continental Shelf (Libyan Arab Jamahiriya v Malta)*, ICJ Reports 1985, 3 June 1985, para 27; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ Reports 2012, 3 February 2012, para 155; Michael Wood, Special Rapporteur, 'Second Report on Identification of Customary International Law', 22 May 2014, A/CN.4/672, para 21; International Law Commission ('ILC'), 'Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee', 30 May 2016, A/CN.4/L.872, Draft Conclusions 2–3

⁵⁶ ILC, 'Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee', 30 May 2016, A/CN.4/L.872, Draft Conclusion 15; See Dino Kritsiotis, 'On the Possibilities of and for Persistent Objection' (2010) 21 *Duke Journal of Comparative and International Law* 121; Brian D Lepar (n55), 10, 31

2.1.3 Jus Cogens

A very small number of international legal norms may be classified as *jus cogens*, namely a peremptory norm of international law. The definition is set out in the Vienna Convention on the Law of Treaties ('VCLT'):

[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁵⁷

Jus cogens may be characterised as an 'intransgressible' norm of international law, the binding force of which is unconditional.⁵⁸ The VCLT also sets out that if 'a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.⁵⁹ A State must not only desist from entering into a treaty that would contravene a *jus cogens* norm, it must not adopt laws or policies to such effect.⁶⁰ It may be convenient to consider that *jus cogens* is the international legal equivalent of a constitutional principle in a national legal system in which all national legislation and practice must be in compliance.

The norms which may be characterised as *jus cogens* are not always clear or universally agreed. However, the prohibition against torture,⁶¹ genocide,⁶² crimes against humanity,⁶³ acts of aggression, slavery and the slave trade, racial discrimination, and piracy, are generally accepted as being *jus cogens*,⁶⁴ as is the right to self defence, and the prohibition of hostilities directed at a civilian population.⁶⁵

⁵⁷ VCLT, Art 53

⁵⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 8 July 1996, para 79

⁵⁹ VCLT, Art 63

⁶⁰ See *Prosecutor v Anto Furundžija*, IT-95-17/1-T, 10 December 1998, para 155

⁶¹ *ibid*

⁶² See Judge Lauterpacht of the International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, ICJ Reports 1993, 13 September 1993, 440

⁶³ Note that while the Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948, there is no treaty concerned with 'crimes against humanity'; however, the ILC is currently drafting articles regarding the prevention and punishment of crimes against humanity <http://legal.un.org/ilc/summaries/7_7.shtml>

⁶⁴ Brian D Lepard (n55), 11

⁶⁵ ILC, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 13 April 2006, A/CN.4/L.682, para 374

Note that a norm that is characterized as part of *jus cogens* generally gives rise to *erga omnes* obligations, which are obligations owed by a State to all other States. This concept was first introduced into positive law by the ICJ in *Barcelona Traction, Light and Power Company (Belgium v Spain)*, ICJ Reports 1970, 5 February 1970, para 33; see also Erika de Wet, 'Jus Cogens and Obligations Erga Omnes' in Dinah Shelton (Ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013), 554; Stefan Kadelbach, 'Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publications 2006), p 22

2.2 INTERNATIONAL HUMAN RIGHTS LAW

IHRL applies to all situations at all times. While primarily applied in peace-time, IHRL also applies to situations of insecurity and armed conflict. In contrast, IHL only applies during armed conflict. As discussed below, ICL may apply in relation to crimes committed in both armed conflicts and situations of insecurity.

The core international human rights treaties considered in this Handbook are:

- Convention Against Discrimination in Education 1960 ('CDE'), which has 104 States Parties;
- International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), which has 169 States Parties, and its Optional Protocol, which has 24 States Parties;
- International Covenant on Civil and Political Rights 1966 ('ICCPR'), which has 172 States Parties, and its Optional Protocols, with the Optional Protocol adopted in 1966 having 116 States Parties and the Second Optional Protocol aiming at the abolition of the death penalty having 86 States Parties;
- International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') 1966, which has 179 States Parties, and its Article 14 on a communications procedure.
- Convention on the Elimination of all Forms of Discrimination against Women 1979 ('CEDAW'), which has 189 States Parties, and its Optional Protocol adopted in 1999 which has 109 States Parties;
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, which has 54 States Parties, and its Articles 76 and 77 on a communications procedure.
- Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 ('CAT'), which has 165 States Parties, and its Optional Protocol adopted in 2002 which has 88 States Parties;
- ^a • Convention on the Rights of the Child 1989 ('CRC'), which has 196 States Parties, and its Optional Protocols (with the Optional Protocol on the Involvement of Children in Armed Conflict adopted in 2000 having 168 States Parties and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography adopted in 2000 having 175 States Parties, and the Optional Protocol on a Communications Procedure of 2011 having 42 States Parties);
- Convention on the Rights of People with Disabilities 2006 ('CRPD'), which has 177 States Parties, and its Optional Protocol adopted in 2006 having 94 States Parties; and
- International Convention for the Protection of All Persons from Enforced Disappearance 2006, which has 59 States Parties, and its Article 31 on a communications procedure.

The Universal Declaration of Human Rights 1948 ('UDHR') is also referred to, though it is not a treaty, it is a soft law instrument and therefore non-binding.⁶⁶ However, many of its Articles

⁶⁶ For a discussion of the significance of soft law, see Alan Boyle, 'Soft Law in International Law Making' in Malcolm D Evans, *International Law* (5th edn, Oxford University Press 2018)

would be considered to have become customary international law, through their inclusion in treaties, State practice or other applications. For example, each State in the world is now subject to a regular Universal Periodic Review by the UN Human Rights Council ('HRC'), in which the basis for review includes compliance with the UDHR.⁶⁷

Other relevant international treaties considered in the Handbook include:

- Convention Relating to the Status of Refugees 1951, which has 146 States Parties, and its Optional Protocol of 1967 having 147 States Parties.
- Convention relating to Stateless Persons 1954, which has 91 States Parties.
- Various International Labour Organization ('ILO') Conventions, such as ILO Convention No 155 on Occupational Safety and Health Conditions, ILO Convention No 161 on Occupational Health Services, ILO C182 on Worst Forms of Child Labour and ILO Convention No 187 on Promotional Framework for Occupational Safety and Health.

The regional human rights treaties considered in this Handbook are:

- European Convention on Human Rights 1950 ('ECHR'), which has 47 States Parties (the Council of Europe Members) and its Optional Protocols, such as its First Protocol which includes the right to education and which has 45 States Parties;
- European Social Charter 1961 (revised 1996) ('ESC'), which has 47 States Parties to its 1961 text and 34 States Parties for the revised Charter, and its Optional Protocols;
- American Convention on Human Rights 1969 (ACHR), which has been ratified by 25 Member States of the Organization of American States, and its Optional and Additional Protocols;
- African Charter on Human and Peoples' Rights 1981 (ACHPR), which has 55 States Parties, and its Protocol on the Rights of Women in Africa of 2003 which has 40 Parties;
- African Charter on the Rights and Welfare of the Child 1990 ('ACRWC'), which has 48 States Parties;
- Arab Charter on Human Rights 2004 ('ArabCHR'), which has 14 States Parties (out of 22 States Parties to the League of Arab States).⁶⁸

There is no binding regional human rights treaty in the Asia/Pacific region. However, there is the non-binding ASEAN Human Rights Declaration, wherein Southeast Asian States commit to ensuring IHRL.⁶⁹

⁶⁷ HRC Resolution 5/21 of 18 June 2007, A/HRC/RES/5/1

⁶⁸ It has been signed by 17 Member States of the League of Arab States. The first version of the Arab Charter was adopted in 1994, the second version was adopted in 2004. At the time of writing, Syria was suspended from the League of Arab States but has nevertheless been included in its number of States Parties.

⁶⁹ Association of Southeast Asian Nations, *ASEAN Human Rights Declaration*, 19 November 2012, <<https://asean.org/asean-human-rights-declaration>>; the ASEAN Declaration was adopted by Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam, and was adopted on 18 November 2012.

Each of these treaties has a treaty body that monitors and supervises compliance with the treaty obligations of States. For example, the ICESCR has a Committee of independent experts, called the Committee on Economic, Social and Cultural Rights ('CESCR'). The roles of these treaty bodies and the mechanisms of these treaties are set out in Chapter 6.

It is important to be aware that every single State in the world is party to at least one of the major global human rights treaties. Each of these treaties includes obligations to give effect to the treaty in national law.

It is also important to realise that all human rights are interrelated and interdependent, which means that the enjoyment of one particular human right often relies, in part or completely, on the enjoyment of other right(s). This is explained further in Chapter 3.

2.2.1 State Obligations

IHRL creates obligations for States parties. The obligations can be negative (e.g. a State should not commit torture and should allow freedom of thought) and positive (e.g. a State shall provide a fair trial). Sometimes an obligation requires limited State action (e.g. to allow trade unions) or significant State action (e.g. creation of an independent judiciary for the right to a fair trial), and sometimes it requires considerable resources (e.g. to provide medical facilities) or few resources (e.g. not to commit slavery). An obligation can be immediate (e.g. non-discrimination) or undertaken over time, namely progressively (e.g. provision of social security). As discussed below, in cases when the obligation can be undertaken over time, there are nevertheless measures that need to be taken immediately in order for the obligation to be undertaken within a reasonable timeframe. These obligations will usually be set out in the treaty—as interpreted by a court, the treaty monitoring body and other authoritative sources, including a national court interpreting a treaty—and will vary across each human rights treaty depending on the right in issue.

The general approach to these obligations is that States have specific obligations to respect, protect and fulfil the human rights provisions contained in the treaties to which they are a party:

- *The obligation to respect* requires States not to take any measures that would result in preventing or limiting or otherwise interfering in the exercise by individuals of their human rights, including the right to education and other rights that are necessary for the realisation of the right to education.
- *The obligation to protect* requires States to ensure individuals do not become the victims of human rights abuses, including by the conduct of non-State actors. As a result, States may have to adopt necessary measures to ensure that third parties such as individuals, armed groups, corporations etc, do not act to nullify or impair the exercise by right-holders of their right to education and the other human rights needed for the right to education to be realised.
- *The obligation to fulfil* requires that States take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of rights, including the right to education, including by the provision of appropriate remedies.

A particular aspect of the ICESCR (in which the right to education is specifically protected for all persons rather than only for specific categories of protected persons, e.g. only children are protected in the CRC) is that it includes both immediate obligations on a State which must be fully achieved by a State party to the ICESCR upon its entry into force for the State in question, such as non-discrimination, and obligations which must be ‘progressively realised’ by the State party. Article 2(1) of the ICESCR sets out the principle of progressive realisation, stating that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

While the ICESCR does not explicitly set out in Article 2(1) that States have immediate obligations, the CESCR provides that the ICESCR, as well as imposing progressively realisable obligations, also imposes on States ‘obligations which are of immediate effect’.⁷⁰

It is clear that the obligation of progressive realisation is a positive obligation that requires States to take steps immediately towards the full realisation of these rights. For a State to do nothing or to act retrogressively in the protection of the rights under the ICESCR would be to act contrary to its legal obligations.⁷¹ Thus States must take ‘deliberate, concrete and targeted’ steps toward the full realisation of the right to education ‘within a reasonably short time’ after the entry into force of the legally binding ICESCR on their territory.⁷² The obligation to achieve the right to education progressively is contained in some other human rights treaties that protect the right to education, such as the CRC under Article 28(1). However, this obligation is not made explicit in other treaties,⁷³ such as in Article 17 of the ACHPR.

In addition, obligations include ‘minimum core obligations’, which require States ‘to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’ in the ICESCR. However, the obligation is on the State to show that it cannot meet its minimum core obligations due to scarcity of resources, unless the particular minimum core obligation in question is immediately realisable, for example minimum core obligations relating to non-discrimination. So it must prove that all efforts have been made to meet this minimum standard, including by

⁷⁰ CESCR, *General Comment 3: The Nature of States Parties Obligations*, 14 December 1990, para 1 (‘CESCR General Comment 3’); Mashood A Baderin and Robert McCorquodale, ‘The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development’ in Mashood A Baderin and Robert McCorquodale, *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007), 12–13

⁷¹ CESCR General Comment 3, para 1

⁷² *ibid.*, which states at para 3 that legislative measures in the field of education are particularly desirable and may be indispensable. Other possible appropriate measures may be administrative or financial or consist of the provision of judicial remedies, for example, and at para 9, adds that there is ‘an obligation to move as expeditiously and effectively as possible towards that goal’.

⁷³ For example, Art 17 of the ACHPR does not explicitly make a distinction between the types of obligations on a State.

the adoption of low-cost programmes.⁷⁴ This justification by a State is needed as sometimes a State will have used its resources for non-human rights purposes, such as for military expenditure. It should also be noted that, as set out in Article 2(1), the available resources may originate from another State and that cooperation measures must be facilitated in order to satisfy the obligations contained in the ICESCR.⁷⁵ States must similarly also show that it cannot meet their non-core obligations due to resource scarcity. However, minimum core obligations require that States prioritise their resource allocation towards minimum core obligations.

In addition, all States have these obligations for human rights that are customary international law, whether they are party or not to a treaty protecting such rights.

2.2.2 Temporal Application

IHRL applies at all times (assuming the treaty is in force), but the State may limit or restrict the scope of its obligations under IHRL in three ways:

- Reservations to treaties
- Derogations from rights
- Limitations to rights

Reservations to Treaties

A reservation is:

[A] unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.⁷⁶

As this definition makes clear, while a State may make a reservation to one or more provisions of a treaty (but not to the whole treaty), it can do so only when it becomes party to the treaty and not later. A State can withdraw a reservation at any time.

Reservations are the means whereby States indicate that there are aspects of treaty provisions which they cannot accept, sometimes for social, cultural or economic reasons. However, reservations can have the effect of excluding altogether the legal effect of a particular provision of a treaty, or modifying or qualifying the extent of a provision.⁷⁷ In addition, some State pronouncements purported to constitute reservations are in fact ‘declarations’ or ‘understandings’, which

⁷⁴ CESCR General Comment 3, paras 10–11; See Sir Nigel Rodley, ‘International Human Rights Law’ in Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018), 783

⁷⁵ Any such international assistance must be in accordance with international law: see for example UN Charter, Arts 55–56

⁷⁶ VCLT, Art 2

⁷⁷ See Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases and Materials on International Law* (Oxford University Press 2011), Chapter 3

provide that State's interpretation as to the scope and nature of a treaty provision, but are without the legal effect of a reservation.

There are many rules about reservations but the main issue for our purposes is to do with whether a reservation is permissible.⁷⁸ The primary rules are set out in the VCLT, which is considered to represent customary international law. This provides:

- If a reservation is not allowed by a treaty then no reservations are permissible.
- If a reservation is allowed by a treaty but it is against the 'object and purpose' of the treaty then it is impermissible.
- If a reservation is allowed by the treaty, then another State can still object to the reservation. If it does object, then the reservation does not apply between it and the reserving State.

None of the major human rights treaties considered here expressly prohibits reservations (either by express or implied term), unless the contrary is indicated at a relevant point in the Handbook.

A major issue concerns whether a reservation is against the 'object and purpose' of a treaty, not least as other States cannot be relied upon to object to any reservation (due to political and other reasons). Thus the human rights treaty monitoring bodies have taken on themselves the task of considering whether a reservation is permissible.⁷⁹

Derogations from Rights

Derogations from a provision of a human rights treaty are possible under certain strict circumstances. The two essential requirements for a derogation to be possible are:

- the existence of a situation of 'a public emergency which threatens the life of the nation';⁸⁰ and
- the official proclamation of that emergency situation by the State seeking the derogation and informing other parties to the treaty.⁸¹

While 'a public emergency which threatens the life of the nation' (often called a 'state of emergency') may occur where there is an armed conflict, certain situations of insecurity resulting from civil unrest or a natural disaster may also be considered as such an emergency. The general

⁷⁸ For more on reservations, see the ILC, *Guide to Practice on Reservations to Treaties* (2011), adopted by the Commission at its sixtythird session <http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf>

⁷⁹ See, for example, HRCCommittee, *General Comment 24: Reservations to the Covenant or Optional Protocols or Declarations under Art 41 of the Covenant*, 1994, and its views in *Rawle Kennedy v Trinidad and Tobago*, Communication No 845/1998, 26 March 2002

⁸⁰ For example, ICCPR, Art 4(1)

⁸¹ HRCCommittee, *General Comment 29 Art 4 (Derogations during a State of Emergency)* 2001, para 2 ('HRCCommittee General Comment 29')

applicability of human rights law during situations of armed conflict is discussed later, so this section will focus on the situations of insecurity.

Article 4 of the ICCPR requires that:⁸²

[T]he States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Therefore, as the extent of the derogation must be strictly limited to ‘the exigencies of the situation’, the principle of proportionality must be respected both for the derogation itself and for the measures taken as a result of the derogation.⁸³ Indeed, States have to ‘carefully consider the justification and why such a measure is necessary and legitimate in the circumstances’.⁸⁴ Given that the requirements of necessity and proportionality must be applied to each derogating measure, States will never be able lawfully to delete the protection of any right entirely.⁸⁵

The ICCPR and the regional human rights treaties expressly restrict the rights from which there can be derogations, though none of the other major global human rights treaties has derogation provisions. For example, under the ICCPR, derogations are never permissible for the following provisions:

- the right to life (Article 6);
- the prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 7);
- the prohibition of slavery (Article 8);
- the prohibition of imprisonment because of an inability to fulfil contractual obligation (Article 11);
- the principle of legality in criminal law (Article 15);
- the recognition of everyone as a person before the law (Article 16); and
- the freedom of thought, conscience and religion (Article 18).⁸⁶

These rights are generally considered to be rights that are either fundamental to life during a state of emergency or by their nature not justifiable in being limited even during a state of emergency. Yet, if a human right is non-derogable it does not mean that it has priority over other human rights; it simply indicates that it should not be limited in a particular situation where there is a state of emergency.

⁸² This has been interpreted by the HRCCommittee in HRCCommittee General Comment 29.

⁸³ *ibid*, para 4

⁸⁴ *ibid*, para 3: ‘Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation’. Note also that, even in the case of an armed conflict, the situation must be a threat to the life of the nation.

⁸⁵ *ibid*, para 4

⁸⁶ ICCPR, Art 4(2); see also *ibid*, paras 11 and 13

In addition to the rights clearly mentioned in a treaty, there are other rights that cannot be the subject of lawful derogations, as such derogation would not be consistent with the necessary protection of rights during a state of emergency. For example, the Human Rights Committee has stated that other non-derogable rights include the right to an effective remedy for violations (Article 2 (1)); the prohibition against the taking of hostages, abductions or acknowledged detention (Article 9); most components of the right to a fair trial and other judicial guarantees, such as habeas corpus (Articles 9(4) and 14);⁸⁷ the protection of the rights of minorities (Article 27); and the prohibition of inciting war or hatred among peoples (Article 20). A derogation must also be consistent with all other international law obligations of the State in question,⁸⁸ which would mean that it was not possible to derogate in violation of IHL and CIL treaty and customary international law.⁸⁹ Non-discrimination and equality can also not be derogated.⁹⁰

The ICESCR does not contain a provision allowing for derogation. The Committee that monitors the ICESCR seems to have taken the view that, accordingly, core obligations arising from the rights protected in the ICESCR cannot be subject to derogation, in that it has stated that essential health care and basic water provision are non-derogable.⁹¹ It is consistent with this view that there can be no derogation by a State from any of the core obligations in the ICESCR (see Chapter 3), which include basic housing and shelter and basic education, as well as non-discrimination.⁹² So it is probably the case that other rights could be derogated from, such as labour rights,⁹³ and non-basic education provision.

Limitations to Rights

There are few situations under which rights may be lawfully restricted. According to the ICESCR, limiting the enjoyment of certain rights, including the right to education, may be lawful only under strict circumstances, as ‘the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’.⁹⁴ Any limitation must thus be lawful (in accordance with the law), necessary (in accordance with the prin-

⁸⁷ See also IACtHR, *Habeas Corpus in Emergency Situations Advisory Opinion*, No OC-8/87, 30 January 1987, para 42

⁸⁸ HRCCommittee General Comment 29, para 9

⁸⁹ See, for example, the prohibition of deporting or forcibly transferring population without legal grounds in Statute of the International Criminal Court (Rome Statute), adopted 17 July 1998, entered into force 1 July 2002, Art 7(1)(d) and 7(2)(d)

⁹⁰ See IACtHR, *Juridical Condition and Rights of the Undocumented Migrants Advisory Opinion*, No OC-18/03, Series A No.18, 2003, paras 100–101

⁹¹ See CESCR, *General Comment 14, The Right to the Highest Attainable Standard of Health*, 11 August 2000, E/C.12/2000/4, paras 15, 40 and 47

⁹² See Mashood A Baderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010), 77; and CESCR General Comment 3

⁹³ See Amrei Müller, ‘Limitations to and Derogations from Economic, Social and Cultural Rights’ (2009) 9 Human Rights Law Review 557

⁹⁴ International Covenant on Economic Social and Cultural Rights, entered into force 3 January 1976, Art 4. Note that, as mentioned in Chapter 2, this does not amount to a general derogation clause.

ciple of proportionality), and legitimate (i.e. not exceed what is required by its aim). The harm and the purpose of a limitation must then be balanced. Some rights may also be limited by the exercise of other rights. For example, the right to freedom of expression may be limited by the rights of others (such as their privacy).

Examples of limitation of the right to education include the imposition of a particular age for starting school or the imposition of an examination to gain access to a higher level of education.⁹⁵

2.2.3 Territorial Application

An international human rights treaty is applicable on the territory of a State party and thus to all individuals situated on its territory, no matter their nationality or statelessness status (see further below). This protection is also applicable to individuals subject to the ‘jurisdiction’ of a State party and thus the treaty obligations may be applicable extraterritorially.

Extraterritorial Application

An extraterritorial application of a treaty arises when a State takes actions (or makes omissions) outside its territory or where there are consequences outside that territory of decisions taken within the territory. It could also include general international legal obligations to take action, such as through international cooperation, to realise human rights internationally.⁹⁶ The HRC has also stressed ‘the importance of international cooperation, including the exchange of good practices, and of technical cooperation, capacity-building, financial assistance and technology transfer on mutually agreed terms in the realization of the right to education, including through the use of information and communications technology’.⁹⁷ Not all the international human rights treaties make explicit their territorial scope but, as will be shown, it is now generally accepted that the below treaties all have extraterritorial application and so States have the obligations to protect, respect and fulfil human rights extraterritorially.

When commenting on Article 2(1) of the ICCPR, which provides for the scope of application of the treaty,⁹⁸ the HRCCommittee, which is the relevant treaty monitoring body, has stated that

⁹⁵ Klaus D Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Martinus Nijhoff 2006), 456–457

⁹⁶ See *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (2011), Principle 8 (Maastricht Principles). These principles were drafted by experts in this field. Which means that they are persuasive but not legally binding.

⁹⁷ HRC Resolution, *The right to education: follow-up to Human Rights Council resolution 8/4*, 22 June 2017, A/HRC/RES/35/2, para 14

⁹⁸ ICCPR, Art 2(1) states that: ‘[E]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

the ICCPR is applicable to ‘anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’.⁹⁹ The International Court of Justice (‘ICJ’) has endorsed this interpretation.¹⁰⁰

While the ICESCR does not contain a provision limiting its scope of application, the CESCR has also found that it may be applicable beyond the territory of a State party when it has effective control over a population not situated within its territory,¹⁰¹ and the ICJ endorsed the extraterritorial application of the ICESCR.¹⁰² This position has been confirmed by the revised Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. In addition, the ICESCR enjoins States to take positive action extraterritorially, when it provides in Article 2(1) that States must ‘take steps, individually and through international assistance and cooperation ... with a view to achieving progressively the full realization of [Covenant] rights’. Some means of such assistance are further spelled out in Article 23.

With regard to education, the extraterritorial application of the ICESCR is further supported by its own Article 14, which provides that any State which ‘has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education free of charge’ at the time it became a party, must take measures for its progressive implementation.¹⁰³ Finally, the Committee has also issued a General Comment on the relationship between economic sanctions and economic social and cultural rights, noting that the international community must do everything possible to protect the minimum the core economic, social and cultural rights of the people of the targeted State.¹⁰⁴

⁹⁹ HRCCommittee General Comment 31, *The Nature of the general Legal Obligation Imposed on State Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 10 (‘HRCCommittee General Comment 31’). The HRCCommittee added that: ‘This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation’. See HRCCommittee, *Lopez Burgos v Uruguay*, Communication No 52/1979, 29 July 1981.

¹⁰⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 9 July 2004, para 111, where the ICJ found that the ICCPR was ‘applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’.

¹⁰¹ CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, 23 May 2003, E/C.12/1/Add.90, para 31. On this basis, the Committee found that the ICESCR applied to the occupied Palestinian territories under Israeli control.

¹⁰² *Wall Advisory Opinion*, para 112 where the ICJ noted that the lack of a provision in the ICESCR regarding the scope of its application ‘may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction’. This position has been confirmed by the revised *Maastricht Principles*.

¹⁰³ Emphasis added. This article is referred to by the ICJ in the context of the Court’s discussion on the extraterritorial application of the ICESCR in *Wall Advisory Opinion*, para 112.

¹⁰⁴ CESCR *General Comment No 8, The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, 12 December 1997, E/C.12/1997/8.

The CRC has a provision regarding its application that shows that it covers all people within a State's 'jurisdiction' and so is not territorially limited.¹⁰⁵ The Committee on the Rights of the Child has also determined that the Convention applies beyond the territory of a State party, a position which was also supported by the ICJ.¹⁰⁶

The extraterritorial application of regional human rights treaties has also been found by the relevant regional monitoring bodies in their application of the treaty to the 'jurisdiction' of the State.¹⁰⁷ Indeed, the revised Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights suggests that there are three aspects to the scope of a State's jurisdiction:

- (a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
- (b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory; [and]
- (c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.¹⁰⁸

When establishing whether 'effective control' exists, the European Court of Human Rights ('ECtHR') has analysed the factual situation and assessed the 'strength of the State's military presence in the area', as well as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.¹⁰⁹ This control may be exercised directly, through the State party's armed forces, or through local administration.¹¹⁰ Furthermore, the Court has found that the State party in control should be held accountable for any breaches of the ECHR within the controlled area, whether the breaches were the result of the actions of that State's own officials or of

¹⁰⁵ United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, Art 2(1) provides that '[S]tates Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.

¹⁰⁶ Committee on the Rights of the Child, *Concluding Observations: Israel*, paras 2, 5, 52–57. See also para 58, where the Committee considered that the CRC also applied to Israeli army activities in Lebanon. See also *Wall Advisory Opinion*, para 113 where the ICJ found that the Convention applied within the occupied Palestinian territory.

¹⁰⁷ ACHR, Art 1(1)

¹⁰⁸ *Maastricht Principles*, Principle 9

¹⁰⁹ *Al-Skeini and Others v United Kingdom*, Application No 55721/07, 7 July 2011, para 139.

¹¹⁰ *ibid*, para 138 citing, inter alia, *Cyprus v Turkey*, Application No 25781/94, 10 May 2001; *Loizidou and Others v Turkey*, Application No 15318/89, 23 March 1995; *Banković and others v Belgium and 16 Other Contracting States*, Application No 52207/99, 12 December 2001; *Ilașcu and Others v Moldova and Russia*, Application No 48787/99, 8 July 2004

the remaining local administration.¹¹¹ Similarly, in *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, where it was alleged that armed forces of the respondent States had committed grave violations of human rights on the territory of the Democratic Republic of the Congo ('DRC'),¹¹² the African Commission on Human and Peoples' Rights ('ACommHPR') considered that violations were committed while the armed forces had a variety of forms of control or occupation of the area in question.

In other instances, the ECtHR has found that, where a State party has physical custody over a person, that person falls within their jurisdiction, no matter where the alleged ECHR violation took place and whether or not the State party exercised effective control over the territory where the violation took place.¹¹³ In *Isaak and others v Turkey*, the ECtHR found that an individual beaten to death by Turkish armed forces within a UN buffer zone in Northern Cyprus was within the effective control of Turkey through Turkish agents.¹¹⁴ In *Al-Skeini v United Kingdom*, which concerned individuals killed or allegedly killed by UK troops in Iraq and a breach of the procedural obligation of the UK to investigate the deaths, the Court considered that the UK 'through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom'.¹¹⁵ The deceased individuals only came within the authority and control of the UK as it was exercising public powers in Iraq, including maintenance of security, at the time of the deaths, which occurred in the course of security operations.

A broader approach has been hinted at by the Inter-American Commission of Human Rights in stating that a State's obligations are not limited to effective control as 'a State party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that State's own territory'.¹¹⁶ This could occur where the State's agents act in another State. Whether the State in which the illegal action occurred is also a party to the treaty is not relevant, as the jurisdiction of a State

¹¹¹ *Cyprus v Turkey*; *Loizidou v Turkey*. Though note that in *Banković and others v Belgium and 16 Other Contracting States*, Application No 52207/99, 12 December 2001, concerning the North Atlantic Treaty Organization ('NATO') bombing of Serbian Radio-Television headquarters in Belgrade, the court adopted a rather restrictive approach in deciding that there was no effective control of the territory of another State but only some control over its airspace.

¹¹² *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication 227/99, May 2003, para 63

¹¹³ See *Al-Skeini and Others v United Kingdom* (n109), paras 136–137 citing *Öcalan v Turkey*, Application No 46221/99, 12 May 2005; *Issa v Turkey*, Application No 31821/96, 16 November 2004; *Al-Saadoon and Mufdhi v the United Kingdom*, Application No 61498/08, 2 March 2010; *Medvedyev and Others v France*, Application No 3394/03, 23 March 2010

¹¹⁴ *Isaak and others v Turkey*, Application No 44587/98, 28 September 2006

¹¹⁵ *Al-Skeini and Others v United Kingdom* (n109), para 149. See also Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *European Journal of International Law* 121

¹¹⁶ *Saldano v Argentina*, Report No 38/99, 23 June 1998, para 17

party occupying another State may extend to the territory of the occupied State even if the occupied State is not a party to the relevant human rights treaty.¹¹⁷

2.2.4 Personal Application

IHRL is applicable to all persons situated within the territory of a State party to the human rights treaty and, as discussed above, within its jurisdiction, which may be outside that territory. For example, Article 2(2), which is common to both Covenants, provides that:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

A State has an obligation under IHRL to protect all people within their territory and jurisdiction. The individual's nationality or citizenship is not relevant, except in a few specific situations,¹¹⁸ and even these are subject to the general principles of non-discrimination, which are customary international law.¹¹⁹

State Actors

Once a State has ratified a treaty, all State officials and agents should comply with the State's obligations. These officials and agents include, for example, members of the State's executive, legislature, judiciary, armed forces, police and security services.¹²⁰ A State is also responsible for the actions of these officials even where those actions are committed outside the scope of the officials' apparent authority if the officials 'acted, at least apparently, as authorized officials or organs, or that, in so acting, they...used powers or measures appropriate to their official character'.¹²¹ In contrast, the acts of non-State actors are not generally considered to be actions by State officials and so are not directly attributable to the State.

Non-State Actors

There are many non-State actors whose actions may impact upon education and cause education-related violations. These include corporations and other business enterprises (transnational and local), non-State armed groups, non-governmental organisations, cultural and social

¹¹⁷ *Al-Skeini and Others v United Kingdom* (n109), para 142

¹¹⁸ For example, ICESCR, Art 2(3) enables developing States to determine the extent to which they would guarantee economic rights to non-nationals.

¹¹⁹ CESCR, *General Comment 20 on Non-Discrimination in Economic, Social and Cultural Rights* (2009)

¹²⁰ ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts: Article 6' in *Report of the International Law Commission on the Work of its 53rd Session*, 21 August 2001, UN Doc A/56/10(SUPP) ('ILC Articles')

¹²¹ *France v Mexico (Caire Claim)* (1929) 5 Reports of International Arbitral Awards 516

groups, trade unions and employer groups, and individuals. Inter-governmental organisations, such as the United Nations ('UN') and its agencies, can be considered as a type of non-State actor. Non-State armed groups have been responsible for some of the most flagrant violations of international law during situations of armed conflict.¹²² As such, non-State armed groups pose 'a significant threat to the enjoyment of human rights and freedoms of individuals. This is particularly so where a State has lost control over part of its territory as a result of the activities of the non-State armed group'.¹²³ The difficulty in making non-State actors legally responsible for violations of IHRL is that human rights treaties are so drafted that the State is the only entity directly responsible for compliance with the treaty.¹²⁴ The loss of territorial control to a non-State armed group can therefore result in a protection gap, where the State has no power to enforce its IHRL obligations and the non-State armed group is considered unbound by IHRL.¹²⁵

However, there are two broad ways in which international law has operated to ensure that the actions of non-State actors will have substantial legal consequences, particularly when they impact on the enjoyment of human rights:

- Under the law of State responsibility, a State in some situations may be responsible for actions of non-State actors where those actions are effectively considered to be those of the State (called 'attribution' to the State); and
- Human rights treaty bodies have required States to act to protect all those in its territory or under its jurisdiction from abuses of human rights by all persons, even if the actor that caused them is a non-State actor (called an obligation to act with 'due diligence').¹²⁶

In addition, the growing acceptance that non-State actors should also bear the obligation to (at least) respect the human rights applicable on the territory of which they operate is thus also briefly mentioned on page 33.

¹²² Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff 2005), 7–8

¹²³ Tatyana Eatwell, *State Responsibility for Human Rights Violations Committed in the State's Territory by Armed Non-State Actors* (Geneva Academy of International Humanitarian Law and Human Rights 2018), 7

¹²⁴ For a fuller discussion, see Robert McCorquodale, 'Non-State Actors and International Human Rights Law' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 97

¹²⁵ Tatyana Eatwell (n123), 7; See also Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016), 9–10; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017), 375

¹²⁶ For example, according to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997, 'The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors', para 18

Extending Attribution to a State

There are five key situations in which the acts of non-State actors can be attributed to the State, for which the State will incur international responsibility for a breach of an obligation under a human rights treaty.¹²⁷ They are:

- A State is responsible for the acts of a non-State actor, where the latter is exercising elements of governmental activity.¹²⁸ This could occur where a State allows armed groups to control a region of its territory or uses private security firms to control law and order.
- A State is responsible for the acts of a person or entity that was acting under the instructions or direction or control of the State.¹²⁹ This would include where a State uses mercenaries in situations of insecurity or relies on corporations to manage all its educational facilities on its behalf.
- A State is responsible for the acts of a person or entity where the State adopts or acknowledges the act as its own. This can happen where a State does not act to regain control where a group takes over an educational institution.¹³⁰
- A State is responsible where it is complicit in the activity of the non-State actor.¹³¹ This could occur where a State encourages a corporate body to manage a school knowing that it had a record of abuse of children.
- A State is responsible for the conduct of a non-State group where that group becomes the Government of the State.¹³² Thus an armed non-State group that destroyed educational facilities when it was not in power would be internationally legally responsible for those acts if it became the Government.

In each instance, the actions of non-State actors are attributed to the State and so the action becomes a State action—for which the State is internationally responsible under IHRL—and it is not then a non-State action.

Due Diligence

The international human rights treaty monitoring bodies have interpreted a State's obligation to protect under the treaty to mean that the State should act to prevent, prohibit and remedy

¹²⁷ See Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598

¹²⁸ ILC Articles, Arts 5 and 9

¹²⁹ *ibid*, Art 8

¹³⁰ *ibid*, Art 11 and see *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, ICJ Reports 1980, 24 May 1980, paras 69–71: 'a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it'.

¹³¹ ILC Articles, Art 16

¹³² *ibid*, Art 10

human rights violations by all persons within its jurisdiction.¹³³ This obligation was expressed most clearly by the Inter-American Court of Human Rights ('IACtHR') in *Vélásquez Rodríguez v Honduras*,¹³⁴ where the Court was considering a case of a 'disappearance' possibly caused by para-military forces. The Court held that the international responsibility of a State may arise:

[N]ot because of the act itself, but because of a lack of *due diligence* [by the State] to prevent the violation or to respond to it as required by [the human rights treaty] ... [The] State is obligated to investigate every situation involving a violation of rights under the [ACHR]. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to persons within its jurisdiction. *The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised in the Convention.*¹³⁵

The HRCCommittee has expressed the due diligence obligations on the State in this way:

The Article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also *against acts committed by private persons or entities that would impair the enjoyment of Covenant rights* in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, *as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence* to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under Article 2 and the need to provide effective remedies in the event of breach under Article 2, paragraph 3.¹³⁶

Similarly, the ECtHR has held in several cases that the failure of the State's security forces to protect civilians during internal armed conflict, and the inadequacy of subsequent investigations by the State, amounted to a breach by the State of its obligations under the ECHR.¹³⁷ The Court

¹³³ See Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006)

¹³⁴ *Vélásquez Rodríguez v Honduras*, Judgment of 21 July 1988, Series C No 7 ('Rodríguez'). An earlier instance was the views of the HRCCommittee in *Herrera Rubio v Colombia*, Application No 161/1983, 2 November 1987, where it was not clear if the victims has been murdered or disappeared by State or non-State officials.

¹³⁵ *Rodríguez*, paras 172 and 176 (emphasis added).

¹³⁶ HRCCommittee General Comment 31, para 8 (emphasis added). The HRCCommittee also notes that some articles of the ICCPR address more directly the positive obligations of States in relation to the activities of non-State actors (for example, Art 7 ICCPR). See, for example, HRCCommittee, *General Comment 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, HRI/GEN/1/Rev, para 4

¹³⁷ See, for example, *Ergi v Turkey*, 32 EHRR 388, 28 July 1998

has gone further, to decide that the failure by the State to provide adequate protection for a boy who was caned by his stepfather violated the ECHR.¹³⁸ While the State did not have control over the caning (in contrast to the situation in its educational institutions), it was held that it did have control over its national law and therefore it had an obligation to ensure that the child would be protected by the law from the actions of the stepfather.¹³⁹ As the national law allowed for ‘reasonable chastisement’, which had resulted in the stepfather being found not guilty under UK law, the State had failed to protect the child and so was in breach of its international human rights obligations.

Thus this expansion of the obligation to protect to be an obligation of due diligence is a positive obligation on a State, requiring a State to undertake fact-finding, criminal investigation and, perhaps, prosecution in a transparent, ‘accessible and effective manner’ and to provide redress.¹⁴⁰ Accordingly, States have been found by the human rights treaty monitoring bodies to be in breach of such obligations in situations where, for example, employees of corporations have been dismissed or victimised for joining a trade union,¹⁴¹ where the activities of corporations have polluted both air and land,¹⁴² and for failures by the State to protect Indigenous peoples’ land and culture from harm caused by corporate activities or from corporate development.¹⁴³ In all of these cases, the State was in breach of its obligations under the relevant human rights treaty because its acts or omissions enabled the non-State actor to act as it did. The State may also be in breach of its obligations when it acquiesces in the violations of human rights by non-State actors, such as where the State has a policy of non-action on domestic violence or dowry killings, or, perhaps, of constant gender discrimination.¹⁴⁴ This approach has also been endorsed by the HRC in adopting the Special Representative’s Guiding Principles on Business and Human Rights.¹⁴⁵

¹³⁸ *A v UK*, 27 EHRR 611, 1 October 1998

¹³⁹ Rhona Smith, ‘To Smack or Not to Smack? A review of *A v United Kingdom* in an International and European context and its potential impact on physical parental chastisement’, 1999, 1 Web Journal of Current Legal Issues <www.bailii.org/uk/other/journals/WebJCLI/1999/issue1/smith1.html>

¹⁴⁰ See *Jordan v United Kingdom*, Application No 24746/94, 4 May 2001

¹⁴¹ *Young, James and Webster v United Kingdom*, 4 EHRR 38, 13 August 1981

¹⁴² See, for example, ACommHPR, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication No 155/96, 27 October 2001; *Lopez Ostra v Spain*, 20 EHRR 277, 9 December 1994; *Guerra v Italy*, 26 EHRR 357, 19 February 1998

¹⁴³ See *Yanomami Community v Brazil*, Resolution No 12/85, 5 March 1985; *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Series C No 79, 31 August 2001; and *Hopu and Bessert v France*, Communication No 549/1993, 29 December 1997

¹⁴⁴ Radhika Coomaraswamy, *Preliminary Report submitted by the Special Rapporteur on Violence against Women*, 22 November 1994, E/CN.4/1995/42

¹⁴⁵ OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011, HR/PUB/11/04. Guiding Principle 1 provides: ‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication’. These Guiding Principles are not legally binding but are indicative of the current approach to this issue.

These actions by non-State actors for which a State has been found to be in breach of its international human rights legal obligations do not arise in these instances because the actions of non-State actors are being attributed to the State (see above). Rather, the responsibility here arises owing to the State's obligation to exercise due diligence to protect the human rights of all persons in a State. Therefore, even where a State (or a State official) is not directly responsible for the actual harm arising from an impairment of human rights, the State can still be held responsible for a lack of positive action by it in responding to, or preventing, the violation of human rights by a non-State actor. This is the position even where such violations were committed by non-State actors over which the State has no direct control, including where it has no effective control over a part of its territory.¹⁴⁶ This is a considerable development in IHRL in terms of the scope of a State's obligations beyond its own direct actions by State organs and officials.

Direct Responsibility of Non-State Actors

In addition, changes can occur through developments in international law.¹⁴⁷ In particular, there is growing consensus that non-State actors should have the obligation (at least) to respect the human rights applicable on the territory of which they operate.¹⁴⁸ However, as there is a lack of agreement as to whether and to what extent non-State armed groups are bound by IHRL, the development of an understanding of the IHRL obligations of armed non-State armed groups is required in order to effectively close the protection gap.¹⁴⁹ A framework has been suggested to hold non-State armed groups accountable, which may go beyond the obligation to respect human rights: the determination of the extent of non-State armed groups' responsibility for human rights' obligations should be context dependent and determined through a review of their control, capacity and governance.¹⁵⁰ Non-State armed groups may have a significant role to play in the provision of education in situations of armed conflict; however, the provision of education by non-State armed groups, while fulfilling a human right, may also be considered as a controversial part of a state-building agenda.¹⁵¹

¹⁴⁶ See *Ilascu and Others v Moldova and Russia*, Application No 48787/99, 8 July 2004

¹⁴⁷ HRC, *Report of the Special Rapporteur on freedom of religion or belief*, Heiner Bielefeldt, 29 December 2014, A/HRC/28/66, para 54. On developments with regard to non-State armed groups, see Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016); Daragh Murray, 'Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward' (2017) 20 *Leiden Journal of International Law* 435; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017); and Tilman Rodenhüser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law* (Oxford University Press 2018)

¹⁴⁸ HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (armed non-State actors: the protection of the right to life)*, 5 June 2018, A/HRC/38/44

¹⁴⁹ Tatyana Eatwell (n123), 7

¹⁵⁰ HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (armed non-State actors: the protection of the right to life)*, 5 June 2018, A/HRC/38/44

¹⁵¹ See the PEIC and Geneva Call, 'Report of the Workshop on Education and Armed Non-State Actors:

Furthermore, in the area of corporation's legal responsibility for human rights violations,¹⁵² there have been national law cases in which corporations have been found liable for violations of human rights in other States and there may be, over time, direct international legal responsibility of corporations (and other business enterprises) for their human rights impacts.¹⁵³ There are similar developments in regard to international organisations¹⁵⁴ and, in both instances, international mechanisms for ensuring compliance have yet to be established.

2.3 INTERNATIONAL HUMANITARIAN LAW

2.3.1 The Scope of Application of International Humanitarian Law

IHL is a body of law that regulates the conduct of parties to an armed conflict. It is sometimes referred to as 'the law of war' or 'the international law of armed conflict'. IHL aims to make war more humane and its rules and restrictions embody the international ideal that military victory ought not to be achieved at any cost.¹⁵⁵ IHL does not apply to situations of insecurity. The core principles of IHL are codified in:

- the four Geneva Conventions for the Protection of War Victims of 1949, each of which has 196 States Parties (the Geneva Conventions); and
- the three protocols additional to the Geneva Conventions (Additional Protocols): Additional Protocol I of 1977 applicable in IAC which has 174 States Parties; Additional Protocol II of 1977 applicable in NIAC which has 168 States Parties; and Additional Protocol 3 relating to the adoption of a new distinctive emblem (the 'Red Crystal') which has 75 States Parties.

Towards a Comprehensive Agenda' (PEIC and Geneva Call, 2015) <https://genevacall.org/wp-content/uploads/dlm_uploads/2015/12/Geneva_Call_Paper1.pdf>

See also Geneva Call, 'Armed non-State actors speak about child protection in armed conflict' report of a meeting held on 22-24 November 2016 with PEIC (September 2017); Geneva Call, 'Armed non-State Actors share their policies and practice with regards to education in armed conflict' (November 2017) <<https://reliefweb.int/sites/reliefweb.int/files/resources/GC-research-on-education.pdf>>

¹⁵² CESCR, *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, 10 Aug 2017, E/C.12/GC/24, para 5, which states that 'business entities are expected to respect Covenant rights'.

¹⁵³ See UN Guiding Principles on Business and Human Rights 2011, 16 June 2011, HRC Resolution 17/4. This is not legally binding but has been influential in soft law developments, and national regulation in this area. Note that negotiations to develop a treaty on business and human rights were initiated in July 2015 with the first meeting of the UN Human Rights Council's open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIWG). A first draft, known as the "Zero Draft", was released in July 2018 <<https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>>

¹⁵⁴ See Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010)

¹⁵⁵ Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), xiii

IHL is also found in other international treaties that regulate specific areas of conflict:

- the Hague Conventions, and their Regulations, of 1899 and 1907, regulating the conduct of war on land, sea and air (The Hague Conventions or Regulations);
- various treaties prohibiting the use of particular weapons, including:
 - Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects 1980, which has 125 States Parties, and its Protocols;
 - Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993, which has 193 Parties;
 - Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997 which has 164 Parties;
 - Convention on Cluster Munitions 2008, which has 106 States Parties;
 - Treaty on the Prohibition of Nuclear Weapons of 2017;¹⁵⁶ and
- various treaties establishing special protection for groups of persons or objects, such as the UNESCO Convention of Cultural Property in the Event of Armed Conflict of 1954, which has 133 States Parties, and its Protocols.

Interpretation of the Geneva Conventions and the Additional Protocols is aided by reference to the ICRC Commentaries on these treaties.¹⁵⁷ Although the content of these Commentaries is not legally binding, they are widely used. They set out an authoritative summary of the discussions and decisions of the drafters of the treaties and provide clarity and detail to some, occasionally, vague provisions.¹⁵⁸

In addition to the above, IHL is comprised of customary international law. In 2005 the ICRC published its Study on Customary International Humanitarian Law,¹⁵⁹ which examines relevant

¹⁵⁶ Treaty on the Prohibition of Nuclear Weapons, New York, 7 July 2017, which has 23 State parties and is thus not yet in force.

¹⁵⁷ Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952–1960), in four volumes. See also Claude Pilloud (ed) (n34), in 26 volumes. The ICRC has recently updated the Commentaries for the First Geneva Convention (2016) and Second Geneva Convention (2017). See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (2nd edn, ICRC 2016) and ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (2nd edn, ICRC 2017). The text of both commentaries is available online on the ICRC website: <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>>

¹⁵⁸ The preparatory documents of treaties are a recognised source of international legal interpretation; the commentaries assist in the understanding of these preparatory documents and, as such, assist with legal interpretation.

¹⁵⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules and Volume II: Practice* (Cambridge University Press 2005); This publication, and an online database of the rules and practice relating to the study can also be viewed in full at <www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp> (ICRC CIHL Study)

state practice and identifies rules of IHL that have attained customary international legal status, including those applicable in NIAC.¹⁶⁰ The Study does not purport to be an exhaustive list of all customary international law rules; however, it is an important resource in IHL and is a valuable tool for understanding customary international law in armed conflict. As such, it is used throughout this Handbook.

Each of these treaties and the relevant customary international law embody the central protection afforded by IHL. This is the principle of distinction: that parties to a conflict must at all times distinguish between civilians (and civilian objects) and military objectives and may only target military objectives.

In IAC, IHL distinguishes between, on the one hand, those persons who are combatants¹⁶¹ (members of a State's armed forces) and those participating directly in hostilities¹⁶² and, on the other hand, those who take no part in hostilities.¹⁶³ This second group includes civilians (those not in the armed forces of a State or organised armed group) who do not engage directly in hostilities and those combatants who are no longer willing or able to fight (*hors de combat*).¹⁶⁴ In NIAC, however, IHL distinguishes only between those who participate directly in activities and those who do not; it does not recognise 'combatant' status.¹⁶⁵ IHL places a special emphasis on protecting civilians and those not directly participating in hostilities from direct attack, as well as the general effects of hostilities, in both IAC and NIAC.¹⁶⁶

2.3.2 Temporal Application

As outlined in Chapter 1, IHL applies to situations of IAC and NIAC. Different rules of IHL

¹⁶⁰ Although the methodology of the study has been the subject of criticism: see Emily Crawford, 'Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts' (2007) 20 *Leiden Journal of International Law* 441, 457; Daniel Bethlehem, 'The Methodological Framework of the Study' in Elizabeth Wilmschurst and Susan Breau, *Perspectives on the ICRC Study on Customary International Law* (Cambridge University Press 2007), 13; see also John Bellinger III and William J Haynes II, 'A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*' (2007) 88 *International Review of the Red Cross* 866, 443; and a response to these comments by the ICRC: Jean-Marie Henckaerts, '*Customary International Humanitarian Law: a response to US comments*' (2007) 89 *International Review of the Red Cross* 866, 473; Iain Scobbie, 'The Approach to Customary International Law in the Study' in Elizabeth Wilmschurst and Susan Breau, *Perspectives on the ICRC Study on Customary International Law* (Cambridge University Press 2007), 47; For general comments and analysis of the ICRC CIHL Study, see, generally, Elizabeth Wilmschurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007).

¹⁶¹ As defined by Additional Protocol I, Art 43. This definition is discussed in detail in Chapter 4.

¹⁶² A technical legal concept discussed in detail in Chapter 4.

¹⁶³ Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 79

¹⁶⁴ *ibid* 96–106

¹⁶⁵ The consequences of this are outlined in Chapter 4 in relation to combatant immunity and POW status.

¹⁶⁶ See discussion of the principle of distinction in Chapters 4 and 5.

apply to each type of conflict, although some IHL rules of IAC as set out in the Geneva Conventions and Additional Protocol I, especially regarding the conduct of hostilities, are widely accepted as applying to NIAC as a matter of customary international law.¹⁶⁷ This Handbook uses the term ‘armed conflict’ to refer collectively to the two situations of conflict and to distinguish both of them from situations of internal disturbance or tensions (i.e. ‘insecurity’), to which IHL does not apply. However, it is important to note IHL does not recognise a single concept of ‘armed conflict’ and so, where relevant, the law will be addressed separately.

The Application of International Humanitarian Law to International Armed Conflict

Chapter 1 sets out the definition of IAC as including both:

- the use of force between states; and
- situations of belligerent occupation.¹⁶⁸

This definition requires elaboration in two areas: first, the definition of belligerent occupation needs to be considered—this can be found immediately below. Secondly, it is necessary to outline when a conflict that appears to be a NIAC, including one between a State and a non-State armed group, may become an IAC to which the IHL rules of IAC apply. These situations are set out below, in the section entitled ‘Internationalisation of non-international armed conflict’, after the concept of NIAC has been discussed.

The Definition of Belligerent Occupation

Partial or total belligerent occupation is a situation of IAC.¹⁶⁹ The IHL definition of belligerent occupation is found in Article 42 of the Hague Regulations, which has customary international law status:¹⁷⁰

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to territory where such authority has been established and can be exercised.¹⁷¹

¹⁶⁷ As identified, for example, in the ICRC CIHL Study.

¹⁶⁸ Such occupation often occurs after an initial attack or invasion of a State. Examples include the occupation of many European States by Germany during the Second World War, the occupation of the Baltic States (Estonia, Lithuania, Latvia) by the Soviet Union after the Second World War until 1991, the occupation of Kuwait by Iraq in the Gulf War in 1990–1991, the occupation of Gaza and the West Bank by Israel since 1967, the occupation of Eritrea and Ethiopia during the Eritrean–Ethiopian War of 1998–2002.

¹⁶⁹ Geneva Conventions, Common Art 2(2).

¹⁷⁰ *Wall Advisory Opinion*, para 78.

¹⁷¹ Hague Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, adopted 18 October 1907, entered into force 26 January 1910, Art 42.

This means that the occupying power must substitute its own authority for that of the occupied State, without the occupied State's consent.¹⁷² While this will usually involve the deployment of armed forces, IHL applies to situations of occupation whether or not the occupation meets with armed resistance.¹⁷³

There are three elements of the definition of occupation:

- an exercise of authority or control by a State;
- over the whole or part of the territory of another State; and
- armed resistance to this exercise of control is not determinative of whether or not a situation is one of occupation.

An occupying power is responsible for the occupied territory and its inhabitants under IHL.¹⁷⁴ The occupying authorities are under a general obligation to 'restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.¹⁷⁵ This means that occupying powers must ensure that political institutions and public life continue with as little disturbance as possible.¹⁷⁶ The occupying power is bound by the rules of occupation¹⁷⁷ from the beginning to the end of any such occupation.¹⁷⁸

The Law of International Armed Conflict

The four Geneva Conventions (except for Common Article 3) and Additional Protocol I apply to situations of IAC.¹⁷⁹ In addition, the provisions of Additional Protocol I also apply to the specific situations set out in Article 1(4) of that Protocol, set out above. Situations of belligerent occupation are situations to which the rules of IAC apply; however, they also benefit from more specific rules of IHL.¹⁸⁰

The rules of the Geneva Conventions are customary international law¹⁸¹ and, therefore, apply

¹⁷² See generally, Adam Roberts, 'What is Military Occupation?' (1984) 55 *British Yearbook of International Law*, 249

¹⁷³ Geneva Conventions, Common Art 2

¹⁷⁴ See the protection offered by the Hague Regulations, Art 43, and the Fourth Geneva Convention, Arts 29, 47–135

¹⁷⁵ Hague Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, adopted 18 October 1907, entered into force 26 January 1910, Art 43.

¹⁷⁶ Hans-Peter Gasser, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 278.

¹⁷⁷ As found in the Fourth Geneva Convention, Sections III and IV of Part III. The fundamental rules of occupation are set out in Art 6(3) of the Fourth Geneva Convention.

¹⁷⁸ Additional Protocol I, Art 3(b)

¹⁷⁹ Geneva Conventions, Common Art 2.

¹⁸⁰ As found in Sections III and IV of Part III of the Fourth Geneva Convention, and in Additional Protocol I. The fundamental rules of occupation are set out in Art 6(3) of the Fourth Geneva Convention.

¹⁸¹ Christopher Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 28

to all States regardless of whether or not they have been ratified. The ICRC Customary International Humanitarian Law Study also identified that many of the provisions of Additional Protocol I are customary international law¹⁸² and, therefore, apply regardless of ratification.¹⁸³ IHRL continues to apply concurrently with IHL during IAC. Further, many provisions of ICL, including under the Rome Statute, apply to situations of IAC.¹⁸⁴

The Application of International Humanitarian Law to Non-international Armed Conflict

Chapter 1 set out the definition of NIAC, used by this Handbook, as including both:

- protracted armed violence between a State and a non-State armed group; and
- protracted armed violence between non-State armed groups on the territory of a State.

This section will examine the different thresholds of NIAC and then consider, in further detail, the meaning of ‘protracted’ and the organisational requirements of non-State armed groups. The rules of IHL applicable in NIAC will then be discussed.

IHL Thresholds for Non-international Armed Conflict

IHL treaty law sets out two different thresholds for the application of particular provisions of IHL to NIAC:

- the threshold in Common Article 3,¹⁸⁵ which is applicable to all armed conflict not of an international character, and is relatively low; and
- the threshold set out in Article 1 of Additional Protocol II,¹⁸⁶ which is higher. The latter

¹⁸² See ICRC CIHL Study.

¹⁸³ The United States, Iran, Israel and India have not ratified Additional Protocol I—which means it is of far more limited scope than the Geneva Conventions: Christopher Greenwood, ‘Historical Development and Legal Basis’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 30.

¹⁸⁴ See, for example, the provisions of Art 8(b) of the Rome Statute, which apply specifically to IAC.

¹⁸⁵ Common Article 3 of the Geneva Conventions applies to all armed conflicts ‘not of an international character occurring in the territory of one of the High Contracting Parties...’ and contains no threshold test. ‘Armed conflict not of an international character’ is not defined in the text of the Geneva Conventions but was intended to have a broad meaning: Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volume III* (ICRC 1960) at 39. See also the discussion of this point by Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002), 31–34; ICRC, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law’, Opinion Paper 5 (ICRC 2008).

¹⁸⁶ Art 1(1) of Additional Protocol II sets out that Additional Protocol II applies to armed conflicts which take place on the territory of a party only when there is violence ‘between [a State party’s] armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.

limits its application to any conflict between a State and an organised non-State armed group, which, among other things, must be under a responsible command and exercise a degree of territorial control.

This discrepancy between thresholds has meant that essentially two sets of rules (those in Common Article 3 and those in Additional Protocol II) have been applicable to NIAC. This is problematic because in situations where only Common Article 3 applies there is a lower level of protection, as Additional Protocol II contains a much greater number of provisions that afford a wider level of protection.

This discrepancy has been mitigated by the recognition of a customary international law definition of NIAC by the Appeals Chamber of the ICTY in the *Prosecutor v Dusan Tadić* ('*Tadić*').¹⁸⁷ In that case, the Tribunal held that a NIAC¹⁸⁸ exists when there is:

- protracted armed violence between a State and an organised non-State armed group on its territory, or
- protracted armed violence between organised non-State armed groups on the territory of a State.¹⁸⁹

This is the definition of NIAC set out in Chapter 1 of this Handbook. It is based on the Common Article 3 threshold. While this definition was already recognised as forming part of customary international law,¹⁹⁰ the judgment in *Tadić* provides further guidance as to its applicability.¹⁹¹ This clarified customary international law definition of NIAC is supported by the ICRC,¹⁹² and has also been adopted by the Rome Statute,¹⁹³ and is incorporated into the updated ICRC Commentaries on Common Article 3 of the Geneva Conventions.¹⁹⁴ This definition differs from that set out in Additional Protocol II by incorporating the use of violence between non-State armed groups within the definition and by not requiring that non-State armed groups exercise a degree of territorial control.

¹⁸⁷ *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, the Chamber purported to pronounce on customary international law, pursuant to Art 3 of its Statute setting out its jurisdiction to deal with 'violations of the laws or customs of war'.

¹⁸⁸ Although the Appeal Chamber does not explicitly state in paragraph 70 of *Tadić* that it is setting out two definitions, one of IAC and one of NIAC, a contextual reading of the judgment makes it clear that this was the Chamber's intention. This issue is expertly argued and summarised in Dino Kritsiotis, 'The Tremors of *Tadić*' (2010) 43 Israel Law Review 262

¹⁸⁹ *Tadić* (n187), para 70.

¹⁹⁰ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ Reports 1986, 27 June 1986, 179 ('*Nicaragua Case*')

¹⁹¹ Lindsay Moir (n185), 42–43

¹⁹² ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', Opinion Paper 5 (ICRC 2008)

¹⁹³ See Rome Statute, Art 8(f). Note, however, the term 'violence' is replaced with 'conflict'.

¹⁹⁴ See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (2nd edition, ICRC 2016), at para 414–444

In any case, both situations of NIAC require a minimum level of intensity of violence (protracted) and a minimum level of organisation of the non-State armed group involved. It is these two factors which distinguish NIAC from situations of violence amounting to only internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

The relevance of the Common Article 3 and Additional Protocol II thresholds has been lessened by the development of this customary international law definition. The significance of this customary international law definition is that it provides the threshold for the application of the principles of customary international law that apply in all NIAC, including those rules of Additional Protocol II that form part of customary international law for NIAC. The higher threshold for NIAC set out in Article 1 of Additional Protocol II remains relevant only in relation to the application of those few rules of the Protocol which do not form part of customary international law.¹⁹⁵ In such cases, those rules are applicable only where States are parties to the Protocol and also engaged in a conflict meeting that higher threshold.

The development of both a customary international legal definition of NIAC and recognition of an increasing number of rules as applicable to such conflict through customary international law has, arguably, significantly increased the level of protection available in NIAC.

'Protracted' Armed Violence and Organisation of Non-State Armed Groups

The term 'protracted' armed violence is included in the customary international law definition of NIAC in order to set it apart from situations of insecurity, which do not attain the required intensity of violence to qualify as NIAC and ought to be considered to be only internal disturbances or tensions. In *Ramush Haradinaj*¹⁹⁶ the ICTY held that the phrase 'protracted armed violence' refers to the intensity rather than duration of the violence.¹⁹⁷ A number of factors have been identified by the Tribunal as relevant to assessing the intensity of violence. These include, but are not limited to:

- the number, duration and intensity of individual confrontations;
- the type of weapons and other military equipment used;
- the number and calibre of munitions fired;
- the number of people and type of forces taking part in the fighting;
- the number of casualties;
- the extent of material destruction;
- the number of civilians fleeing combat zones; and
- the involvement of the UNSC may also be a reflection of the intensity of a conflict.¹⁹⁸

¹⁹⁵ According to the ICRC CIHL Study many of those rules set out in Additional Protocol II are customary international law and, therefore, are applicable to those conflicts meeting the customary threshold, even though they do not meet the Additional Protocol II threshold.

¹⁹⁶ *Prosecutor v Ramush Haradinaj et al*, IT-04-84-T, 3 April 2008

¹⁹⁷ *ibid*, para 60

¹⁹⁸ *ibid*

The customary international law definition of NIAC also requires a minimum level of organisation of the non-State armed group. This is because a NIAC, as opposed to an internal disturbance, can only exist between parties that are sufficiently organised to confront each other with military means.¹⁹⁹ The ICTY has identified a number of ‘indicative factors’ relevant to assessing the organisation of an armed group, including but not limited to:

- the existence of a command structure;
- disciplinary rules and mechanisms within the group;
- whether a group controls territory; and
- a group’s ability to engage in a unified military strategy and military tactics.²⁰⁰

The Law of Non-international Armed Conflict

As addressed throughout this Handbook, the rules of IHL that apply to NIAC are different from those that apply in IAC. There are fewer rules of IHL applicable to NIAC than to IAC. One of the most significant differences between the law of IAC and the law of NIAC is that the rules relating to combatant immunity and prisoner of war (‘POW’) status do not apply in NIAC.²⁰¹

However, in all conflicts ‘not of an international character’ (i.e. NIAC),²⁰² all parties are required to apply, at a minimum, the fundamental humanitarian guarantees set out in Common Article 3 to the Geneva Conventions. Common Article 3 sets out standards for protection of the physical and mental well-being of those who are not actively participating in hostilities, including those who are wounded and sick.

In addition to the minimum rules for NIAC set out in Common Article 3, Additional Protocol II contains a number of more detailed provisions applicable to NIAC that meet the threshold requirements set out in Article 1 of Additional Protocol II (discussed above). Also, where the rules of Additional Protocol II form part of the customary international law, they are applicable to those NIAC that meet the customary international law definition.²⁰³

A large number of rules governing conduct of hostilities in respect of IAC are also applicable to NIAC, by virtue of customary international law.²⁰⁴ As is the case with the law of IAC, those rules of IHL which form part of customary international law apply to all parties to a conflict regardless of whether they have ratified the relevant treaty.

¹⁹⁹ *ibid*

²⁰⁰ *ibid*

²⁰¹ See discussion of this issue in Chapter 4.

²⁰² Geneva Conventions, Common Art 3

²⁰³ In *Tadić* (n187), the Court held that the minimum ‘core’ of Additional Protocol II reflected customary international law, para 117.

²⁰⁴ See ICRC CIHL Study; and *Tadić* (n187), paras 96–127

These customary international legal rules have developed primarily in the areas of protection of victims of armed conflict, and relating to the conduct of hostilities. As noted above, there are no customary international legal rules relating to combatant or POW status in NIAC. The following IHL principles form a significant part of the customary international law applicable in NIAC:

- the principle of distinction;²⁰⁵
- the prohibition on superfluous injury and unnecessary suffering;²⁰⁶
- the prohibition of indiscriminate or disproportionate attacks on civilians and civilian objects;²⁰⁷
- the requirements to take precautions;²⁰⁸ and
- the prohibition of particular means and methods of warfare.²⁰⁹

Each of these rules is discussed in further detail in Chapters 4 and 5.

In addition to the rules outlined above which apply compulsorily, the IHL of NIAC contains provisions encouraging parties to a NIAC to enter into special agreements that set out the rules of IHL applicable to the hostilities between them.²¹⁰ Parties can reach agreements about all or some of the provisions relating to NIAC, including, for example, the setting-up of safety zones or the release of wounded prisoners.²¹¹ It is also encouraged for parties to a NIAC to supplement the minimum rules of Common Article 3 by agreeing to be bound by a broader range of IHL provisions, including those applicable in IAC.²¹²

Further, non-State armed groups (which are not able to sign and ratify treaties) may make a unilateral declaration as to their commitment to and consent to be bound by the rules of IHL (generally or in relation to specific provisions).²¹³ This can be done by public statement or, as is often the case, in negotiation with the ICRC.²¹⁴

As already noted, IHL continues to apply concurrently with IHL during NIAC. Further, many provisions of ICL, including under the Rome Statute, apply to situations of NIAC.²¹⁵

²⁰⁵ See ICRC CIHL Study Chapter I, in particular Rules 1–10

²⁰⁶ See *ibid*, Chapter III, in particular Rule 70

²⁰⁷ See *ibid*, Chapter I, in particular Rules 11–14

²⁰⁸ See *ibid*, in particular Rules 15–24

²⁰⁹ See *ibid*, Rules 2, 13, 17, 46–86

²¹⁰ Common Art 3(2) provides that parties to a conflict must endeavor to put all or part of the other rules of the Geneva Conventions into effect by means of special agreement.

²¹¹ Toni Pfanner, ‘Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims’ (2009) 91 *International Review of the Red Cross* 279, 300

²¹² Dieter Fleck, ‘The Law of Non-International Armed Conflicts’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 621

²¹³ Toni Pfanner (n211), 301–303. See fn.134 of this article for list of examples.

²¹⁴ *ibid*, 302

²¹⁵ See, for example, the provisions of Art 8(c) and (e) Rome Statute, which apply specifically to NIACs.

Internationalization of Non-international Armed Conflict

A NIAC can become an IAC when another State directly²¹⁶ or indirectly²¹⁷ intervenes on the part of a non-State armed group without the consent of the State on whose territory the conflict is taking place.²¹⁸

In addition, Article 1(4) of Additional Protocol I sets out three situations of violence to which the rules of IAC apply, even though they involve violence between a State and a non-State group:²¹⁹

- where people are fighting against colonial domination or an alien occupation;
- against a racist regime;
- or in order to exercise a right of self determination.

However, the procedural requirements of Article 96(3) of Additional Protocol I must be met before the rules of the Protocol apply to such conflicts.²²⁰

It is also possible for two or more conflicts, with different classifications, to exist on the same territory at the same time. In the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*²²¹ the ICJ recognised that on the same territory at the same time there was both an international conflict (between the United States and Nicaragua) and a non-international conflict (between the *contras* and the Nicaraguan Government).²²² A similar situation was recognised by the ICTY in the *Tadić* cases.²²³ Situations of mixed conflict can make it difficult for lawyers, civilians and members of the armed forces to understand which rules of IHL apply in which circumstances.

²¹⁶ For example, by arming and training an armed group, but not by financing them only, *Nicaragua Case*, para 115; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, 19 December 2005, 168; *Prosecutor v Tihomir Blaškić* IT-95-14-T, 3 March 2000

²¹⁷ Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 177

²¹⁸ As the 2001 conflict in Afghanistan demonstrates, conflict can also change from international to non-international once a 'third-party' State withdraws or obtains permission to be there from the State on whose territory the conflict is. This was the case with the coalition forces once the Taliban were removed from government and the new administration of Afghanistan gave permission for the coalition forces to stay on its territory. For an analysis of the internationalization of NIACs, see Kubo Mačák, *Internationalized Armed Conflicts in International Law* (Oxford University Press 2018).

²¹⁹ Additional Protocol I, Art 1(4), has 'proved highly controversial and is one of the reasons for the United States' decision not to ratify AP1': Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 48

²²⁰ Additional Protocol I, Art 96(3), requires that the authority representing people engaged against a State in the type of conflict identified here must, by unilateral declaration, agree to be bound by the Geneva Conventions and Protocol and the authority assumes the rights and obligations of a State under the Conventions and Protocol. The provisions of the Conventions and the Protocol are then equally binding on all parties.

²²¹ *Nicaragua Case*

²²² *ibid*, para 210

²²³ *Tadić*, para 70

Duration of the Application of International Humanitarian Law

In *Tadić*, the ICTY held that IHL applies from the initiation of either an IAC or NIAC and extends beyond the cessation of hostilities until peace is restored (in the case of IAC) or until peaceful settlements are achieved (in the case of NIAC).²²⁴ However, in most cases a ceasefire or cessation of active hostilities will terminate an armed conflict, regardless of any formal confirmation or agreement.²²⁵

The cessation of hostilities brings into effect specific IHL obligations regarding, for example, the release and repatriation of POWs.²²⁶ POWs benefit from the protection of the Third Geneva Convention until their release and repatriation, regardless of the fact that hostilities have ceased.²²⁷ Arguably, until such obligations have been fully complied with, peace has not been restored.²²⁸

Cessation of Belligerent Occupation

The rules of IHL applicable to belligerent occupation no longer apply when a belligerent occupation ceases. A belligerent occupation ends when the criteria for establishing occupation are no longer met, i.e. when the hostile armed forces cease to control the occupied territory. This may occur through a variety of means:

- the occupying power may remove its armed forces from the occupied territory (perhaps following a peace treaty);
- consent may be given to the presence of the occupier's armed forces on the territory of the occupied State; or
- conflict may resume in the occupied territories to such an extent that the occupying forces no longer exercise a sufficient degree of control over it.²²⁹

Derogations and Reservations

While it is possible to derogate from a certain number of the provisions of major international

²²⁴ *ibid*, paras 65–70

²²⁵ Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 72

²²⁶ For example, Third Geneva Convention, Art 118

²²⁷ Third Geneva Convention, Art 5. However, repatriation must be by consent. Should a POW not wish to be repatriated (as determined by, for example, a delegate of the ICRC) the detaining State must release but is not obliged to repatriate the POW in order to be released from their obligations under the Third Geneva Convention. See Horst Fischer, 'Protection of Prisoners of War' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 416–417

²²⁸ Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 71

²²⁹ Robert Kolb and Richard Hyde, *An Introduction to the Law of Armed Conflict* (Hart Publishing 2008), 230–231

human rights treaties, as seen above, IHL treaties are non-derogable.²³⁰ The wording of many derogation clauses in human rights treaties, including the ICCPR, specifically permits derogation in war or other emergency.²³¹ To include such a provision in the IHL regime would be contradictory and undermine the regime as a whole, since most armed conflict would constitute just such a public emergency.

While derogations from IHL treaties are not permitted, States are entitled to make reservations or interpretive declarations to IHL treaties. Some IHL treaties contain clauses which prohibit States parties from making reservations.²³² However, where an IHL treaty does not contain such a clause, States may enter reservations which are not contrary to the object and purpose of the treaty and do not undermine its substance.²³³

2.3.3 Territorial Application

The Geneva Conventions impose on States an obligation to respect and to ensure respect for the Conventions in all circumstances.²³⁴ They do not contain any territorial limitations. The effect is that ‘States take this obligation with them wherever their armed forces operate, during an international armed conflict, whether on national territory or outside such territory’.²³⁵ For example, the obligations on States parties to ensure education in specific circumstances, set out in Chapter 3, apply to the armed forces of those parties regardless of where the armed conflict may be. In other words, a State’s IHL obligations follow its armed forces.

Territories of the Parties to a Conflict

The ICTY in *Tadić* concluded that IHL applies in IAC throughout the whole territory of the parties to a conflict, whether or not actual combat is taking place in that whole area.²³⁶ In the case of NIAC, the ICTY held that IHL applied to the whole of the territory under the control of a party.²³⁷

²³⁰ Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press 2006), 119; See also *Juan Carlos Abella v Argentina* (La Tablada case), Report No 55/97, 18 November 1997, para 170

²³¹ ICCPR, Art 4

²³² For example, the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, adopted 13 January 1993, entered into force on 29 April 1997; the Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, adopted 18 September 1997, entered into force 1 March 1999 (‘Ottawa Convention’); Convention (1997), and the Convention on Cluster Munitions, adopted 30 May 2008, entered into force 1 December 2010

²³³ See ICRC, ‘The Domestic Implementation of International Humanitarian Law: A Manual’ (ICRC, 2015) <www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf>, 22

²³⁴ Geneva Conventions, Common Art 1

²³⁵ Peter Rowe (n230), 121; See also UNS-G’s Bulletin, ‘Observance by United Nations Forces of International Humanitarian Law’ (1999) 38 ILM 1656

²³⁶ *Tadić*, paras 65–70

²³⁷ *ibid*

It must be noted, however, that IHL applies only to acts that are ‘closely related’ to hostilities, and while it may apply across the whole territory of a State party, it will only be triggered by an act connected to the armed conflict.²³⁸ For example, IHL does not regulate ordinary criminal matters, issues relating to social services, and other judicial functions of State that are part of its normal operation during peacetime.²³⁹

2.3.4 Personal Application

All parties to a conflict are under an obligation to respect and ensure respect for the rules of the Geneva Conventions.²⁴⁰ However, the rules of IHL are not subject to the principle of reciprocity and ought to be complied with regardless of the conduct of an enemy’s forces.²⁴¹ In addition to applying through the territories of a party to a conflict, IHL also applies to protected persons,²⁴² as defined by the Fourth Geneva Convention, and POWs regardless of where they are located.²⁴³

States Parties

The rules of IHL are binding on all to IHL treaties, and their armed forces.²⁴⁴ To the extent that rules of IHL form customary international law, they are also binding on those States which are not party to the IHL treaty that contains that rule.

The obligation to respect and ensure respect of IHL means that States parties to conflicts are obliged to do what is necessary to ensure that those authorities and persons under their control (including armed forces) comply with IHL. For example, States are obliged to take measures ensuring national implementation of IHL,²⁴⁵ including through national legislation,²⁴⁶ and to punish grave breaches of the Conventions and Protocols.²⁴⁷

²³⁸ *ibid*

²³⁹ However, in situations of belligerent occupation the obligation to ensure public order, set out in Art 43 Hague Regulations 1907, may require occupying powers to regulate such issues.

²⁴⁰ Geneva Conventions, Common Art 1

²⁴¹ ICRC CIHL Study Rule 140; See also Rüdiger Wolfrum and Dieter Fleck, ‘Enforcement of IHL’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 689

²⁴² Defined in Art 4 of the Fourth Geneva Convention as, in effect, enemy nationals. This is discussed in further detail in Chapter 4.

²⁴³ See Third Geneva Convention.

²⁴⁴ Christopher Greenwood, ‘Scope of Application of Humanitarian Law’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 39; The definition of State’s armed forces in the Third Geneva Convention, Art 4A, includes those non-State armed groups that form part of a State’s armed forces.

²⁴⁵ Additional Protocol I, Art 80

²⁴⁶ See, for example First Geneva Convention, Art 48; Second Geneva Convention, Art 49; Third Geneva Convention, Art 128; Fourth Geneva Convention, Art 145; and Additional Protocol I, Art 84

²⁴⁷ First Geneva Convention, Arts 49–54; Second Geneva Convention, Arts 50–53; Third Geneva Convention, Arts 129–132; Fourth Geneva Convention, Arts 146–149; and Additional Protocol I, Arts 85–89

Non-State Armed Groups

When fighting between a non-State armed group and a State, or between non-State armed groups, reaches the threshold of NIAC, IHL applies and binds all belligerents, which includes non-State armed groups.²⁴⁸ In particular, Common Article 3 and Additional Protocol II, in conflicts that meet its applicability thresholds, are widely considered to be binding on all parties to a non-international conflict, including non-State armed groups.²⁴⁹ All parties to a NIAC, including non-State armed groups, must respect and ensure respect for the rules of IHL.²⁵⁰

In addition to being bound by the key norms of IHL, a number of non-State armed groups have pledged to respect it through other, non-legally binding, means. For example, non-State armed groups have adhered to ‘deeds of commitments’, including on protecting children in armed conflict and on prohibiting sexual violence and gender discrimination.²⁵¹ To date, 26 non-State armed groups have signed the Deed of Commitment for the Protection of Children from the Effects of Armed Conflict, and 24 have signed the Deed of Commitment Prohibiting Sexual Violence and Gender Discrimination.²⁵²

On 12 March 2014, the European Parliament unanimously passed a non-binding recommendation to the European Council to support engagement with non-State armed groups to protect children in armed conflict.²⁵³ While there is no direct reference made to education, the recommendations encourage the signing of action plans for the protection of children in armed conflict by States and non-State actors, including non-State armed groups, and encourage the inclusion in political dialogue with third States the goal of preventing and stopping the recruitment and forced involvement of children under the age of 18 in armed groups.

²⁴⁸ Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010), 157; UNSC Resolution 1214, 8 December 1998, para 12; Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff 2005), 2; Daragh Murray ‘How International Humanitarian Law Treaties Bind Non-State Armed Groups’ (2015) 20 *Journal of Conflict & Security Law* 101

²⁴⁹ Lindsay Moir (n185) 52, 96–97; Antonio Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict’ (1981) 30 *International and Comparative Law Quarterly* 416, 424; UNSC Resolution 1214, 8 December 1998, para 12

²⁵⁰ Toni Pfanner (n211), 281; See also Daragh Murray ‘How International Humanitarian Law Treaties Bind Non-State Armed Groups’ (2015) 20 *Journal of Conflict & Security Law* 101–131; Ben Saul, ‘Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law’ (2017) 22 *Journal of Conflict and Security Law* 39; Tilman Rodenhüser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law* (Oxford University Press 2018)

²⁵¹ Those deeds of commitments have been elaborated by the NGO Geneva Call, which monitors their implementation. Note that, for example, the Deed of Commitment protecting children in armed conflict specifically provides for concrete measures to be taken in order to ensure that children have access to education (Article 7(i))

²⁵² For more information see the website of Geneva Call <<https://genevacall.org/how-we-work/deed-of-commitment/>>

²⁵³ European Parliament recommendation to the Council of 12 March 2014 on humanitarian engagement of armed non-state actors in child protection (2014/2012(INI)).

Individual Participants

The rules of IHL are also binding on every individual participant involved in both IAC and NIAC.²⁵⁴ Military commanders are under a responsibility to issue orders that comply with IHL and each person involved in a conflict has an individual responsibility to conduct himself or herself in accordance with IHL. This is reinforced by the principle of individual criminal responsibility in ICL.²⁵⁵ IHL also addresses some obligations directly to the civilian population, including the rules on how to participate lawfully in armed conflict through formation of a 'levée en masse', being an organised uprising of civilians.²⁵⁶

2.3.5 Application of IHRL to International and Non-international Armed Conflict

IHRL applies *directly* to situations of IAC and NIAC and applies concurrently with IHL.²⁵⁷ The ICJ in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* ('*Nuclear Weapons Advisory Opinion*') held that 'the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of national emergency'.²⁵⁸ This was affirmed by the ICJ in the *Legal Consequences of the Construction of a Wall Advisory Opinion* ('*Wall Advisory Opinion*'), *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ('*DRC v Uganda*'), as well as by human rights treaty bodies.²⁵⁹

In addition, some human rights instruments contain provisions that expressly apply to armed conflict situations:

- Article 38 of the CRC and the Optional Protocol to the Convention on the Rights of the Child set out particular obligations on parties under the treaty that apply during both IAC and NIAC. These include obligations regarding the recruitment and use of children as soldiers. The rules relating to the use and recruitment of children as soldiers are discussed below, in Chapter 4. It also contains, in Article 38(1), a general obligation on States to respect and ensure respect for IHL in relation to children during armed conflict.
- Articles 1 and 3 of the Convention on the Worst Forms of Child Labour set out a prohibition on the forced or compulsory recruitment of children in armed conflict.
- Article 22 of the ACRWC sets out a similar prohibition on the use of children as soldiers and an obligation to ensure that children do not directly participate in hostilities. The Charter also sets out other obligations of parties in relation to the protection of children in

²⁵⁴ Christopher Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 39; UNSC Resolution 1214, 8 December 1998, para 12

²⁵⁵ For a discussion of this, see the ICL section below.

²⁵⁶ Hague Regulations, Art 2; Third Geneva Convention, Art 4(A)(6)

²⁵⁷ For a discussion of IHRL obligations, see above.

²⁵⁸ *Nuclear Weapons Advisory Opinion*, para 25; See also UNGA Res. 2675 (XXV), 9 December 1970

²⁵⁹ HRCCommittee General Comment 31

armed conflict. The Charter expressly applies to internal armed conflict as well as those situations of tension and strife that fall below the armed conflict threshold (i.e. ‘insecurity’).

- Article 11 of the CRPD requires parties to ensure the safety and protection of persons with disabilities during both armed conflict and situations of insecurity.

Further, many provisions of IHL overlap in substance with those of IHRL and provide concurrent protection for particular rights. This will be considered in more detail in the discussion on the relationship between IHL and IHRL at the end of Chapters 4 and 5.

Belligerent Occupation

An occupying State is bound by IHRL in its activities in occupied territory.²⁶⁰ Human rights treaties have been found to apply directly to situations of occupation. This is because:

- human rights obligations do not cease to apply in times of armed conflict;
- occupying powers are required to take all measures within their power to ensure the operation of the laws in force in the occupied state, including IHRL;²⁶¹ and
- the conditions of occupation (being an effective control of territory) are frequently found to satisfy the extraterritorial application requirements of many human rights instruments.

Non-international Armed Conflict

As there are fewer IHL rules applicable in NIAC, it means that IHRL is an important source of rights for victims of NIAC. Also, in NIAC the substance of many of the provisions of IHRL is incorporated through the operation of Common Article 3 to the Geneva Conventions and Article 4(2) of Additional Protocol II. In particular, these provisions guarantee the following protection to those not participating in hostilities,²⁶² all of which form part of customary international law:

- humane treatment and equal application of the protection of Common Article 3 and Article 4(2);²⁶³
- prohibition on violence to life and person including murder, mutilation, cruel treatment and torture;²⁶⁴
- prohibition on outrages to a person’s dignity;²⁶⁵
- prohibition on the taking of hostages;²⁶⁶

²⁶⁰ See the *Wall Advisory Opinion*; HRCCommittee, *Concluding observations of the Human Rights Committee: Israel*, 21 August 2003, CCPR/C0/78/ISR, para 11

²⁶¹ Hague Regulations 1907, Art 43

²⁶² See discussion of these provisions in Lindsay Moir (n185) Chapter 5.

²⁶³ Common Art 3, Art 4(1); Additional Protocol II; ICRC CIHL Study Rule 87

²⁶⁴ Common Art 3(1)(a); Additional Protocol II, Art 4(2); ICRC CIHL, Study Rule 89 and Rule 90

²⁶⁵ Common Art 3(1)(c); Additional Protocol II, Art 4(2)(e); Respect of dignity is a central component of all the customary international law rules listed here, in particular Rule 87 on humane treatment and Rules 89 and 90 on violence to life and prohibition of torture.

²⁶⁶ Common Art 3(1)(b); Additional Protocol II, Art 4(2)(c); ICRC CIHL Study, Rule 96

- particular judicial guarantees;²⁶⁷
- prohibition on collective punishments;²⁶⁸ and
- prohibition of slavery.²⁶⁹

Common Article 3 and Article 4(2) of Additional Protocol II form part of IHL. They contain many provisions which are traditionally associated with IHRL. However, as part of IHL, they apply to all parties to a conflict, including non-State armed groups (in contrast to the more indirect application to non-State actors under IHRL (see above), at all times during hostilities without derogation. These two provisions are, therefore, a helpful means of pushing towards compliance with particular human rights obligations in NIAC.

Application of Economic, Social and Cultural Rights in Armed Conflict

Consideration of economic, social and cultural rights, including the right to education, has 'largely been absent from debate about the applicability of human rights law in times of armed conflict'.²⁷⁰ However, in the *Wall Advisory Opinion* the ICJ recognised the application of the ICESCR to the Occupied Palestinian Territories and further found that the construction of the wall 'impede[s] the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights'.²⁷¹

The CESCR takes the same approach as the ICJ in relation to the application of the ICESCR during occupation:

The Committee reminds the State party that even during conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law...The Committee expresses deep concern about...the severe measures adopted by the State party to restrict the movement of civilians between points within and outside the occupied territories, severing their access to food, water, health care, education and work.²⁷²

It is now widely accepted that economic, social, and cultural rights apply in times of armed conflict in the same way as all other rights.²⁷³

²⁶⁷ Common Art 3(1)(d). ICRC CIHL, Rule 100

²⁶⁸ Additional Protocol II, Art 4(2)(b); ICRC CIHL Study, Rule 103

²⁶⁹ Additional Protocol II, Art 4(2)(f); ICRC CIHL Study, Rule 94

²⁷⁰ Elizabeth Mottershaw, 'Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law' (2008) 12 *The International Journal of Human Rights* 449, 449

²⁷¹ *Wall Advisory Opinion*, para 134

²⁷² CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, 31 August 2001, E/C.12/1/Add.6, paras 12–13

²⁷³ Some violations of IHL, such as in relation to the prohibition of direct attacks on civilian objects, are simultaneously violations of economic, social and cultural rights. Examples of this interaction are discussed in Chapter 5 below.

2.3.6 Relationship between International Humanitarian Law and International Human Rights Law

This section examines how the concurrent application of both IHL and IHRL in armed conflict situations has been addressed by international and regional bodies. Discussion of the interaction between particular provisions of IHL and IHRL will be undertaken, as relevant, in Chapters 3, 4 and 5. The relationship between IHRL, IHL and ICL will be discussed after the ICL section below.

Both IHL and IHRL apply concurrently to armed conflict situations. While it is traditionally argued that the two regimes have developed separately, this proposition has been challenged.²⁷⁴ Nonetheless, although the traditional divide between IHL and IHRL has narrowed considerably, IHL and IHRL remain distinct regimes,²⁷⁵ designed to regulate different circumstances and power relationships.²⁷⁶ In particular:

Unlike human rights law, the law of war [IHL] allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law. It allows an occupying power to resort to internment and limits the appeal rights of detained persons. It permits far-reaching limitations of freedoms of expression and assembly.²⁷⁷

This means that, although both regimes seek to protect individuals, their ‘normative framework[s] are] often paradoxical and at odds’.²⁷⁸ When faced with a situation of armed conflict, where both IHRL and IHL apply, it is important to consider what the relationship between the two regimes is, as understood by international and regional bodies.

There are several different approaches to this issue among international and regional bodies, which are considered below.

International Approaches

International Court of Justice

The ICJ has considered the relationship between IHL and IHRL in armed conflict in three cases.²⁷⁹ Although the Court clearly recognises the concurrent application of IHL and IHRL to

²⁷⁴ Katharine Fortin, ‘Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948 to 1968’ (2012) 94 *International Review of the Red Cross* 1433, 1434; Boyd van Dijk, ‘Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions’ (2018) 112 *The American Journal of International Law* 553, 553

²⁷⁵ Lindsay Moir (n185) 193.

²⁷⁶ Christopher Greenwood (n47), 72

²⁷⁷ Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *American Journal of International Law* 239, 240

²⁷⁸ Nancie Prud’homme, ‘*Lex Specialis*: Oversimplifying a more complex and multifaceted relationship?’ (2007) 40 *Israeli Law Review* 356, 361

²⁷⁹ *Nuclear Weapons Advisory Opinion*; *Wall Advisory Opinion*; and *DRC v Uganda*

armed conflict in particular instances before them, there is uncertainty about the Court's approach beyond that instance.²⁸⁰

The issue of the relationship between IHL and IHRL was first considered by the ICJ in its *Nuclear Weapons Advisory Opinion*.²⁸¹ In this case, the ICJ was asked to rule on the compatibility of the use or threat of nuclear weapons with international law.²⁸² In this context, the Court found that the right not to be arbitrarily deprived of life, as set out in Article 6 of the ICCPR, applied during hostilities:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.²⁸³

There are different views on what the ICJ's comments and reliance on the principle of *lex specialis* mean, both as a doctrine and how it might be used in practice.²⁸⁴

In the *Wall Advisory Opinion*²⁸⁵ the Court considered the application of human rights treaties to the Occupied Palestinian Territories and their relationship with the simultaneously applicable IHL.²⁸⁶ It confirmed that the ICCPR, and other human rights treaties including the CRC, apply in situations of armed conflict.²⁸⁷ In addition, the Court held that:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.²⁸⁸

²⁸⁰ See, for example, discussion of the confusion that the ICJ's decisions have caused, in Paul Eden and Matthew Happold, 'Symposium: The Relationship between International Humanitarian Law and International Human Rights Law' (2010) 14 *Journal of Conflict and Security Law* 441

²⁸¹ *Nuclear Weapons Advisory Opinion*.

²⁸² *ibid*, para 13

²⁸³ *ibid*, para 25.

²⁸⁴ In general international law, the principle of *lex specialis* has been traditionally understood to be the principle that a more general rule is interpreted subject to, and in light of, a more specific rule: Emer de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, Book II, (1793) ch.XVII, paras 311, 316, cited in Nancie Prud'homme, 'Lex Specialis: Oversimplifying a more complex and multifaceted relationship?' (2007) 40 *Israeli Law Review* 356, 367

²⁸⁵ *Legal Consequences of the Construction of a Wall*, Advisory Opinion, ICJ Reports 1996

²⁸⁶ *ibid*, para 104

²⁸⁷ *ibid*, paras 105–111

²⁸⁸ *ibid*, para 106

Its finding that the construction of the wall violated both IHRL, including the right to education under the ICESCR,²⁸⁹ and IHL,²⁹⁰ meant that the Court was not required to resolve the situation where the two areas of law created conflicting rights or obligations for Israel.

In the case of *DRC v Uganda*²⁹¹ the ICJ considered the provisions of IHRL and IHL applicable to territory of the DRC occupied by Ugandan forces. In this case the Court did not address the issue of *lex specialis*. The Court concluded ‘that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration’.²⁹²

From these cases, it is clear that the approach of the ICJ is that both IHRL and IHL apply in armed conflict; and that some situations in armed conflict are governed by IHL, some by IHRL, and some by both areas. Further, it is clear from the ICJ’s analysis that in armed conflict it is not always necessary to interpret IHRL in light of IHL. What is not clear from the cases of the ICJ is how, in those situations of overlap between IHRL and IHL, any potential conflict between the regimes is to be resolved.

Two potential approaches can be discerned. One is that neither legal regime is automatically the *lex specialis*, with resolution of a potential conflict having to be taken on a case-by-case basis.²⁹³ For example, the Court in the *Nuclear Weapons Advisory Opinion* used IHL to shed light on the meaning of a particular IHRL obligation (in this case, the right to life). The two areas of law are interpreted in a complementary way—with reference to whichever law is the more specific given the particular situation at hand.²⁹⁴ This interpretation of the principle of *lex specialis* avoids a conflict arising between the rules of IHL and IHRL²⁹⁵ and seeks to give the fullest effect possible to both areas of law simultaneously.

The other potential approach taken by the Court is that in those situations that are matters of both IHRL and IHL, IHL is always the *lex specialis* applicable in armed conflict.²⁹⁶ Under this approach the rule of *lex specialis* creates a general hierarchy of regimes and holds that, in situations of armed conflict, IHL provides the relevant rules governing the ultimate determination of lawfulness.²⁹⁷ This approach is consistent with the statement of the Court in the *Wall*

²⁸⁹ *ibid*, paras 133–135

²⁹⁰ *ibid*, para 138

²⁹¹ *DRC v Uganda*

²⁹² *ibid*, para 216; The same approach is taken in HRCCommittee, General Comment No 31, paras 2, 10, 11

²⁹³ Iain Scobbie, ‘Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict’ (2009) 14 *Journal of Conflict and Security Law* 449, 451

²⁹⁴ Christopher Greenwood (n47), 75

²⁹⁵ *ibid*, 74–75. Cordula Droege, ‘Elective affinities? Human rights and humanitarian law’ (2008) 90 *International Review of the Red Cross* 501, 501

²⁹⁶ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011), 234

²⁹⁷ For example, in the *Wall Advisory Opinion*, para 135, the ICJ outlined the extensive human rights law breaches resulting from the construction of the wall and then went on to state that ‘the application of international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances’. Although no ‘military exigencies’ were applicable in this case, the court’s consideration of, and approach to, this issue strongly suggests that it contemplated that a justification for an action under IHL, otherwise in breach of human rights law, might nonetheless render a State’s conduct legal.

Advisory Opinion, cited above. This contrasts with the first approach in that it establishes a *general rule* for when IHL might be applied instead of allowing the Court to determine the legal regime applicable to each potential situation of conflicting rules on a case-by-case basis.

The current ambiguity of the position of the ICJ on the relationship between IHL and IHRL is problematic from a practical point of view. The ICJ has not provided a guide as to when a particular situation may be a matter of IHRL, IHL, or when the two conflict. This uncertainty creates the risk that courts are effectively free to reach any conclusion about the application of IHL and IHRL, depending on how they choose to frame the issue.²⁹⁸ This is of little assistance to those seeking to understand how the two areas of law might work together to provide protection for students and education staff who fall victim to the effects of war.

International Human Rights Treaty Bodies

The HRCCommittee has pronounced on relevant provisions of IHL and the application of the ICCPR in armed conflict in a number of its General Comments.²⁹⁹ In its General Comment 31 the HRCCommittee concludes that:

While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.³⁰⁰

It does not, however, elaborate on this statement.³⁰¹ The HRCCommittee does not use the term *lex specialis* and, instead, refers to the use of IHL as an interpretive mechanism for provisions of the ICCPR in armed conflict. It is clear that the HRCCommittee's focus is on emphasizing the harmony, complementarity, and common objective of many of the provisions of both IHL and the ICCPR. The approach, then, is that States are to apply both IHL and IHRL to the fullest extent, and only where a conflict between them arises does it become permissible to allow a rule of one regime to supersede that of the other.

The Committee on the Rights of the Child frequently considers the application of the CRC in armed conflict and its relationship with IHL,³⁰² especially because Article 38, and the CRC's Optional Protocol, expressly deal with the application of the CRC in times of armed conflict

²⁹⁸ Cordula Droegge (n295), 501; Martii Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, A/CN.4/L.682, para 117; See also Marko Milanovic (n296), 234

²⁹⁹ HRCCommittee General Comments 29, 31, and 36

³⁰⁰ HRCCommittee General Comment 31, 11

³⁰¹ It is of note that the USA has recently changed its position on the application of the ICCPR to armed conflict and, in its latest report to the HRCCommittee, declared that IHL and IHRL are complementary fields of law: *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the ICCPR*, 30 December 2011, <www.state.gov/j/drl/rls/179781.htm>, para 507

³⁰² See for example HRCCommittee, *General Comment 1 Reporting Obligations* (2001); *General Comment 36 Right to Life* (2018); *General Comment 9 Humane treatment of persons deprived of their liberty* (2009)

and provide that States must also comply with their relevant IHL obligations. The Committee is, therefore, empowered to incorporate IHL provisions in its analysis of the CRC, and has encouraged States to adopt practices that are consistent with whichever legal provision might be more conducive to the realisation of the rights of the child in armed conflict.³⁰³ It emphasises the concurrent application of the two areas of law, their complementarity and, indeed, the similarity of many of the provisions of IHL and the CRC in relation to the protection of children in armed conflict. The Committee clearly takes the view that IHL and the CRC, to the extent that they seek to protect children, are mutually reinforcing and beneficial areas of law.

International Tribunals

The International Criminal Tribunal for the former Yugoslavia ('ICTY') has demonstrated that, where the two areas of law are similar, it will draw on the jurisprudence and norms of IHRL to fill gaps in IHL. In the *Kunarac Case*,³⁰⁴ the Tribunal held, in relation to the IHL prohibition of torture, that '[b]ecause of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to the instruments and practices developed in the field of human rights law'.³⁰⁵ However, the tribunal emphasised the similarity between the two areas of law in relation to the prohibition of torture and that IHRL notions can be used to interpret IHL (not to replace it) 'only if they take into consideration the specificities of the latter body of law'.³⁰⁶

Regional Approaches

The African Commission has proved to be amenable to considering IHL alongside the rules of the African Charter of Human and Peoples' Rights. In *DRC v Burundi, Rwanda and Uganda*, it referred to a number of rules contained in Part III of the Fourth Geneva Convention and Additional Protocol I to determine the legality of particular acts under the Charter itself.³⁰⁷ The Charter is unique among regional human rights instruments in that it contains provisions allowing it to consider³⁰⁸ and 'draw inspiration from'³⁰⁹ other areas of international law, including IHL.

³⁰³ Committee on Rights of the Child, *General Discussion on children in armed conflict*, 1992, CRC/C/10, para 68.

³⁰⁴ *Prosecutor v Dragoljub Kunarac et al*, IT-96-23-T & IT-96-23/1-T, 22 February 2001

³⁰⁵ *ibid*, para 467. Those cases cited by the tribunal all used IHRL in the context of the definition of torture.

³⁰⁶ *ibid*, para 471. It must be noted that there are differences in the application of the two areas of law, i.e. to State officials and non-State actors. This was recognised as a reason for exercising caution by the Tribunal. This approach was upheld by the ICTY in the later case of *Prosecutor v Milorad Krnojelac*, IT-97-25-T, 15 March 2002, para 181

³⁰⁷ *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication 227/99, May 2003, para 64

³⁰⁸ ACHPR, Art 61

³⁰⁹ *ibid*, Art 60

Similarly, the ACRWC clearly envisages a complementary and concurrent operation of its provisions with IHL. It expressly obliges States parties to ‘respect and ensure respect for rules of international humanitarian law applicable in armed conflict which affect the child’.³¹⁰

Unlike the African Commission, the IACtHR has doubted its competency to determine whether or not there has been a violation of IHL by a State party.³¹¹ In *Bamaca Velasquez*³¹² the Court found that, while it could not decide whether a provision of IHL had been violated, it can take IHL into consideration when interpreting the Convention, though it is not obligated to do so.

In contrast, the Inter-American Commission on Human Rights (‘IACHR’) has tried to interpret the two bodies of law consistently to avoid conflict.³¹³ Yet, where there is a potential conflict between the two areas of law, the Commission has held that the text of the Convention dictates the approach to this issue, as Article 29 prevents the Convention’s being interpreted in a way that limits any other rights contained in other treaties to which States are a party. In *Abella v Argentina* the Commission interpreted Article 29 in relation to IHL. It held that Article 29 empowered the Commission to apply the standard of law that was most favourable to an individual in a particular situation and that ‘if that higher standard is a rule of humanitarian law, the Commission should apply it’.³¹⁴

Unlike both the African Commission and the Inter-American Commission of Human Rights, the ECtHR frequently decides cases arising from armed conflict situations without specific reference to IHL rules or norms.³¹⁵ A notable exception, however, is the case *Varnava and others v Turkey*,³¹⁶ where the ECtHR used IHL to clarify and interpret Article 2 (right to life) of the ECHR. In that case the Court held, in relation to the disappearance of wounded Greek Cypriot men in the IAC of 1974, that:

Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law ... in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities.³¹⁷

The ECtHR goes on to cite a number of other obligations found in the Geneva Conventions and Additional Protocol I. The Court is clearly using provisions of IHL to interpret the meaning of

³¹⁰ ACHPR, Art 22

³¹¹ *Las Palmeras v Colombia*, 4 February 2000

³¹² *Bámaca Velásquez v Guatemala*, Series C No 70, 25 November 2000

³¹³ *Abella v Argentina*, para 161

³¹⁴ *ibid*, paras 164–165. This approach was confirmed in *Coard et al v United States*, Report No 109/99, 29 September 1999; although, as the US was not a party to the Convention, the Commission did not refer to Art 29 but rather referred to its mandate under the OAS Charter.

³¹⁵ For example, see the ‘Chechen Cases’: *Isayeva v Russia*, Application No 57950/00, 24 February 2005; *Khashiyev and Akayeva v Russia*, 57942/00; 57945/00, 24 February 2005. Also see Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011), 115

³¹⁶ *Varnava and others v Turkey*, 18 September 2009

³¹⁷ *ibid*, para 185

Article 2, and flesh out its content, in the circumstances of IAC.³¹⁸ This approach is similar to that taken by the ICJ in the *Nuclear Weapons Advisory Opinion*.

In two cases before the ECtHR, occurring in situations of armed conflict: *Al-Skeini v United Kingdom* and *Al-Jedda v United Kingdom*, the ECtHR set out both the relevant provisions of IHRL and IHL relating to the investigation of unlawful killing, and detention, respectively. However, in both cases the Court did not consider it necessary to reach a conclusion on the relationship between the provisions of the two regimes.³¹⁹ It is finally in *Hassan v United Kingdom* that the ECtHR offered its view on the interaction between the two bodies of law, without relying on an exclusive application of the *lex specialis* principle but rather by considering both bodies of law in a complementary manner.³²⁰ Although the Court limited its analysis to the case in question, which concerned the deprivation of liberty of an individual by British armed forces during hostilities in Iraq, it ruled that given the co-existent safeguards provided by IHL and the ECHR, a deprivation of liberty could be accommodated under Article 5(1) in order to detain a civilian who poses a risk to security under the Geneva Conventions.³²¹

It is clear from the above examination that there are multiple approaches and understandings of the relationship between IHL and IHRL at the regional level, often determined by the text and mandate of each regional instrument as interpreted by each regional body. It is not possible to express these different approaches as one single principle.

It ought to be noted that, where an action is brought before an international or regional human rights body, IHRL will continue to be the applicable regime in respect of establishing and determining obligations such as right to remedy and reparation (as discussed in Chapter 6), as well as establishing an obligation to investigate and prosecute under the relevant treaty. This is the case even where IHL may be found to be the relevant regime for determining the scope of a particular right or the lawfulness of particular conduct.

Summary

Some rules and norms of IHL and IHRL are similar in their expression or meaning and do not give rise to a potential conflict: for example, the general prohibition on torture.³²² Sometimes

³¹⁸ Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011), 17

³¹⁹ In the case of *Al-Jedda v United Kingdom*, Application No 27021/08, 7 July 2011, this was because the detention was deemed unlawful under both regimes so no conflict arose, para 107; In the case of *Al-Skeini and Others v United Kingdom* (n109), the Court did not address the substantive aspect of the two areas of law relating to unlawful killing as the matters before it were limited to the procedural elements of Art 2 ECHR in relation to investigation of a killing, which gave rise to no conflict.

³²⁰ *Hassan v United Kingdom*, Application no 29750/09, 16 September 2014

³²¹ *ibid*, 106

³²² See discussion of this issue in Chapter 4. Note, however, that although IHRL and IHL both contain a general prohibition on torture, the specific requirements of this prohibition may differ across various judicial bodies. For a discussion of this issue, see Sandesh Sivakumaran, 'Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals' (2005) 18 *Leiden Journal of International Law* 541

it will be possible to interpret two legal rules in a complementary way in order to, as far as possible, avoid a conflict between the two regimes: for example, the use of IHL to give meaning to the IHRL prohibition on ‘arbitrary’ deprivation of life or ‘arbitrary’ detention in armed conflict. Where there is no possibility of avoiding a potential conflict between the two areas of law, the applicable regime and rule will, almost certainly, be unpredictable. Each jurisdiction takes a different approach to resolution of unavoidable conflict.

Ultimately, it is clear that there is not one correct way to understand the relationship between IHL and IHRL and that the approach that might be taken in a particular case depends on which body is hearing a matter or seeking to apply the law.

2.4 INTERNATIONAL CRIMINAL LAW

ICL refers to the set of rules proscribing conduct that is considered criminal by the international community, and the procedures by which these criminal violations are enforced in both international and domestic courts.³²³ At its core, ICL foresees that individuals rather than States should be held accountable for conduct that ‘shocks the conscience of humanity’.³²⁴ This conduct primarily includes the international crimes of aggression, genocide, crimes against humanity, trans-national terrorism, war crimes and other serious breaches of IHL, torture and enforced disappearance.³²⁵

ICL is a relatively new discipline, widely accepted as having originated as recently as the prosecutions before the International Military Tribunals (‘IMTs’) following the Second World War.³²⁶ The trials of the leading Nazis in Nuremberg and senior Japanese leaders in Tokyo established beyond question the basic principle of individual criminal responsibility, regardless of whether the criminal acts were committed by perpetrators in their official State capacity.³²⁷

In the absence of any single, universally applicable law, it can often be difficult to identify the precise content and applicability of ICL. Since the IMTs, ICL has developed through a disparate collection of sources.³²⁸ Foremost are the rules in international treaties and other binding inter-

³²³ See Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 3–10; Karim A A Khan and Rodney Dixon (eds), *Archbold International Criminal Courts, Practice Procedure and Evidence* (3rd edn, Sweet & Maxwell 2009), 21–22 (‘*Archbold International Criminal Courts*’)

³²⁴ A phrase most recently cited in the Rome Statute to describe international crimes: Rome Statute, Preamble, para 2

³²⁵ See Antonio Cassese, ‘International Criminal Law’, in Malcolm D Evans, *International Law* (2nd edn, Oxford University Press 2006), 719; *Archbold International Criminal Courts*, 21–22; Roger O’Keefe, *International Criminal Law* (Oxford University Press 2015), 63–67; Robert Cryer, ‘International Criminal Law’ in Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018), 745

Note that the definition of the crime of aggression under the Rome Statute was adopted at the 2010 Kampala Review Conference and entered into force on 17 July 2018 with regard to those states that have ratified or accepted the amendment to the Rome Statute.

³²⁶ Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 30–31

³²⁷ *ibid*, 30–31

³²⁸ *ibid*, 15–27

national instruments, such as the resolutions of the United Nations Security Council ('UNSC'). These rules establish the jurisdictional and procedural basis for dealing with international crimes.

In the last decade of the twentieth century and first decade of the twenty-first, a number of *ad hoc* regional courts and tribunals (called 'courts' here for convenience) were created, each with a limited mandate to investigate and prosecute individuals for international crimes within a particular geographical area over a particular timeframe. The ICTY and the International Criminal Tribunal for Rwanda ('ICTR') were both established through UNSC Resolutions.³²⁹ The provisions of these resolutions were binding on the whole international community. Similarly, the Special Court for Sierra Leone ('SCSL'), the Extraordinary Chambers in the Courts of Cambodia ('ECCC') and the Special Tribunal for Lebanon ('STL') were created by specific agreement between the UN and the respective States, and whose provisions are binding on that particular State in relation to each specific court.

The most important recent development in the field of ICL has been the establishment of the ICC in The Hague by the 'Rome Statute' in 1998.³³⁰ To date, 122 States are parties to the Rome Statute.³³¹ In establishing a permanent court with jurisdiction over international crimes committed by individuals, the States parties to the Rome Statute stated their aim to end impunity for such crimes and to ensure lasting respect for, and enforcement of, international justice.³³²

A second source of ICL is the collection of humanitarian and human rights treaties reciprocally entered into by States to protect their nationals from harm, such as the Genocide Convention of 1948; the Geneva Conventions of 1949 and their Additional Protocols; and the Convention Against Torture of 1984; and the International Convention on the Protection of All Persons from Enforced Disappearance 2006.

A third source of ICL is the body of legal principles drawn from the specific discipline of ICL, as well as other international legal frameworks such as IHRL. One example is the principle of legality, which requires the law to be clear, ascertainable, and non-retroactive.

³²⁹ UNSC Resolution 827 of 1993, S/RES/827, establishing the ICTY and UNSC Resolution 955 of 1994, S/RES/955, establishing the ICTR. Both the ICTY and the ICTR have ceased to function, in 2017 and 2015 respectively.

³³⁰ The Rome Statute was amended in 2017 to prohibit the use of additional weapons, namely: weapons which use microbial or other biological agents, or toxins, whatever their origin or method of production; weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays; and laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. These amendments are not yet in force.

³³¹ United Nations Treaty Collection, 'Rome Statute of the International Criminal Court' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en>

At the time of writing, both Burundi and the Philippines had withdrawn from the Rome Statute, withdrawals which do not affect the opening of prior preliminary investigations with regard to alleged crimes perpetrated on their territories while they were party to the Rome Statute.

³³² Rome Statute, Preamble, paras 5 and 11

All courts exercising jurisdiction over international crimes have made important contributions to the development of both ICL and customary international law. Some of its provisions, such as the prohibition on genocide, war crimes and crimes against humanity, are also considered to be part of *jus cogens* (see above).³³³

ICL is therefore particularly relevant for victims seeking justice for education-related violations in insecurity and armed conflict. Under the Rome Statute, victims can actively participate in the proceedings and can seek reparations, including to remedy educational harm, as discussed in Chapter 6. Conduct deemed criminal under ICL can have a direct or indirect impact on the full and effective realisation of the right to education. The scope and application of ICL in situations of insecurity and armed conflict is analysed below. The substantive elements of ICL, as it applies to the protection of education, will be examined in subsequent chapters.

2.4.1 Individual Criminal Responsibility and State Obligations

ICL is based upon the principle of individual criminal responsibility for international crimes. Irrespective of the existence of national laws and practice to the contrary, individuals are directly responsible under international law for the commission of international crimes.

The tendency has been to prosecute individuals accused of international crimes in international criminal courts specifically created to deal with the crimes committed in a particular conflict or region. Very often, the relevant domestic criminal justice authorities may be incapable or unwilling to prosecute. Nevertheless, States have an obligation under both specific treaty law, the general principles of ICL, and of customary international law, to bring to justice those who have committed such crimes.³³⁴ For example, international treaties such as the Geneva Conventions, the Convention against Torture, and the Convention against Enforced Disappearances, impose obligations upon States parties to bring to justice those accused of violations of the provisions of the treaties.³³⁵ Exactly how this happens in practice will depend on the applicable national legal procedures, but many States have enacted specific domestic legislation to give effect to the obligation to bring those accused of international crimes to justice.³³⁶

The prosecution or extradition of individuals for the commission of international crimes does not, however, exclude or affect a State's own responsibility for breach of its international legal obligations.³³⁷

³³³ M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63, 68

³³⁴ See for example UN Economic and Social Council, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, 8 February 2005, E/CN.4/2005/102/Add.1, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>>, Principles 19 and 20 ('UN Updated Set of Principles on Impunity'). As Principles, these are not legally binding, but are reflective of many principles of international law.

³³⁵ For example, First Geneva Convention, Art 49; Second Geneva Convention, Art 50; Third Geneva Convention, Art 129; Fourth Geneva Convention, Art 146

³³⁶ See for example the Dutch International Criminal Court (Implementation) Act 2002; the International Criminal Court Act 2001 of England and Wales.

³³⁷ See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, ICJ Reports 2007, 26 February 2007

2.4.2 Application of International Criminal Law

ICL applies regardless of whether specified prohibited conduct occurs in armed conflict, in times of insecurity, or even in peacetime.

Treaties that proscribe certain conduct as criminal will normally stipulate that States have a duty to enact domestic criminal laws penalizing such conduct, and to investigate or prosecute where there is evidence to do so.³³⁸ Treaties establishing specific international courts may also limit the scope of application of these obligations, for example, by criminalizing only those acts committed within a certain period of time or within a defined region, such as in a particular armed conflict.³³⁹

A State's obligation to prosecute in any specific case may be limited by principles of IHRL. Procedural rights of due process, such as the prohibition on retrospective sanction and punishment (*nullem crimen sine lege*) and the prohibition of double jeopardy (*ne bis in idem*, or the right not to be tried twice for the same conduct), apply equally to the prosecution of international crimes as to ordinary domestic crimes.

2.4.3 Exercise of Jurisdiction over International Crimes

The governing statutes of the ICC and the *ad hoc* international courts contain specific provisions setting out the basis upon which they have jurisdiction over international crimes. The governing statutes of the various *ad hoc* courts each specify the circumstances in which they exercise jurisdiction. Jurisdiction is normally limited to a specific period or geographical location rather than according to the nationality of the accused or victims.

The ICC has jurisdiction over those crimes committed within the territory or by the nationals of States Parties or a non-State Party which accepts the jurisdiction of the court.³⁴⁰ In addition, the ICC has jurisdiction over the crimes specified in Article 5 of the Rome Statute that are referred to the Prosecutor by the UNSC acting under Chapter VII of the United Nations Charter,³⁴¹ irrespective of whether the acts were committed by nationals of or within the territory of States Parties.³⁴²

³³⁸ For example, the Geneva Conventions, see above. This is also the case with IHRL, see above.

³³⁹ See for example: Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted 25 May 1993, Art 1, ('ICTY Statute'), restricting the competence of the Tribunal to acts 'committed in the territory of the former Yugoslavia since 1991'; Statute of the Special Court for Sierra Leone, adopted 16 January 2002, Art 1, ('Statute of the SCSL') similarly restricting the jurisdiction of the Special Court to 'the territory of Sierra Leone since 30 November 1996'.

³⁴⁰ Rome Statute, Art 12(2)

³⁴¹ *ibid*, Art 13(c)

³⁴² So far, the UNSC has referred only two situations to the ICC: Darfur in Sudan, in 2005 and Libya, following the uprising and civil war, in 2011. An attempt to refer the situation in Syria was vetoed in 2014. However, the UNGA adopted resolution 71/248 on 21 December 2016 establishing the International, Impartial and Independent Mechanism, known as the "IIIM", in order to assist in the investigation and prosecution of those responsible for the international crimes committed in Syria since March 2011.

Outside the international courts, jurisdiction has traditionally been asserted by the State upon whose territory the international crime was committed;³⁴³ but it may also be asserted in relation to potential criminal conduct outside the territory of a State on the basis of the nationality of the alleged perpetrator of a crime (*active personality jurisdiction*)³⁴⁴ and, more controversially, on the nationality of the victim (*passive personality jurisdiction*).³⁴⁵ It has been accepted that the alleged perpetrator or victim need not be a national of the prosecuting State but merely domiciled or a resident at the time the crime was committed.³⁴⁶ In addition, a State is entitled to exercise jurisdiction over potential offences committed outside its territory on the basis of 'protective jurisdiction'. This is where conduct which threatens a State's security, such as the selling of State secrets or counterfeiting of its currency, falls within its extraterritorial reach.³⁴⁷

Where one State declines to exercise jurisdiction because it is unwilling or unable to prosecute, another State may exercise jurisdiction on alternative grounds if permitted under relevant domestic legislation.

A further, somewhat more controversial,³⁴⁸ basis upon which a State is authorised to prosecute international crimes is the doctrine of universal jurisdiction. According to the principle of universal jurisdiction, a State may assert jurisdiction over crimes with no territorial or personal connection to the accused or victim. The rationale behind universal jurisdiction is twofold. Firstly, international crimes are often perpetrated in places where there is neither a functioning domestic criminal justice system nor an effective jurisdiction of an international court. Universal jurisdiction enables any State that apprehends someone suspected of an international crime to bring that person to justice. Secondly, international crimes are so damaging to the fabric of humanity that it is considered in the interests of the international community as a whole to permit any State, at any time or place, to assume jurisdiction.³⁴⁹ In order to exercise universal jurisdiction over a particular international crime, a State must have expressly criminalised it in the relevant domestic legislation.

³⁴³ *Lotus Case (France v Turkey)*, Series A No 10, 7 September 1927. See also Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 27; See also UN Updated Set of Principles on Impunity, Principles 19 and 20

³⁴⁴ See discussion of this principle in Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010), 47-49

³⁴⁵ *ibid*, 50

³⁴⁶ IBA, *Report of the Task Force on Extraterritorial Jurisdiction*, (IBA, 2009) <tinyurl.com/taskforce-etj-pdf>, 148

³⁴⁷ See discussion of this principle in Robert Cryer and others (n344), 47-48

³⁴⁸ *ibid*, 50

³⁴⁹ With regard to the exercise of universal jurisdiction over the international crimes provided for in the Rome Statute, three quarters of UN Member States have authorised their courts to exercise universal jurisdiction over one or more international crimes. For more detail see Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World' (Amnesty International Publications, October 2011), 1 <<https://www.amnesty.org/download/Documents/32000/ior530042011en.pdf>>

2.4.4 Individual Criminal Responsibility

Under the Rome Statute, the basic form of individual criminal responsibility is commission of a crime, where the perpetrator commits a crime individually, jointly or through another person.³⁵⁰ Individual criminal responsibility accrues regardless of whether a person acts in a private capacity or as an agent of the State.³⁵¹

Individual criminal responsibility encompasses broader forms of liability, such as ordering, soliciting, inducing, aiding, abetting or assisting, and contributing to the commission or attempted commission of a crime by a group.³⁵² Under the doctrine of command or superior responsibility,³⁵³ an accused may be held criminally responsible as a superior for the acts or omissions of the person(s) who committed the crime where it can be proved that such persons were under his effective command and control, the superior had or should have had knowledge of the conduct of his subordinates and failed to take action necessary to prevent or suppress the crimes.³⁵⁴ Participation in a common criminal plan, or what has become known as a joint criminal enterprise (JCE), is also sufficient to establish criminal responsibility. The material element of a crime is satisfied if it can be proved that the accused participated together with other persons in an enterprise that involved the commission of a crime under ICL.³⁵⁵ The fact that an accused committed an international crime while in his or her official capacity has been held to be an aggravating factor for the purposes of sentencing upon conviction.³⁵⁶

The statutes and jurisprudence of the ICC and the other *ad hoc* international courts have further established the circumstances in which criminal liability may be excluded, many of

³⁵⁰ Rome Statute, Art 25(3)(a)

³⁵¹ For the irrelevance of official capacity, see Rome Statute, Art 27

³⁵² For more on the scope of individual criminal responsibility see for example ICTY Statute, Art 7(1); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted 8 November 1994, ('ICTR Statute'), Art 6(1); Rome Statute, Art 25(3). See Antonio Cassese, 'International Criminal Law' in Malcolm D Evans, *International Law* (2nd edn, Oxford University Press 2006), 733

³⁵³ See for example Rome Statute, Art 28; International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, entered into force 23 December 2010, Art 6

³⁵⁴ See generally, Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 236–252

³⁵⁵ There are three forms of JCE: JCE 1 (co-perpetratorship), where all co-defendants acting pursuant to a common design possess the same criminal intention in relation to the crimes committed within the enterprise; JCE 2 (system cases), where diverse crimes are committed by the participants of the enterprise in an organised criminal system and all are held liable for the crimes committed within that system; and JCE 3 (extended JCE), where all accused participating in the enterprise are liable for crimes that may be considered natural and foreseeable consequences of the enterprise, even if the crimes were outside the common plan. See Archbold *International Criminal Courts*, 873–887, and Allison M Danner and Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 California Law Review 75

³⁵⁶ Antonio Cassese, 'International Criminal Law' in Malcolm D Evans, *International Law* (2nd edn, Oxford University Press 2006), 735

which are also found in national criminal laws. For example, an accused may have complete defence (of the whole alleged crime) to criminal liability on the grounds of mental incapacity (insanity);³⁵⁷ involuntary intoxication;³⁵⁸ self-defence, defence of others or defence of property;³⁵⁹ where the accused was acting under duress or out of necessity.³⁶⁰ Some defences that can be raised by the accused are not complete defences but rather may be raised to undermine one of the elements that the prosecution needs to prove beyond reasonable doubt. These types of defence include: mistake of fact or law;³⁶¹ or 'consent' in sexual offences. Similarly, if the accused can raise reasonable doubt as to any of the particular elements of each crime as set out in the ICC's Elements of Crime, then they will not be found guilty of that offence. It is important to note that, except where it is expressly set out within the elements,³⁶² 'military necessity' is not a defence to an international crime.

The limited defence of 'superior orders' is controversial. The Rome Statute takes a narrow view of when 'superior orders' may be raised as a defence by an accused. Article 33(1) of the Rome Statute allows the defence of superior orders only where:

- (a) the person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) the person did not know the order was unlawful; and
- (c) the order was not manifestly unlawful.

This defence cannot be raised in relation to charges of genocide or crimes against humanity.³⁶³ As outlined above, the person giving the order may also be criminally responsible whether or not this defence applies.³⁶⁴

Certain high-ranking government officials and heads of State have also been granted immunity from indictment, arrest and prosecution under ICL. Historically, there were two types of immunity from prosecution available to such officials under international law: functional and personal. Functional immunities protect State agents indefinitely in relation to the acts that they carry out in their official capacity. Personal immunities apply only to a very limited number of government officials, such as heads of State, heads of governments and foreign ministers, but apply to all private acts as well as those carried out in an official capacity for as long as the individual is in office.³⁶⁵

³⁵⁷ Rome Statute, Art 31(1)(a)

³⁵⁸ *ibid*, Art 31(1)(b). Voluntary intoxication is only a defence when the accused did not know that they were likely to commit the alleged crime.

³⁵⁹ *ibid*, Art 31(1)(c)

³⁶⁰ *ibid*, Art 31(1)(d)

³⁶¹ *ibid*, Art 32(1) and (2). Mistake of law is not the same as an ignorance of the law—it is relevant only to those crimes that require the prosecution to prove a particular mental element, for example, that a person took property from another *knowing it was not their property*. In such a case, a mistake as to the legal ownership of the property may be a defence. This example is cited in Robert Cryer and others (n344), 415

³⁶² For example, in some offences listed in Rome Statute, Art 8(2)

³⁶³ *ibid*, Art 33(2)

³⁶⁴ Robert Cryer and others (n344), 417

³⁶⁵ Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 302–304

The scope of such immunities from prosecution is being eroded.³⁶⁶ It is now accepted as customary international law that functional immunities cannot apply to international crimes.³⁶⁷ Additionally, personal immunity may only protect senior State officials accused of international crimes before national courts, and only for as long as they remain in office.³⁶⁸ Recent judgments have established that senior State officials are no longer able to rely on the claim of personal immunity from prosecution for international crimes before international courts.³⁶⁹ Similarly, ICL does not permit limitation periods or amnesty laws that may limit the prosecution of international crimes.³⁷⁰

The prohibition on immunity from prosecution for international crimes is also explicitly stated in numerous international treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention Against Torture. Immunity from prosecution is also directly prohibited in the statutes of the ICTY and ICTR,³⁷¹ and in the Rome Statute.³⁷² The Rome Statute also obliges States Parties to amend their national legislation to remove,³⁷³ or allow the circumvention of, any immunity provisions relating to crimes over which the ICC would have jurisdiction.³⁷⁴ For officials of those States that have not ratified the Rome Statute, their personal immunities under traditional international law persist, unless an indictment is authorised by the UNSC under Article 13(2) and (3) of the Rome Statute.³⁷⁵

³⁶⁶ *ibid*, 305–314

³⁶⁷ *ibid*, 305–308

³⁶⁸ Immunity no longer applies once a person ceases to be an incumbent head of State or representative of a State: *ibid*, 304

³⁶⁹ This was set out in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Reports 2002, 14 February 2002, para 61

³⁷⁰ See for example Rome Statute, Art 29. However, statutes of limitation or amnesty laws may exist at the domestic level.

³⁷¹ ICTY Statute, Art 7(2) and ICTR Statute, Art 6(2). In these statutes the ability to invoke personal immunity is not expressly excluded; however, from the wording of the provision it has been widely acknowledged that personal immunity cannot be invoked to prevent a prosecution occurring. See also Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 311; Antonio Cassese, 'International Criminal Law', in Malcolm D Evans, *International Law* (2nd edn, Oxford University Press 2006), 734

³⁷² Rome Statute, Art 27 (2); see also the Appeals Chamber decision of 6 May 2019 in *The Prosecutor v. Omar Hassan Ahmad Al Bashir* regarding the Jordan referral, ICC-02/05-01/09-397-Corr.

³⁷³ Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 314; Art 88 Rome Statute provides for the implementation of national legislation to ensure that the State can honour its obligations under the Rome Statute

³⁷⁴ See Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press 2003), 139; Note that this is what France had to do, its constitutional court declaring that the removal of immunities would be unconstitutional.

³⁷⁵ See the indictment of Sudanese President Omar Al-Bashir. Sudan is not a signatory to the Rome Statute and is not bound by its provisions, including Art 27(2), which prevents immunities from being a bar to prosecution for acts committed in an official capacity. However, the Security Council authorised the indictment of Al-Bashir under Chapter 7 of the UN Charter, pursuant to Art 13(a) of the Rome Statute, thereby engaging the full regime of the ICC and ensuring that Al-Bashir cannot rely upon personal immunity; see also the Appeals Chamber decision of 6 May 2019 in *The Prosecutor v. Omar Hassan Ahmad Al Bashir* regarding the Jordan referral, ICC-02/05-01/09-397-Corr.

2.4.5 Enforcement of International Criminal Law

Unlike in a domestic criminal justice system equipped to deal with violations of national penal law, in the international criminal legal system there is no single mechanism for the prosecution and punishment of individuals who commit international crimes. This raises issues of accountability and impunity.

As previously discussed, both international and national courts may have jurisdiction over international crimes. Often this jurisdiction is concurrent, but the rules on which court should take precedence have varied.

States should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty law.

States must ensure that they fully implement any legal obligations they have assumed to institute criminal proceedings against persons with respect to whom there is credible evidence of individual responsibility for serious crimes under international law if they do not extradite the suspects or transfer them for prosecution before an international court.

The *ad hoc* international courts have exerted primacy over the respective domestic courts in the prosecution of international crimes under their jurisdiction—particularly where it appears to the *ad hoc* court's prosecutor that there may be a lack of impartiality, independence or diligence, or the domestic proceedings are designed to shield the accused from international criminal responsibility.³⁷⁶ Given that it was always intended that these *ad hoc* courts would exist only for a limited time, in the case of the ICTY, cases are now being transferred back to the national authorities for prosecution before their respective domestic courts.³⁷⁷

In contrast, the ICC operates according to the principle of 'complementarity'.³⁷⁸ The ICC has jurisdiction over international crimes considered the 'most serious crimes of concern to the international community as a whole'.³⁷⁹ However, the ICC's jurisdiction is complementary to that of domestic courts and thus it can exercise its jurisdiction only where the relevant State is unable or unwilling to prosecute. Therefore, the primary responsibility for the investigation and prosecution of international crimes rests with a State's domestic courts. In the words of the Preamble to the Rome Statute, 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.³⁸⁰

³⁷⁶ See Rules of Procedure and Evidence of the ICTY, Rule 9, Rules of Procedure and Evidence of the ICTR, Rule 8

³⁷⁷ See for example, Rules of Procedure and Evidence of the ICTY, Rule 11 and the Completion Strategy of the ICTY.

³⁷⁸ For further discussion of the principle of complementarity, see Mark Ellis, 'Principle of Complementarity in Contemporary International Criminal Justice' and Frederica Gioia, 'Ten Years of the International Criminal Court and Complementarity "in Bonam Partem"', both in Andraž Zidar and Olympia Bekou (eds), *Contemporary Challenges for the International Criminal Court* (BIICL 2014).

³⁷⁹ According to the Rome Statute, Art 1, these are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

³⁸⁰ Rome Statute, Preamble, para 6

Under the terms of the Rome Statute, the ICC is only authorised to exercise its jurisdiction over the crimes under its jurisdiction pursuant to Article 7 of the Rome Statute, including genocide, war crimes, crimes against humanity, and aggression, thereby overriding a State's sovereignty and its domestic courts, in limited circumstances. Two conditions are required: firstly the unwillingness or inability of a State's domestic courts to investigate and prosecute; secondly, the requirement that the case is of sufficient gravity to justify the involvement of the ICC. Additionally, the ICC may not exercise its jurisdiction over a person who has already been acquitted or convicted for the same crimes, provided the trial was conducted fairly and properly.³⁸¹

The ICC binds States from the date they ratified the Rome Statute and there can be no derogation from or reservation to the terms of the Statute itself. However, some States have issued declarations in relation to specific articles.³⁸² Non-State parties have also sought agreements with States Parties in relation to the application of the Rome Statute on non-State party nationals.³⁸³

2.4.6 The Relationship between International Human Rights Law, International Humanitarian Law and International Criminal Law

The relationship between IHRL and IHL is addressed above. This section will address the relationship of ICL with both IHL and IHRL.

There is significant substantive overlap between the three regimes. IHL and ICL share common sources of substantive law (including the Geneva Conventions and Additional Protocols) and are mutually reinforcing regimes. Many of the crimes set out in ICL are based on, or identical to, the provisions of IHL. For example, Article 8 of the Rome Statute, setting out war crimes, draws its entire content from IHL and, in Article 8(2)(c), it specifically refers to Common Article 3 of the Geneva Conventions. Further, IHL is a regime that does not have its own judicial mechanisms; therefore, effective implementation of IHL is often dependent on the clarification and application of the law through the jurisprudence of ICL courts. For example, the 'grave

³⁸¹ Rome Statute, Arts 15, 17, 18 and 19. For a more detailed discussion, see Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 342-350. It could also be argued that an additional condition exists, namely that the ICC should exercise its jurisdiction only where there is no *ad hoc* regional court or tribunal with a mandate to investigate and prosecute the crimes.

³⁸² For a full list of the Declarations and Reservations of all States Parties, see the Status Page of the Rome Statute in the online United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en>

³⁸³ A notable example relates to Art 98(2) of the Rome Statute, prohibiting the ICC from requesting surrender or assistance from a State Party that would be in breach of that party's obligations under international law. This includes treaty obligations. The United States of America has concluded over one hundred bilateral immunity agreements with States Parties, which ensure that Americans cannot be surrendered to the ICC from the territory of a State Party where such an agreement is in place: see David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent' (2005) 3 *Journal of International Criminal Justice* 333

breaches' regime of IHL³⁸⁴ relies on both national legal mechanism and those of ICL for its enforcement. However, the substantive nature of the two areas of law is not identical. The ICC, for example, has jurisdiction over only 'the most serious crimes of international concern',³⁸⁵ and, consequently, only those most serious breaches of IHL fall into the category of war crimes or crimes against humanity. On the other hand, the ICC has jurisdiction over a number of war crimes in NIAC, which is not expressly provided under the IHL treaties.

Substantive overlap between the content of ICL and IHRL exists, but is less clear. Many crimes against humanity, war crimes, or conduct which may form part of the elements of genocide may be equally prohibited by IHRL and ICL, such as torture, although these crimes are not explicitly linked to IHRL treaty sources, as they are with IHL. Nevertheless, some ICL courts have identified the substantive overlap between ICL and IHRL and have sought to rely on IHRL jurisprudence in interpreting particular crimes³⁸⁶ or to supplement gaps in their own jurisprudence.³⁸⁷ However, this reliance on IHRL jurisprudence by ICL courts has not yet been reciprocated by IHRL.

Despite this substantive overlap, the three regimes remain distinct from each other, particularly in their object and purpose. IHRL is concerned primarily with the conduct of States and State responsibility and constraining exercises of State power, whereas ICL is concerned only with the criminal liability of individuals. The two types of responsibility are entirely distinct and a finding of responsibility for a violation in one regime does not necessarily give rise to liability under the other regime. The courts mandated to apply and enforce IHRL do not have jurisdiction to ascribe individual liability, whereas many of the principles they have developed relating to the treatment of individuals, for example ensuring fair trial in criminal courts, are highly relevant to the operation and procedure of ICL courts. IHL, on the other hand, is concerned with restraining the behaviour of both States and individuals and contributes substantively to both areas of law.

However, despite the obvious closeness of ICL and IHL, they have overlapping but distinct objects and purposes. IHL defines the rules which regulate conflict, its main aim being to alleviate the conditions of victims of armed conflict, and this aim is pursued through a number of mechanisms, including reciprocity, practicality and the text of IHL itself, which represents the delicate balance between humanity and necessity. The post-conflict enforcement of its provisions, through the processes of ICL, is only one of the ways in which IHL seeks to improve the

³⁸⁴ Those breaches of the Geneva Conventions and Additional Protocols identified as 'grave breaches' constitute war crimes under IHL: First Geneva Convention, Art 50; Second Geneva Convention, Art 51; Third Geneva Convention, Art 130; Fourth Geneva Convention, Art 147; Additional Protocol I, Art 85; Additional Protocol II, Art 11

³⁸⁵ Art 1 Rome Statute, Art 1

³⁸⁶ See *Prosecutor v Ferdinand Nahimana et al*, ICTR-99-52-T, 3 December 2003, paras 88-90: in which the Court relied heavily on IHRL 'free speech' jurisprudence in order to establish the content and scope of the crime 'incitement to genocide'.

³⁸⁷ See, for example, the ICTY Cases: *Prosecutor v Anto Furundžija*, IT-95-17/1-T, 10 December 1998; *Prosecutor v Dragoljub Kunarac et al*, IT-96-23-T & IT-96-23/1-T, 22 February 2001; *Prosecutor v Zdravko Mucić et al*, IT-96-21-T, 16 November 1998

humanity of conflict. ICL, on the other hand, has a far narrower focus: defining the substance and procedure of when and how violations of IHL (and IHRL) can give rise to individual criminal responsibility.

It is clear from this discussion that the relationship between the three areas of law is complex and far less structured than the relationship between IHL and IHRL, discussed above. Nevertheless, it is vital to understand the interactions between these international legal regimes in the context of education-related violations in situations of insecurity and armed conflict. Therefore, the next three chapters will examine closely three key aspects of the international legal regimes: the right to education; the protection of students and education staff; and the protection of educational facilities.

3

Protection of Education

This chapter sets out the international legal protection of the right to education under IHRL and how that right applies in situations of insecurity and armed conflict. It also sets out how education generally is protected under IHL and ICL, and the relationship between those three regimes in relation to education.

3.1 INTERNATIONAL HUMAN RIGHTS LAW

This section examines how IHRL supports and protects the fulfilment and enjoyment of the right to education in situations of insecurity and armed conflict. While this section focuses on the right to education, some other rights that affect education in such situations will also be considered to a limited extent in this section. As mentioned in Chapter 2, all human rights are interrelated and interdependent. This means that the right to education is often necessary for the realisation of other human rights, such as the right to work, rights to freedom of expression and of association, and to access health services. Education can thus be considered as a ‘key to unlock other human rights’,³⁸⁸ crucial to the realisation of other human rights and of democratic societies in general.³⁸⁹ Similarly, in order for the right to education to be realised, other human rights must also be realised, such as the protection of the family, which is responsible for the care and education of dependent children, the protection of children from economic and social exploitation, and the right to an adequate standard of living (including food, clothing and housing). While some of these rights are introduced in this section, most are discussed in Chapters 4 and 5.

This section starts with the international human rights framework before discussing the existing regional human rights frameworks: the African, Inter-American and European systems. It concludes with some considerations of the existing human rights frameworks which are applicable to Arab states and to the South East Asian region. It is worth noting that many States in the Asia-Pacific region do not benefit from any supranational human rights framework. Most of the relevant case law emerging from the frameworks presented in this Chapter can be found in Chapter 6.

³⁸⁸ Katarina Tomasevski, *Education Denied: Costs and Remedies* (Zed Books 2003), 32

³⁸⁹ Klaus D Beiter (n95), 3

3.1.1 Protection under the International Human Rights Framework

General Principles

Following the affirmation of the importance of human rights in the United Nations Charter, three major international human rights instruments were subsequently adopted:

- UDHR;³⁹⁰
- ICCPR; and
- ICESCR.³⁹¹

As noted in Chapter 2, the UDHR is an aspirational document which, although non-binding *per se*, is widely accepted and even considered by some as part of customary international law or as containing provisions which are part of customary international law. In fact, the UDHR was the basis on which several binding human rights treaties were later developed, including the two Covenants. Both Covenants are binding international law treaties for its States Parties, which must not only abide by the obligations contained in them but also have to provide regular reports on the measures taken to implement these rights.³⁹²

The UDHR first enshrined the right to education at the universal level and is thus the source of the binding right to education, as enshrined as a legally binding right in the ICESCR and other international instruments. According to Article 26 UDHR:

- (1) [E]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- (3) Parents have a prior right to choose the kind of education that shall be given to their children.³⁹³

Article 26 must be read along with Article 2 UDHR, which sets out the principle of non-discrimination:

³⁹⁰ Universal Declaration of Human Rights, adopted 10 December 1948, includes the purpose and content of education, which was added in a later draft (in 1947). The concept of compulsory education was retained, but only for children and only at primary level, and in 1951 UNESCO affirmed the wide acceptance of the concept of universal compulsory education. Note also that parental choice was added to the UDHR to balance the powers of States.

³⁹¹ Both the ICCPR and the ICESCR were adopted in 1966 and entered into force in 1976.

³⁹² As Chapter 6 explains, States parties must report, for example, to the HRCCommittee with regard to the ICCPR and to the CESCRC with regard to the ICESCR.

³⁹³ The UDHR was adopted by the UNGA on 10 December 1948.

[E]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The principle of non-discrimination and equality is a general principle of IHRL which is essential to the exercise of and enjoyment of all human rights, including the right to education. It is also enshrined in the Charter of the United Nations,³⁹⁴ the ICESCR and the ICCPR,³⁹⁵ as well as all the major international human rights treaties.³⁹⁶ Furthermore, the CESCR has commented on the principle of non-discrimination, underlining that it is an ‘immediate and cross-cutting obligation’ for States Parties to the ICESCR.³⁹⁷ As a result, States’ constitutions and other legal and policy texts must not contain any form of discrimination, and States must also ensure that non-discrimination is applied in practice.

The principle of non-discrimination and equality is particularly important for the realisation of the right to education. Indeed, before the right to education was even adopted in the Covenants, a specific treaty was adopted to prohibit discrimination in education: the CDE.³⁹⁸ Article 4 of this Convention provides for States Parties to ‘make primary education free and compulsory’ and other levels of education to be available and/or accessible to all. In addition, it states that standards of education must be similar no matter in which institution it is provided. It also specifically notes that rights of national minorities must be protected.³⁹⁹ Providing education in

³⁹⁴ See the UN Charter, Preamble, Art 1 para .3, and Art 55

³⁹⁵ Art 2(1), 3 and 26 ICCPR; Art 2(2) and 3 ICESCR

³⁹⁶ See, in addition, the Convention relating to the Status of Refugees, adopted 28 July 1951, entered into force on 22 April 1954, Art 3; the Convention relating to the Status of Stateless Persons, adopted 28 September 1954, entered into force 6 June 1960, Art 3; the International Convention on the Elimination of All Forms of Racial Discrimination, adopted 7 March 1965, entered into force 4 January 1969, 1965; the Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, entered into force 3 September 1981; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, Art 1; the CRC 1989, Art 2; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted 18 December 1990, entered into force 1 July 2003, Art 7; and the Convention on the Rights of Persons with Disabilities 2006, Art 5; International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, entered into force 23 December 2010 Art 1(1)

³⁹⁷ CESCR General Comment 20, para 7

³⁹⁸ Convention against Discrimination in Education, adopted 4 December 1960, entered into force 22 May 1962

³⁹⁹ CDE, Art 5; See also ILO Convention 169 on Indigenous and Tribal Peoples, adopted 27 June 1989, entered into force 5 September 1991, Art 31, which states that ‘[E]ducational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples’. See also the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted 18 December 1992, and the *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007

a non-discriminatory manner also means that States must provide ‘equality of opportunity and treatment for all in education’.⁴⁰⁰ The Special Rapporteur on the Right to Education has stated that the prohibition against discrimination aims not only at addressing the barriers to accessing education, but also addressing those factors that impair success once in school. She distinguishes between equity and equality, providing that equality refers to treating all students the same while equity is providing all students with what they need to succeed. States must adopt equitable approaches in the sense that they should address barriers by pursuing equitable and inclusive approaches to ensuring that individual learners receive the support they require to succeed. States must also realise inclusive education by ensuring that all learners, regardless of their circumstances, are provided the same learning environment so that students can learn together in a welcoming and supportive environment.⁴⁰¹

The Right to Education as a Legally Binding Human Right

The right to education enshrined in the UDHR became a legally binding right with the adoption of the ICESCR. Its Article 13 provides that:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or

⁴⁰⁰ See the Preamble to CDE. Consideration of some specific groups is given below.

⁴⁰¹ Koumbou Boly Barry, *Report of the Special Rapporteur on the right to education – Inclusion, equity and the right to education*, 29 September 2017, A/72/496, 29 September 2017, para 19, 25–26

approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

In accordance with the general principle of non-discrimination and equality, the right to education provided for in the ICESCR reiterates that everyone possesses this right and thus that primary education must be compulsory and available free to all and that other levels of education must also be available and/or accessible to all on an equal basis. The definitions of education are set out in Chapter 1.

This provision also highlights the liberty of parents to choose the education of their children, providing this education conforms to minimum educational standards, a liberty which is also affirmed in the ICCPR. Article 18(4) ICCPR states that '[T]he States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.

With regard to parents, Article 10 ICESCR obliges the State to protect the family unit, which is responsible for the education of dependent children. As a result, although the right to education *per se* starts at the primary school level, the ICESCR recognises that the education of children starts at home, before they attend primary school, and before and after the school day. In relation to the protection of the home, Article 12 ICESCR provides for the right to adequate standards of living. These standards are not limited to housing, but extend to food and clothing, elements which are all necessary to ensure the healthy development of children before, and in parallel with, the school system.

The CRC also guarantees the right of children to education and largely reflects the content of the provisions contained in the ICESCR, with a few additions, such as providing for measures in order to encourage regular attendance at schools.⁴⁰² This Convention is applicable to children, being 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.⁴⁰³ Article 29 paragraph 1 of the CRC states that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

⁴⁰² CRC, Arts 28 and 29, in particular Art 28(1)(e). All UN members have ratified the CRC, except for the United States and Somalia, which have only signed it, and South Sudan which has neither signed nor ratified the CRC.

⁴⁰³ *ibid*, Art 1

- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

The Committee on the Rights of the Child highlighted the importance of a 'qualitative dimension' to the right to education, meaning that education should be available to all whilst also being of a sufficient quality, and 'the need for education to be child-centred, child-friendly and empowering'.⁴⁰⁴

The Right to Education and Development

In addition to the above mentioned international treaties and declarations providing for the right to education, there are a number of additional international instruments which, although non-binding for the States that have adopted them, are helpful in defining further the relevance and scope of the right to education, in particular with regard to development. These may assist in interpreting the legal obligations attached to the right to education, as well as give directions for the evolution of the law or for law reform.⁴⁰⁵

Some of these instruments have a specific focus on education, such as the 1990 *World Declaration on Education for All* (also known as the 'Jomtien Declaration') which refers to the educational opportunities required to meet basic learning needs.⁴⁰⁶ These include:

⁴⁰⁴ Committee on the Rights of the Child General Comment 1, para 2. The Committee also stated that this Art 29 adds to Art 28 CRC, which states that:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

⁴⁰⁵ CESCR, General Comment 13, para 5: The CESCR has maintained that '[t]hese new elements are implicit in, and reflect a contemporary interpretation of article 13 (1)'.

⁴⁰⁶ The World Declaration on Education for All and the Framework for Action to meet Basic Learning Needs, adopted in Jomtien (Thailand) in 1990 by representatives from 155 States, <www.unesco.org/education/pdf/JOMTIE_E.PDF>

essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.

The Jomtien Declaration marked the beginning of global policy making with the *Education for All (EFA) movement*, and made education a ‘need’ rather than a ‘right’.⁴⁰⁷ The EFA process was initiated by the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’), and in 2000, the Dakar Conference led to the *Dakar Framework for Action*, whereby 164 States pledged to achieve EFA goals and targets by 2015, which included primary education for all girls and boys.⁴⁰⁸

Other international commitments, while also not directly (or entirely) focused on education, contain provisions on education given its importance for international development in general. Similar to the EFA goals, one of the eight Millennium Development Goals (‘MDG’), also adopted in 2000, was the achievement of universal primary education for boys and girls.⁴⁰⁹ This goal, like the other MDG and the EFA goals, was meant to be reached by 2015. The MDGs have now been replaced by the SDGs,⁴¹⁰ which includes Goal 4 on ‘Quality Education’ which seeks to ‘[E]nsure inclusive and equitable quality education and promote life-long learning opportunities for all’. One of the targets of Goal 4 is that ‘by 2030, all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes’. While the MDG was to provide free and compulsory primary education for boys and girls, this has been extended in the SDG’s as states must additionally guarantee universal, free, quality secondary education for all, as well as primary education.⁴¹¹ With regard to education facilities, SDG 4 underlines the need to ‘build and upgrade education facilities that are child, disability and gender sensitive and provide safe, non-violent, inclusive and effective learning environments for all’. In addition, a number of other SDGs are also relevant, such as Goal 5 on ‘Gender Equality’, Goal 11 which includes the provision of a safe and peaceful environment, and Goal 16 on ‘Peace, Justice and Strong Institutions’, which includes targets regarding the reduction of all forms of violence (in particular with regard to children) and equal access

⁴⁰⁷ Klaus D Beiter (n95), 2

⁴⁰⁸ The Dakar Framework for Action, ‘Education for All: Meeting our Collective Commitments’ (2000) <<https://unesdoc.unesco.org/ark:/48223/pf0000121147>>; UNESCO, ‘Education: Education for All Movement’ <<http://www.unesco.org/new/en/archives/education/themes/leading-the-international-agenda/education-for-all/>>; Note also that the Dakar Conference was criticised for adopting similarly vague terms and choosing low common denominators, see Katarina Tomasevski (n388), 3

⁴⁰⁹ These development goals (and their associated targets) are based on the UN *Millennium Declaration*, 8 September 2000, UNGA Resolution 55/2

⁴¹⁰ The SDGs for the period 2015–2030 and their targets are available at <<https://sustainabledevelopment.un.org/sdgs>>

⁴¹¹ *Report of the Special Rapporteur on the Right to Education, Koumbou Boly Barry: Governance and the right to education*, 18 June 2018, A/HRC/38/32, para 35; *Report of the Special Rapporteur on the Right to Education, Koumbou Boly Barry – Inclusion, equity and the right to education*, 29 September 2017, A/72/496, para 23; *Report of the Special Rapporteur on the Right to Education: Realizing the Right to Education through Non-Formal Education*, 2 June 2017, A/HRC/35/24, para 3

to justice for all. Thus, in case of education-related violations, victims must receive adequate and prompt reparations in order to redress the educational harm they suffered as a result of these violations.⁴¹² The *Incheon Declaration and Framework for the Implementation of Sustainable Development Goal 4* (Incheon Declaration) reaffirms the commitment to access to ‘quality life-long learning opportunities for all, in all settings and at all levels of education’.⁴¹³ Significantly, the Incheon Declaration notes:

with serious concern that a large proportion of the world’s out-of-school population live in conflict-affected areas, and that crises, violence and attacks on education institutions, natural disasters and pandemics continue to disrupt education and development globally. We commit to developing more inclusive, responsive and resilient education systems to meet the needs of children, youth and adults in these contexts, including internally displaced persons and refugees. We highlight the need for education to be delivered in safe, supportive and secure learning environments free from violence. We recommend a sufficient crisis response, from emergency response through to recovery and rebuilding; better coordinated national, regional and global responses; and capacity development for comprehensive risk reduction and mitigation to ensure that education is maintained during situations of conflict, emergency, post-conflict and early recovery.⁴¹⁴

The Special Rapporteur on the Right to Education has called for the SDGs and the Incheon Declaration to be implemented through a governance framework that is ‘broad, encompassing anything which relates to ruling or controlling the education system’,⁴¹⁵ including, but not limited to, ‘the laws, policies, institutions, administrative procedures and practices, monitoring and accountability mechanisms, and judicial procedures to address violations, as they relate to the education system’.⁴¹⁶ The Special Rapporteur also states that the ‘guidance provided by the four “A”s shed further light on how rights-based education practices should be designed’.⁴¹⁷

Another international commitment that has given importance to education is the action plan *Agenda 21*, the outcome of the 1992 United Nations Conference on Environment and Development, which cites improved access of the poor to education as one of the factors necessary to combat poverty.⁴¹⁸ Among a number of references to education, Agenda 21 also stresses the importance of providing girls with equal access to education in order to strengthen women’s role in sustainable development.⁴¹⁹

⁴¹² See Chapter 6

⁴¹³ Incheon Declaration and Framework for the Implementation of Sustainable Development Goal 4, <<https://unesdoc.unesco.org/ark:/48223/pf0000245656>>, 8

⁴¹⁴ *ibid*, 9

⁴¹⁵ *Report of the Special Rapporteur on the Right to Education, Koumbou Boly Barry: Governance and the Right to Education*, 18 June 2018, A/HRC/38/32, <<https://www.ohchr.org/EN/Issues/Education/SREducation/Pages/AnnualReports.aspx>>, paras 3 and 14

⁴¹⁶ *ibid*, para 15

⁴¹⁷ *ibid*, para 109

⁴¹⁸ Section 1, Chapter 3 of Agenda 21, adopted by more than 178 governments at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 3–14 June 1992.

⁴¹⁹ Section 3, Chapter 24 of Agenda 21

Another example is the *Durban Declaration on Sport, Education and Culture*, adopted in 2010, which underlines the role of sport in educating young people. The Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security highlight the essential role of education with regard to sustainable development and the importance of providing primary education to all, including girls.⁴²⁰

The Right to Education and Human Rights Education

Other instruments mention education in relation to education about, and of, human rights. This is the case with the 1993 *Vienna Declaration and Programme of Action*, which provides that education on human rights is crucial for the promotion and respect of all human rights (and thus of the right to education itself) and that it should be integrated in education policies at the national and international levels.⁴²¹ The *Plan of Action for the United Nations Decade for Human Rights Education*, operational between 1995 and 2004,⁴²² includes both ‘human rights through education’⁴²³ and ‘human rights in education’,⁴²⁴ defining human rights education as ‘education, training and information aimed at building a universal cultural of human rights’. Thus education should not only provide knowledge of what human rights are, but also develop the necessary skills to ‘promote, defend and apply’ these rights.⁴²⁵ The *World Programme for Human Rights Education* was initiated by the United Nations General Assembly (‘UNGA’) in 2005, which builds on the achievements of the United Nations Decade for Human Rights Education. The first phase of the World Programme was dedicated to the integration of human rights education in the primary and secondary school systems’.⁴²⁶ The second phase, operational between 2010 and 2014, ‘was focused on human rights education in higher education and human rights training for teachers and educators, civil servants, law enforcement officials and military personnel at all levels’.⁴²⁷ The third phase, operational between 2015 and 2019, was ‘devoted to strengthening the implementation of the first two phases and promoting human rights training for media professionals and journalists’.⁴²⁸ The fourth phase is ongoing, with youth being the focus group, and ‘with special emphasis on education and training in equality,

⁴²⁰ Guideline 11 on ‘Education and awareness raising’ of the *Voluntary Guidelines*, adopted by the Food and Agriculture Organization Council in November 2004, <www.fao.org/3/y7937e/y7937e00.pdf>

⁴²¹ UNGA, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, <www.unhcr.org/refworld/docid/3ae6b39ec.html>, para 33.

⁴²² UNGA, *Plan of Action for the United Nations Decade for Human Rights Education*, 12 December 1996, A/51/506/Add.1, <daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/51/506/Add.1&Lang=E>

⁴²³ *ibid*, in its Section 2, it states that ‘all the components and processes of education—including curricula, materials, methods and training’ must be ‘conducive to the learning of human rights’.

⁴²⁴ *ibid*, Section 2: ‘human rights of all members of the school community’ must be respected.

⁴²⁵ *ibid*, Section 1

⁴²⁶ UNGA, *Plan of Action for the Third Phase (2015–2019) of the World Programme for Human Rights Education, Report of the Office of the United Nations High Commissioner for Human Rights*, 4 August 2014, A/HRC/27/28, para 10 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/099/55/PDF/G1409955.pdf?OpenElement>>

⁴²⁷ *ibid*, para 11

⁴²⁸ *ibid*, para 12

human rights and non-discrimination, and inclusion and respect for diversity with the aim of building inclusive and peaceful societies', and with aim of aligning 'the 2030 Agenda for Sustainable Development and specifically with target 4.7 of the Sustainable Development Goals'.⁴²⁹

Additionally, in 2011 the *United Nations Declaration on Human Rights Education and Training* was adopted. It provides that 'every individual and every organ of society shall strive by teaching and education to promote respect for human rights and fundamental freedoms'.⁴³⁰ This Declaration further recognises that the effective enjoyment of the right to education enables access to human rights education and training, and that human rights education and training is a lifelong process that concerns all ages.⁴³¹ It also provides that UN and international and regional organisations should provide human rights education and training to military and police personnel serving under their mandate.⁴³²

The Committee on the Rights of the Child, in General Comment 17 on the 'Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts', mention human rights training and the fact that education staff must be informed about the human rights of children.⁴³³

The Content of the Human Right to Education

The components of the right to education may be identified through the so-called 'four As' framework, which reflects the framework of the right to education.⁴³⁴ According to this framework, the right to education should consist of the following interrelated and essential features:

1. Availability
2. Accessibility
3. Acceptability
4. Adaptability

⁴²⁹ UNGA, *World Programme for Human Rights Education*, 3 October 2018, A/HRC/RES/39/3, para 3 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/293/75/PDF/G1829375.pdf?OpenElement>>

⁴³⁰ *United Nations Declaration on Human Rights Education and Training*, 19 December 2011, A/RES/66/137, preamble <[www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/UnitedNationsDeclarationonHumanRightsEducationandTraining\(2011\).aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/UnitedNationsDeclarationonHumanRightsEducationandTraining(2011).aspx)>

⁴³¹ *ibid*, Arts 1(3) and 3(1)

⁴³² *ibid*, Article 11

⁴³³ Committee on the Rights of the Child, General Comment No. 17 (2013) on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (Art. 31), 17 April 2013, CRC/C/GC/17 <www.refworld.org/publisher/CRC/GENERAL/51ef9bcc4,0.html>, para 58 (h); See also Article 31 of the CRC for the right of the child to rest and leisure, to engage in play and recreational activities.

⁴³⁴ This framework was developed by the Commission on Human Rights, see Katarina Tomasevski, *Annual Report of the Special Rapporteur on the Right to Education*, UN Doc E/CN.4/1999/49, paras 51–74; Katarina Tomasevski, *Annual Report of the Special Rapporteur on the Right to Education*, E/CN.4/2000/6, paras 32–65; Katarina Tomasevski, *Annual Report of the Special Rapporteur on the Right to Education*, E/CN.4/2001/52, paras 64–77, and Katarina Tomasevski, *Annual Report of the Special Rapporteur on the Right to Education*, E/CN.4/2002/60, paras 22–45

While this framework is not universally accepted, it has become a standard that is often used by the CESCR, the Office of the High Commissioner for Human Rights ('OHCHR') and ESCR advocates in general.⁴³⁵ The HRC has recently urged states to give full effect to the right to education by addressing issues of availability and accessibility, but also quality and equality in education.⁴³⁶ It is also a useful tool to understand the various facets that this right entails in practice.

The CESCR applies the four As framework in a broad manner as it stated that they 'are common to education in all its forms and at all levels'.⁴³⁷ This framework is used in this Handbook to analyse the content of education in all its forms and at all levels.⁴³⁸

The CESCR has also used this framework when considering a State's obligations, as it has stated that:

In relation to article 13 (2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.⁴³⁹

The CESCR has thus reasserted States as the duty-bearers of the right to education and their obligation to respect, protect and fulfil the core components of the right to education, as a consequence of State obligations as discussed in Chapter 2. The CESCR also reiterates that education must be both quantitative and qualitative, for example by stating in respect of the latter that it must be culturally appropriate for the minorities and Indigenous groups concerned. As analysing the right to education through the four As framework assists with the understanding of the content of the right to education, the section below presents each of the four concepts

⁴³⁵ Also, the HRC, though not using the exact 4A terminology, has urged states to give full effect to the right to education by addressing issues of availability and accessibility, in particular by ensuring quality and equality in education, see HRC Resolution, 22 June 2017, A/HRC/RES/35/2, para 2

⁴³⁶ HRC Resolution, 22 June 2017, A/HRC/RES/35/2, para 2

⁴³⁷ CESCR General Comment 13, para 8

⁴³⁸ Note that 'affordability' has been suggested as a possible fifth core component to the right to education. However, as affordability may be linked to accessibility, it will not be looked at separately. 'Accountability' is also sometimes suggested as a core component; however, as accountability is a general component that may be associated with any human right, it will not be considered in this section. However, bringing accountability for education-related violations is very important, and is a vital part of Chapter 6 below.

⁴³⁹ CESCR General Comment 13, para 50

as they have been defined by the CESCR and the Special Rapporteur on the Right to Education (the ‘SR’). While these components are presented separately, they are interrelated, as, for example, what is presented under ‘availability’ may also be an issue of accessibility. The section below also includes some considerations as to how these components may be affected in situations of insecurity or conflict.⁴⁴⁰

Availability

Availability refers to the general obligation of states to establish schools or allow the establishment of schools. States must also ensure that free and compulsory education is available to all at the primary level.⁴⁴¹ According to the CESCR, ‘functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party’.⁴⁴² However, the availability of functioning educational institutions and programmes may depend on the current situation of the State and may take into account economic or developmental setbacks. As a minimum, the CESCR identifies the following basic requirements: ‘[B]uildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials’.⁴⁴³

The facilities required to fulfil this component depend also of the stage of development of the State in question. In more developed States, other facilities, such as libraries and computer facilities, may be required to fulfil this component.⁴⁴⁴ These basic requirements with regard to educational facilities will be further developed in Chapter 5.

Accessibility

Accessibility may be divided into three characteristics:

- non-discrimination,
- economic accessibility, and
- physical accessibility.

Education should, firstly, be accessible to all without discrimination on any of the prohibited grounds. In addition, economic accessibility refers to the fact that education has to be affordable. This is defined differently at various levels of education. As expanded upon below, the ICESCR and the CRC both call for free primary education and the progressive implementation of free education at the secondary and higher education levels. States have to secure free access to primary education as this is also a requirement to render attendance at the primary level

⁴⁴⁰ *ibid*; also the 2000 Report of the Special Rapporteur on Education

⁴⁴¹ Katarina Tomasevski (n388), 51

⁴⁴² CESCR General Comment 13, para 6(a)

⁴⁴³ *ibid*

⁴⁴⁴ *ibid*

compulsory. States must also take all possible measures to render post-primary education levels progressively free for all.⁴⁴⁵

States may associate fees with the access to secondary and higher education levels if these fees support the availability of post-primary education systems for all. However, such fees must not be prohibitive and/or bursaries must be available to those in need of financial support to avoid any discrimination based on financial capacity. Issues of affordability are not limited to the existence of school fees but also include those indirect costs which may affect the accessibility of education. Indirect costs may include expensive uniforms or compulsory levies on parents.⁴⁴⁶ They may also include the cost of food if school meals are not provided. Students who have fled violence or insecurity may find themselves in situations of extreme poverty and such educational costs may have a large impact on whether they attend school.⁴⁴⁷ In contrast, if certain basic need items are provided free of charge at school, in particular food through meals programmes, school attendance may be increased (and absenteeism reduced) in these difficult contexts.

In addition to being economically accessible, education has to be also physically accessible, meaning that ‘education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (i.e., a neighbourhood school) or via modern technology (i.e., access to a “distance learning” programme)’.⁴⁴⁸ Physical accessibility may be particularly challenged during periods of insecurity and armed conflict. Not only can violence and attacks destroy schools, but they may also render the travel of students and education staff to and from school more hazardous.⁴⁴⁹ As a consequence, the obligation of States to ensure the physical accessibility of schools extends to transport.⁴⁵⁰ If, due to safety considerations, students and education staff cannot travel to and from school, special measures, including distance education programmes or local school antennae/satellites, are necessary to ensure continued accessibility. Another aspect of physical accessibility is that the implementation of policies on access to education shall support the principle of equality and not discriminate against any group, including persons with disabilities or foreign nationals. In fact, accessibility for displaced and refugee children in particular may be affected by provisions that restrict access only to those who fulfil certain legal status requirements.⁴⁵¹ Furthermore, in accordance with the principle of reasonable accommodation, which is set out later in this chapter, positive measures must be taken by States to ensure that education is also accessible to persons with disabilities.

⁴⁴⁵ While the infrastructural and developmental capacities of the respective State may be taken into account when assessing what measures can be taken, international cooperation may assist States unable to take measures on their own.

⁴⁴⁶ CESCR, *General Comment 11, Plans of action for primary education*, 1999, E/C.12/1999/4, para 7

⁴⁴⁷ Vernor Muñoz, *Report of the Special Rapporteur on the Right to Education: Right to Education in Emergency Situations*, 20 May 2008, A/HRC/8/10, para 107 (‘Report of the Special Rapporteur Education (2008)’)

⁴⁴⁸ CESCR General Comment 13, para 6(b)(ii)

⁴⁴⁹ Report of the Special Rapporteur Education (2008), para 108: ‘children stated that they had to walk long distances to reach school and were afraid of being attacked by armed groups’.

⁴⁵⁰ Klaus D Beiter (n95), 489–490

⁴⁵¹ Report of the Special Rapporteur on Education (2008)

Acceptability

Acceptability refers to the relevance, cultural appropriateness and quality of the curricula and teaching methods. The acceptability requirements need to be set and enforced by States.⁴⁵² States must ensure that the norms set, and their protection, pertain not only to education curricula but also to teaching methods. It is also relevant for the teaching environment and respect for other rights, such as privacy, as well as for matters such as girl's sanitation.

Acceptability defines the content of education both negatively and positively. For example, a curriculum must not include messages encouraging hatred between peoples. Article 20 ICCPR provides for the prohibition of propaganda for war, as well as the prohibition of advocacy of national, racial or religious hatred which constitutes incitement to discrimination, hostility or violence. While derogating to certain human rights contained in the ICCPR is sometimes possible following a declaration of a state of emergency pursuant to Article 4 (1) ICCPR, see Chapter 2, such a situation may never be a valid ground for a State party to engage itself in this type of propaganda or incitement.⁴⁵³ This means that propaganda for war or armed conflict, or incitation to hatred through educational supports (books or educational programmes) or through the education personnel (a teacher's speech, for example) is never possible, even in a state of emergency.⁴⁵⁴ Teaching methods must also not allow any form of violence, such as corporal punishment, an education-related violation which is prohibited under IHRL.⁴⁵⁵

Thus, as mentioned above, States have not only the obligation to provide for education but also the obligation to provide for an education that is in accordance with other human rights, such as the prohibition of discrimination. The content of education is thus an extremely important element, as providing individuals with an education that is contrary to human rights may in fact be more detrimental to a society than not providing for any education. While the content of education must not violate other human rights provisions, it must also be in accordance with the sensibilities and cultures of the population concerned. As a result, acceptability may also be said to define positively what education should contain. IHRL has developed this characteristic particularly in relation to the development of Indigenous and minority rights. The CESCR highlighted the need for culturally appropriate educational content for groups at risk of exclusion, such as minorities and Indigenous peoples.⁴⁵⁶

In situations of insecurity and armed conflict, there is a high risk of neglecting the vigilant oversight of acceptability standards. Although oversight may not be able to attain usual or normalised standards, it does not mean that no oversight must occur. This oversight (but not the State's international legal obligations) may even be assumed by actors other than those traditionally carrying such tasks.

⁴⁵² Katarina Tomasevski (n388), 51

⁴⁵³ See the discussion above on derogation of ICCPR and the HRCCommittee General Comment.

⁴⁵⁴ This is discussed in more details in Chapter 4.1.4, where the limitations on the right to freedom of expression is discussed, including in relation to academic freedom.

⁴⁵⁵ CRC, Art 19, which requires States to protect children from 'all forms of physical or mental violence'. This was interpreted by the Committee on the Rights of the Child as including the protection from all corporal punishment. This is discussed in Chapter 4.1.3 in relation to the prohibition on ill-treatment.

⁴⁵⁶ CESCR General Comment 13, para 50

Adaptability

Adaptability refers to the need for schools to adapt to each child. Hence it refers to the flexibility of education to respond to the ‘needs of changing societies and communities’, including the need to adapt to current knowledge and latest scientific standards, and ‘to the needs of students within their diverse social and cultural settings’.⁴⁵⁷ In accordance to the CRC, the best interests of each child are paramount.

In a situation of insecurity adaptability would require, for example, a rapid resumption of educational activities and reintegration of children after an attack on the school or other security-related school closure.⁴⁵⁸ Adaptive programmes in such contexts may also include education about conflict resolution, disaster risk reduction, civic education (or citizenship competencies). These would give students tools with which to handle the different challenges in insecurity or conflict situations.

State Obligations with regard to the Right to Education

The general international legal obligations on States are set out in Chapter 2, as well as the specific approach to obligations under the ICESCR. In relation to the right to education, States have both positive obligations towards individuals, such as the provision of free and compulsory primary education, and negative obligations, such as the prohibition on interfering with an individual’s choice of school, whether public or private for example; in 2019, the Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education (Abidjan Principles) were adopted by a group of independent experts in order to assist States in addressing the challenges brought by private education providers through ten overarching principles.⁴⁵⁹ States also have immediate obligations, including non-discrimination in the provision of education, and obligations to take steps immediately towards the full realisation of the right, such as access to higher education. Thus States have a continuous obligation with regard to the right to education as soon as they are party to a treaty protecting it, which entails taking all necessary measures to achieve the full realisation of this right as expeditiously as possible.

Under the ICESCR, as discussed in Chapter 2, the right to education must be achieved to the maximum of a State’s available resources through an effective use of these resources.⁴⁶⁰ Situations of insecurity and armed conflict may limit the availability of such resources and thus affect a State’s ability to realise fully and effectively the right to education using its own national resources. However, ‘available resources’ refer not only to the resources that have been allocated

⁴⁵⁷ *ibid*, para 6(d)

⁴⁵⁸ Report of the Special Rapporteur on Education (2008), paras 135–136

⁴⁵⁹ Katarina Tomasevski (n388), 36, according to whom the right to education provides for both entitlements and prohibitions and thus it can be considered as both ‘positive’ and ‘negative’; The Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education (Abidjan Principles 2019) <<https://abidjanprinciples.org/>>.

⁴⁶⁰ ICESCR, Art 2(1). See also CRC, Art 4

by a State to realise this right, but to all the resources which could be allocated to realise this right, no matter their provenance. This includes resources that are directly available within a State's national resources (which may need reallocating from, for example, military expenditure), as well as resources that are indirectly available through the assistance and cooperation of the international community.

In addition to the obligation to take immediate steps towards the full realisation of the right to education, States may have an immediate obligation to meet some of the minimum core obligations of the right to education. The CESCR has stated:

In its General Comment 3, the Committee confirmed that States Parties have “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels” of each of the rights enunciated in the Covenant, including “the most basic forms of education”. In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards” (Art.13(3) and (4)).⁴⁶¹

These minimum core obligations correspond to the essential elements of the right to education, without which the right in question loses its substance (or ‘*raison d’être*’). If States do not meet the minimum core obligations, they are in breach of their treaty obligations.

One minimum core obligation is the provision of primary education.⁴⁶² As a result, primary education must be given continued priority, even in times of economic or other constraints.⁴⁶³ The compulsory nature of primary education highlights ‘the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education’.⁴⁶⁴ As mentioned above in the discussion on the accessibility component of the right to education, no charges must be attached to the access to primary education, whether such costs are direct or indirect, such as ‘compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform’⁴⁶⁵ or costly school meals. In addition, within two years of the entry into force of the ICESCR in the State concerned,⁴⁶⁶ a detailed plan of action to secure the right to education has to be adopted, even when resources are lacking.⁴⁶⁷

⁴⁶¹ CESCR General Comment 13, para 57

⁴⁶² ICESCR, Art 13(2)(a); CRC, Art 28(1)(a); UDHR, Art 26. As already mentioned, this was also one of the eight MDGs that world leaders committed to achieving by 2015.

⁴⁶³ According to CESCR General Comment 11, para 3: ‘Severe fiscal hardship does not avail states of obligation to work towards the elaboration of a plan of action for primary education’.

⁴⁶⁴ CESCR General Comment 11, para 6

⁴⁶⁵ *ibid*, para 7

⁴⁶⁶ ‘or within two years of a subsequent change in circumstances which has led to the non-observance of the relevant obligation’, see the CESCR General Comment 11, paras 8 and 10

⁴⁶⁷ CESCR General Comment 11, paras 8–9

In addition, a minimum core obligation of the right to education is that States parties have the obligation to establish a comprehensive educational strategy for secondary, higher and fundamental education. Such a plan would need to require that '[t]he development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved'.⁴⁶⁸ An educational system needs to be developed as a whole and include educational facilities, qualified teachers and educational materials. This strategy would also have to, in accordance with Article 13(2)(b) require that secondary education, 'including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education'.⁴⁶⁹ Thus secondary education must be available to all throughout the territory of a state and must not depend 'on a student's apparent capacity or ability'.⁴⁷⁰ In order to provide secondary education, states should use 'every appropriate means', meaning any innovative approach that may be best suited to a particular social or cultural context.⁴⁷¹

Under Article 13(2)(c), the strategy would need to require that tertiary education 'be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education'.⁴⁷² As a result, tertiary education does not have to be made 'generally available' by a State, but only 'on the basis of capacity'. Capacity should be determined in accordance with 'relevant expertise and experience'.⁴⁷³ However, in order to reach equal representation at all levels of education, temporary special measures should be taken by States in order to support attendance of under-represented groups at higher levels of education. This could mean, for example, the introduction of quotas for certain groups at risk of being under-represented, such as women or Indigenous peoples.⁴⁷⁴

Finally, in respect of the inclusion of basic (or 'fundamental') education within the strategy, this would need to 'be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education'.⁴⁷⁵ Given the fact that this type of education may also be an important element of adult education and life-long learning, specific age-appropriate programmes and delivery systems must be developed.⁴⁷⁶

⁴⁶⁸ ICESCR, Art 13(2)(e). CESCR General Comment 13, para 25: '[T]he requirement that the "development of a system of schools at all levels shall be actively pursued" means that a State Party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels, but the Covenant requires States Parties to prioritize primary education (see para 51). "[A]ctively pursued" suggests that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour'.

⁴⁶⁹ ICESCR, Art 13(2)(b)

⁴⁷⁰ CESCR General Comment 13, para 13

⁴⁷¹ *ibid*

⁴⁷² ICESCR, Art 13(2)(c). Note that the CRC, with its corresponding Art 28(1)(c) stating 'Make higher education accessible to all on the basis of capacity by every appropriate means', does omit terms such as 'progressive introduction of free education' and 'equally'.

⁴⁷³ CESCR General Comment 13, para 19

⁴⁷⁴ See, for example, *Concluding Observations of the Committee on the Elimination of Discrimination against Women in regard to Germany*, 2009, CEDAW/C/DEU/CO/6, paras 33–34

⁴⁷⁵ ICESCR, Art 13(2)(d). See also CESCR General Comment 13, para 23

⁴⁷⁶ CESCR General Comment 13, para 24

Technical and vocational education and training, as an essential component for the realisation of the right to work, also needs to be part of secondary and tertiary education.⁴⁷⁷ Note, however, that informal education is not mentioned in the relevant general comments of the CESCR.⁴⁷⁸

According to the non-binding Maastricht Guidelines already mentioned in Chapter 2, the minimum core obligations ‘apply irrespective of the availability of resources of the country concerned or any other factors and difficulties’.⁴⁷⁹ However, the CESCR has stated that resource constraints must be taken into account when assessing a State’s failure to satisfy its minimum core obligations. States must then show that all efforts have been made to prioritise the use of available resource to meet these obligations.⁴⁸⁰ Some minimum core obligations may be immediate, for example, the obligation not to discriminate in the provision of education. But not all minimum core obligations necessarily are, such as the provision of primary education to all on a free and compulsory basis. The minimum core obligation to provide free and compulsory primary education to all is specified to be of an immediate nature within General Comment 13.⁴⁸¹ However, the nature of a state’s obligation with respect to primary education is overstated, as Article 14 of the ICESCR provides for its progressive realisation.⁴⁸² The minimum core obligations concept is useful as it facilitates the States determination as to how to prioritise their resources. Namely, States must prioritise the minimum core obligations of the right to education over the non-core obligations. Prioritisation must, of course, take into account the need to satisfy everyone’s subsistence requirements and to provide essential services.⁴⁸³ Minimum core obligations are also particularly crucial for education because they cannot be derogated from or limited in situations of insecurity or armed conflict.⁴⁸⁴

Finally, ‘any deliberately retrogressive measures [from the State’s obligations] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’.⁴⁸⁵ In fact, even during periods of constraints due to ‘a process of adjustment, of

⁴⁷⁷ ICESCR, Art 6(2): ‘[T]he steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual’. See also art 13(2)(b) which mentions secondary education ‘in all its forms’, as well as CESCR *General Comment 18 on the Right to Work*, 2005, E/C.12/GC/18; ICESCR, Art 6, in particular para 14, which underlines the importance of education and vocational training to promote and support access to employment for young people, particularly women.

⁴⁷⁸ Informal educational settings, such as the home, are not the object of this book.

⁴⁷⁹ *Maastricht Guidelines*, paras 9–10. See also the non-binding *Limburg Principle on the Implementation of the ICESCR*, 2–6 June 1986.

⁴⁸⁰ CESCR General Comment 3, para 10

⁴⁸¹ General Comment 13, para 51

⁴⁸² Klaus D Beiter (n95), 390

⁴⁸³ See for example *Limburg Principle 28*

⁴⁸⁴ For a discussion of derogations and limitations, see Chapter Two.

⁴⁸⁵ CESCR General Comment 31, *The nature of States parties’ obligations*, 1990, para 9

economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes'.⁴⁸⁶

3.1.2 Protection of Education under Regional Human Rights Frameworks

The regional human rights treaties and standards adapt the principles of the key international instruments to meet the socio-economic, developmental, traditional and cultural nuances of the regions.

While the following section focuses on the right to education, there are other regional human rights provisions which are related to the right to education. Human rights are interrelated and interdependent at the regional level in the same way as they are at the international level. They are discussed in Chapter 4 in relation to the protection of students and education staff.

African Human Rights Framework

Over the last two decades, the African Union (AU), preceded by the Organization of African Unity (OAU), has developed several key human rights instruments.⁴⁸⁷ Education features prominently in all of them, whether it be the right to education *per se* or the recognition of the importance of education for the realisation of other human rights.

African Charter on Human and Peoples' Rights

Adopted in 1981 and entered into force five years later, the ACHPR⁴⁸⁸ has been ratified by all 54 member states of the AU.⁴⁸⁹ It incorporates in one text all CPR and ESCR present in the major international human rights instruments, conceptualizing these rights and obligations through a distinctly regional lens. A novel aspect of the Charter is the elaboration of individual duties that are incumbent upon the people.⁴⁹⁰ The ACHPR rejection of the bifurcated structure

⁴⁸⁶ General Comment 31, para 12

⁴⁸⁷ These instruments recognise the particular experiences and challenges faced by African nations and their peoples. See, for instance, ACHPR, preamble, paras 3, 4, 5 and 8; ACRWC, preamble, paras 3 and 5. The OAU focused on the process of decolonisation and liberation, and the defence of newly acquired African sovereignty. See Gino J Naldi, 'Future Trends in Human Rights in Africa: The Increased Role of the OAU', in Malcolm D Evans and R Murray (eds), *African Charter on Human and Peoples' Rights: The System in Practice: 1986–2000* (Cambridge University Press 2002), 2, 3, 35. Since the end of the decolonisation process, African States have engaged in the human rights dialogue, making good governance, the rule of law and human rights central to the AU's objectives.

⁴⁸⁸ *African (Banjul) Charter on Human and Peoples' Rights*, 27 June 1981, entered into force 21 October 1986, CAB/LEG/67/3

⁴⁸⁹ African Union, 'List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights' <www.achpr.org/instruments/achpr/ratification/>

⁴⁹⁰ Found in Chapter II of the Charter. Discussed at Makau W Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339

of IHRL (between civil and political rights on one hand, and economic, social and cultural rights on the other) has been described as ‘a truly indivisible and interdependent normative framework, addressing all rights equally in the same coherent text’.⁴⁹¹ As such, the right to education enjoys the same status as any other right in the ACHPR.

Article 17 of the ACHPR provides for the right to education:

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 17 leaves open to interpretation the content of the right, both in terms of its scope and the duties upon the State to ensure the realization of the right. For example, it does not expressly guarantee the protection of compulsory and free education. However, the Pretoria Declaration on Economic, Social and Cultural Rights in Africa has elaborated on Article 17 stating that it entails the ‘provision of free and compulsory basic education that will also include a programme in psycho-social education for orphans and vulnerable children’.⁴⁹² This Declaration also states that special schools and facilities must be provided for children with disabilities. It further provides that secondary and higher education, as well as vocational training and adult education, must be accessible and thus affordable. The need to address obstacles to girls’ access to education is also highlighted.

The African Commission on Human and People’s Rights has stated it is concerned about the negative impact of internal conflicts, political crisis and instability in some African countries on the realisation of the right to education and has called on States to ‘[p]rovide the enabling environment for all persons to be educated, as well as ensure safety of schools for all children’.⁴⁹³

African Charter on the Rights and Welfare of the Child

The ACRWC⁴⁹⁴ was designed to complement the CRC by addressing the specificities of the

⁴⁹¹ Chidi Anselm Odinkalu, ‘Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples’ in Malcolm D Evans and Rachel Murray (eds), *African Charter on Human and Peoples’ Rights: The System in Practice: 1986–2000* (Cambridge University Press 2002), 192. For a comparative analysis of regional human rights regimes and their adoption or rejection of the bifurcated structure of human rights discourse, see James Mouangue Kobilu, ‘Comparative Practice on Human Rights: North-South’ in Jean-Marc Coicaud, Michael W Doyle and Anne-Marie Gardener (eds), *The Globalization of Human Rights* (United Nations Publications 2002), 93.

⁴⁹² Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004), <www.achpr.org/instruments/pretoria-declaration/>, which is a non-binding agreement.

⁴⁹³ African Commission on Human and Peoples’ Rights, Resolution on the Right to Education in Africa, 2016, ACHPR/Res. 346 (LVIII), at (ii)

⁴⁹⁴ African Charter on the Rights and Welfare of the Child, 1990, entered into force 29 November 1999, CAB/LEG/24.9/49

rights of children in the African context.⁴⁹⁵ Adopted in 1990, it entered into force in 1999,⁴⁹⁶ and is applicable to children, i.e. individuals under the age of 18, being the same age threshold as provided for in the CRC.⁴⁰⁷ The right to education is more extensive in the ACRWC than it is in the ACHPR. Article 11, for example, provides for ‘free and compulsory basic education’,⁴⁰⁸ the need to take specific measures for ‘female, gifted and disadvantaged children to ensure equal access to education’,⁴⁹⁹ and the protection of parental liberty in choosing their children’s education.⁵⁰⁰

The ACRWC defines the functions of education rather differently from the CRC, highlighting the regional perspective of this instrument, as it states that education shall preserve and strengthen, for example, ‘African morals, traditional values and cultures, ... national independence and territorial integrity, ... African Unity and Solidarity’.⁵⁰¹ With regard to matters such as literacy and equipping children with the skills necessary for life and work, the ACRWC is not as clear as the CRC. Furthermore, Article 11(2)(b) and (d) underline the role of education in the understanding and advancement of human rights.

In contrast to the ACHPR, the ACRWC provides a more practical standard for assessing the realization or violation of the right to education. As the ACRWC is intended to complement rather than supersede the obligations set forth in CRC, it may be appropriate to read Article 11 ACRWC alongside Article 28 of the CRC in order to assess the regional right to education contained within the African human rights regime.

Other relevant provisions of the ACRWC include Article 3 on the principle of non-discrimination; Article 12 on leisure, recreation and cultural activities; and Article 13(2) on the rights of children with disabilities, that obliges States Parties, subject to available resources, to ‘ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development’.

Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women

⁴⁹⁵ *ibid*, preamble, para 8; see Gino J Naldi, ‘Future Trends in Human Rights in Africa: The Increased Role of the OAU’, in Malcolm D Evans and R Murray (eds), *African Charter on Human and Peoples’ Rights: The System in Practice: 1986–2000* (Cambridge University Press 2002), 14–17; Dejo Olowu, ‘Protecting Children’s Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child’ (2002) 10 *International Journal Children’s Rights* 127, 128

⁴⁹⁶ For the current number of members of the AU having ratified the Convention, see the African Union, ‘List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child’, <https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf>

⁴⁹⁷ ACRWC, Art 2

⁴⁹⁸ *ibid*, Art 11(3)(a)

⁴⁹⁹ *ibid*, Art 11(3)(e)

⁵⁰⁰ *ibid*, Art 11(4)

⁵⁰¹ *ibid*, Art 11 (2)

(Maputo Protocol)⁵⁰² consolidates the rights of women of all ages, including female children, building upon the existing African provisions found in the ACHPR and the ACRWC. It entered into force in November 2005.⁵⁰³ Education has a prominent place in the Protocol, which includes the negative impact of behaviour, attitudes and practices upon the fundamental right of women and girls to education. Such behaviour, attitudes and practices are clearly defined as ‘harmful practices’ and there is an obligation on States to commit themselves to modifying ‘cultural patterns of conduct of women and men’ through education.⁵⁰⁴ The key provision on the right to education and training can be found in Article 12. Among other measures, this Article highlights the principle of non-discrimination against women, which must also apply to the content of educational material which shall not perpetuate stereotypes.⁵⁰⁵ It also reiterates the prohibition of all forms of abuse, including ‘sexual harassment in schools and other education institutions’.⁵⁰⁶

African Youth Charter

Classifying ‘youths’ as persons between the ages of 15 and 35 years, the African Youth Charter⁵⁰⁷ recognises the importance of quality education and the value of all educational formats including non-formal, informal, distance learning and life-long learning.⁵⁰⁸ It also expresses particular concerns regarding ‘illiteracy and poor quality educational systems’.⁵⁰⁹ Other relevant provisions include Article 15 on sustainable livelihoods and youth employment, which limits the kind of work that a young person can perform to work that is not hazardous to his or her education, and which recognises the importance of the realization of the right to education as a requisite to the realization of the right to gainful employment. Article 23 on girls and young women builds on the Maputo Protocol by addressing the need to eliminate discrimination against women and emphasizing the role of education in eradicating discrimination.

Despite the rather low number of ratifications of the Youth Charter in comparison with the numbers of ratifications of other African human rights treaties, this instrument is particularly

⁵⁰² Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted 1 July 2003, entered into force 25 November 2005 (‘Maputo Protocol’)

⁵⁰³ As of 1 April 2019, it has been ratified by 36 member States of the AU, with four States having neither signed nor ratified the Protocol: see the African Union, List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, <<http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf>>

⁵⁰⁴ Maputo Protocol, Art 1(g) and Art 2(2)

⁵⁰⁵ Art 12(1)(b)

⁵⁰⁶ Art 12 (1)(c)

⁵⁰⁷ African Youth Charter, adopted 2 July 2006, entered into force 8 August 2009. As of 1 April 2019, the Charter has so far been ratified by 38 member states of the AU: see the African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Youth Charter <https://au.int/sites/default/files/treaties/7789-sl-african_youth_charter_1.pdf>

⁵⁰⁸ Education and Skills Development, Art 13, in particular paras 1 and 2

⁵⁰⁹ African Youth Charter, preamble, para 11

relevant as it contains precise and comprehensive provisions with regard to the right to education. However, unlike the ACRWC and the ACHPR, the African Youth Charter does not provide for the establishment of a mechanism through which compliance can be monitored and advanced.

Convention for the Protection and Assistance of Internally Displaced Persons in Africa

The AU adopted this Convention (also called the Kampala Convention) on 22 October 2009. States Parties shall ‘provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services, and where appropriate, extend such assistance to local and host communities’.⁵¹⁰

Although this treaty is not yet in force, any State which has signed it (or exchanged instruments constituting the treaty) or expressed its consent to be bound by the treaty pending its entry into force, is obliged to refrain from acts which would defeat its object and purpose, in accordance with international law.⁵¹¹

Inter-American Human Rights Framework

American Declaration on the Rights and Duties of Man

The American Declaration on the Rights and Duties of Man, which includes the right to education, was adopted in 1948. It is not legally binding and provides for the right to education at its Article XII:

Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.

The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merits and the desire to utilize the resources that the state or community is in a position to provide.

Every person has the right to receive, free, at least a primary education.⁵¹²

Article XXXI of the Declaration further states that ‘it is the duty of every person to acquire at least an elementary education’.⁵¹³ Other relevant provisions include Article II on the right to equality and equal enjoyment of rights and duties and, importantly, Article XXVIII on the scope

⁵¹⁰ Art 9(2)(b)

⁵¹¹ VCLT, Art 18

⁵¹² Art XII; Klaus D Beiter (n95), 205: the first two paras outline the aims of education. With ‘the liberation of the individual in the first, and his socialization in the second paragraph’.

⁵¹³ *ibid*, 205

of the rights of man, which provides that the ‘rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy’. As the organ which promotes and protects human rights in the Americas, the IACHR monitors the human rights situation within the territory of the Members of the Organization of American States (OAS) and thus monitors observance of the provisions of the American Declaration.⁵¹⁴ This is important, as it means that those States that are members of the OAS but are not parties to the ACHR, such as the United States of America, have presumably been monitored by the Commission for their compliance with the Declaration.

Charter of the Organization of American States (‘Pact of Bogota’)

Similarly to the American Declaration, the Charter of the OAS, also adopted in 1948, places education at the heart of the Organization’s founding principles, with Article 3(n) affirming that ‘the education of peoples should be directed toward justice, freedom, and peace’. Equally, education is viewed as central to the objective of integral development, namely the ‘economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved’.⁵¹⁵ Describing the basic objectives of integral development as being ‘equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development’, Article 34 identifies ‘the rapid eradication of illiteracy and expansion of educational opportunities for all’ as key goals to achieve those objectives.⁵¹⁶

Article 48 additionally provides for the obligation for interstate cooperation to facilitate States collectively meeting their educational, scientific, technological and cultural needs. The main source of obligation under the Charter with regard to the right to education is Article 49, which provides for availability and accessibility of the different levels of education.⁵¹⁷ The prominence with which education features in the Charter suggests that the member States view education

⁵¹⁴ In one case so far, the Commission had to decide whether Art XII had been violated by a member of the OAS. This case, in which the IACommHR decided that the State’s action violated the right to equality of opportunity in education under Art XII, is discussed further in Chapter 6. Klaus D Beiter (n95), 206

⁵¹⁵ Charter of the Organization of American States, adopted 30 April 1948, entered into force on 13 December 1951, Art 30

⁵¹⁶ Art 34(h). See also Art 47, which states that: ‘[T]he Member States will give primary importance within their development plans to the encouragement of education, science, technology, and culture, oriented toward the overall improvement of the individual, as a foundation for democracy, social justice, and progress’.

⁵¹⁷ Art 49 states that ‘The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:

- a) Elementary education, compulsory for children of school age, shall also be offered to all other who can benefit from it. When provided by the State it shall be without charge;
- b) Middle-level education shall be extended progressively to as much of the population as possible with a view to social improvement. It shall be diversified in such a way that meets the development needs of each country without prejudice to providing a general education; and
- c) Higher education shall be available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met.’

as a key means by which to realise the aims and objectives of the OAS. With the Charter emphasizing the role of education in the economic, social and cultural development of all member States of the OAS, education remains at the forefront of governmental and inter-governmental attention. As a result, a number of mechanisms, organizations, agencies, committees and subcommittees have been established, all operating at different levels and focusing specifically on the issue of education (see Chapter 6).

American Convention on Human Rights

Adopted in November 1969 and entering into force nine years later, the ACHR, which is also known as the Pact of San Jose, has been ratified by 25 States in the region.⁵¹⁸ In contrast to the OAS Charter and the American Declaration, the ACHR does not contain an explicit reference to the right to education. Whereas under the ECHR and its Additional Protocols (as discussed below), the right of parents to provide for their child's religious or moral education in a manner that accords with their own convictions is a part of the protection of the right to education,⁵¹⁹ the ACHR places this right of the parent within Article 12 on the right to freedom of conscience and religion.⁵²⁰

Note that, according to Article 27 ACHR, a State may take measures derogating from a number of its obligations under the Convention in 'time of war, public danger, or other emergency' if such situation threatens its independence or security. As with the ICCPR, this general derogation clause contains a number of exceptions to which no derogation is ever possible, such as the right to life or the prohibition on ill-treatment.⁵²¹

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights

While the ACHR does not include specific provisions on ESCR, its Additional Protocol ('AP ACHR'), also known as the Protocol of San Salvador, deals specifically with such issues, including the right to education at Article 13. It was adopted in 1988 and entered into force in 1999, having now been ratified by 16 States.

The right to universal, compulsory and free elementary education, which is provided for under Article 13(3)(a) of the AP ACHR, is reaffirmed in Article 16 with regard to the rights of children, which states that '[e]very child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the education system'. Other relevant provisions include Article 6(2) on the right to work, which obliges the State to take measures to make the right to work fully effective, including 'vocational guidance, and the

⁵¹⁸ The United States of America has only signed it, eight States have neither signed nor ratified it, and Trinidad and Tobago has denounced it <www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm#23>; See Chapter 6 for a discussion of the IACtHR.

⁵¹⁹ First Additional Protocol, Art 2

⁵²⁰ Art 12(4)

⁵²¹ See Art 27(2) for the list of exceptions.

development of technical and vocational training projects, in particular those directed to the disabled'. Thus a broad understanding of the term 'education' is used, going beyond formal education and including adult education, even into the workplace. In accordance with the discussion on State's obligations, non-discrimination and equality form a part of this right.⁵²²

Inter-American Democratic Charter

Adopted by the General Assembly of the OAS in 2001,⁵²³ the Inter-American Democratic Charter, a non-binding instrument, seeks to reaffirm the commitment to, and strengthening of, representative democracy within the Americas.⁵²⁴ Furthermore, it 'identifies democracy with a set of integral values and rights', which include respect for and enjoyment of human rights.⁵²⁵ Its Article 16 highlights the role of education in 'strengthening democratic institutions, promoting the development of human potential, and alleviating poverty and fostering greater understanding among our peoples. To achieve these ends, it is essential that a quality education be available to all, including girls and women, rural inhabitants and minorities'.

European Human Rights Framework

The most prominent European institutions with legislative and judicial functions in the field of human rights are the Council of Europe and the European Union (EU). The Council of Europe, founded in 1949, adopted the ECHR in 1951.

Although there was a lack of reference to human rights in the original EU treaties, EU law has gradually evolved to protecting fundamental rights as 'part of the very foundations of the Community legal order'.⁵²⁶ The Charter of Fundamental Rights of the European Union ('CFR'), proclaimed in 2000, provides the EU with a written catalogue of rights which became legally binding under the Treaty of Lisbon 2009.

European Convention on Human Rights

The ECHR entered into force in September 1953, but did not originally contain any specific

⁵²² See also Art 3 on the obligation of non-discrimination 'of any kind for reasons related to race, color, sex, language, religion, political other opinions, national or social origin, economic status, birth or any other social condition'. In a region where issues of Indigenous rights and minority rights take a prominent role in human rights discourse, the principle of non-discrimination, and as it is applied to the right to education, is particularly important. Note that Nicaragua made a declaration to the Protocol with regard to the right to education to confirm that, when interpreting the term 'disabled/handicapped', the State of Nicaragua understands and considers it to refer to the internationally-accepted understanding of 'persons with disability'.

⁵²³ Sitting in a special session.

⁵²⁴ Inter-American Democratic Charter, adopted 11 September 2001, 2

⁵²⁵ *ibid*

⁵²⁶ *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, 3 September 2008, para 304

provision on the right to education. However, Additional Protocol 1 ('A2P1 ECHR'), which came into force in May 1954, contains additional rights to those protected under the Convention, including the right to education at Article 2:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.⁵²⁷

Similarly to the ICCPR and the ACHR, Article 15 ECHR allows derogations for States parties from some of the rights enshrined in the ECHR 'in time of war or other public emergency threatening the life of the nation'. However, like the ICCPR and ACHR, it is never possible to derogate from certain rights, such as the right to life or the prohibition of torture.⁵²⁸ Any measures taken by States Parties pursuant to Article 15 are subject to the review of the ECtHR if a derogation is relied upon before the Court, with the Court judging whether a state of emergency exists, whether the measures taken were strictly required and whether the obligations of informing the Secretary General of the Council of Europe were abided by. Generally the Court has accepted the assessment of the State party relying on a derogation regarding the existence of a state of emergency.⁵²⁹ However, the Court has been more stringent in its review of the requirement that the measures taken were strictly necessary.⁵³⁰ To assess whether particular measures are necessary, the Court considers whether the derogations are necessary to cope with the threat, the proportionality of the measures and the duration of the measures.⁵³¹ States Parties thus have an option of derogating from many of the rights relevant to the realization of the right to education as well as from the right to education, as Article 15 also applies to A2P1.⁵³² However, the majority of derogations made to date have been in relation to the right to liberty and security (Article 5) and the right to fair trial (Article 6).⁵³³

A2P1 is framed in negative terms as a prohibition to deny any person the right to education rather than as a positive obligation as in all other human rights instruments.⁵³⁴ Nevertheless,

⁵²⁷ The Additional Protocol has been ratified by 45 out of the 47 Council of Europe members; Switzerland and Monaco have not ratified, <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p_auth=Yb7hwtIN>

⁵²⁸ See ECHR, Art 15(2), for the list of exceptions to the derogation clause.

⁵²⁹ Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (5th edn, Oxford University Press 2010), 118.

⁵³⁰ *Aksoy v Turkey*, Application No 21987/93, 18 December 1996; *A and others v United Kingdom*, Application No 3455/05, 19 February 2009.

⁵³¹ Bernadette Rainey, Elizabeth Wicks and Clare Ovey (n529), 119.

⁵³² Additional Protocol 1 ECHR, Art 5.

⁵³³ Bernadette Rainey, Elizabeth Wicks and Clare Ovey (n529), 113.

⁵³⁴ This negative construction of the first sentence is supported in the *travaux préparatoires* of the Protocol, see Klaus D Beiter (n95), 162, where it is noted that it was agreed that '[w]hile education is provided by the State for children, as a matter of course, in all member States, it is not possible for them to give an unlimited guarantee to provide education, as that might be construed to apply to illiterate adults for whom no facilities exist, or to types or standards of education which the State cannot furnish for one reason or another'.

this provision still contains a positive and enforceable right, although there is controversy over what this provision actually entails, such as whether it provides for a mere right of access to those educational systems that each State has decided to provide, or whether it should be construed to compel States to provide a substantive or effective level of education.⁵³⁵ In other words, does A2P1 merely guarantee procedural rights or can it be used to impose upon the domestic law of a signatory State a right of substance? The general view is that, once a decision has been taken by a State to provide facilities for the education of a certain group (e.g. adult illiterates), then A2P1, and the associated non-discrimination provisions under Article 14 ECHR, guarantee an equal and non-discriminatory right to access those facilities, and that those States that do not have such facilities are not required by A2P1 to establish them.⁵³⁶

The bulk of case law in the ECtHR has concerned the second sentence. The right of parents to ensure their children's education in conformity with their beliefs is also protected and must be read together with the first sentence.⁵³⁷ The case law on A2P1 is briefly presented in Chapter 6.

European Social Charter

The ESC, adopted in 1961, complements the ECHR by guaranteeing social and economic rights, including the right to education, as well as the rights to housing, health, employment, social and legal protection, and non-discrimination.⁵³⁸ In order to update some of the provisions in the Charter and to supplement the existing rights protected,⁵³⁹ the Charter was revised in 1996.⁵⁴⁰ The revised Charter includes the rights set out in the Charter and the 1988 Additional Protocol to the Charter,⁵⁴¹ with updates reflecting new standards, as well as additional rights not previously included in these instruments.⁵⁴²

⁵³⁵ See *Case Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium v Belgium*, Application No 1474/62, 23 July 1968; *A v Essex* [2010] UKSC 33

⁵³⁶ In any case, in 1954, all the parties signing up to A2P1 already had advanced systems of education and there was therefore no question of the Convention forcing them to develop such systems, though this may not apply to the newer State parties. See *Ali v The Governors of Lord Grey School* [2006] 2 AC 363

⁵³⁷ See Klaus D Beiter (n95), 160

⁵³⁸ The Charter was originally adopted in 1961. A Protocol adding further rights was adopted in 1988, while a revised version of the Charter, which updates and extends the rights protected, was adopted in 1996.

⁵³⁹ David Harris and John Darcy, *The European Social Charter* (2nd edn, Transnational Publishers 2001), 18

⁵⁴⁰ European Social Charter (Revised), adopted 3 May 1996, entered into force 1 July 1999. The revised Charter came into force in 1999 and is gradually replacing the initial Charter. The revised Charter has been signed by 47 members of the Council of Europe and ratified by 34 of those members.

⁵⁴¹ The 1988 Additional Protocol, which came into force in 1992, extends the rights guaranteed by Charter.

⁵⁴² It was 'designed progressively to take the place of the European Social Charter'. European Social Charter (revised) CETS No: 163, Preamble. From the date the obligations in the revised Charter enter into force for a State, the corresponding provisions of the Charter and, where appropriate, of its Additional Protocol, cease to apply to the party bound by those instruments. See European Social Charter (revised) CETS No: 163, Part III Art B

The right to education was not included in the 1961 Charter but has now been enshrined in Article 17 of the revised Charter. Article 17 provides:

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

- 1.a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
- b. to protect children and young persons against negligence, violence or exploitation;
- c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

The inclusion of the right to free primary and secondary education goes further than the protection previously given by the Council of Europe.⁵⁴³ While the Appendix to the revised Charter states that Article 17(2) does not require compulsory education up to the age of 18, the European Committee of Social Rights, which evaluates state compliance with the Charter and revised Charter, considers that education should be compulsory for a reasonable period until the minimum age for admission to employment.⁵⁴⁴ The revised Charter introduced a new right to education for those persons who live in poverty or social exclusion, requiring from States Parties the enforcement of a coordinated policy in the area.⁵⁴⁵

In addition, the education system must be both accessible and effective. The accessibility component of education is discussed earlier, under the 'four As' framework. In order to determine whether an education system is effective, the Committee considers whether there is a functioning system of primary and secondary education, the number of children enrolled in school, the number of schools, class sizes, the teacher to pupil ratio and the teachers' training programmes.⁵⁴⁶ In addition to the consideration of quantum data, the effectiveness of the education system must also be monitored through the quality of the education provided.⁵⁴⁷ Accessibility must be ensured through fair geographical distribution of schools, in addition to

⁵⁴³ Klaus D Beiter (n95), 175

⁵⁴⁴ Council of Europe Information Document prepared by the Secretariat of the ESC, 17 November 2006, 'The Right to Education under the European Social Charter', 2

⁵⁴⁵ Art 30(a)

⁵⁴⁶ Council of Europe Information Document prepared by the Secretariat of the ESC 17 November 2006, 'The Right to Education under the European Social Charter'. The Information Document outlines guidelines to help assess whether these requirements are met. It also states that '[S]chool drop-out rates and the number of children who successfully complete compulsory education and secondary education must also be monitored'.

⁵⁴⁷ *ibid*

the gratuity and the equal access to education for all children. In order to ensure education for all, particular attention should be paid to groups at risk of exclusion.⁵⁴⁸

The ESC also places significant emphasis on the right to vocational guidance under Article 9 and the right to vocational training under Article 10. Vocational guidance has to be promoted within both the school system and the labour market.⁵⁴⁹ It must be provided free of charge by qualified and sufficient staff and to a significant number of persons.⁵⁵⁰ Vocational training must be granted to everyone and consists of training at secondary and higher levels of education, apprenticeships and training of adult workers. The revised Charter introduced a new obligation regarding retraining and reintegrating the long-term unemployed.⁵⁵¹ This should be done free of charge or with reduced fees and with the granting of financial assistance in some circumstances. Vocational training is an important part of the educational system and represents an important link between education and employment.

The education of persons with disabilities is dealt with separately in Article 15(1) of the ESC, which applies to all persons with disabilities, regardless of their age and the nature or origin of the disability. The revised Charter extends the rights of people with disabilities to, inter alia, vocational training, to ensure the effective exercise by persons with disabilities of the right to independence, social integration and participation in the life of the community. All persons with disabilities are thus guaranteed general education, including basic compulsory education, further education, as well as vocational training. This must be done, as far as is possible, by integrating such persons into mainstream facilities, with special education being the exception rather than the rule.⁵⁵²

Article 7 of the ESC sets a number of conditions on children's working conditions which affect the realization of the right to education and vocational training, such as a minimum age for admission to employment and limited working hours for young persons.

While the preamble to the Charter states that social rights should be secured without discrimination, the revised Charter strengthens the protection against discrimination with a specific provision prohibiting discrimination.⁵⁵³

⁵⁴⁸ *ibid*

⁵⁴⁹ Council of Europe Information Document prepared by the Secretariat of the ESC, 17 November 2006, 'The Right to Education under the European Social Charter', 3, and Conclusions of the European Committee of Social Rights Conclusions XIV-2, Statement of Interpretation on Art 9, at 55

⁵⁵⁰ Council of Europe Information Document prepared by the Secretariat of the ESC, 17 November 2006, 'The Right to Education under the European Social Charter', 3

⁵⁵¹ Art 10(4)

⁵⁵² This is concurrent with Rule 6 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which states that '[S]tates should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings. They should ensure that the education of persons with disabilities is an integral part of the educational system'.

⁵⁵³ Art E; See David Harris and John Dancy, *The European Social Charter* (2nd edn, Transnational 2001), 21

The respective derogation provisions of the Charter and revised Charter allow for a member State to derogate from any of the provisions to which it is bound under either respective instrument “in time of war or other public emergency threatening the life of the nation”.⁵⁵⁴ However, it appears that to date no State has relied on the right to derogate.⁵⁵⁵ As a result, there is little elaboration regarding the content of this right. The annexes to the Charter and revised Charter do, however, state that the terms “in time of war or other public emergency” in the respective derogation provisions also cover the threat of war.

Each State party can decide as to which substantive rights set out in the ESC they will be bound. Yet States must accept a certain number of ‘core’ provisions of the ESC and must in addition be bound by a minimum number of rights set out in each respective instrument.⁵⁵⁶ Of the substantive rights analysed above, only Article 7 is included as a ‘core’ right in the ESC.⁵⁵⁷ However, a significant majority of States which have ratified the ESC have accepted to be bound by Article 17 of this instrument, and many States are also bound by the other substantive rights discussed above.

EU Charter of Fundamental Rights

The CFR, which came into full legal effect in the Treaty of Lisbon in December 2009, provides for the right to education. It enshrines into EU law certain fundamental rights for EU citizens and residents, meaning that EU Member States must act consistently with the Charter.⁵⁵⁸

⁵⁵⁴ Art 3 of the Charter and Art F of the revised Charter, which states that:

1. In time of war or other public emergency threatening the life of the nation any Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. Any Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefore. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

See the *Explanatory Report* to the European Social Charter (ETS No 163).

⁵⁵⁵ David Harris and John Dancy, *The European Social Charter* (2nd edn, Transnational 2001), 377; Digest of the Case Law of the European Committee of Social Rights, Council of Europe, 1 September 2008, 176 <www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf> No derogations are listed in the list of declarations relating to the Charter and revised Charter on the Council of Europe (see in respect of the Charter <<https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/035/declarations>> and in respect of the revised Charter <<https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/163/declarations>>)

⁵⁵⁶ Part III, Art A of the revised Charter and Part III, Art 20 of the Charter; See also the Revised Charter, Part III, Art B, which indicates that a State Party to the Charter or the 1988 Additional Protocol must, to be able to become party to the revised Charter, consider itself bound by at least the provisions of the revised Charter corresponding to the provisions of the Charter and, where appropriate, the Additional Protocol, to which it was already bound.

⁵⁵⁷ For a list of accepted provisions of the Charter, revised Charter and the 1988 Additional Protocol, see <www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevOct2011.pdf>

⁵⁵⁸ This means that the European Court of Justice, the EU General Court and national courts adjudicating on issues within the scope of EU law have to take into account the Charter and EU Courts will strike

Under Article 14 of the CFR, access to education and vocational training should be non-discriminatory.⁵⁵⁹ It includes the possibility of receiving free compulsory education. Access to education is meaningless unless facilities exist where a person may receive an education of quality. Therefore paragraph 2 requires member States to ensure the availability of a minimum level of education by taking positive action to establish institutions where education may be received at no cost. This may go further than the right of access to facilities, but may hold member States responsible for the establishment of such institutions.⁵⁶⁰ The CFR leaves each member State the freedom to determine what level of education shall be compulsory, but makes clear that any such compulsory education shall be free of cost.⁵⁶¹ The third paragraph of Article 14 CFR imparts freedom on persons and other entities than the State to establish schools, but leaves it to the discretion of member States to set up minimum standards. It also guarantees the right of parents to ensure the teaching of their children in conformity with their religious, philosophical and pedagogical views.⁵⁶² Article 13 also provides that the arts and scientific research shall be free of constraint, and that academic freedom shall be respected'.⁵⁶³

The Preamble to the CFR states that the CFR reaffirms rights recognised in EU member State constitutional traditions and international obligations common to member States, making specific reference to, *inter alia*, the ECHR and the case law of the ECtHR. According to the Explanations to the CFR, Article 14(1) corresponds to Article 2 of the A2P1 ECHR, but its scope is extended to cover access to vocational and continuing training, and Article 14(3) corresponds to Article 2 of the AP1 ECHR as regards the rights of parents.⁵⁶⁴ Pursuant to Article 52(3) of the CFR, CFR rights which correspond to ECHR rights have the same meaning and scope as under the ECHR, though the EU may provide more extensive protection. The CFR itself does not state that the EU is bound by judgments of the ECtHR; however, the CFR Explanations state that the meaning and scope of corresponding rights are determined by the ECHR's text and its Protocols, as well as case law of the ECtHR and the European Court of Justice ('ECJ').⁵⁶⁵

down EU legislation which contravenes it. Note that the Charter is divided into six chapters: Dignity, Freedom, Solidarity, Equality, Citizenship and Justice. It is under the chapter heading 'Freedom' that one finds the right to education.

⁵⁵⁹ Art 14 of the Charter provides that:

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

⁵⁶⁰ See Commentary of the Charter of Fundamental Rights of the European Union, 146 <[www.feantsa.org/files/housing_rights/Instruments_and_mechanisms_relating_to_the_right_to_housing/EU/network_commentary_eucharter.pdf](http://www.feantsa.org/files/housing_rights/Instruments_and_mechanisms_relating_to_the_right_to_housing/EU_network_commentary_eucharter.pdf)>

⁵⁶¹ *ibid*

⁵⁶² *ibid*, 148

⁵⁶³ Charter of Fundamental Rights of the European Union, adopted 2 October 2000, entered into force 1 December 2009, Art 13

⁵⁶⁴ Explanations relating to the Charter of Fundamental Rights, 11 October 2000, 49

⁵⁶⁵ *ibid*, 48

Human Rights Frameworks relevant to Arab States

The right to education and other rights that are necessary for the realization of the right to education are protected by the standards and mechanisms in place and which are relevant to Arab States.⁵⁶⁶ This section presents the two key human rights treaties provided by the two main systems which apply to Arab States, namely the League of Arab States, and the Organisation of Islamic Cooperation ('OIC'), which applies to a number of Arab States that are Islamic, as well as to non-Arab States. A number of Arab States are also part of the African system, discussed above.

Arab Charter on Human Rights

The ArabCHR was adopted in 2004 and entered into force on 15 March 2008,⁵⁶⁷ two months after seven Arab States ratified it.⁵⁶⁸ It affirms international instruments as positive applicable norms by providing in its Article 43 that:

Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities.⁵⁶⁹

The Arab League Charter on Human Rights recognises the right to education by providing that the 'eradication of illiteracy is a binding obligation upon the State and everyone has the right to education'.⁵⁷⁰ In the Charter words, it is also the responsibility of the State to 'guarantee their citizens free education, at least throughout the primary and basic levels'.⁵⁷¹

The Charter also provides that 'all forms and levels of primary education shall be compulsory and accessible to all without discrimination of any kind'. The education provided by the State should be 'directed to the full development of the human person'.⁵⁷² The Charter also requires

⁵⁶⁶ The notion of Arab States used in this section denotes those States which are members on the League of Arab States, which includes 22 Arab States. These are: Syria, Jordan, Iraq, Lebanon, Saudi Arabia, Egypt, Libya, Sudan, Morocco, Tunisia, Kuwait, Algeria, Yemen, Oman, Qatar, United Arab Emirates (UAE), Bahrain, Mauritania, Somalia, Palestine, Djibouti and Comoros.

⁵⁶⁷ Arab Charter on Human Rights, adopted 22 May 2004, entered into force 15 March 2008

⁵⁶⁸ There are currently 14 States Parties to the ArabCHR. It should be noted that the Arab Charter was first adopted in 1994, but it was not ratified by any States at that time and thus did not enter into force. In May 2004, pursuant to a reform process in the Arab League, which encompassed the revision of the Charter initiated in 2002, the Summit of the Council of the League adopted the revised version of the ArabCHR.

⁵⁶⁹ For background information about the revision process of the Charter, see Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' (2005) 5(2) Human Rights Law Review 361

⁵⁷⁰ ArabCHR, Art 41

⁵⁷¹ Note that in the OIC Covenant on the right of the child the secondary level has also to be made free and compulsory, but progressively, with the aim to have free secondary education provided within a period of 10 years. Thus the protection of the right to education in the OIC Covenant has the potential of being stronger than the one provided for by the Arab League standards.

⁵⁷² Art 41.2

States parties to ‘guarantee the establishment of the mechanisms necessary to provide ongoing education for every citizen and shall develop national plans for adult education’.⁵⁷³ States are also required to ‘provide full educational services suited to persons with disabilities, taking into account the importance of integrating these persons in the educational system and the importance of vocational training and apprenticeship and the creation of suitable job opportunities in the public or private sectors’.⁵⁷⁴

The protection conceived by the Charter requires that education should be provided without discrimination of any kind. This broad formulation could be used as a legal basis to accommodate a large array of situations, including perhaps the States parties’ obligations to guarantee education in conflict and post-conflict situations. It is important to note that this protection is not provided to all persons, but is limited to the citizens of States Parties. Thus non-citizens, such as refugees or asylum seekers, or children of migrant workers, may be excluded from the protection contained in this provision. There are no other specific provisions in the Charter which recognise the rights of these groups to education. The Charter fails to prohibit the recruitment of child soldiers below the age of 15, although the Charter provides in Article 10(2) that exploitation of children in armed conflict is prohibited. On the other hand, the Charter requires States to recognise the right of the child ‘to be protected from economic exploitation and from being forced to perform any work that is likely to be hazardous or to interfere with the child’s education’.⁵⁷⁵

Covenant on the Rights of the Child in Islam

The Covenant on the Rights of the Child in Islam (‘CRCI’), adopted by the OIC in 2005,⁵⁷⁶ stipulates the protections afforded to children in accordance with the spirit of Islam, and provides for the establishment of an Islamic Committee on the Rights of the Child to monitor its implementation.⁵⁷⁷ The CRCI does not identify a specific age to be considered a child, but provides that a child is ‘every human being who, according to the law applicable to him/ her, has not attained maturity’.⁵⁷⁸ The CRCI itself provides a list of rights, such as the right to life (Article 6), the right to education and culture (Article 12), the right to social security (Article

⁵⁷³ Art 14.6

⁵⁷⁴ Art 40.4

⁵⁷⁵ The Arab League has adopted a Model Law and Plan of Action on Rights of Arab This law includes provisions on education, health care, child care, culture, child labour, protection from violence, protection against trafficking, protection in armed conflict, juvenile justice and children in conflict with the law. The model law provides that a child is any person below the age of 18, unless national legislation provides that majority is attained earlier. Many of the provisions of the model law are written in rights language, and actually echo or are similar to provisions in the CRC. For example, it provides that basic education should be free and compulsory. This is one of several model laws adopted within the framework of the Arab League for the purpose of serving as a model for framework legislation to be adopted at national level in Arab States.

⁵⁷⁶ Information regarding ratification of the CRCI is not published by the OIC. For the OIC as a regional human rights mechanism, see Chapter 6.

⁵⁷⁷ CRCI, Art 24

⁵⁷⁸ Art 1

14), and the right to health (Article 15). The CRCI reserves a special protection for children who are particularly at risk, such as children with disabilities and those with special needs (Article 16). The CRCI provides for the equality of all children to enjoy their rights and freedoms without discrimination on the basis of sex, birth, race, religion, language and political affiliation.⁵⁷⁹ It is the obligation of the States to respect the rights stipulated in the CRCI,⁵⁸⁰ among them the right to education, and to take the necessary steps to enforce it in accordance with their national legislation. The right to education is directly addressed in the CRCI, which provides protection to the right to education at all times, and thus also during armed conflict or periods of insecurity. The CRCI sets the implementation of the right to education in all its facets as one of its main objectives. Article 2 Paragraph 4 stipulates that the Covenant aims to ‘provide free, compulsory and secondary education for all children irrespective of gender, color, nationality, religion, birth or any other consideration, to develop education through enhancement of school curricula, training of teachers and providing opportunities for vocational training’.

Article 12 encompasses the right to education by detailing the obligations of States Parties to the Covenant, as well as to the implementation and the enforcement of the right to education. It provides that it is the duty of the State to provide compulsory, free primary education for children on an equal footing, and free and compulsory secondary education on a progressive basis, aiming to provide it for all within a 10-year period. The State’s duties concerning the right to education include provision of higher education, use of the mass media for educational purposes, publication of books for children and the establishment of special libraries for children.⁵⁸¹ The rights, as part of the objectives of care that the States should seek to ensure for children with disabilities and those with special needs, include education, rehabilitation and training.⁵⁸² Article 18 firmly prohibits child labour that may obstruct the education of the child or that is exercised at the expense of the child’s health or physical and spiritual growth. The Covenant refers, however, to national legislations of each State to establish a minimum working age, working conditions and hours.

The CRCI, as its title suggests, frames education and other rights directly within Islamic Shari’a. Article 3(1) clearly states that, to achieve its objectives, it is incumbent on States Parties to ‘[r]espect the provision of Islamic Shari’a, and observe the domestic legislations of member States’. The Covenant provides in Article 12(1) that every child should have free compulsory basic education, ‘by learning the principles of Islamic education (as well as belief and Islamic Shari’a according to the situation)’. This provision relates to the specific education in Islamic Shari’a as opposed to education in general.

⁵⁷⁹ However, this protection may be limited, as it is put under the requirements of national legislation or Shari’a law. See Aphrodite Smagadi, *Sourcebook of International Human Rights Materials* (BIICL 2008), 74

⁵⁸⁰ See CRCI, Art 4(1)

⁵⁸¹ The CRCI provides also that the State’s duties in respect of the right to education includes the ‘proper sex education distinguishing between the lawful and unlawful for children approaching puberty’. The Covenant does not give explanation on what is meant by lawful and unlawful. It should be understood to mean lawful and unlawful within the context of Shari’a (*halal* and *haram*) and in accordance with the national regulations of each State.

⁵⁸² Art 16(2)

Many of the violations of the right to education in armed conflict, such as the recruitment of child soldiers or attacks on education for religious and ethnic reasons, are addressed by the Covenant. These include the obligation of the State to 'protect children by not involving them in armed conflict and wars'.⁵⁸³ By using the vague term 'involvement', the Covenant does not expressly prohibit the recruitment of children during armed conflict. The Covenant also requires States to ensure, as far as possible, that refugee children enjoy within the State's national legislation, all the rights included in the Covenant, including the right to education.⁵⁸⁴ This provision should be read in conjunction with the prohibition of discrimination on basis of 'gender, colour, nationality, birth, religion and 'any other consideration'.⁵⁸⁵

The CRCI further protects children by prohibiting the exercise of torture or humiliating treatment in all circumstances and conditions.⁵⁸⁶ It stresses that a child, when deprived of liberty, should always be treated with dignity, respect for human rights and basic freedoms.⁵⁸⁷ However, Article 17 does not echo Article 40⁵⁸⁸ of the CRC as punishments are not included in the torture and humiliating treatment. While it also does not clearly prohibit the use of the death penalty for children, it provides clearly that the punishment of child offenders 'should be considered as a means of reform and care in order to rehabilitate the child and reintegrate him/her into the society'.⁵⁸⁹

As provided by Article 25, States have the right to make reservations on 'some sections of the Covenant'. The formulation is vague and does not appear to prohibit the formulation of reservations which are incompatible with the object and purpose of the Covenant. As the Covenant refers on many occasions to the provisions of Shari'a and the considerations of national legislation, it appears that possible limitations to the rights and freedoms addressed in the Covenant may occur when they do not meet with Islamic considerations applicable within a State or with national regulations. Although the CRCI is legally binding, the formulation of its provisions remain vague, the repetitive use of elastic terms such as 'as much as possible',⁵⁹⁰ and 'in accordance with the national legislations',⁵⁹¹ gives a very large discretionary power to the States in implementing the rights and freedoms mentioned within the CRCI.

In relation to the relationship between Islam and IHRL, including with regard to education, there are a range of views.⁵⁹²

⁵⁸³ CRCI, Art 17(5)

⁵⁸⁴ *ibid*, see Art 21

⁵⁸⁵ Art 2, para 4

⁵⁸⁶ Art 17(2)

⁵⁸⁷ Art 19(2)

⁵⁸⁸ CRC, Art 40(a), provides: 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age'.

⁵⁸⁹ Art 19(3.f)

⁵⁹⁰ See for example CRCI, Arts 16 and 21

⁵⁹¹ Or other similar formulations. See for example CRCI, Arts 4, 7, 8, 10, 12, 14 and 20

⁵⁹² For a fuller discussion, see Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (BIICL 2008); Nisrine Abiad and Farkhanda Zia Mansoor, *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective* (BIICL 2010); Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016)

Human Rights Framework relevant to the Asia-Pacific Region

While there is no binding regional instrument on human rights in Asia, the Association of Southeast Asian Nations (ASEAN) has adopted a Charter in 2007,⁵⁹³ as well as the non-binding ASEAN Human Rights Declaration, which was adopted in 2012.⁵⁹⁴ Article 31 of the Declaration sets out that the right to education is a right of every person, and that:

Primary education shall be compulsory and made available free to all. Secondary education in its different forms shall be available and accessible to all through every appropriate means. Technical and vocational education shall be made generally available. Higher education shall be equally accessible to all on the basis of merit.

It adds that:

Education shall be directed to the full development of the human personality and the sense of his or her dignity. Education shall strengthen the respect for human rights and fundamental freedoms in ASEAN Member States. Furthermore, education shall enable all persons to participate effectively in their respective societies, promote understanding, tolerance and friendship among all nations, racial and religious groups, and enhance the activities of ASEAN for the maintenance of peace.⁵⁹⁵

Significantly, the Declaration recognises the impact of economic and social exploitation of children on their normal development and education, and requires those who employ children in work that is harmful to their development and education are punished by law.⁵⁹⁶

3.2 INTERNATIONAL HUMANITARIAN LAW

The human rights obligations on a State to ensure the right to education, as outlined above, continue to apply during IAC and NIAC. However, the ability of a State to fulfil its human rights obligations can be severely undermined by its involvement in hostilities. The obligations of parties to a conflict, contained in the rules of IHL, are therefore crucial to preserving the core components of education in the circumstances of armed conflict.

3.2.1 Protection of Education by IHL

Unlike IHRL, IHL is a legal regime that does not set out particular rights but rather protects people during armed conflict by prohibiting certain conduct. For this reason IHL does not set out a 'right to education'; however, many of its rules are intended to ensure that students, educa-

⁵⁹³ Association of Southeast Asian Nations Charter, adopted 20 November 2007, entered into force 15 December 2008. ASEAN includes the following ten States: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

⁵⁹⁴ Association of Southeast Asian Nations Human Rights Declaration, adopted 18 November 2012

⁵⁹⁵ ASEAN Human Rights Declaration, Article 31

⁵⁹⁶ *ibid*, Article 27(3)

tion staff and educational facilities are protected, and that education, where it exists before the outbreak of an armed conflict, continues. The substance of the IHL provisions addressing education in IAC and NIAC takes a broad and purposive interpretation of education that embodies its availability, accessibility, acceptability and adaptability.

General Protection of Civilians and Civilian Objects

The foundational protection of IHL is the principle of distinction. As explained in Chapter 2, parties to a conflict are required to distinguish between civilians and military persons and objects and may only direct attacks at military objectives.⁵⁹⁷ Students, educational personnel, and facilities are protected by the rule of distinction because they are civilians and civilian objects. In addition to the principle of distinction, IHL sets out general rules relating to targeting,⁵⁹⁸ when civilian protection may be lost,⁵⁹⁹ circumstances and conditions of internment⁶⁰⁰ and special protection of children and vulnerable people in times of armed conflict.⁶⁰¹ Each of these rules reinforces the general protection afforded to students, educational personnel and facilities and seeks to protect the conditions necessary for education to be available, accessible, acceptable and adaptable in armed conflict. The application of these rules to particular aspects of the right to education will be discussed in Chapters 4 and 5.

Many of the provisions of IHL relate to or apply exclusively to ‘children’. Except where an age limit is specified, the term is deliberately undefined by IHL to incorporate varying cultural interpretations of ‘childhood’.⁶⁰² It is arguable that, since the drafting of the Geneva Conventions and Additional Protocols, the international meaning of ‘child’ has developed to incorporate those persons under the age of 18, unless otherwise specified.⁶⁰³

Protection of Education in International Armed Conflict

*Orphaned Children and Those Separated from their Families*⁶⁰⁴

Article 24 of the Fourth Geneva Convention ensures the protection of education of the most vulnerable children in armed conflict: those who have been orphaned or separated from their

⁵⁹⁷ Additional Protocol I, Arts 48 and 51(2); Additional Protocol II, Art 13(2); Customary IHL Database, Rule 1

⁵⁹⁸ See, for example, prohibition on indiscriminate attacks: Additional Protocol I, Art 51(4); Additional Protocol II, Art 85(3)(b); Customary IHL Database (ICRC), Rule 11

⁵⁹⁹ See, for example, Additional Protocol I, Art 51(3); Additional Protocol II, Art 13(3). Rules 6 and 10 Customary IHL Database

⁶⁰⁰ See, for example, Parts 3 and 4 of the Fourth Geneva Conventions.

⁶⁰¹ For example, the special protection of children: Fourth Geneva Convention, Arts 23, 24, 38, 50, 76, 89; Additional Protocol I, Arts 8(a); 10(1); 77(1); Additional Protocol II, Art 4(3)

⁶⁰² Claude Pilloud (ed) (n34); Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949: Volume IV* (International Committee of the Red Cross 1952–1960)

⁶⁰³ See, for example, the discussion of this issue by Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Clarendon Press 1997), 9 and 80. See also ICRC CIHL Study Rule 150

⁶⁰⁴ Fourth Geneva Convention, Art 24

families. It requires that parties to an IAC take the necessary measures to ensure that the maintenance and education of children under 15⁶⁰⁵ who are orphaned or are separated from their families as a result of armed conflict are facilitated in all circumstances. The education of these children shall, as far as possible, be entrusted to persons of a similar cultural tradition. This rule forms part of customary international law.⁶⁰⁶

Children over 15, or those under 15 that have been orphaned or separated from their families for a reason not related to armed conflict, for example the operation of a judicial order or through social services, are not covered by this specific rule, although they may still benefit from other IHL provisions relating to children and civilians more generally. This provision is not restricted to children of enemy nationality, but applies equally to all children in the territory of a party to a conflict that meet the criteria in Article 24.⁶⁰⁷

The Commentary to this Article makes it clear that ‘education’ must be understood in a broad sense and ought to include ‘moral and physical education as well as school work and religious instruction’.⁶⁰⁸ This interpretation is consistent with the other uses of the term ‘education’ in the Geneva Conventions, in particular Article 50⁶⁰⁹ and Article 94.⁶¹⁰

Further, Article 24 expressly requires that education, where possible, be provided by those from the same cultural tradition as a child’s parents. This requirement is designed to ensure the acceptability of education and prevent the exposure of a child to propaganda.

*Internment*⁶¹¹

During IAC, parties are entitled to detain civilians where security makes it ‘absolutely necessary’.⁶¹² Article 94 of the Fourth Geneva Convention sets out a detaining party’s obligations in

⁶⁰⁵ The ICRC Commentary makes it clear that 15 was deliberately chosen by the drafters: Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1952–1960) Vol.4, 186

⁶⁰⁶ ICRC CIHL Study Rule 150

⁶⁰⁷ Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1952–1960) Vol 4, 188

⁶⁰⁸ *ibid*, 187

⁶⁰⁹ Which states ‘The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children...Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend’. This Article is discussed in further detail below.

⁶¹⁰ This states: ‘The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not. It shall take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises. All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside...’. This Article is discussed in further detail below.

⁶¹¹ Fourth Geneva Convention, Art 94

⁶¹² Fourth Geneva Convention, Art 42; ICRC CIHL Study Rule 99, however, this applies only to protected persons (enemy aliens) within the meaning of Art 4, Fourth Geneva Convention.

relation to the education of internees (in particular children and young people) in situations of internment. Aspects of this rule are customary international law.⁶¹³ It states that the detaining party shall:

- encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not;
- take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises; and
- provide all possible facilities to internees to enable them to continue their studies or to take up new subjects.

Article 94 also requires that the education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside.

The purpose of Article 94 is to adapt education to ensure that all internees are provided with the opportunity to access education in the challenging circumstances of internment—but that they must not be required to do so. This qualification ensures that educational and recreational opportunities are not used for propaganda purposes and that education is acceptable to those in internment.

Those civilians who are interned in armed conflict are detained on precautionary grounds, and their detention is not a punishment. For this reason, the disruption of education caused by internment ought to be as minimal as possible. To this end, the second paragraph of Article 94 contains three obligations on the detaining power:

- the obligation to grant all possible facilities to enable internees to continue their studies and take up new subjects;
- the obligation to ensure the education of children and young people; and
- the obligation to allow children and young people to attend schools, either within internment or outside.

These obligations were designed to protect education, especially that of children, during internment. Although no specific definition of education is given in the Article, the ICRC Commentary makes it clear that it is capable of incorporating more than just basic or primary education and potentially includes sophisticated tertiary education programmes.⁶¹⁴ This means that Article 94

⁶¹³ Art 94 is not discussed in the ICRC CIHL study; however, elements of its protection are recognised in various rules: Relating to children see ICRC CIHL Study Rule 135, as it relates to protection of conviction and religious practices (and, therefore, protection from inappropriate educational content that violates this protection); see ICRC CIHL Study Rule 104, as it relates to other basic necessities of internees including clothing, food and medical treatment; see ICRC CIHL Study Rule 118

⁶¹⁴ Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952–1960) Vol.4, 411–412; The Commentary expressly links the creation of this obligation in the Geneva Conventions with experience of the ‘Camp Universities’ established in POW camps during the Second World War. These higher education facilities were developed in POW camps and comprised research and teaching at a higher education level. Some of these facilities offered courses in multiple disciplines, as well as the opportunity for

places a broad obligation on detaining parties to safeguard and take all possible steps to ensure education at all levels and of all types. Article 94 makes it clear that internment is not a justification for denying civilians any form of education during armed conflict.

The Role of Non-Governmental Organisations ('NGOs') in Facilitating Education in Internment

Article 94 requires the detaining power to take all practicable measures to fulfil its obligations to ensure the encouragement of educational pursuits. The ICRC Commentary to Article 94 highlights the difficulties that might exist for the detaining power resulting from armed conflict. For example, the resource and security issues that might arise from providing internees with unrestricted access to reading material in their own language.⁶¹⁵ Under Article 94, therefore, a detaining party is not obliged to grant access to all educational material. There are, however, innovative solutions to this problem.

The obligations contained in Article 94 must be read in conjunction with Article 142 of the Fourth Geneva Convention,⁶¹⁶ which provides that parties must provide relief societies, especially the ICRC, with 'all facilities for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes' to persons, including internees.

For example, during the Second World War the ICRC formed an Advisory Committee on Reading Matter for Prisoners and, in consultation with both the German Government and the British Red Cross, facilitated the provision of books to internees and prisoners thereby minimizing both the logistical and security issues involved for detaining parties.⁶¹⁷ This example demonstrates that 'all practical measures' is not necessarily a qualification on protection of education in internment, but that it may be a stringent standard which requires international cooperation between parties to a conflict and non-government organizations, to assist internees to continue to access education even in the challenging circumstances of conflict. However, the cooperation of relief organizations, or a lack thereof, does not relieve a detaining party of its obligations under this Article.

*Special Protection for Children*⁶¹⁸

The above-mentioned Articles of the Fourth Geneva Convention must be read in light of Article 77 of Additional Protocol I, which contains special protection for all children in IAC. This special protection is customary international law.⁶¹⁹ The specific content of Article 77 is consid-

POWs to communicate by correspondence with higher education institutions in their country of origin. Publication of research undertaken with camps was encouraged and examinations were offered, many of which were recognised by higher educational institutions or technical schools outside the camps.

⁶¹⁵ Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1952–1960) Vol 4, 410

⁶¹⁶ *ibid*, 409

⁶¹⁷ *ibid*, 409–411

⁶¹⁸ Additional Protocol I, Art 77

⁶¹⁹ ICRC CIHL Study Rule 135

ered in this Handbook in the context of protection of students and educational personnel. Article 77 is an important development on the above provisions of the Geneva Conventions in ensuring that the human rights of children are respected in times of armed conflict.⁶²⁰ It seeks to ensure that all parties to a conflict provide children with the ‘care and aid that they require’. Although this Article does not specifically mention education, it requires that children are provided with those facilities which are necessary for their normal development ‘as far as possible in armed conflict’.⁶²¹ The purpose of this Article is broad enough to support the argument that this includes the provision of facilities necessary for all children in IAC to pursue education.

Further, the Article requires that children be given care and aid appropriate to their needs, whether these needs are the result of their age ‘or any other reason’.⁶²² This phrase was deliberately included by the drafters to ensure that children with physical and mental disabilities⁶²³ were provided with the care and aid that they need, including, it is argued here, appropriate education.

*Belligerent Occupation*⁶²⁴

Article 50 of the Fourth Geneva Convention sets out an occupying power’s obligations in relation to the education of children.⁶²⁵ It sets out that that the occupying power, with the cooperation of the national and local authorities, shall:

- facilitate the proper working of all institutions devoted to the care and education of children; and
- make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

The special protection of children and respect for the cultural tradition of children (including through their education) is customary international law.⁶²⁶ The ICRC Commentary to Article 50 explains that this provision means that occupying powers must not interfere with educational activities established in the occupied territory. Further, occupying powers have a positive

⁶²⁰ Claude Pilloud (ed) (n34), 3176

⁶²¹ *ibid*, 3185; Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Clarendon Press 1997), 80

⁶²² Additional Protocol I, Art 77(1)

⁶²³ Claude Pilloud (ed) (n34), 3180

⁶²⁴ Fourth Geneva Convention, Art 50. See ICRC CIHL Study Rules 135 (protection of children) and Rule 104 (respect for convictions and religious practices)

⁶²⁵ The meaning of ‘children’ is not defined in Art 50, nor in IHL more generally: Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952–1960) Vol.4, 285

⁶²⁶ See ICRC CIHL Study, Rules 135 (protection of children), and Rule 104 Respect for convictions and religious practices

obligation to encourage local authorities to fulfil their educational obligations, or to ensure fulfilment themselves where local authorities are unable.⁶²⁷

The phrase ‘proper working of institutions devoted to the education of children’ places the following obligations on the occupying power:⁶²⁸

- to refrain from requisitioning staff, premises or equipment which are being used by such establishments;
- to give people who are responsible for children facilities for communicating freely with the occupation authorities;
- to ensure by mutual agreement with the local authorities that children and those looking after them receive food, medical supplies and anything else necessary to enable them to carry out their task when their own resources are inadequate. This may include educational resources, such as books and computers.

There is an emphasis in occupation law on the maintenance of the status quo before occupation.⁶²⁹ This means that education ought to be provided by an occupying power in a manner consistent with the removed Government.⁶³⁰ An occupier must attempt to ensure the continued education of children in an appropriate way, for example, in their language and in accordance with their customs. This is especially important in the case of children who have been orphaned or separated from their families and are particularly vulnerable in occupied territories.⁶³¹

Protection of Education in Non-international Armed Conflict⁶³²

As outlined in Chapter 2, the rules of IHL that apply to non-international conflict can be different from those that apply in IAC, although the basic principles of IHL, including distinction, remain the same. Article 4(3)(a) of Additional Protocol II, which applies to NIAC,⁶³³ states that children shall be provided with the care and aid they require, and that, in particular, they shall receive an education, including religious and moral education, in keeping with the wishes of their parents or, in the absence of parents, of those responsible for their care. This special protection of children is customary international law.⁶³⁴

⁶²⁷ Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952–1960) Vol 4, 286

⁶²⁸ *ibid*, 286–287

⁶²⁹ Jonathon Horowitz, ‘The Right to Education in Occupied Territories: Making More Room for Human Rights in Occupation Law’ (2004) 7 *Yearbook of International Humanitarian Law* 233, 234–235

⁶³⁰ *ibid*, 254

⁶³¹ Fourth Geneva Convention, Art 50

⁶³² Additional Protocol II, Art 4(3)(a)

⁶³³ Specifically, those non-international armed conflicts that meet the threshold set out in Art 1, AP1, as discussed in Chapter 2.

⁶³⁴ ICRC CIHL Study, Rule 150. This means that this special protection also applies in all NIAC meeting the customary law definition, as set out in Chapter 2.

Additional Protocol II contains no other express reference to education in NIAC, although students and educational personnel benefit from the general protection afforded to those who do not participate in hostilities (distinction) in NIAC.

The purpose of this Article is to ‘ensure the continuity of education, so that children retain their cultural identity and link with their roots’.⁶³⁵ For this reason, education is to be broadly understood⁶³⁶ as including, but not limited to, religion and morality. The specification that the education of children, including their moral and religious education, must be consistent with the wishes of those responsible for their care attempts to ensure the absence of propaganda in educational content,⁶³⁷ ensuring that education remains acceptable and protects an important part of a child’s identity, even where their lives have otherwise been disrupted by NIAC.

Article 4(3)(a) applies only to children, in recognition of their acute vulnerability and need for special protection in armed conflict, including NIAC.⁶³⁸ It deliberately does not specify an age limit so that different cultural traditions might be taken into account when assessing childhood.⁶³⁹

The individual needs of children must be considered when a party to a NIAC seeks to fulfil its obligations under Article 4(3)(a).⁶⁴⁰ This strongly suggests that the educational needs of children, including whether or not they suffer from learning difficulties, disability or trauma from the armed conflict, ought to be taken into account in providing education in accordance with Additional Protocol II. Such an interpretation is consistent with the protection of children recognised in Article 77 of Additional Protocol I. This would ensure parity in protection of children across IAC and NIAC.

3.2.2 The Special Relationship between IHL and Education

The above discussion addressed the different ways in which IHL protects education in situations of armed conflict. It is also important to recognise that education is also an important implementation and enforcement mechanism of IHL. Parties to both IAC and NIAC are under express obligations to disseminate the rules of IHL as widely as possible among their civilian populations and to encourage the study of it through civilian education.⁶⁴¹ This means that States must facilitate courses in IHL, usually through their national Red Cross or Red Crescent societies. This rule applies to non-State armed groups in non-international conflicts and forms part of the customary international law.⁶⁴²

⁶³⁵ Claude Pilloud (ed) (n34), 4552

⁶³⁶ *ibid*

⁶³⁷ *ibid*

⁶³⁸ Claude Pilloud (ed) (n34), 4244

⁶³⁹ *ibid*, 4549

⁶⁴⁰ The statement in the first part of Art 4(3), that children must be provided with the care and aid ‘they require’, is intended to embody this requirement.

⁶⁴¹ First Geneva Convention, Art 47; Second Geneva Convention, Art 48; Third Geneva Convention, Art 127; Fourth Geneva Convention, Art 144; Additional Protocol I, Art 83; Additional Protocol II, Art 19

⁶⁴² ICRC CIHL Study, Rule 143

The importance of human rights education to the ability of people to access other rights is discussed in detail above. Similar considerations apply to IHL education, even in times of peace. In particular, the rules of IHL are highly consistent with the learning content of basic education necessary in order for a person to develop to his or her full capacity.⁶⁴³ IHL emphasises that military victory must not come at any cost and encourages the study of various historical and current armed conflicts from a different perspective. IHL education should be incorporated into human rights education in order to improve access to and awareness of its protections during conflict, but also to encourage widespread dissemination of its rules and condemnation of its violations.

3.3 INTERNATIONAL CRIMINAL LAW

There is no ICL treaty that deals with the protection of education itself. Education is only mentioned within the targeting and/or destruction of educational *property*, which is listed in the Rome Statute as a war crime.⁶⁴⁴ The only mention found of the violation of education itself within an international setting has so far been at the internationalised ECCC, where the Co-Investigating Judges, in their Closing Order in Case 002, found that workers at Trapeang Thma Dam were also denied schooling.⁶⁴⁵ However, the defendants were not charged with a crime in relation to this.

There is scope under current ICL to incorporate the protection of education within current crimes through either persecution or incitement to genocide. These will be discussed briefly.

3.3.1 Persecution

ICL prohibits persecution as a crime against humanity in the treaty statutes of the *ad hoc* tribunals⁶⁴⁶ as well as the ICC.⁶⁴⁷ The Rome Statute defines persecution as the ‘intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group of collectively’.⁶⁴⁸ Unlike other expressions of the crime, the Rome Statute also requires that persecution be committed in connection with another crime or at least one inhumane act.

Although untested, it is possible that the intentional and severe deprivation or prevention of education of a particular group can, if the other elements of the crime are fulfilled, constitute

⁶⁴³ For an interesting discussion of this issue, see Sobhi Tawil, ‘International Humanitarian Law and Basic Education’ (2000) 82 *International Review of the Red Cross* 581

⁶⁴⁴ See Chapter 5 below, which contains case law on the matter. See also Art 56 of the Hague Regulations of 1907

⁶⁴⁵ See the ECCC case *Closing Order, Case 002*, 002/19-09-2007-ECCC-OCIJ, para 345

⁶⁴⁶ ICTY Statute, Art 5(h); ICTR Statute, Art 3(h)

⁶⁴⁷ Rome Statute, Art 7(1)(h)

⁶⁴⁸ *ibid*, Art 7(2)(g)

persecution. In order for the deprivation of education to amount to a crime against humanity under the Rome Statute, it must meet the following criteria:⁶⁴⁹

- education must be defined as a ‘fundamental right’;
- its deprivation must be intentional and severe. Further, it must be contrary to international law, and not, for example, consistent with limitations permitted by IHRL;
- the denial of education of a particular group must on discriminatory grounds: based on a group’s political, racial, national, ethnic, cultural, religious, or gender identity (or other grounds universally recognised by international law, potentially including disability);
- the deprivation of education must be part of a widespread or systematic attack directed against any civilian population or in connection with any other act prohibited by the Rome Statute; and
- the perpetrator or perpetrators of this deprivation knew it was part of a widespread or systemic attack.⁶⁵⁰

International criminal jurisprudence has so far recognised examples of persecution including murder, imprisonment, deportation and other related conduct.⁶⁵¹ However, persecution can include other conduct that ‘severely deprives political, civil, economic or social rights’.⁶⁵² In particular, the ICTY has recognised that the exclusion of members of an ethnic or religious group from educational institutions can potentially constitute persecution under the ICTY Statute, even though it was not specifically listed as an example therein.⁶⁵³ This demonstrates the potential protection that the crime of persecution offers to ensuring education in situations of insecurity and armed conflict.

If the prevention of education cannot be considered persecution, it may still amount to a crime against humanity if it can fall into the category of ‘inhumane acts’ provided for under ICL. However, it is generally agreed that, for an act to be considered ‘inhumane’, there must be both customary international law in relation to the act and the act must also be of a similar nature to the crimes enumerated in the Statute.

3.3.2 Incitement to Genocide

Similarly untested in relation to education, the crime of incitement to genocide offers potential protection of the content of education. Direct and public incitement to genocide is a crime under

⁶⁴⁹ ICC, *Elements of Crimes*, 2000, PCNICC/2000/1Add.2 (‘ICC’s Elements of Crimes’), 10

⁶⁵⁰ Jurisprudence of the ICTY suggests that intention to discriminate is also required: *Prosecutor v Milorad Krnojelac*, IT-97-2

ICL, both under the statutes of the ICTR and ICTY and the Rome Statute.⁶⁵⁴ It is also prohibited by Article 3(c) of the *Genocide Convention*. Where the content of education amounts to incitement to genocide it is unquestionably a violation of the students' right to education, as outlined above. However, it may constitute an international crime attracting individual criminal responsibility.

The crime of direct and public incitement to genocide requires fulfilment of the following elements:

- The encouragement, persuasion, or direct provocation of a number of individuals or the public at large to commit genocide.⁶⁵⁵ It is likely that 'hate speech' alone is not enough to constitute incitement to commit genocide.
- This incitement must be in public. This requirement is met when incitement occurs through 'speeches, shouting or threats uttered in public places or public gatherings, or through the sale or dissemination...of written material or printed matter in public places...';⁶⁵⁶
- The incitement must be direct, which is to be assessed in light of its cultural and linguistic context;⁶⁵⁷
- Incitement must be coupled with the intention that the incitement should create in others a state of mind necessary to commit genocide.⁶⁵⁸

The purpose and context of the communication is important and the effect on the audience is irrelevant.⁶⁵⁹ It does not require the actual commission of genocide or proof that anyone actually attempted to commit genocide as a result of the incitement.⁶⁶⁰

These elements suggest that, where the substance of educational material constitutes incitement to genocide and it is taught to students with the intent directly to prompt or provoke them to commit genocide, it may constitute elements of an international crime. It is possible that a school curriculum, lessons, textbooks and other widely disseminated educational material which contain incitement to genocide may meet the 'public' requirement.

The application of the crime of incitement to genocide has so far been restricted to public speeches by government officials and broadcasts by mass media.⁶⁶¹ Its application to educational material and content has not yet been considered.

⁶⁵⁴ ICTY Statute, Art 4(3)(d); ICTR Statute, Art 2(3)(c); Rome Statute, Art 25(3)(e) .

⁶⁵⁵ *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, para 555.

⁶⁵⁶ *Prosecutor v Callixte Kalimanzira*, ICTR-05-88, 22 June 2009, para 515.

⁶⁵⁷ *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, para 557; *ibid*, para 514.

⁶⁵⁸ *Prosecutor v Ferdinand Nahimana et al*, ICTR-99-52-T, 3 December 2003, ICTR-99-52-T, 3 December 2003, paras 1000–1012

⁶⁵⁹ *ibid*

⁶⁶⁰ *ibid*, para 678

⁶⁶¹ See generally *Prosecutor v Georges Ruggiu*, ICTR-97-32-I, 1 June 2000; *Prosecutor v Ferdinand Nahimana et al*, ICTR-99-52-T, 3 December 2003, ICTR-99-52-T, 3 December 2003

3.4 CONCLUSIONS

Education is protected under IHRL, which guarantees the right to education at all times, including during situations of insecurity and armed conflict. As a legally binding right enshrined in international and regional treaties, the right to education must be respected by the States Parties to these treaties. States must take the necessary concrete steps to achieve the full realization of the right to education, either immediately or progressively (depending on the aspect of the right). Even in situations of insecurity and armed conflict, every effort to satisfy the minimum core obligations associated with the realization of the right to education must be undertaken by States. When necessary, a State should use international assistance and cooperation to achieve the realization of the right to education.

One of the elements for the right to education to be fully realised is the provision of free and compulsory primary education. In fact, the provision of primary education to all must be given continued priority. Secondary education must be available and accessible to all and higher education must be accessible to all on the basis of capacity and not, for example, on the basis of financial resources. The right to education must be available to all without discrimination. The principle of non-discrimination is also applicable to the content of education itself, which must not discriminate against any group. The content of education is also protected under IHRL from any expression of hate or intolerance. The adoption of the SDGs and the Incheon Declaration are key developments, in respect of their value in assisting States in working towards the full realisation of these obligations.

The objects and purposes of both the IHL and IHRL provisions on education are similar. They both attempt to ensure the provision and continuation of education in all circumstances. This means that many rules in the two legal regimes are compatible and give rise to similar obligations. For example, the obligation to ensure the education of children in internment is an obligation that exists on States parties to a conflict under both IHL and IHRL. In such cases, the elements of the right to education that overlap with similar IHL provisions are strengthened in armed conflict and benefit from the wider applicability (and non-derogability) of IHL to situations of armed conflict.

Some minor differences exist in the application of the rights contained under IHRL and IHL. For example, the provisions of IHL addressing education mostly apply to children, whereas IHRL provides for a right to education applicable to all, including adults. Further, IHL makes provisions only for those deprived of education as a result of the circumstances of the armed conflict and not for other reasons. These differences in application, however, do not give rise to a conflict between the two legal regimes; rather they set out the distinct situations in which IHL and IHRL regulate different aspects of education. This allows the two regimes to operate concurrently to provide comprehensive protection for education in all situations.

The lack of specific protection for education under ICL sets it apart from IHRL and IHL. Many provisions of ICL have the potential to be used to protect education, for example the crime of persecution and the crime of incitement to genocide. Further, the mechanisms of ICL, for example, the reparations mechanism of the ICC, discussed in Chapter 6, can attempt to provide redress for education-related violations of ICL. Despite the lack of specific provisions,

the provisions of ICL are not incompatible with IHL and IHRL. As will now be discussed in Chapters 4 and 5, ICL can be an important enforcement mechanism for many of the IHRL and IHL provisions that protect against education-related violations, including the protection of the lives of students and educational personnel and the protection of educational facilities.

4

Protection of Students and Education Staff

In order for education to be ensured, it is not just the right to education which has to be respected but also the rights of the people dispensing and benefiting directly from education, namely students and education staff.⁶⁶² As a result, the right to education, which is set out in Chapter 3, must be considered in the context of the right of students and education staff to be safe from harm, and more generally to enjoy the conditions and environment that are conducive to education. Thus this chapter sets out the primary issues related to the international legal protection of the physical and mental well-being of students and education staff under IHRL, IHL, and ICL.⁶⁶³

The chapter begins with the protection under IHRL, as it applies at all times, including during armed conflict situations.⁶⁶⁴ As mentioned in Chapter 3, education is the ‘key to unlock other human rights’. However, as human rights are ‘indivisible, interrelated and interdependent’,⁶⁶⁵ a violation of another human right may adversely affect the realization of the right to education and the effective provision of education in general. The human rights of students and education staff, as the prime beneficiaries and providers of education, need to be protected. The first section of this chapter considers some of the other human rights that need to be ensured in order for the right to education to be fully and effectively realised. These include the right to life, the right to liberty and security of the person, the prohibition of torture and cruel, inhuman and degrading treatment or punishment, as well as other rights protecting the general well-being of students and education staff, and specific protection for particular groups, such as children and women.

The protection of students and education staff under IHL, which is applicable during IAC and NIAC, is set out after discussion of IHRL. This enables comparisons to be made between the

⁶⁶² Note that the term ‘student’ is understood in this Handbook in its wider sense and thus includes all of those who receive a form of education.

⁶⁶³ As noted in Chapter 1, not every education-related violation can be addressed here so the issues covered in Chapters 4 and 5 are those that are most directly relevant to education-related violations.

⁶⁶⁴ Subject to the issues of derogation and extraterritorial application set out in Chapter 2.

⁶⁶⁵ See, for example, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, para 5. This concept of human rights’ interdependence is also present in the Preamble of the Covenants, which state that ‘...the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights’.

content of the two regimes that apply concurrently during armed conflict, as discussed in Chapter 2. The most significant protection afforded by IHL to students and education staff is the rule of distinction prohibiting the targeting of civilians, or the failure to distinguish between civilians and military objectives. This Chapter also considers the special protection of particular groups of persons, including children and women, under IHL. This is followed by discussion of the circumstances when students and education staff might lose protection from direct attack. In particular, the issues of child soldiers and the arming of guards or education staff in self-defence will be addressed. This section also examines the absolute prohibition under IHL of particular types of attack that have impacts on education, including the use of sexual violence and torture. The chapter concludes with consideration of ICL, especially when and how violations of IHRL and IHL can give rise to individual criminal responsibility in relation to the protection of the physical and mental well-being of students and education staff. ICL contains provisions which apply at all times and some that apply only during armed conflict.

4.1 INTERNATIONAL HUMAN RIGHTS LAW

While all rights are interrelated, some human rights are particularly crucial for the full and effective realization of the right to education. In particular, CPR, such as the right to life, security and well-being of students and education staff, need to be ensured through the continuous application of international (including regional) human rights provisions. It is not only the physical well-being but also the mental well-being that needs to be ensured in order for the students to benefit from education and for the education staff to be able to provide education. In addition to CPR, a number of ESCR are also relevant to ensuring the physical and mental well-being of students and education staff, such as by safeguarding the conditions and environment necessary for their well-being. Some of these other ESCR are mentioned in this chapter, as well as in Chapter 5.

Students and education staff are protected as physical persons by a number of CPR, such as the right to life; the right to liberty and security of the person, including the prohibition against the taking of hostages, abductions or unacknowledged detention;⁶⁶⁶ and the prohibition of torture and other inhuman and degrading treatment.

More generally, the physical and mental well-being of students and staff is also protected through the principle of equality and non-discrimination (including freedom of thought, conscience and religion) and the prohibition against persecution, as well as by ESCR, such as the right to freedom of assembly and association, the right to work and the right to form and join trade unions, the right to health and the right to an adequate standard of living, and the right to cultural life.

Some groups which are at particular risk of human rights violations, such as women, children, minorities and Indigenous peoples, displaced persons and non-nationals, are provided with additional protection under IHRL.

⁶⁶⁶ HRCCommittee General Comment 29, para 13(b).

Other rights may also be relevant, such as the protection against slavery or forced labour, child labour in particular, or the protection against unlawful expulsion of refugees, though these will not be considered in any detail here.

4.1.1 Protection of the Life of Students and Education Staff

According to the main international and regional human rights instruments,⁶⁶⁷ it is prohibited to deprive someone of his or her life in an arbitrary manner. The right not to be deprived of life in an arbitrary manner must not be limited, even during a state of emergency.⁶⁶⁸ A violation of the right to life may be found even if the victim has not died but has disappeared, and a threat to life may be sufficient to find a violation of the right to life.⁶⁶⁹

In situations of insecurity and armed conflict, students and education staff are at risk of being abducted and murdered by the State itself (or by another entity under the responsibility of the State). These forced (or ‘enforced’) disappearances can also amount to an education-related violation. This was recognised by the Working Group on Enforced or Involuntary Disappearances (‘WGEID’),⁶⁷⁰ when it acknowledged that during times of conflict, many women are targeted and forcibly disappeared, and may then suffer additional violence, including sexual violence.⁶⁷¹ It also recognised that education is essential to ensure that women are aware of their rights and available remedies when they are victims of enforced disappearance.⁶⁷² It also highlighted that education is a means of raising awareness and training law enforcement officials on issues related to enforced disappearances.⁶⁷³

The WGEID issued a similar comment in relation to children, again highlighting the risks of education-related violations for those children whose parents have disappeared and, of course, for children who are direct victims of enforced disappearances.⁶⁷⁴ The legal uncertainty of disappeared parents may not only affect a child’s right to identity, it may also create an obstacle to his or her enjoyment of the right to education. Furthermore, the comment highlighted that education may be a means of preventing children from becoming victims of enforced disappearance.⁶⁷⁵

⁶⁶⁷ ICCPR, Art 6; ACHPR, Art 4; ACHR, Art 4; ECHR, Art 2; Arab Charter, Art 5. See also CRC, Art 6, according to which States Parties shall not only ensure the survival but also the development of the child. See also the HRC Committee, *General Comment 36: the Right to Life* (2018)

⁶⁶⁸ ICCPR, Art 4(2)

⁶⁶⁹ See *Makarazis v Greece*, Judgment, 20 December 2004, para 49; See also the ACommHPR in *Kazeem Aminu v Nigeria*, Communication No 205/97, 11 May 2000, para 18

⁶⁷⁰ See HRC WGEID, *General Comment on Women Affected by Enforced Disappearances*, 14 February 2013 A/HRC/WGEID/98/2, para 12

⁶⁷¹ paras 7-8.

⁶⁷² para 34.

⁶⁷³ para 45.

⁶⁷⁴ HRC WGEID, *General Comment on Women Affected by Enforced Disappearances*, 14 February 2013 A/HRC/WGEID/98/2, paras 7 and 33.

⁶⁷⁵ At para 11.

The prohibition of the arbitrary deprivation of life also means that a deprivation of life which is not arbitrary may be allowed under IHRL in specific circumstances:

- where the death penalty is still legally applicable; or
- if the deprivation of life results from a lawful use of force.

The death penalty is being progressively abolished universally.⁶⁷⁶ Where still provided for by law, capital punishment may be applicable to someone who has been found guilty of a serious crime as the result of the final judgment of a competent court of law.⁶⁷⁷ IHRL prohibits the imposition of the death penalty to someone who is below 18 years of age or carrying out this sentence on a pregnant woman.⁶⁷⁸

Among the international and regional human rights treaties, the lawful use of force is only specified in the ECHR, which also provides that such use of force shall be ‘no more than absolutely necessary’.⁶⁷⁹ It also adds the exceptional circumstances under which such use of force is possible:

- in defence of any person from unlawful violence (such as self-defence);
- in order to effect a lawful arrest or to prevent escape of a person lawfully detained; or
- in an action lawfully taken for the purpose of quelling a riot or insurrection.

This is a very strict standard that has to be interpreted restrictively. The ECtHR analysed this provision in the case of *McCann and Others v the United Kingdom*,⁶⁸⁰ which concerned the killing of three alleged terrorists in Gibraltar by members of the British Army. The Court decided that the level of force used, which resulted in the deaths of the alleged terrorists, was not absolutely necessary. It considered that, instead of using a level of force that led to fatalities, the individuals should have been arrested at an earlier stage. Thus the specific circumstances contained in Article 2(2) ECHR do not permit a use of force that may lead to a loss of life if another means is available.⁶⁸¹

The African Commission followed the same reasoning in *Mouvement Burkinabé des Droits de l’Homme et des Peuples v Burkina Faso*.⁶⁸² In this case, which concerned the deaths of two

⁶⁷⁶ The ICCPR and the ACHR both have a Protocol abolishing the death penalty.

⁶⁷⁷ ICCPR, Art 6; ACHR, Art 4 paras 2-6; ACHPR, Art 4; Arab Charter, Arts 6–7. Such provision is also contained in Art 2(1) ECHR, but the Council of Europe abolished the death penalty in Protocol 13 (only Belarus still applies the death penalty within the member States of the CoE).

⁶⁷⁸ ICCPR, Art 6 (5). Some treaties also provide for an upper age limit for carrying out the death penalty.

⁶⁷⁹ ECHR, Art 2(2)

⁶⁸⁰ *McCann and others v United Kingdom*, 21 EHRR 97, 5 September 1995

⁶⁸¹ In this case, the Court added that the planning of the use of force must also take into account this principle. The Court further highlighted that the State must not only use the minimum amount of force necessary, but also protect the lives of others, in this case the people of Gibraltar and its own military staff. The Court also considered that the obligation to protect the right to life includes the conduct of an effective official investigation when State agents use force that results in the deaths of individuals.

⁶⁸² *Mouvement Burkinabe des Droits de l’Homme et des Peuples v Burkina Faso*, Communication No 204/97, 7 May 2001, para 43

students during a demonstration, the Commission said that authorities have various means to disperse crowds and that, in choosing the most appropriate means, they must ensure the respect and protection of human life.⁶⁸³

When assessing the necessity of the use of force, the ECtHR has also considered the particular context within which force was used. In *Isayeva, Yusopova and Bazayeva v Russia*,⁶⁸⁴ the ECtHR acknowledged that ‘the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency’.⁶⁸⁵ Within these circumstances, the use of force may then be deemed necessary if armed resistance from rebel forces is to be expected. However, specific circumstances may also mean that the authorities may have to take adequate measures to protect lives. In *Tagayeva and Others v Russia*,⁶⁸⁶ the ECtHR assessed the existence of an imminent and immediat risk to life as a result of the threat of terrorism in North Ossetia, which was even more prominent at the opening of the academic year and the ‘Day of Knowledge’ which takes place on the 1st of October, when schools hold a celebration that gathers students, education staff, relatives and visitors. While some security measures had been taken in the region, the local police had insufficient resources which led to security gaps, in particular at the school where only one (unarmed) police officer was on duty.⁶⁸⁷ The Court thus found that there had been a breach of the positive obligations under Article 2 ECHR as the authorities had not taken sufficient measures to protect the life of students and education staff in light of the known threat of a terrorist attack against an educational facility.⁶⁸⁸ The attack against a school in Beslan eventually led to the death of 334 individuals, including students and education staff.

In *Ergi v Turkey*,⁶⁸⁹ the ECtHR also considered the positive obligation to take precautionary measures to protect the right to life, courts may also consider the precautionary measures that might have been taken along the use of force. In *Ergi v Turkey*,⁶⁹⁰ the ECtHR deemed that the Turkish forces, in targeting alleged terrorists, had not taken sufficient precautionary measures to protect the villagers, who were at risk of cross-fires during the attack. It thus concluded that Article 2 ECHR had been violated. This analysis is consistent with the view of the HRCCommittee that the right to life includes a positive obligation for the State: a duty to protect life.⁶⁹¹

⁶⁸³ On the various means available to the authorities and their risks, in particular tasers and tear gas, see Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011), 171.

⁶⁸⁴ *Isayeva v Russia*, Application No 57950/00, 24 February 2005, para 181.

⁶⁸⁵ *ibid*, para 180

⁶⁸⁶ *Tagayeva and Others v. Russia*, Application No 26562/07, 13 April 2017, paras 481–493

⁶⁸⁷ *ibid*, paras 488–489

⁶⁸⁸ *ibid*, para 493

⁶⁸⁹ *Ergi v Turkey*, 32 EHRR 388, 28 July 1998, para 79

⁶⁹⁰ *ibid*, para 79

⁶⁹¹ HRCCommittee General Comment 36 (2018), paras 18–31; in that General Comment, at para 69, the HRCCommittee also highlighted that many thousands of lives are lost every year as a result of wars and that efforts to avert the risks of war are an important safeguard for the right to life.

The duty to protect life was at the centre of *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v Turkey*,⁶⁹² a case concerned with the death of a seven year old boy who froze to death after attempting to walk home from school in a snowstorm, after the school had shut early and the shuttle bus did not come on time. The ECtHR affirmed that there was a violation of the right to life as the authorities had failed to take a measure, i.e. inform the municipality's shuttle service of the early closure of the school, which would have avoided a risk to the boy's life. It thus affirmed that the State must not only refrain from taking life intentionally and unlawfully but must also 'take appropriate steps to safeguard the lives of those within its jurisdiction'.⁶⁹³ Positive measures must be taken 'in the context of any activity, whether public or not, in which the right to life may be at stake', which may include 'school authorities, who carry an obligation to protect the health and well-being of pupils, in particular young children who are especially vulnerable and are under the exclusive control of the authorities'.⁶⁹⁴ While 'not every risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising',⁶⁹⁵ the Court deemed that 'it cannot be considered as unreasonable to expect the school authorities to take basic precautions to minimise any potential risk and to protect the pupils' in the particular circumstances.⁶⁹⁶ Going further, the Human Rights Committee has also underlined that the right to life should not be interpreted narrowly and that it includes not only a duty to protect life but also the right to enjoy a life with dignity.⁶⁹⁷

The right to life of students and education staff must thus be respected, protected and fulfilled under IHRL. If a student or member of a teaching body takes an active part in disrupting public order, such as in demonstrations, the law enforcement and military personnel may use force only in limited circumstances and must at all times respect the principle of proportionality. It is the duty of States to ensure the provision of national legal frameworks and adequate training to law enforcement and military personnel in accordance with the international human rights norms protecting the right to life.⁶⁹⁸ In addition, if the death of a member of the student or education staff is due to the action of a non-state actor, a State may be held responsible for not having ensured the protection of human lives through adequate preventive measures, such as was the case in the Beslan school siege. Finally, authorities may also be held responsible if they

⁶⁹² *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, Application no. 19986/06, 10 July 2012

⁶⁹³ *ibid*, para 32

⁶⁹⁴ *ibid*, para 35. See also paragraph 36, where the Court stated that 'For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.

⁶⁹⁵ *ibid*, para 36

⁶⁹⁶ *Ibid*, para 41

⁶⁹⁷ HRCCommittee General Comment 36 (2018), para 3. This is in line with the 'vida digna' jurisprudence of the IACtHR.

⁶⁹⁸ *Makaratzis v Greece*, 20 December 2004, para 66. In this case, the Court found that Greece had violated the right to life because it lacked adequate guidelines and training for the police forces in this regard. For more on the required national framework that has to be implemented, see *Zambrano Velez et al v Ecuador*, 4 July 2007, paras 86–87.

failed to take basic precautionary measures to protect students, as highlighted by the case of Turkish boy who froze to death because a school shuttle did not arrive to pick him up following early school closure.

4.1.2 Protection of the Liberty and Security of Students and Education Staff

In order to be able to benefit from education, the liberty and security of students and education staff must be protected. Like the right to life, this human right is at particular risk in situations of insecurity and armed conflict. The right to liberty and security of the person, which may be closely associated with the right to life,⁶⁹⁹ is protected by the same key human rights treaties.⁷⁰⁰

As it is the arbitrary arrest or detention that is not permitted under IHRL,⁷⁰¹ the deprivation of liberty may be permissible if there is a legal basis and if a legal procedure is followed.⁷⁰² The ECHR includes detention following ‘conviction by a competent court’ as a permissible deprivation of liberty.⁷⁰³ While it is imperative that the legal basis and procedures be clearly implemented at the national level, an arrest or detention may still be arbitrary even though it is in accordance with the relevant national legislation.⁷⁰⁴

An individual may be deprived of his or her liberty by authorities through arrest or detention.⁷⁰⁵ Deprivation of liberty can occur on a wide variety of grounds, from criminal activity and immigration control to mental illness.

The ECHR is the only treaty which lists in an exhaustive manner all the situations under which someone may be lawfully deprived of liberty, including ‘the detention of a minor by lawful order for the purpose of education supervision or his lawful detention for the purpose of bringing him before the competent legal authority’.⁷⁰⁶ However, while this situation is listed as a possible legal basis for detention, it must not be contrary to the objects and purpose of the ECHR. Situations where an individual is being restricted to a facility for ‘education purposes’ may also amount to a deprivation of liberty.⁷⁰⁷

⁶⁹⁹ These rights may even be protected by the same provision, see Arab Charter, Art 5.

⁷⁰⁰ ICCPR, Arts 9 and 10; ACHPR, Art 6; Arab Charter, Art 14, para 1; ACHR, Art 7; ECHR, Art 5 para 1

⁷⁰¹ In *Chaparro Álvarez and Lapo Iñiguez v Ecuador*, 21 November 2007, para 93, the IACtHR stated that detention is arbitrary if it is contrary to the ACHR or if it is not essential or appropriate. The principle of proportionality must thus be respected.

⁷⁰² ICCPR, Art 9(1); ACHPR, Art 6; Arab Charter, Art 14(1); ACHR, Art 7(2); ECHR, Art 5(1)

⁷⁰³ ECHR, Art 5(1)

⁷⁰⁴ Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011), 257–260

⁷⁰⁵ ICCPR, Art 9(1)

⁷⁰⁶ ECHR, Art 5(1). Note that IHL allows detention of certain persons (such as POWs) who do not fall within any of the categories cited in Art 5 para 1 of the ECHR. This may be problematic unless this right is derogated from due to a state of emergency.

⁷⁰⁷ HRCCommittee *General Comment 8: Right to Liberty and Security of Persons (Art 9)*, 30 June 1982, para 1, which makes a non-exhaustive list of possible detention situations.

Deprivation of liberty entails a number of obligations on the authority carrying it out. In particular, the person detained must be promptly informed of the reason for detention.⁷⁰⁸ Other safeguards include the prohibition of *incommunicado* detention (where no communication with anyone outside the detention centre is allowed the detainee, not even with a legal representative) and the availability of *habeas corpus* (right to have a court consider the lawfulness of detention).⁷⁰⁹ In fact it is crucial that pre-trial detention follows strict procedures so that all detainees are brought before a court as soon as possible. It is particularly important for students who are missing out on their education while being detained. In addition, all sentenced prisoners, no matter their age, should be offered adequate education opportunities.⁷¹⁰

The right to liberty of movement and choice of residence of anyone lawfully within the territory of a State, as provided under IHRL, enhances the liberty of students and education staff.⁷¹¹ This right includes the right of anyone to be allowed to enter his or her own country. In times of insecurity and armed conflict, the internal movement of individuals may be restricted, possibly rendering access to education facilities difficult. Although such restrictions can be lawfully put in place to guarantee the security, these restrictions may also be misused and amount to a violation of freedom of movement. In addition, during challenging times, students and education staff may also be internally displaced. On that matter, the Guiding Principles on Internal Displacement, although not legally binding, provide a number of principles of assistance for the interpretation of the right to liberty of movement and choice of residence.⁷¹² According to the first principle, ‘internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country’. This includes the right to education, of which no displaced person should be deprived.

The liberty of students and education staff during a period of insecurity and armed conflict may not only be curtailed by authorities but also, for example, by hostage-takers seeking to put pressure on a State or an organization. While IHRL does not specifically prohibit hostage-taking, the International Convention against the Taking of Hostages offers additional protection against this type of situation under international law and thus is worth mentioning here.⁷¹³ For example, it requires States to cooperate in the prevention of hostage-taking and, if a hostage is

⁷⁰⁸ ICCPR, Art 9(2), for example. For more on the guarantees against arbitrary arrest and detention, see Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press 2009), 449–493

⁷⁰⁹ The safeguards are listed in the United Nations Body of Principles and for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by Resolution A/Res/43/173 on 9 December 1988.

⁷¹⁰ See the *Basic Principles for the Treatment of Prisoners*, adopted by the UN in 1990: prisoners retain the human rights as contained in the UDHR, Art 26, including the ‘right to take part in cultural activities and education aimed at the full development of the human personality’.

⁷¹¹ ICCPR, Art 12

⁷¹² UN Guiding Principles on Internal Displacement, 2001

⁷¹³ International Convention Against the Taking of Hostages, adopted 17 December 1979, entered into force 3 June 1983

being detained, to take all possible measures to secure his or her release.⁷¹⁴ The prohibition against taking of hostages, as well as the prohibition against abductions or unacknowledged detention, cannot be subject to derogation, even in a state of emergency.⁷¹⁵ During times of insecurity and armed conflict, schools are likely to be the target of hostage-takers, as was the case in September 2004, when a school in Beslan, North Ossetia, was targeted by terrorists, who took students and education staff hostage, eventually killing 334 individuals.⁷¹⁶

The liberty of students and education staff is also protected through the IHRL prohibition against slavery and forced or compulsory labour.⁷¹⁷ In that regard, children benefit from added protection against labour, even if it is not forced or compulsory. This is discussed in more detail below, in the section on Special Protection for Children.

4.1.3 Protection from Torture and Other Inhuman and Degrading Treatment

Situations of insecurity and armed conflict may also lead to inhuman and degrading treatment, or to the use of torture against students or education staff. The prohibition of torture and other inhuman and degrading treatment, a norm of *jus cogens*, is protected by the key human rights treaties,⁷¹⁸ and also by a specific treaty: the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT').

The ICCPR does not contain a definition of torture or cruel treatment or punishment, but the HRCCommittee has stated that this prohibition relates not only to 'acts that cause physical pain but also to acts that cause mental suffering to the victim'.⁷¹⁹ The Committee added that it does not 'consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied'.⁷²⁰

Unlike the ICCPR, CAT contains a definition of torture:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when

⁷¹⁴ International Convention Against the Taking of Hostages, Arts 3 and 4

⁷¹⁵ See the HRCCommittee General Comment 29, *States of Emergency*, 31 August 2001, para 13(b)

⁷¹⁶ This case is discussed in more details above under 4.1.1.

⁷¹⁷ ICCPR, Art 8

⁷¹⁸ ICCPR, Art 7: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'; CRC, Art 37(a): 'States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age'. See also ECHR, Art 3; ACHR, Art 5; ACHPR, Art 5.

⁷¹⁹ HRCCommittee General Comment 20, paras 4–5

⁷²⁰ *ibid*

such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷²¹

The Committee Against Torture has held that rape can amount to torture ‘when it is carried out by or at the instigation of or with the consent or acquiescence of public officials’.⁷²² It also decided that sexual abuse by police may be a form of torture.⁷²³ CAT defines cruel, inhuman or degrading treatment or punishment as acts which do not amount to torture as defined above. These acts must also be ‘committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.⁷²⁴ While torture may be defined as an ‘aggravated form of cruel, inhuman or degrading treatment or punishment’,⁷²⁵ it has been argued that the decisive criterion to distinguish torture is the purpose of the conduct and the intention of the perpetrator, but not the intensity of the pain or suffering.⁷²⁶ Unlike torture, cruel and inhuman treatment or punishment does not have to be intentional or inflicted for a particular purpose. Degrading treatment or punishment, also an infliction of pain or suffering, is aimed at humiliating the victim.⁷²⁷

The ECtHR has found that a conduct must attain a minimum level of severity to fall within the scope of cruel, inhuman or degrading treatment.⁷²⁸ When assessing the level of severity of a conduct, the court takes a case-by-case approach and looks at ‘the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc’.⁷²⁹ While the ECtHR also considers that inhuman treatment does not necessarily have to be deliberate, it does not deem that degrading treatment must necessarily be aimed at humiliating the victim.⁷³⁰

⁷²¹ CAT, Art 1(1). The elements constituting torture under CAT are the involvement of a public official, the infliction of severe pain or suffering, intention and specific purpose: see Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008), 28

⁷²² This is recognised by former Special Rapporteurs on torture and by regional jurisprudence: see the Special Rapporteur on Torture report before the Human Rights Council, 15 January 2008, A/HRC/7/3, para 36

⁷²³ *V.L. v Switzerland*, CAT/C/37/D/262/2005

⁷²⁴ CAT, Art 16(1)

⁷²⁵ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008), 28

⁷²⁶ *ibid*, 558. Note that the Committee Against Torture has lessened the impact of the distinction between torture and cruel, inhuman or degrading treatment: see its General Comment 2, where the Committee states that ‘the obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture’.

⁷²⁷ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008), 558

⁷²⁸ *Ireland v United Kingdom*, 2 EHRR 25, 18 January 1978, para 162

⁷²⁹ *ibid*, para 162; See also *Jalloh v Germany*, Application No 54810/00, 11 July 2006, paras 67–68

⁷³⁰ *Jalloh v Germany*, Application No 54810/00, 11 July 2006, para 68, referring, *inter alia*, to *Raninen v Finland*, Application No 152/1996/771/972, 16 December 1997

In differentiating between ‘torture’ and ‘cruel, inhuman or degrading treatment’, the ECtHR noted that torture attaches a particular stigma and requires suffering of particular intensity and cruelty.⁷³¹ In addition to the level of intensity, the ECtHR requires intention for a conduct to qualify as torture.⁷³² It is unclear whether a specific purpose is necessary for a conduct to be considered torture by the ECtHR. However, the court did refer to CAT and the fact that ‘the aim, inter alia, of obtaining information, inflicting punishment or intimidating’ is necessary for a conduct to amount to torture.⁷³³ The ECtHR added that actions which may have been classified as inhuman and degrading treatment at a certain point may be classified as torture at a later stage because the ECHR is a ‘living instrument’.⁷³⁴

As the ACHR does not contain a definition of torture, the IACtHR, as well as the Commission, have relied on the definition of torture as found in the Inter-American Convention to Prevent and Punish Torture.⁷³⁵ When considering cases involving children, the IACHR noted that, while this definition leaves some room for interpretation in assessing whether a specific act constitutes torture, ‘in the case of children the highest standard must be applied in determining the degree of suffering, taking into account factors such as age, sex, the effect of the tension and fear experienced, the status of the victim’s health, and his maturity, for instance’.⁷³⁶

In other cases, the IACtHR has also referred to Article 1 CAT when considering the scope of torture.⁷³⁷ As neither the ACHR nor the Inter-American Convention to Prevent and Punish Torture defines ‘cruel, inhuman or degrading treatment or punishment’, the IACtHR has taken into account the jurisprudence of the ECtHR on the requirement of a minimum level of severity for an act to amount to ‘torture or cruel, inhuman or degrading treatment’.⁷³⁸ The court also referred to the definition given by the ICTY to ‘cruel, inhuman and degrading treatment’.

The African Commission has also relied on ECtHR judgments to interpret the African Charter prohibition of torture, cruel, inhuman and degrading treatment, in particular with the necessity of a minimum degree of severity and a relative case-by-case approach.⁷³⁹ It highlighted that these terms have to be interpreted as widely as possible in order to ensure protection against all

⁷³¹ *Ireland v United Kingdom*, Series A No 25, 2 EHRR 25, para 167

⁷³² See *Aksoy v Turkey*, Application No 21987/93, 18 December 1996, para 63, referring to *Ireland v United Kingdom*, 2 EHRR 25, 18 January 1978, para 167

⁷³³ *Gafgen v Germany*, Application No 22978/05, 1 June 2010, para 90

⁷³⁴ *Selmouni v France*, Application No 25803/94, 28 July 1999, para 101, where it stated that ‘the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies’.

⁷³⁵ *Tibi v Ecuador*, Series C No 114, 7 September 2004, para 145, citing Art 2 of the Inter-American Convention to Prevent and Punish Torture

⁷³⁶ *Jailton Neri Da Fonseca v Brazil*, Report No 33/04, 11 March 2004, para 64

⁷³⁷ *Maritza Urrutia v Guatemala*, 27 November 2003, paras 90–91

⁷³⁸ *Caesar v Trinidad and Tobago*, Series C No 123, March 11 2005, para 67

⁷³⁹ *Huri-Laws/Nigeria*, Communication 225/98, 6 November 2000, para 41. Note that Arts 60 and 61 of the African Charter make express allowance for the Commission to consider and draw inspiration from other human rights instruments.

kinds of abuses.⁷⁴⁰ Relying on the definition of torture contained in CAT, the African Commission adopted the *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)*, which exhort member States to ensure that acts of torture are offences within their national legal systems.⁷⁴¹

The relation between education and inhuman and degrading treatment or punishment has been considered by the ECtHR in *Cyprus v Turkey*.⁷⁴² The Court noted, based on a UN Secretary-General report on the living conditions of the Karpas Greek Cypriots, that:

[T]he Victims were the object of very severe restrictions which curtailed the exercise of basic freedoms and had the effect of ensuring that, inexorably, with the passage of time, the community would cease to exist... [The Secretary General] made reference to the facts that the Karpas Greek Cypriots were not permitted by the authorities to bequeath immovable property to a relative, even the next-of-kin, unless the latter also lived in the north; there was no secondary-school facilities in the north and Greek-Cypriot children who opted to attend secondary schools in the south were denied the right to reside in the north once they reached the age of 16 in the case of males and 18 in the case of females.⁷⁴³

Given that the Karpas Greek Cypriots were required to live 'isolated, restricted in their movements, controlled and with no prospect of renewing or developing their community',⁷⁴⁴ respect for their human dignity was violated. The Court thus concluded that the 'discriminatory treatment attained a level of severity which amounted to degrading treatment'.⁷⁴⁵ Thus the deliberate lack of access to secondary schooling facilities for a minority within a state may be considered a form of degrading treatment under IHRL.

Protection against Forms of Punishment Amounting to Ill-treatment

Of particular interest for the protection of students, the HRCCommittee has noted that the prohibition contained in Article 7 ICCPR 'must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions'.⁷⁴⁶

Corporal punishment has been defined by the Committee on the Rights of the Child as 'any punishment in which physical force is used and intended to cause some degree of pain or

⁷⁴⁰ Institute for Human Rights and Development in Africa/ Republic of Angola, Communication No 292/04, 22 May 2008, para 52, citing *Media Rights Agenda v Federal Republic of Nigeria*, Communication 224/1998, see also, paras 36-38

⁷⁴¹ For the Robben Island Guidelines, see <www.achpr.org/sessions/32nd/resolutions/61/>

⁷⁴² *Cyprus v Turkey*, Application No 25781/94, 10 May 2001

⁷⁴³ *ibid*, para 307

⁷⁴⁴ *ibid*, para 309

⁷⁴⁵ *ibid*, para 310

⁷⁴⁶ HRCCommittee General Comment 20, para 5

discomfort, however light'.⁷⁴⁷ As an 'invariably degrading' measure, corporal punishment is consequently incompatible with the CRC. Thus the CRC highlights that the right to education requires a State to take measures to 'ensure that school discipline is administered in a manner consistent with the child's human dignity'.⁷⁴⁸ More generally, the CRC requires States to take all necessary measures, including educational measures, to protect children 'from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.⁷⁴⁹ This includes students who are in the care of education staff.

Within the regional courts, corporal punishment at school has been condemned by ECtHR decisions in both public and private school systems.⁷⁵⁰ The ECtHR stated that corporal punishment could amount to inhumane treatment if it attains a certain level of severity and thus could fall within Article 3 ECHR.⁷⁵¹ The level of severity required to amount to inhuman treatment has to be assessed on a case-by-case basis and consider both the physical and the mental effects. The IACtHR has condemned corporal punishment as a violation of Article 5 ACHR, which prohibits torture or cruel, inhuman or degrading treatment or punishment, when considering the application of physical violence to individuals for the commission of offences.⁷⁵² When requested to provide an advisory opinion on the compatibility of corporal punishment as a means of disciplining children and adolescents with the ACHR and the American Declaration, the IACtHR referred to the CRC and the obligation it imposes on States to ensure that no child shall be subjected to physical harm, including in schools.⁷⁵³ Similarly, in a case that regarded the infliction of lashes to students for public order offences, the African Commission stated that corporal punishment is not an admissible form of sentencing⁷⁵⁴ and that corporal punishment may amount to torture.

As already mentioned, the prohibition of ill-treatment is not only concerned with physical pain but extends to the mental suffering of an individual.⁷⁵⁵ There are forms of punishment inflicted

⁷⁴⁷ It adds that it generally involves hitting children by hand or with an object, but can also involve 'for example, kicking, shaking or throwing children, scratching, pinching or biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forcing ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices)': see the Committee on the Rights of the Child, *General Comment 8 on the Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment*, 2 June 2006, CRC/C/GC/8

⁷⁴⁸ CRC, Art 28

⁷⁴⁹ *ibid*, Art 19

⁷⁵⁰ *Campbell and Cosans v United Kingdom*, Application No 7511/76; 7743/76, 25 February 1982; *Costello-Roberts v United Kingdom*, Application No 13134/87, 25 March 1993

⁷⁵¹ *A v UK*, 27 EHRR 611, 1 October 1998. In this case, the corporal punishment was inflicted by a family member.

⁷⁵² *Caesar v Trinidad and Tobago*, Series C No 123, March 11 2005, which regarded the sentencing to strokes (flogging) for a conviction of rape.

⁷⁵³ See the Resolution of the IACtHT of 27 January 2009, <www.corteidh.or.cr/docs/asuntos/opinion.pdf>

⁷⁵⁴ *Curtis Francis Doebller v Sudan*, Communication No 236/2000, 4 May 2003

⁷⁵⁵ HRCCommittee General Comment 20

on students which are also incompatible with IHRL, even though they are not corporal punishment, because they harm their human dignity. These include ‘punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child’.⁷⁵⁶

4.1.4 General Protection of Physical and Mental Well-being of Students and Education Staff

IHRL also contains provisions that must be respected in order to ensure the physical and mental well-being of students and education staff. If some students or members of the education body are discriminated against, if their freedom of thought or religion is violated and if their health is not protected, the right to education cannot be effectively fulfilled.

The Right to Freedom from Discrimination

While students and education staff might be discriminated against at all times, this issue may take on increased importance in times of insecurity and armed conflict, in particular if there is animosity between the different groups inhabiting a particular territory. Discrimination is prohibited under IHRL, whether on the basis of ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.⁷⁵⁷ In accordance with IHRL, it is not permissible to discriminate on any basis against students and education staff. IHRL also prohibits ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.⁷⁵⁸ This will be discussed under the restrictions to the right to freedom of expression below.

In addition to a number of specific declarations against discrimination,⁷⁵⁹ treaties on this matter have also been adopted, such as the CDE, ICERD, CEDAW, CRC, and CRPD.⁷⁶⁰ These treaties contain specific provisions protecting the right to education and training from discrimination, whether on the basis of race or gender.⁷⁶¹

⁷⁵⁶ Committee on the Rights of the Child, *General Comment 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*, 2 June 2006, CRC/C/GC/8

⁷⁵⁷ ICCPR, Arts 2(1), 3, 17 and 26; ICESCR, Arts 2(2) and 3; CRC, Art 2. See also CESCR General Comment 20 on Non-discrimination in economic, social and cultural rights (2009). Non-discrimination is also not permitted in the private sphere and thus, for example, girls cannot be prohibited by their family from attending school.

⁷⁵⁸ See ICCPR, Art 20, which states this has to be prohibited by law.

⁷⁵⁹ The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981); the Declaration on the Elimination of All Forms of Racial Discrimination (1965); and the Declaration on the Elimination of Discrimination Against Women (1967)

⁷⁶⁰ ICERD, adopted on 21 December 1965 and entered into force on 4 January 1969; CEDAW, Art 10, protects equality between women and men in the field of education. Some declarations protecting specific groups, such as the Declaration on the Rights of Indigenous Peoples (2007) and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), also contain provisions against discrimination.

⁷⁶¹ ICERD, Art 5(e)(v); CEDAW, Art 10

The CDE, already mentioned in Chapter 3, was the first treaty to codify the right to education, seeks to eliminate and prevent discrimination and to ensure equality in education.⁷⁶² It allows for separate educational systems in some instances, such as for gender separation or for religious or linguistic reasons, as long as the opportunities are equal in all systems.⁷⁶³ In protecting against discrimination, the CDE also includes the prohibition of discriminatory educational content. Textbooks must not contain language which supports stereotypes, or demeaning images of particular groups in society. To the contrary, they must ‘convey the message of the inherent dignity of all human beings and their equality of human rights’.⁷⁶⁴

In relation to the obligations of State parties under the relevant provision of the ICERD,⁷⁶⁵ the Committee on the Elimination of Racial Discrimination (‘CERD’) stated that it includes ‘teaching, education, culture and information’ in the promotion of inter-ethnic understanding and tolerance.⁷⁶⁶ According to the CERD Committee, the educational approach to eliminating racial discrimination is an indispensable complement to other approaches to combating racial discrimination. Appropriate educational strategies must be inter-cultural (bilingual where appropriate) and represent a genuine balance of interests (and not lead to cultural assimilation). Therefore, States should include teaching about the history, cultures and traditions of their minority groups, including Indigenous peoples.⁷⁶⁷

States must ensure that everyone under their jurisdiction benefits from educational opportunities. For example, schools cannot impose admission requirements that could have the effect of discriminating against a particular group of persons, for example by imposing a language requirement.⁷⁶⁸ CERD has issued recommendations which have included concerns for education, such as on the measures necessary to ensure the education of Roma children, or on the need for children not to have different educational opportunities based on descent.⁷⁶⁹ The Committee on the Elimination of Discrimination against Women has also issued recommendations, including the issue of education, with a view in particular to encourage positive measures, such as through preferential treatment or quotas, to improve the integration of women in education.⁷⁷⁰

⁷⁶² CDE. See also Klaus D Beiter (n95), 245

⁷⁶³ CDE, Art 2. The matter of separate schools remains a debated issue as it may reinforce stereotypes for example. See also Klaus D Beiter (n95), 251–252

⁷⁶⁴ See, for example, General Recommendation XXIX (Sixty-First Session, 2002) Art 1(1) ICERD (descent) at para vv

⁷⁶⁵ ICERD, Art 7

⁷⁶⁶ CERD Committee General recommendation No 35 (2013) on combating racist hate speech, 26 Sep 2013, para 30

⁷⁶⁷ *ibid*, paras 31–34

⁷⁶⁸ Klaus D Beiter (n95), 106

⁷⁶⁹ General Recommendation XXVII (Fifty-Seventh Session, 2000) Discrimination against Roma and General Recommendation XXIX (Sixty-First Session, 2002) Art 1(1) ICERD (descent). See Klaus D Beiter (n95), 108–109, for discussion of the need to adopt ‘active non-discrimination’ policy.

⁷⁷⁰ General Recommendation No 5 (Seventh Session, 1988) and General Recommendation No 25 (Thirtieth Session, 2004), both on temporary special measures.

As indicated by the Committee on the Elimination of Discrimination against Women, positive measures, such as support for education through additional courses, classes or subsidies, can be taken with regard to individuals where there has been long-term structural and other discrimination, in order to ensure that they benefit from equal educational opportunities.⁷⁷¹ This principle is valid for other groups of people who are (or are at risk of) being disadvantaged. With regard to persons with disabilities, the principle of ‘reasonable accommodation’ provides that modification and adjustments that do not impose a disproportionate or undue burden must be taken if they are necessary and appropriate to ensure them equality of enjoyment or exercise of their human rights.⁷⁷² This includes any measure that enables inclusive education, allowing persons with disabilities to be taught alongside other students. With regard to children in general, the principle of the ‘best interests of the child’ must be a primary consideration whenever a decision is taken that may affect them.⁷⁷³ Special measures, including legislative or administrative measures, may need to be taken in order to promote or achieve substantive equality for everyone within the education system. These measures must be generally appropriate, proportionate and justified and must not continue once substantive equality has been achieved.⁷⁷⁴

General Comment 14 on the ‘Right of a Child to have His or Her Best Interests taken as a Primary Consideration’ provides guidance with regard to the interpretation of the concept of ‘the best interests of the child’ as enshrined in Article 3(1) of the CRC. This cross-cutting provision seeks to ensure ‘both the full and effective enjoyment of all the rights recognized in the Convention and the holistic developments of the child’.⁷⁷⁵ As there is no hierarchy of rights in the CRC, the right of a child to education must be respected when assessing his or her best interests: ‘no right could be compromised by a negative interpretation of the child’s best interests’.⁷⁷⁶ In addition to reiterating that free education falls within the scope of ‘child’s best interests’, the Committee on the Rights of the Child also highlights that the content of education must be of ‘quality’.⁷⁷⁷ It states that the children’s well-being includes their educational needs and that these needs must be balanced with others when assessing the elements that are in a child’s best interests.⁷⁷⁸ This General Comment also highlights the duty of States in ensuring that education staff are well-trained, the teaching environment must be child-friendly, and the teaching and

⁷⁷¹ See the General Recommendation 25 of the Committee on the Elimination of Discrimination against Women on ‘temporary special measures’, adopted at the thirtieth session of the Committee, A/59/38, Annex I (2004)

⁷⁷² CRPD, Art 2

⁷⁷³ CRC, Art 3(1)

⁷⁷⁴ See CESCR General Comment 20, para 9. See also the General Recommendation 32 of the Committee on the Elimination of Racial Discrimination on the meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination. More generally, see Marc Bossuyt, *The Concept and Practice of Affirmative Action, Final Report by Special Rapporteur*, E/CN.4/Sub.2/2002/21

⁷⁷⁵ The Committee on the Rights of the Child General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art 3, para 1), 29 May 2013

⁷⁷⁶ See para 4

⁷⁷⁷ See para 79

⁷⁷⁸ See paras 71 and 80

learning methods must be appropriate. Finally, in addition to being an investment for the future of children, the Committee recognises that education is ‘also an opportunity for joyful activities, respect, participation and fulfilment of ambitions’.⁷⁷⁹ When providing education to children, whether in time of peace or armed conflict, States must ensure that the education provided respects the best interests of the child as detailed in this General Comment. Therefore, even in situations of insecurity or armed conflict, the best interests of the child must remain the primary consideration when providing for his or her education.

While it is possible to treat some students differently, the ECtHR stated that there is a violation of the principle of equality if a distinction is not based on a reasonable justification and if it does not have an objective.⁷⁸⁰ Thus a difference in treatment amounts to discrimination if it is based on one of the prohibited grounds (such as race, sex, religion, etc) and ‘has the purpose or effect of nullifying or impairing equality of treatment in education’.⁷⁸¹

Within the protection against discrimination, the prohibition to persecute may be included. However, IHRL does not explicitly prohibit persecution, which is a term used by ICL.

The Right to Freedom of Thought, Conscience and Religion

IHRL lists a number of grounds on which discrimination is prohibited, including political or other opinion and religion.⁷⁸² In parallel, the freedom of thought, conscience and religion of students and education staff benefits from additional guarantee under IHRL, including the ICCPR, under which it is a non-derogable right, and the CRC.⁷⁸³

This right means that anyone may exercise this freedom by manifesting his religion or belief in teaching.⁷⁸⁴ It also means that the content of education itself must be neutral and objective.⁷⁸⁵ Neutrality in education does not necessarily mean that schools have to be entirely free of religious signs. The ECtHR decided that the presence of crucifixes in classrooms is not against religious freedom even though it highlights the dominant religion of a territory.⁷⁸⁶ However, if a religious symbol is part of a process of indoctrination, if a school curriculum includes compulsory religious teaching against the beliefs of the students, then there is a violation of freedom of religion through education.⁷⁸⁷ A school may also offer teaching of a particular religion but it

⁷⁷⁹ See para 79

⁷⁸⁰ See *Case Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium v Belgium*, Application No 1474/62, 23 July 1968, para 10

⁷⁸¹ CDE, Art 1

⁷⁸² ICCPR, Art 2; CDE, Art 1

⁷⁸³ ICCPR, Art 18 and ICCPR, Art 4(2); CRC, Art 14

⁷⁸⁴ ICCPR, Art 18(1)

⁷⁸⁵ HRCCommittee, *General Comment 22: The Right to Freedom of Thought Conscience and Religion, Art 18* (Forty-eighth session, 1993), paras 6–8

⁷⁸⁶ *Lautsi and others v Italy*, Application No 30814/06, 18 March 2001

⁷⁸⁷ See, for example, ECtHR in *Folgero and Others v Norway*, Application No 15472/02, 29 June 2007. In this case, the court deemed that an emphasis on Christian instruction violated the right of freedom of religion.

must then offer an exemption (or an acceptable alternative) to this religious instruction if it goes against a child's beliefs.⁷⁸⁸

With regard to students who are children, the convictions of their parents are also protected under IHRL, as they can choose freely the religious and moral education of their children.⁷⁸⁹ As a consequence, parents are also free to choose to send their children to private schools to facilitate the religious and moral upbringing in accordance with their convictions.⁷⁹⁰ However, the need to respect the parents' convictions are limited by the primary right of a child to receive education. Thus, for example, a parent cannot decide to take a child out of school on a particular day because of religious beliefs.⁷⁹¹ While parents can object to a particular religious education, they cannot oppose other educational matters or demand that a State provide a specific school to cater for their religion, as long as knowledge is provided in a neutral and objective manner.⁷⁹²

The Right to Freedom of Expression

The right to freedom of expression includes the right to freedom of speech and all forms of expression.⁷⁹³ This right may be limited by restrictions if these are provided by law and are necessary:

- for the respect of the rights or reputations of others;
- for the protection of national security or of public order (*ordre public*), or of public health or morals.⁷⁹⁴

More generally, this right can also be curtailed by the prohibition of propaganda for war and the prohibition of 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.⁷⁹⁵ As a result, hate and discriminatory speech and all expressions of intolerance, including incitement, harassment or threats to students and education staff, are prohibited under IHRL.

As part of their right to freedom of expression, students must be able to express their opinions in class freely, without the fear of becoming victims of human rights abuses. The right of students to freedom of expression must not, however, violate the prohibitions mentioned above.

⁷⁸⁸ HRCCommittee General Comment 22, paras 6–8. See also the HRCCommittee in *Erkki Hartikainen v Finland*, Communication No 40/1978, 4 September 1981

⁷⁸⁹ ICCPR, Art 18(4)

⁷⁹⁰ ICESCR, Art 13(3)

⁷⁹¹ *Martins Casimiro and Cerveira Ferreira v Luxembourg*, Application No 44888/98, 27 April 1999. This case concerned Seventh Day Adventists who wished to take their children out of school on Saturdays on religious grounds.

⁷⁹² *Kjeldsen, Busk, Madsen and Pedersen v Denmark*, Application No 5095/71, 7 December 1976, para 53

⁷⁹³ ICCPR, Art 19(2)

⁷⁹⁴ *ibid*, Art 19(3)

⁷⁹⁵ See ICCPR, Art 20, which states that this must be prohibited by law.

Thus, for example, a student is not allowed to make comments that incite hatred.

In addition, students cannot be prohibited from protesting and demonstrating their views, even if these oppose the policies of their school or university or the views or policies of the government in place. The right of students to express their discontent through demonstrations can be curtailed only under the restrictions mentioned above.

The right to freedom of expression also includes the right to academic freedom, which includes the right to discuss freely all matters in a curriculum, as well as the right to decide on some aspects of the curriculum.⁷⁹⁶ The ECtHR stated that ‘the importance of academic freedom [...] comprises the academics’ freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction’.⁷⁹⁷ However, the right to academic freedom is also subject to the restrictions mentioned above. As a result, a teacher or professor must not make discriminatory comments or incite hatred among the student body.⁷⁹⁸

The restrictions on the right to freedom of expression can only be applied in accordance with IHRL.⁷⁹⁹ In limited circumstances, they may be necessary to ensure a safe and welcoming environment for students and education staff.

The Right to Freedom of Assembly and Association

Student unions and student associations are common, in particular in higher education. IHRL protects the right to freedom of association with others and thus students must be able to establish and join associations.⁸⁰⁰ Students must be able to join unions and associations freely, without the fear of being monitored or being threatened. This is also valid for education staff, who also have the right to form and join trade unions as a result of their employed status, as mentioned below.

This right may be limited in the same way as the right to freedom of expression. These restrictions must be provided by law and be ‘necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others’.⁸⁰¹

The Right to Work and the Right to Form and Join Trade Unions

The right of education staff to work and to be remunerated for their work is protected under

⁷⁹⁶ See also Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe (PACE) concerning the protection of academic freedom of expression which states that ‘history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation’.

⁷⁹⁷ *Sorguç v Turkey*, 23 June 2009, para 35

⁷⁹⁸ For example, a teacher or professor cannot deny the Holocaust to his or her students.

⁷⁹⁹ See in particular ICCPR, Arts 19 and 20

⁸⁰⁰ ICCPR, Art 22

⁸⁰¹ ICCPR, Art 22(2); ICESCR, Art 8(1)(a) and (c)

IHRL.⁸⁰² The right to work entails the right to choose freely or accept a position in the education sector, such as a teaching job. This right is closely connected to the right to education as, in order to be able to educate others, one must have been educated in the first place. The right to work allows individuals to live in dignity by enabling them to secure housing, food and clothing for themselves and for their families. The right to work in the education sector must also be ensured in situations of insecurity or during armed conflict. Education staff must not be deprived of their work in an unfair manner, such as, for example, on the basis of discrimination. Remuneration for work must be equal, no matter the individual holding the position in question, in accordance with the general principle of equality and non-discrimination.⁸⁰³ All workers should be given remuneration that equates to a fair wage, with ‘equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work’. The remuneration must provide ‘a decent living for workers and their families’.⁸⁰⁴ Remuneration must be sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as education.⁸⁰⁵

Furthermore, the right to work also entails rights *at* work, such as the enjoyment of safe and healthy working conditions.⁸⁰⁶ The ILO has adopted a number of treaties which specifically provide for such conditions and the prevention of occupational hazards, including accidents.⁸⁰⁷ Safe and healthy conditions for workers, including those in the education sector, must be achieved through coherent national policies.

A corollary of the right to work is the right of education staff to form and join trade unions. IHRL protects the right of workers to jointly seek the promotion and protection of their interests by forming and joining trade unions.⁸⁰⁸ This right includes the right to strike. This right, like the right to freedom of expression and the right to freedom of assembly and association, may also be restricted by law.⁸⁰⁹

The right to work must also be respected by States by prohibiting forced or compulsory labour. As discussed below, children are particularly protected under IHRL against economic exploitation.

⁸⁰² ICESCR, Art 6

⁸⁰³ CESCR, *General Comment 18: the Right to Work*, 24 November 2005, para 4

⁸⁰⁴ CESCR, *General comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 26 Apr 2016, E/C.12/GC/23, para 9

⁸⁰⁵ *ibid*, para 18

⁸⁰⁶ ICESCR, Art 7(b)

⁸⁰⁷ International Labour Organization Convention 155 Concerning Occupational Safety and Health and the Working Environment; ILO Convention No 161 on Occupational Health Services (1985); ILO Convention No 187 on Promotional Framework for Occupational Safety and Health (2006)

⁸⁰⁸ ICESCR, Art 8

⁸⁰⁹ *ibid*, Art 8(1)(a) and (c)

The Right to Health and the Right to an Adequate Standard of Living

The physical and mental well-being of students and education staff is also protected under IHRL by the right to health. Gaps in the enjoyment of the right to health impede the realization of the right to education. IHRL provides for ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.⁸¹⁰ This provision also includes the steps to be taken by States parties to achieve the full realization of this right, including the improvement of hygiene, the prevention and control of diseases, and the provision of medical care to the sick. This healthy environment must be provided to all and must include the prenatal period, as well as the first years of a child’s life. This is crucial to ensure the development of the child in a way that will enable him or her to attend school.

The right to education and the right to health, like the other human rights, are interdependent. Thus, while students and education staff need to enjoy good health for the right to education to be fulfilled, the realization of the right to education may also be necessary for the realization of the right to health. In situations of insecurity and armed conflict, a lack of resources may quickly lead to the spreading of diseases. Education on elementary health matters, including on sanitation and safe sex measures, for example, is also crucial to ensure the maintenance of basic health requirements within communities living in difficult situations. The CESCR recognises the interdependence between Article 12 of the ICESCR on the right to sexual and reproductive health and Articles 13 and 14 on the right to education, and provides that education ‘entails a right to education on sexuality and reproduction that is comprehensive, non-discriminatory, evidence-based, scientifically accurate and age appropriate’.⁸¹¹

The Committee on the Rights of the Child underlined the need to take into account the best interests of the child, including its educational needs, when making a health-related decision regarding the child.⁸¹² It is particularly important in situations of insecurity and armed conflict to consider the educational needs of children who may have been injured as a result of the context of the insecurity or armed conflict in which they live. Educational attainment is also a factor for the realisation of children’s right to health.⁸¹³ Health itself, and the prevention of illnesses, must be part of education programmes.⁸¹⁴ It must be appropriate to children’s age and educational level.⁸¹⁵ The provision of health education also includes teaching parents about

⁸¹⁰ *ibid*, Art 12. See also ACHPR, Art 16; Additional Protocol to the ACHR in the Area of ESCR, Art 10; and ESC, Art 11

⁸¹¹ CESCR, *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 01 May 2016, E/C.12/GC/22, para 9

⁸¹² Committee on the Rights of the Child, *General Comment 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art 24)*, 17 April 2013, para 12: This General Comment provides additional guidance for States and supplements General Comment 14 issued by the Committee of Economic, Social and Cultural Rights.

⁸¹³ Committee on the Rights of the Child, *General Comment 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art 24)*, 17 April 2013, paras 17

⁸¹⁴ See paras 26, 31 and 46, which specifically mention ‘health education’.

⁸¹⁵ See para 58

children's health (including hygiene and breastfeeding and also the risks associated with substance abuse, for example),⁸¹⁶ as well as informing children about sexual and reproductive health.⁸¹⁷ Health education is particularly important in situations of insecurity and armed conflict as children often live in precarious conditions, where diseases are likely to spread rapidly.

According to the Committee on Economic Social and Cultural Rights, 'women and girls living in conflict situations are disproportionately exposed to a high risk of violation of their rights, including through systematic rape, sexual slavery, forced pregnancy and forced sterilization'.⁸¹⁸ The protection of the right to health also includes an obligation to protect groups at risk of violence, in particular women and children. States must prevent the coercion of persons to undergo practices which are harmful to health, such as female genital mutilation.⁸¹⁹ The Committee also stated that there must be no discrimination towards pregnant adolescents, such as through expulsion from schools and states that 'opportunities for continuous education should be ensured'.⁸²⁰ This is important in areas affected by conflict, where girls may be the targets of sexual violence and become pregnant as a result. Mental health is also given special attention as the Committee mentions the obligation of States to 'provide adequate treatment and rehabilitation for children with mental health and psychosocial disorders while abstaining from unnecessary medication'.⁸²¹ Again, children who have grown up in areas affected by insecurity and armed conflict are often suffering from mental health issues as a result.⁸²² Therefore, the obligation of mental health rehabilitation also applies to reparations programmes set up to remedy the harm suffered by students who were the victims of education-related violations.⁸²³

Another right which must also be ensured in order for students and education staff to be able to attain the highest standard of health is the right to an adequate standard of living, which includes their right to clothing, food and housing.⁸²⁴ The Committee on the Rights of the Child also highlighted the nexus between the provision of school meals and children's health – as ensuring that pupils have access to a full meal every day increases their attention – as well

⁸¹⁶ See para 59

⁸¹⁷ Para 57 highlights the importance of educating men and boys as well given their role in family planning. See also para 60

⁸¹⁸ CESCR, *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 01 May 2016, E/C.12/GC/22, para 30

⁸¹⁹ CESCR, *General Comment No 14, The Right to the Highest Attainable Standard of Health*, 2000, para 35

⁸²⁰ Committee on the Rights of the Child, *General Comment 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art 24)*, 17 April 2013, para 56

⁸²¹ See para 39

⁸²² See, for example, Vindya Attanayake and others, 'Prevalence of Mental Disorders Among Children Exposed to War: A Systematic Review of 7,920 Children' (2009) 25 *Medicine, Conflict and Survival* 4

⁸²³ For more on rehabilitation programmes to remedy education-related violations, see Francesca Capone and others, *Education and the Law of Reparations in Insecurity and Armed Conflict* (BIICL/Protect Education in Insecurity and Conflict 2013)

⁸²⁴ ICESCR, Art 11

increasing school enrolment in general.⁸²⁵ It recommended teaching children about nutrition and healthy eating habits in addition to health education in general. Sport must also be part of children's education as it increases their overall health. In addition, in situations of insecurity and armed conflict, when access to subsistence resources may be scarce, schools that provide daily meals to children may become a crucial place to fulfil their vital needs whilst at the same time ensuring that students remain on their educational track. If this is not the case, there is a high risk that students will drop out of schools, either because they fall ill or because they have to find alternative means to sustain themselves. Although insecurity and armed conflict are likely to generate economic difficulties, schools should nevertheless endeavour to offer nutritious meals to their students and not micronutrient-poor meals which may in the long term be a cause of illnesses in children. The Committee recognised the role of schools (and education in general) as a factor for children to attain the highest standards of health, not only through teaching (nutrition, disease prevention, sexual and reproductive health, etc.), but also through the actual provision of daily access to nutritional meals.⁸²⁶ This is in turn deemed a means to ensure the fulfilment of the right to education.

The Right to Cultural Life

The right to cultural life, another human right relevant to education which may be at particular risk in situations of insecurity and armed conflict, is also guaranteed under IHRL.⁸²⁷ This right includes the diffusion of science and culture through education. The right to cultural life also entails the right of students to participate freely in cultural life and the arts and, as a consequence, the right to join a theatre group or attend a particular art school if they wish to do so. In addition, this right also entails the right of the child to rest and engage in play and recreational activities which are age-appropriate. This means that even in times of insecurity and armed conflict, students have a right to a balanced life which includes sufficient resting time and recreational activities.⁸²⁸

4.1.5 Special Protection for Particular Groups

In addition to the protections above, which are applicable to everyone, IHRL offers additional protection for those groups which are deemed particularly at risk and more likely to have their rights violated.

⁸²⁵ The Committee on the Rights of the Child, *General Comment 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art 24)*, 17 April 2013, para 46

⁸²⁶ See para 62

⁸²⁷ ICESCR, Art 15; CRC, Art 31

⁸²⁸ Note that for education staff this may correspond to the right to rest and annual leave. Note also that the traditions and customs of religious minorities shall be respected if possible; see International Labour Organization Convention 14 Concerning the Application of the Weekly Rest in Industrial Undertakings; International Labour Organization Convention 106 Concerning Weekly Rest in Commerce and Offices; and International Labour Organization Convention 132 Concerning Annual Holidays with Pay.

Special Protection for Children

Children are particularly vulnerable to all kinds of human rights abuses.⁸²⁹ Situations of insecurity and armed conflict, when the rule of law is often less present, increase the likelihood of these abuses occurring and their subsequent impunity for lack of accountability and remedy. Children are disproportionately affected in humanitarian emergencies, particularly when they are unaccompanied or separated.⁸³⁰ The CESCR has specifically expressed concern over the impact of armed conflict on the ability of adolescents to access education and transition into secondary education, as such situations result in the breakdown of social norms and family and community support structures. Proactive measures to end discrimination of marginalised groups in gaining access to education, including by providing education in refugee camps.⁸³¹

The CRC, being the human rights treaty protecting all children under 18 years of age, contains specific provisions protecting children against violence. The CRC constitutes the standard in the promotion and protection of the rights of the child, and the CRC and its Optional Protocols should be universally ratified and effectively implemented.⁸³² It urges States to take protective measures to prevent ‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse’.⁸³³ The Committee on the Rights of the Child has highlighted the long-term implications of not protecting children from violence.⁸³⁴ In particular, it has stated that a child who has suffered from a form of abuse may have lasting physical and mental injuries, as well as suffering disruption of his or her education and, possibly, having to discontinue education. Not being able to obtain education is of course a great impediment for the future of any child, as it reduces the level of personal development and thus the ability to realise his or her right to work and to an adequate standard of living.

Situations of insecurity and armed conflict may lead not only to an increased risk of violence towards children but may also lead to the economic exploitation of children, who then also miss out on education opportunities. Thus the CRC provides protection ‘from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development’.⁸³⁵ The Committee on the Rights of the Child has specifically addressed child

⁸²⁹ See for example the IACtHR, *Case of the ‘Street Children’ (Villagrán Morales et al) v Guatemala*, 19 November 1999, on illegal acts perpetrated by State security agents against ‘street children’.

⁸³⁰ HRC Resolution, 23 March 2018, A/HRC/RES/37/20, preamble

⁸³¹ Committee on the Rights of the Child, *General comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, 6 December 2016, CRC/C/GC/20, paras 70 and 79

⁸³² HRC Resolution, 23 March 2018, A/HRC/RES/37/20, preamble; Note that at present, the only State worldwide that is not a party to the CRC is the United States.

⁸³³ CRC, Art 19. See also CRC, Art 34, which protects children from sexual exploitation and sexual abuse.

⁸³⁴ Committee on the Rights of the Child, *General Comment No. 13 (2011): The Right of the Child to Freedom from all Forms of Violence*, 2011, para 16.

⁸³⁵ Art 32 CRC, Art 32

labour,⁸³⁶ recalling that business enterprises that provide education for children, such as private schools, must also consider the best interests of the child.⁸³⁷ While business enterprises may play an important role in the provision of education, States are not exempted from their obligation to provide for the right of children to education when this task is outsourced to a private body, as States are responsible for the acts of non-State actors if those actors are exercising a public duty.⁸³⁸ Therefore, States must set standards that are to be followed by business enterprises delivering educational services. They must also invest in education and vocational training so that children can transition to the ‘world of work’.⁸³⁹

In addition to the work done on the topic by the Committee on the Rights of the Child, a set of Children’s Rights and Business Principles were also developed by NGOs and the UN Global Compact.⁸⁴⁰ These Principles do not protect the right to education *per se*.⁸⁴¹ In fact, Principle 3 (c) refers to education and vocational training in the context of the promotion of ‘decent work opportunities for young workers’. However, they also state that businesses must promote education to address the root causes of child labour and consider a child’s best interests, including his or her education.⁸⁴² They also mention the need to provide education for the children of parents and caregivers in the workforce,⁸⁴³ as well as the need to respect children’s right to education when they are being resettled because a business is using their land for its operations.⁸⁴⁴ With regard to situations of insecurity and armed conflict in particular, the principles recognise the role of business enterprises in supporting the rights of children affected by emergencies by raising awareness among communities of the risks of abuse and exploitation of children in such contexts.⁸⁴⁵ It also calls for business enterprises to support ‘authorities and humanitarian agencies in emergency response’ and ‘make a positive contribution to sustainable peace and development’.⁸⁴⁶ Finally, business enterprises should support government efforts in (and even contribute to) protecting and fulfilling children’s rights and that includes their right to education.⁸⁴⁷

⁸³⁶ Committee on the Rights of the Child, *General Comment No.16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children’s Rights*, 17 April 2013, CRC/C/GC/16

⁸³⁷ As enshrined in Article 3 para 1 CRC; see above and para 16

⁸³⁸ See para 33

⁸³⁹ See para 57

⁸⁴⁰ UNICEF, The Global Compact and Save the Children, ‘Children’s Rights and Business Principles’ (UNICEF, The Global Compact and Save the Children 2012) <www.unicef.org/csr/css/PRINCIPLES_23_02_12_FINAL_FOR_PRINTER.pdf>

⁸⁴¹ See the paper given by Robert McCorquodale on ‘Business, Human Rights and Education’, at ‘Redressing Violations of International Law: The Role of Non-State Actors in Relation to Education’, Seminar of 22 May 2013, of which a Report is available <www.biicl.org/files/6523_redressing_violations_of_international_law_-_event_report_2013_-_final_with_logos.pdf>

⁸⁴² See Principle 2(c)

⁸⁴³ See Principle 3(d)

⁸⁴⁴ See Principle 7(b)

⁸⁴⁵ See Principle 9(b)(i)

⁸⁴⁶ See Principle 9(b)(ii) and (iii)

⁸⁴⁷ See Principle 10(b) and (c)

The ILO has also adopted instruments to protect children from forced labour. The Minimum Age Convention, which seeks to abolish child labour and raise progressively the minimum age for employment or work, states that the minimum age “shall be no less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years”.⁸⁴⁸ It adds that a State “whose economy and educational facilities are insufficiently developed may ... initially specify a minimum age of 14”.⁸⁴⁹ The ILO has also adopted a treaty concerned with the elimination of the worst forms of child labour.⁸⁵⁰ This treaty, which applies to all persons under 18 years of age, highlights particularly odious forms of child labour, including slavery, prostitution, drug trafficking, dangerous activities or the use of children in armed conflict, which is discussed separately below.⁸⁵¹

The European Committee of Social Rights considered the illegal employment of under-age children in *International Commission of Jurists v Portugal*.⁸⁵² Although Portuguese laws made this type of employment illegal, it was found in breach of its obligations under the Revised European Charter because the enforcement of the laws was unsatisfactory. The Committee confirmed that Article 7 of the Revised European Charter aimed to protect children from the risks associated with work which may have negative effects on, inter alia, their education.⁸⁵³ In establishing a breach of Article 7, the Committee considered, inter alia, that the duration of the work carried out by the children exceeded what could be considered as compatible with their health and education.⁸⁵⁴

The need of children to have ‘joyful activities’, including in situation of armed conflict and other difficult situations,⁸⁵⁵ was further affirmed by the Committee on the Rights of the Child.⁸⁵⁶ It affirmed that special attention must be given to particular groups of children, including refugees, displaced children, and those of minority groups whose rights to their own cultures must be recognised.⁸⁵⁷ In addition to these groups, children who are recruited for military purposes, women and girls, especially women and girls who have been victim of human trafficking or sexual violence, and disabled persons should also be given special attention.

⁸⁴⁸ ILO C138 on Minimum Age, 1973, which entered into force on 19 June 1976, Art 2(3)

⁸⁴⁹ *ibid*, Art 2(4)

⁸⁵⁰ ILO C182 on the Worst Forms of Child Labour, 1999, which entered into force on 19 November 2000

⁸⁵¹ *ibid*, Art 3(a). The issue of trafficking is also addressed from a regional perspective, see the ASEAN Convention against Trafficking in Persons, Especially Women and Children, 2015, which entered into force on 8th March 2017.

⁸⁵² *International Commission of Jurists v Portugal*, Complaint No 1/1998, September 9, 1999, para 32

⁸⁵³ *ibid*, para 26

⁸⁵⁴ *ibid*, para 37

⁸⁵⁵ See para 16

⁸⁵⁶ Committee on the Rights of the Child, *General Comment 17 (2013) on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (Art 31)*, 17 April 2013, CRC/C/GC/17

⁸⁵⁷ See para 28

Special Protection for Children in Armed Conflict

The participation of children in armed conflict is a significant education-related violation. Recruitment of children into conflict places them at serious physical and psychological risk, prevents them from attending educational facilities, and can cause many of them to miss out on education entirely. Quality education provided in a safe environment in conflict areas is also essential in halting and preventing recruitment and re-recruitment of children.⁸⁵⁸ The CESCR has recognised the particular vulnerability of street children to recruitment into armed forces or armed groups, noting that the conflict itself can lead to the child ending up in street situations,⁸⁵⁹ as well as the vulnerability of adolescent boys and girls to recruitment by armed forces, militias, armed groups and involvement in terrorist activities.⁸⁶⁰ The UN Security Council has addressed this issue numerous times through the adoption of resolutions condemning specifically the recruitment and use of children in hostilities,⁸⁶¹ and this issue has also been condemned by the HRC.⁸⁶²

The CRC contains a provision specifically dealing with children in armed conflict.⁸⁶³ Article 38 CRC sets 15 as the minimum age for recruitment or direct participation in an armed conflict. This is the only provision in this treaty which does not protect children until 18 years of age. The prohibition on recruitment or direct participation of children under 15 in armed conflict is customary international law.⁸⁶⁴

An Optional Protocol to the CRC on the Involvement of Children in Armed Conflict was adopted in 2000 and entered into force in 2002. This raises the age of recruitment of children to 18 years for compulsory recruitment or recruitment by non-State armed groups.⁸⁶⁵ According to this Protocol, '[S]tates Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities'.⁸⁶⁶ While voluntary recruitment under the age of 18 remains allowed,⁸⁶⁷ this Protocol prohibits compulsory recruitment under the age of 18.⁸⁶⁸ It further provides that non-State armed groups should not recruit or use in hostilities children under the age of 18, no

⁸⁵⁸ Security Council Resolution 2427, 9 July 2018, preamble

⁸⁵⁹ Committee on the Rights of the Child, *General Comment No. 21 (2017) on Children in Street Situations*, 21 June 2017, CRC/C/GC/21, para 19 and 61

⁸⁶⁰ Committee on the Rights of the Child, *General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, 6 December 2016, CRC/C/GC/20, para 81

⁸⁶¹ See for example Resolutions 1261 (1999), 1314 (2000) 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005) and 2427 (2018) on Children and Armed Conflict.

⁸⁶² HRC Resolution, 23 March 2018, A/HRC/RES/37/20, para 9

⁸⁶³ CRC, Art 38(2), which provides that 'States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities'.

⁸⁶⁴ See ICRC CIHL Study Rule 136 and Rule 137. For further discussion of this, see the IHL section, below.

⁸⁶⁵ Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, 25 May 2000, entered into force on 12 February 2002, Art 2

⁸⁶⁶ *ibid*, Art 1

⁸⁶⁷ *ibid*, Art 3

⁸⁶⁸ *ibid*, Art 2

matter what the circumstances.⁸⁶⁹ Thus IHRL requires States (and non-State armed groups) to ensure that they do not to use children under 18 for taking a direct part in hostilities.⁸⁷⁰

The Committee on the Rights of the Child also specifically addressed violence committed against children, and their forced service in armed conflicts, as an obstacle to the fulfilment of Article 31 on the right of the child to rest and leisure, to engage in play and recreational activities and to participate freely in cultural life and the arts.⁸⁷¹ The Committee mentioned the risks of violations of Article 31 for certain particular categories of children, including girls, children living in poverty, children with disabilities, children in institutions (hospitals, refugee centres, detention facilities, etc.), and children from Indigenous and minority communities.⁸⁷² If these children are excluded from schools because they belong to one of these categories, it is an obstacle to the fulfilment of their rights under Article 31. In addition, the Committee also underlined the situation of children in situations of conflict and humanitarian disasters.⁸⁷³ While it recognised that opportunity for play, recreation and cultural activity is often given a low priority in those situations, they ‘can play a significant therapeutic and rehabilitative role in helping children recover a sense of normality and joy after their experience of loss, dislocation and trauma’.⁸⁷⁴ This is further stressed with regard to post-conflict settings specifically, where, in addition to promoting resilience and healing, investment must be made to clear landmines and cluster bombs as they threaten the safety of children in their recreational activities.⁸⁷⁵

The ACRWC is the only regional treaty which addresses the issue of child soldiers. Its protection extends to all children under the age of 18 years.⁸⁷⁶ It provides that ‘[S]tates Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child’.⁸⁷⁷

The ILO has also adopted a Convention on the Worst Forms of Child Labour, which sets the age of recruitment into the armed forces at 18 years.⁸⁷⁸ IHL concerning child soldiers is dealt with below.

The UN Security Council has stressed the need to address all recruitment methods utilised by non-state armed groups targeting children, notably through education and awareness raising.⁸⁷⁹

⁸⁶⁹ *ibid*, Art 4(1)

⁸⁷⁰ Note also the adoption of the Paris Commitments and Principles in 2007, which is a review of the Cape Town Principles and Best Practices on the prevention of recruitment of children into the armed forces and on demobilisation and social reintegration of child soldiers in Africa, adopted in 1997. Close to 100 States have adopted these principles.

⁸⁷¹ Committee on the Rights of the Child, *General Comment No. 17(2013) on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and Arts (Art 31)*, 17 April 2103, CRC/C/GC/17, para 30

⁸⁷² See paras 48–52

⁸⁷³ See para 53

⁸⁷⁴ See para 53

⁸⁷⁵ See para 57 (e). See also, in general, para 35

⁸⁷⁶ ACHPR, Art 2

⁸⁷⁷ *ibid*, Art 22(2)

⁸⁷⁸ *ibid*, Arts 2 and 22; ILO Convention, Arts 2 and 3

⁸⁷⁹ Security Council Resolution 2427, 9 July 2018, S/RES/2427(2018), para 17

It is also worth noting that the European Parliament recommended to support the engagement of armed non-State actors on protecting children in armed conflict.⁸⁸⁰ Although the recommendations do not include a direct reference to education, they encourage States and armed non-state actors to adopt action plans to protect children in armed conflict, as well as to include the issue of child labour in political dialogue with third States.

The Secretary-General's Annual Report on Children and Armed Conflict identified a trend of abduction in several States and by several non-State armed groups. Among its recommendations made in 2015, which include a call for the ratification of the relevant conventions and the incorporation of child protection provisions in peace agreements, the Secretary-General also called for the respect of the civilian character of schools, as well as for participation with the 'Children, Not Soldiers' campaign.⁸⁸¹ The 2015 Report of the Special Representative of the Secretary-General for Children and Armed Conflict identified the challenges to the protection of education as a result of extreme violence, underlining that millions of children were deprived of their right to education as a result of attacks on schools during armed conflicts. It highlighted the need to prevent such attacks by making the attackers accountable through investigation and prosecution and to adopt the necessary legislation, policies, and military procedures, where necessary. Recommendations included facilitating access to and dialogue with non-State armed groups, implementing the 'Children, not Soldiers' action plan, and ensuring that the right to education is 'a cornerstone of effort to protect children from conflict'.

Special Protection for Women and Girls

Female students are more likely than male students not to complete primary education. Indeed, girls are more likely than boys never even to start school. Armed conflict and insecurity are factors that further constrain women's and girls' access to education, with girls being more likely to be out of schools than boys in these settings.⁸⁸² As a result, gender-based discrimination is particularly prohibited under IHRL. CEDAW defines discrimination against women as 'any distinction, exclusion or restriction' based on gender which impairs (or seeks to impair) the equal enjoyment by women of their rights and freedoms, including ESCR.⁸⁸³ The right to education is thus also protected through this prohibition on discrimination on grounds of gender. As

⁸⁸⁰ European Parliament recommendation to the Council of 12 March 2014 on humanitarian engagement of armed non-state actors in child protection (2014/2012(INI))

⁸⁸¹ UN Secretary-General, *Report of the Secretary-General: Children and Armed Conflict*, 5 June 2015, A/69/296, paras 6–12; The Report contains information on violations committed against children in Afghanistan, the Central African Republic, Chad, Colombia, Cote d'Ivoire, the Democratic Republic of Congo, India, Iraq, Israel and Palestine, Libya, Mali, Myanmar, Nigeria, Pakistan, Philippines, Thailand, Somalia, Sudan, South Sudan, the Syrian Arab Republic, and Yemen.

⁸⁸² HRC Resolution, 1 July 2016, A/HRC/RES/32/20, preamble; Committee on the Elimination of Discrimination against Women, General Recommendation No. 36 (2017) on the Right of Girls and Women to Education, 27 November 2017, CEDAWC/GC/36, para 47; HRC Resolution, 22 June 2017, A/HRC/RES/35/22, preamble

⁸⁸³ CEDAW, Art 1

a result, States must establish policies and take measures to eliminate any discrimination against women, such as by ensuring equality within their national legal systems.⁸⁸⁴

Article 10 CEDAW, which is devoted to education, lists a number of measures that States have to take to ensure women the same educational rights as men. These include:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same Opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Discrimination under CEDAW includes all forms of violence or coercion against women.⁸⁸⁵ The Committee on the Elimination of Discrimination against Women has stated that:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women.⁸⁸⁶

This form of discrimination is an obstacle to women's equal enjoyment of their rights and freedoms, including the right to education.⁸⁸⁷ If women are maintained in a subordinate role, they are likely not to be able to complete a basic level of education and even less likely to advance to higher levels of education. As a result, this type of violence also limits women's future professional opportunities.

⁸⁸⁴ *ibid*, Art 2

⁸⁸⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation 19: Violence against Women*, 1992, para 11. See also UNGA Declaration on the Elimination of Violence against Women, Art 4, which states that prohibiting gender discrimination includes eliminating gender-based violence.

⁸⁸⁶ *ibid*

⁸⁸⁷ CESCR, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para 27

In situations of insecurity and armed conflict, women and girls are particularly at risk of gender-based violence and harmful practices,⁸⁸⁸ such as violence targeting women and girls,⁸⁸⁹ violence aimed at preventing girls from attending schools,⁸⁹⁰ sexual violence,⁸⁹¹ abductions,⁸⁹² trafficking,⁸⁹³ female genital mutilation, child and/or forced marriage,⁸⁹⁴ polygamy, or crimes committed in the name of so-called honour.⁸⁹⁵ The Special Rapporteur on violence against women, its causes and consequences reported that the right to education is particularly affected ‘by violence, including family violence and abuse, sexual violence at school, early and forced marriage, human trafficking and harmful traditional practices — which all prevent women and girls from realizing their right to education’.⁸⁹⁶ The risk of such violence is especially high for those fleeing conflict to refugee and internally displaced persons camps,⁸⁹⁷ for indigenous women and girls,⁸⁹⁸ and rural women and girls.⁸⁹⁹

⁸⁸⁸ Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on Gender-based Violence against Women, updating General Recommendation No. 19, 26 July 2017, CEDAW/C/GC/35, para 14; HRC Resolution, 1 July 2016, A/HRC/RES/32/19, preamble; Committee on the Rights of Persons with Disabilities, *General Comment No. 3 (2016) on Women and Girls with Disabilities*, 25 November 2016, CRPD/C/GC/3, preamble

⁸⁸⁹ Security Council Resolution 2299, 25 July 2016, S/RES/2299(2016), preamble

⁸⁹⁰ Security Council Resolution 2274, 15 March 2016, S/RES/2274(2016), paras 38 and 51; HRC Resolution, 1 July 2016, A/HRC/RES/32/20 preamble; HRC Resolution, 22 June 2017, A/HRC/RES/35/22, preamble

⁸⁹¹ HRC Resolution, 1 July 2016, A/HRC/RES/32/19, preamble; Committee on the Elimination of Discrimination against Women, General Recommendation No. 36 (2017) on the Right of Girls and Women to Education, 27 November 2017, CEDAW/C/GC/36, para 48; HRC Resolution, 22 June 2017, A/HRC/RES/35/10, preamble; Security Council Resolution 2427, 9 July 2018, S/RES/2427(2018), para 1; United Nations General Assembly, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, 17 July 2018, A/73/171, para 8

⁸⁹² HRC Resolution, 1 July 2016, A/HRC/RES/32/20, preamble; HRC Resolution, 22 June 2017, A/HRC/RES/35/22, preamble

⁸⁹³ UNGA Resolution, 19 December 2016, A/RES/71/167, preamble, para 17; UNGA, 17 July 2018, A/73/171, paras 5, 8 and 10

⁸⁹⁴ On child marriage, see also the OHCHR, ‘Nigeria: UN and African experts call for immediate release of abducted girls and accountability of perpetrators’, 8 May 2014, where the chair of the Working Group on the issue of discrimination against women in law and in practice emphasised that child marriage destroys girls’ opportunities for education and that ‘Nigeria has the obligation to provide redress to the victims, and prosecute and punish the perpetrators’ <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14577&LangID=E>>; See also UNGA Resolution, 19 December 2016, A/RES/71/175, preamble; United Nations General Assembly, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, 17 July 2018, A/73/171, para 8

⁸⁹⁵ *ibid*, para 35

⁸⁹⁶ UN General Assembly, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, 1 September 2014, A/69/368, para 31

⁸⁹⁷ UN General Assembly, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, 13 June 2017, A/HRC/35/30, para 55

⁸⁹⁸ HRC Resolution, 1 July 2016, A/HRC/RES/32/19, preamble

⁸⁹⁹ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 34 (2016) on the Rights of Rural Women*, 7 March 2016, CEDAW/C/GC/34, paras 14, 26 and 43

In the HRC panel discussion on the equal enjoyment of the right to education by every girl, the ‘multiple barriers to girls’ education’ were recognised. It was stated that these have, in the past, become ‘insurmountable during emergencies and in conflict situations, and were particularly acute for marginalised and excluded populations, particularly girls with disabilities and those belonging to minority groups’. It was also ‘pointed out that emergencies often led to disruptions in education after which many children never returned to school, while those who stayed received poor quality education as a result of an unsafe and inadequate learning environment. For girls, even a short interruption caused by an emergency situation could lead not only to missing out on education but also expose them to the risk of child marriage, trafficking and other forms of gender-based violence’.⁹⁰⁰ A particular concern regarding ‘the militarization of school premises in situations of conflicts, attacks against schools, and threats to the security and safety of female students’ was also expressed.⁹⁰¹ In response, a development framework was deemed necessary, including in relation to ‘education for girls in conflict settings’.⁹⁰²

All of these practices are harmful and negatively impact education. In a joint General Recommendation/General Comment on harmful practices,⁹⁰³ the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) and the Committee on the Rights of the Child also underline the importance of education in raising awareness about these harmful practices. The Committee on the Elimination of Discrimination Against Women (‘CEDAW Committee’) also issued a General Recommendation on ‘Women in Conflict Prevention, Conflict and Post-Conflict Situations’.⁹⁰⁴ In this General Recommendation, the Committee places education at the centre of its analysis and highlights the post-conflict breakdown of State services, such as education infrastructure, and educational facilities, and considers its effects on women and girls:

In conflict-affected areas, schools are closed owing to insecurity, occupied by State and non-State armed groups or destroyed, all of which impede girls’ access to school. Other factors preventing girls’ access to education include targeted attacks and threats to them and their teachers by nonState actors, as well as the additional caregiving and household responsibilities which they are obliged to take on.⁹⁰⁵

As a result, the CEDAW Committee recommends that State parties:

Develop programmes for conflict-affected girls who leave school prematurely so that they can be reintegrated into schools/universities as soon as possible; engage in the prompt repair and reconstruction of school infrastructure; take measures to prevent the occurrence of attacks and threats against girls

⁹⁰⁰ HRC, *Panel Discussion on the Equal Enjoyment of the Right to Education by Every Girl*, 20 July 2015, A/HRC/30/23, para 13

⁹⁰¹ *ibid*, para 15

⁹⁰² *ibid*, para 16

⁹⁰³ Joint General Recommendation, *General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on Harmful Practices*, 4 November 2014, paras 14, 21.

⁹⁰⁴ Committee on the Elimination of Discrimination against Women, *General Recommendation No 30 on Women in Conflict Prevention Conflict and Postconflict Situations*, 1 November 2013, CEDAW/C/GC/30

⁹⁰⁵ *ibid*, para 48

and their teachers; and ensure that perpetrators of such acts of violence are promptly investigated, prosecuted and punished.⁹⁰⁶

In doing so, States must also coordinate the efforts of all stakeholders, including those concerned with education, to ensure that they are not duplicated and that they reach all segments of an affected population – even those living in remote areas.⁹⁰⁷

In this General Recommendation, the CEDAW Committee acknowledges those who have been displaced as a result of situations of insecurity and armed conflict, including refugees and asylum-seekers. It underlines the risks faced by these women and girls of suffering from violence, including sexual violence, as well the fact that they may be recruited into armed forces or rebel groups. It also recognises that those living in conflict and post-conflict environments generally have unequal access to education, which then impacts negatively on their livelihood.⁹⁰⁸ Finally, the CEDAW Committee recommends that State parties take preventive measures to protect against forced displacement and protect the human rights of those displaced. This must include that education and skill training activities are available.⁹⁰⁹

The Committee on the Elimination of all Forms of Discrimination Against Women reiterated the States' obligation 'to ensure that all women have access to education and information about their rights and remedies available, and how to access these, and to competent, gender-sensitive dispute resolution systems, as well as equal access to effective and timely remedies'.⁹¹⁰ It further stated that '[s]pecial consideration is to be given to girls [...] because they face specific barriers to access to justice. They often lack the social or legal capacity to make significant decisions about their lives in areas relating to education'.⁹¹¹ Ultimately, it recommended that States parties '[t]ake measures to avoid marginalization of girls due to conflicts and disempowerment within their families and the resulting lack of support for their rights; abolish rules and practices that require parental or spousal authorisation for access to services such as education [...] as well as access to legal services and justice systems'.⁹¹²

The prohibition of sexual violence committed during armed conflict has led to the adoption of several non-binding instruments. The Security Council adopted Resolution 2122 (2013), which specifically addresses women. This resolution reaffirms that 'women's and girls' empowerment ... [is] critical to efforts to maintain international peace and security'. Thus education of women and girls is one of the factors that may contribute to minimise the risks of situations of insecurity and armed conflict occurring. Resolution 2122 also notes the importance of educating armed forces and police personnel on preventing sexual and gender-based violence.⁹¹³

⁹⁰⁶ *ibid*, para 52(a)

⁹⁰⁷ *ibid*, para 52(e)

⁹⁰⁸ *ibid*, para 54

⁹⁰⁹ *ibid*, para 57(d)

⁹¹⁰ Committee on the Elimination of all Forms of Discrimination Against Women, *General Recommendation on Women's Access to Justice*, 3 August 2015, CEDAW/C/GC/33

⁹¹¹ *ibid*, para 24

⁹¹² *ibid*, para 25(c)

⁹¹³ UN Security Council Resolution 2122, 18 October 2013, S/RES/2122 (2013), para 9

While the victims of sexual violence are most often women and girls, men and boys can also be affected, either as the direct victims of such violence or as the relatives of women and girls who suffer sexual violence.⁹¹⁴ Several non-binding instruments that seek to prevent this type of violation were adopted in 2013. On 11 April 2013, the G8 Foreign Ministers adopted a 'Declaration on Preventing Sexual Violence in Conflict'.⁹¹⁵ On 24 June 2013, the UN Security Council recognised the G8 Declaration and adopted a resolution on the same issue.⁹¹⁶

In respect of teachers, in order to reflect an equal society, the same opportunities must be offered to female teachers as to male teachers. For women to have teaching opportunities, they must be able to attain and complete the necessary educational qualifications. Equal treatment within education staff thus begins with equal opportunities to attend the first levels of school and all subsequent levels without any form of discrimination. In addition, as mentioned above, the right to work guarantees equal remuneration, as well as equal opportunity to be promoted. Women must also not be treated differently in terms of salaries and chances of promotion.

Special Protection for Persons with Disabilities

Persons with disabilities are also particularly at risk of human rights violations in situations of insecurity and armed conflict.⁹¹⁷ Moreover, such situations are also often the cause of disabilities, whether physical and/or mental, which impacts a person's education. In situations of armed conflict and insecurity, women and girls with disabilities in particular not only face additional barriers to accessing formal and non formal education, but are also at an increased risk of sexual violence and violence, particularly disabled women and girls that are refugees, asylum seekers, migrants or internally displaced persons, or those that are homeless or living in poverty. Given the heightened risk of sexual violence and violence in such settings, measures must be taken to ensure that learning environments are safe and accessible for women and girls with disabilities.⁹¹⁸ States should take all appropriate measures to eliminate discrimination and violence against women and girls with disabilities in the field of education.⁹¹⁹

⁹¹⁴ See for example Sandesh Sivakumaran, 'Lost in Translation: UN Response to Sexual Violence against Men and Boys in Situations of Armed Conflict' (2010) 92 International Review of the Red Cross 877

⁹¹⁵ The G8 Declaration on Preventing Sexual Violence in Conflict (2013) <<https://www.gov.uk/government/publications/g8-declaration-on-preventing-sexual-violence-in-conflict>>

⁹¹⁶ UN Security Council Resolution 2106, 24 June 2013, S/RES2106 (2013)

⁹¹⁷ Committee on the Rights of Persons with Disabilities, *General Comment No. 3 (2016) on Women and Girls with Disabilities*, 25 November 2016, CRPD/C/GC/3, para 50; UNGA Resolution, 19 December 2016, A/RES/71/165, preamble; HRC Resolution, 23 March 2016, A/HRC/RES/31/6, preamble

⁹¹⁸ Committee on the Rights of Persons with Disabilities, *General Comment No. 3 (2016) on Women and Girls with Disabilities*, 25 November 2016, CRPD/C/GC/3, paras 49 and 50; Committee on the Rights of Persons with Disabilities, *General Comment No. 4 (2016) on the Right to Inclusive Education*, 25 November 2016, CRPD/C/GC/4, para 14; HRC Resolution A/HRC/RES/31/6 of 23 March 2016, UNGA Resolution, 19 December 2017, A/RES/72/162, para 16; HRC Resolution, 23 March 2016, A/HRC/RES/31/6, para 8; United Nations General Assembly, *Report of the Special Rapporteur on the Rights of Persons with Disabilities (Theme: Sexual and Reproductive Health and Rights of Girls and Young Women with Disabilities)*, 14 July 2017, A/72/133, paras 24 and 35

⁹¹⁹ UNGA Resolution, 14 April 2014, A/HRC/RES/25/20, paras 5 and 6

Within its section on target areas for participation, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities encourage States to recognise the principle of equal educational opportunities at all levels of education for all persons with disabilities.⁹²⁰ This is in fact specifically guaranteed under the CRPD, which also provides not only for equal opportunity in education in general but for an inclusive education system at all levels.⁹²¹ In a communication considered by the Committee on the Rights of Persons with Disabilities ('CRPD Committee') it was held that the State Party bears the ultimate responsibility to ensure that persons with disabilities have access to basic services such as education and health.⁹²² All necessary support must be provided to students with disabilities, so that they are able to exercise their right to education, in accordance with the principle of reasonable accommodation.⁹²³ In order to ensure that persons with disabilities benefit from the same educational opportunities as others, States should have a clear policy on persons with disabilities within schools and a flexible curriculum which can be adapted for students with disabilities.⁹²⁴ This includes taking positive measures to reduce all structural disadvantages,⁹²⁵ including those disadvantages arising as a result of situations of armed conflict and security. If persons with disabilities are not able to attend the general school system, special education may be provided with a view to integrate the students with disabilities in the general system as soon as possible to achieve inclusive education, unless it is deemed best for the person with a disability to follow a special education programme.

In 2013, the CRPD Committee referred widely to education when considering the reports submitted by its State parties. Its approach supports this Handbook, which highlights the importance of both non-discrimination and special protection for persons with disabilities in situations of insecurity and armed conflict. For example, the Committee recommends that each State party include explicit prohibition of disability-based discrimination in laws governing education and also provide specific training on disabilities for education staff.⁹²⁶ The CRPD reiterates the importance of inclusive education for children with disabilities, including through adequate structures to accommodate students with disabilities.⁹²⁷ The accessibility of schools for students with disabilities is also stressed in the General Comment on Accessibility prepared by the CRPD.⁹²⁸ This General Comment also provides that 'in situations of risk, natural disasters

⁹²⁰ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted on 20 December 1993, Rule 6

⁹²¹ CRPD, Art 24

⁹²² Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 26/2014*, 6 April 2018, CRPD/C/19/D/26/2014, para 9.2

⁹²³ See Chapter 3 and CRPD, Arts 2 and 24

⁹²⁴ See CESCR, *General Comment No. 5: Persons with disabilities*, 9 December 1994, E/1995/22, para 35

⁹²⁵ *ibid*, para 9 states that 'additional resources will need to be made available for this purpose'.

⁹²⁶ See for example Annex II of the Report of the Committee on the Rights of Persons with Disabilities, 2013, A/68/55, paras 13, 18, 27 and 32(c)

⁹²⁷ At paras 30, 31 and 32(b)

⁹²⁸ Committee on the Rights of Persons with Disabilities, *General Comment No. 2 (2014) Article 9: Accessibility*, 22 May 2014, CRPD/C/GC/2, paras 6, 28, 39

and armed conflict, the emergency services must be accessible to persons with disabilities...Accessibility must be incorporated as a priority in post-disaster reconstruction efforts. Therefore, disaster risk reduction must be accessible and disability-inclusive'.⁹²⁹ The CRPD has highlighted the plight of those with disabilities in situations of armed conflict: 'Living in the midst of conflict is physically and emotionally distressing, but all the more so for persons with disabilities who face the same if not greater barriers in times of armed conflict'.⁹³⁰

This is also particularly relevant for post-conflict situations as students, as well as education staff, often suffer from disabilities as a result of those conflicts.

In the draft General Comment on Accessibility, the CRPD Committee insists that it is not just the infrastructures but also the content of education itself which must be accessible for students with disabilities.⁹³¹ In its draft General Comment on Article 12, the Committee underlines that the recognition of the legal capacity of persons with disabilities, which is affirmed under Article 12, is crucial for them to make decisions regarding their education (among other matters).⁹³² It also highlights the rights of persons with disabilities to a name and recognition of their birth, noting that not taking measures to ensure this lead to a denial of their citizenship, which may in turn deny them access to education.⁹³³

With specific regard to children with disabilities, the CRC specifies that States Parties shall provide assistance free of charge:

to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.⁹³⁴

The European Committee of Social Rights, which is responsible for monitoring compliance of States parties to the Charter and revised Charter, considered the situation of persons with disabilities. In *International Association Autism-Europe (IAAE) v France*,⁹³⁵ a collective complaint concerned the right to education of persons with autism. Autism-Europe complained that France was failing to satisfactorily apply its obligations under Article 15(1) and Article 17(1) of the revised European Charter because children and adults with autism could not effectively exercise their right to education in mainstream schooling or through adequately

⁹²⁹ *ibid*, para 36

⁹³⁰ See the communication from the CRPD on 'Persons with disabilities "forgotten victims" of Syria's conflict', 17 September 2013 <<https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E>>

⁹³¹ Committee on the Rights of Persons with Disabilities, *General Comment No. 2 (2014) Article 9: Accessibility*, 22 May 2014, CRPD/C/GC/2, 35

⁹³² Committee on the Rights of Persons with Disabilities, *General Comment on Article 12: Equal Recognition before the Law*, 25 November 2013, CRPD/C/11/4, para 8

⁹³³ *ibid*, para 39

⁹³⁴ CRC, Art 23(3)

⁹³⁵ *International Association Autism-Europe (IAAE) v France*, Complaint No 13/2002, 4 November 2003

supported placements in specialised institutions. The Committee found France in violation of Article 15(1), the right to vocational training for persons with disabilities, and Article 17(1), the right of children to assistance, education and training, whether read alone or in combination with Article E of the revised Charter, the non-discrimination provision. The Commission particularly criticised the use of a more restrictive definition of autism than that adopted by the World Health Organization ('WHO') and the lack of official statistics by which to measure progress through time. This decision emphasises the importance of securing a right to education for children and adults with disabilities in order to advance their citizenship rights, and highlights the importance of the principle of non-discrimination contained in Article E to help secure equal enjoyment of all the rights concerned.⁹³⁶ It further illustrates that implementation of the revised Charter requires not only legal action but also practical action by States to give full effect to the rights contained in the revised Charter.

In *Mental Disability Advocacy Centre (MDAC) v Bulgaria*,⁹³⁷ the European Committee of Social Rights found Bulgaria in violation of the right to education under Article 17(2) and Article E on non-discrimination of the revised Charter for actively depriving children with intellectual disabilities of education. The Committee found evidence that the Bulgarian Government failed to provide education for up to 3,000 children with intellectual disabilities living in so-called 'homes for mentally disabled children' across Bulgaria.

In *International Federation for Human Rights v Belgium*,⁹³⁸ the European Committee of Social Rights found that Belgium does not provide enough support for those with disabilities. This includes the shortages in the Personal Assistance Budget which helps people finance everyday living and education support. Special Protection for Minorities and Indigenous Peoples.

Special Protection for Minorities and Indigenous Peoples

An individual who belongs to an Indigenous or minority group within a society benefits from the general principle of equality and non-discrimination mentioned above.⁹³⁹ Individuals belonging to a minority must be able to exercise their right to education.⁹⁴⁰ In addition, the non-binding Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides that States should take measures in the field of education to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory.⁹⁴¹ It is crucial for the survival of their cultures that minority groups have the opportunity to be taught in accordance with their own traditions, including their own

⁹³⁶ Autism-Europe, 'Autism and Case law: Protecting the Right to Education for Children with Autism Spectrum disease' <www.autismeurope.org/files/files/caselaw-uk.pdf>, 5

⁹³⁷ The European Committee of Social Rights, 26 June 2007 (Complaint No 41/2007)

⁹³⁸ *International Federation for Human Rights v Belgium*, European Committee for Social Rights, Decision on the Merits, 18 March 2013

⁹³⁹ ICESCR, Art 2(2); CERD; UNGA Resolution, 19 December 2016, A/RES/71/166, preamble

⁹⁴⁰ UNGA Resolution, 19 December 2017, A/RES/72/184, para 2

⁹⁴¹ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 18 December 1992, adopted by UNGA Resolution 47/135, Art 4(4)

language.⁹⁴² Addressing areas of discrimination against minorities in education can make a positive contribution to the prevention and peaceful resolution of conflicts.⁹⁴³ Fulfilling their language rights, in particular, is an essential means of preventing tensions from emerging or continuing for protracted periods of time.⁹⁴⁴

Indigenous peoples have often become minority groups within their own territories. During and following acts of colonization, Indigenous children were sometimes taken away from their families and placed in institutions set up by the settlers' society with a view to 'integrating' those children into the settler societies.⁹⁴⁵ In response to these and other human rights violations, a number of specific treaties have been developed to protect Indigenous peoples specifically. The most important treaty to date is the ILO Convention 169 on Indigenous and Tribal Peoples 1989, which makes the improvement of the levels of education of Indigenous peoples a matter of priority.⁹⁴⁶ This must be done with the participation and cooperation of the peoples concerned. In fact, the ILO Convention states that this must be done 'with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples' within their own education facilities.⁹⁴⁷ Language being an important cultural vehicle, this treaty also states that Indigenous children have to be taught in their own language 'wherever practicable' and, if not practicable, States must take measures to make this possible.⁹⁴⁸ The non-binding United Nations Declaration on the Rights of Indigenous Peoples also contains provisions of interest for the rights of Indigenous students and education staff, including the right not to be forced to assimilate or act in a manner likely to lead to the destruction of their culture, such as through forced attendance at a school which does not respect their culture.⁹⁴⁹ It clearly provides Indigenous peoples with the right to establish and control their education systems, including the language of education, and the right to teach their spiritual and religious practices.⁹⁵⁰ It even specifies that Indigenous persons living outside their community shall also have access to education in their culture and language when possible.⁹⁵¹

In *Yakye Axa Indigenous Community v Paraguay*,⁹⁵² the IACtHR considered the alleged mishandling of an Indigenous land claim and its consequences, including the violation of the community's economic, social and cultural rights. As well as arguing that poverty, illness and

⁹⁴² UNGA Resolution, 19 December 2017, A/RES/72/184, preamble; See also the right to cultural life, ICESCR, Art 15, mentioned above.

⁹⁴³ UNGA, *Report of the Special Rapporteur on Minority Issues*, 16 January 2018, A/HRC/37/66, para 43

⁹⁴⁴ UNGA, *Report of the Special Rapporteur on Minority Issues*, 9 January 2017, A/HRC/34/53, para 38

⁹⁴⁵ See for example the Residential School Programmes in Canada.

⁹⁴⁶ ILO C169, 1989, Art 7(2)

⁹⁴⁷ *ibid*, Art 27(2) and (3)

⁹⁴⁸ *ibid*, Art 28(1)

⁹⁴⁹ UNDRIP, Art 8; See also UNDRIP, Art 15, which specifies that Indigenous cultures, traditions, histories and aspirations must be appropriately reflected in education.

⁹⁵⁰ *ibid*, Art 14(1) and 12

⁹⁵¹ *ibid*, Art 14 (3); UNGA Resolution, 19 December 2016, A/RES/71/166, preamble.

⁹⁵² IACtHR (Judgment of 17 June 2005), para 2

lack of food were reasons for high dropout rates and low enrolment, it was also argued that the quality of the school building (which doubled up as a house and chapel) was too poor. In addition, educational material was not provided in the community's language but only in Spanish and Guarani.⁹⁵³ Considering the allegation that the State's mishandling of the claim also violated the right to life under the Inter-American system's expanded definition of the right to life to include quality of life, and taking into account the close nature of Indigenous peoples' ties to their ancestral land and the impact upon their social and cultural wellbeing,⁹⁵⁴ the IACtHR reiterated that "the State has the duty to take positive, concrete measures geared toward fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority".⁹⁵⁵ The IACtHR concluded on the facts that the right to life under Article 4(1) of the Convention had not been violated, but that the conditions of life in the community by virtue of the situation had violated a series of their economic, social and cultural rights, including the right to education.

Special Protection for Internally Displaced Persons

Situations of insecurity and armed conflict are likely to result in individuals being forced to move away from their homes.⁹⁵⁶ Displaced persons are particularly vulnerable to discrimination, violence and sexual violence and exploitation, with women, older persons and persons with disabilities being particularly vulnerable and with children being even more vulnerable than adults.⁹⁵⁷ The challenges are particularly acute for orphans, unaccompanied children, children living with disabilities, injuries or trauma, and children who head households due to the conflict.⁹⁵⁸ Conflict impacts the education for the internally displaced,⁹⁵⁹ as many internally displaced children, in particular girls, lack access to education.⁹⁶⁰ It is important that internally displaced persons, especially children, do not miss out on education in order for them not to suffer even further from their vulnerable status.

With regard to internally displaced persons, the Commission on Human Rights, the UN body responsible for the promotion and protection of human rights, which has now been replaced by

⁹⁵³ *ibid*, para 39

⁹⁵⁴ *ibid*, para 157

⁹⁵⁵ *ibid*, paras 162-163

⁹⁵⁶ HRC Resolution, 1 July 2016, A/HRC/RES/32/11, preamble; UNGA Resolution, 19 December 2017, A/RES/72/182, preamble

⁹⁵⁷ UNGA Resolution, 17 January 2018, A/RES/72/152, preamble and para 10; UNGA Resolution, 19 December 2016, A/RES/71/173, preamble and para 9; UNGA, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons*, 18 April 2017, A/HRC/35/27, para 59; UNGA, 19 December 2017, A/RES/72/182, para 8

⁹⁵⁸ United Nations General Assembly, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons*, 18 April 2017, A/HRC/35/27, para 59

⁹⁵⁹ UNESCO, 'Global Education Monitoring Report 2019: Migration, Displacement and Education – Building Bridges, not Walls' (UNESCO, 2018) <<https://unesdoc.unesco.org/ark:/48223/pf0000265866>>, xvii

⁹⁶⁰ UNGA Resolution, 19 December 2017, A/RES/72/182, para 16; HRC Resolution, 1 July 2016, A/HRC/RES/32/11, para 6

the HRC, stated in its non-binding Guiding Principles on Internal Displacement that, in order to give effect to the right to education “for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion”.⁹⁶¹ The need to ensure full and equal participation of women and girls in education is also highlighted in these Guiding Principles. Education should also be made available for internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.⁹⁶² While this principle highlights the fact that education is to be made available as soon as possible, it also ‘reaffirms practice of suspending education in humanitarian programmes’.⁹⁶³ Of course, other rights are relevant for education in camps, such as the already mentioned right to health and right to an adequate standard of living.

State parties to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, also known as the Kampala Convention,⁹⁶⁴ must ‘provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include...education...’.⁹⁶⁵ It thus reiterates the primary responsibility of national authorities in providing assistance to IDPs. This is the first multilateral treaty protecting IDPs. The Kampala Convention also provides that ‘harmful practices’ means all ‘behaviour, attitudes and/or practices which negatively affect the fundamental rights of persons, such as (but not limited to) their right to life, health, dignity, education, mental and physical integrity and education’.⁹⁶⁶ It calls for measures to combat the root causes of displacement, including armed conflicts and situations of insecurity, such as generalised violence, and address their consequences.⁹⁶⁷ More specifically, State parties must ‘provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include...education...’.⁹⁶⁸ Also with regard to armed conflict, it contains a specific provision (Article 7) which states that members of armed groups are prohibited not only from ‘hampering the provision of protection and assistance to

⁹⁶¹ United Nations High Commissioner for Refugees, *Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, E/CN.4/1998/53/Add 2, Principle 23 (2). Note that although these principles are non-binding, they are useful for interpreting binding rules, as well as to develop policies on international displacement at the national level.

⁹⁶² *ibid*, Principle 23(4)

⁹⁶³ Klaus D Beiter (n95), 125

⁹⁶⁴ Adopted in 2009, it entered into force in 2012.

⁹⁶⁵ Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Art 9(2)(b)

⁹⁶⁶ *ibid*, art 1(j); Its Art 9(1)(d) adds that: ‘States Parties shall protect the rights of internally displaced persons regardless of the cause of displacement by refraining from, and preventing, the following acts, amongst others: (...) d. Sexual and gender based violence in all its forms, notably rape, enforced prostitution, sexual exploitation and harmful practices, slavery, recruitment of children and their use in hostilities, forced labour and human trafficking and smuggling’.

⁹⁶⁷ *ibid*, art 2(c)

⁹⁶⁸ *ibid*, art 9(2)(b)

internally displaced persons’ but also from ‘recruiting children or requiring or permitting them to take part in hostilities’.⁹⁶⁹

The Convention reminds State parties of the obligation to respect IHL with regard to internally displaced persons, including their civilian character.⁹⁷⁰ With regard to armed conflict, it contains a specific provision (Article 7) which states that members of armed groups are prohibited not only from ‘hampering the provision of protection and assistance to internally displaced persons’ but also from ‘recruiting children or requiring or permitting them to take part in hostilities’.⁹⁷¹

The Kampala Convention recognises the role of non-State actors, including armed groups, with regard to the prevention of displacement and assistance to the displaced.⁹⁷² Its provisions go beyond the obligations imposed by IHL, which are aimed at prohibiting forcible transfers. This Convention highlights the role of non-State armed groups in the prevention of all forms of displacement. It also provides for the obligation of State parties to ‘ensure the accountability of non-State actors concerned, including multinational companies and private military or security companies, for acts of arbitrary displacement or complicity in such acts’.⁹⁷³ This provision may close an existing impunity gap with regards to the human rights violations committed by non-State actors which cannot be attributed to States. This Convention also considers remedies for those affected by internal displacement, including compensation but also ‘other forms of reparations, where appropriate’.⁹⁷⁴ Other forms of reparations may include rehabilitation programmes for those who missed their education as a result of the displacement.⁹⁷⁵

Special Protection for Refugees, Asylum Seekers, Migrants and Stateless Persons

Situations of insecurity and armed conflict are likely to result in individuals being forced to move away from their own State. Migrants and refugees are some of the most vulnerable people in the world, yet they are often denied access to schools that provide the promise of a better future. Ignoring their ‘education squanders a great deal of human potential’.⁹⁷⁶ It is important that the children of non-nationals do not miss out on education in order for them not to suffer even further from their vulnerable status. The right of non-nationals to education is also protected. The ICESCR, including the right to education, ‘applies to everyone, including non-nationals such

⁹⁶⁹ *ibid*, art 7 in general and Art 7(5)(b) and (e) in particular. Note that Art 9(1)(d) provides that State parties must also refrain and prevent the ‘recruitment of children and their use in hostilities’.

⁹⁷⁰ *ibid*, art 3(1)(e) and (f)

⁹⁷¹ *ibid*, art 7 in general and Art 7(5)(b) and (e) in particular. Note that Art 9(1)(d) provides that State parties must also refrain and prevent the ‘recruitment of children and their use in hostilities’.

⁹⁷² *ibid*, art 2(d)

⁹⁷³ *ibid*, art 3(h) and (i) underlining the role of exploration and exploitation of natural resources leading to displacement. In fact, the control of natural resources may even be a source of conflict.

⁹⁷⁴ *ibid*, art 12(2)

⁹⁷⁵ For more on reparations for education-related violations, see Francesca Capone and others, *Education and the Law of Reparations in Insecurity and Armed Conflict* (BIICL/Protect Education in Insecurity and Conflict 2013) <https://www.biicl.org/documents/204_6755_reparations_report21.pdf?showdocument=1>

⁹⁷⁶ UNESCO, ‘Global Education Monitoring Report 2019: Migration, Displacement and Education – Building Bridges, not Walls’ (UNESCO, 2018), iii <<https://unesdoc.unesco.org/ark:/48223/pf0000265866>>

as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation'.⁹⁷⁷ Therefore States Parties have also to respect, protect and fulfil the right to education of everyone, no matter their nationality or lack thereof, as long as they are within the State in question.

According to the Convention relating to the Status of Refugees 1951, which has 146 States Parties, these persons shall be given the same treatment as nationals with respect to elementary education.⁹⁷⁸ With regard to other levels of education, the treatment accorded to refugees shall be:

as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.⁹⁷⁹

Thus it appears that States Parties may treat refugees less favourably than nationals in relation to education other than elementary education (but not less favourably than other non-nationals).⁹⁸⁰ According to this treaty, it is only elementary education which has to be guaranteed by States, as they have to offer the same treatment with regard to elementary education to refugees on their territory as they do to their nationals. This does not afford refugees more protection than that they already benefit from under the ICESCR.⁹⁸¹ The Convention Relating to the Status of Refugees does, however, also provide that States shall not treat aliens less favourably than their nationals with regard to education after the elementary level.⁹⁸² It also provides that States must treat on an equal basis all foreign school certificates, diplomas and degrees, as well as applications for scholarships and education fees reduction.⁹⁸³

Without status as nationals or citizens, stateless women and girls are often marginalised and denied access to various rights, such as education. Women refugees and women seeking asylum should be granted, without discrimination, the right to education.⁹⁸⁴ With regard to refugee and

⁹⁷⁷ CESCR General Comment 20, para 30. On the application of ESCR to children unlawfully on the territory of a State, see European Committee of Social Rights, *Defence for Children International (DCI) v the Netherlands*, Complaint No 47/2008, 20 October 2009, on the right to adequate shelter in accordance with the respect for human dignity.

⁹⁷⁸ Convention relating to the Status of Refugees, 1951, Art 22. Note that this Convention also protects religious freedom and freedom as to the religious education of refugees' children (Art 4).

⁹⁷⁹ Zambia, Zimbabwe, Ethiopia, Malawi, Monaco and Mozambique have made declarations to the effect that they consider the obligations in Art 22 or Art 22(1) of the Convention relating to the Status of Refugees to be recommendations only. Papua New Guinea and Timor Leste have declared that they do not accept the obligations in Art 22(1) or Art 22 respectively <www.unhcr.org/3d9abe177.html>

⁹⁸⁰ Klaus D Beiter (n95), 124

⁹⁸¹ See Chapter 3.1.

⁹⁸² Convention Relating to the Status of Refugees, Art 22(2)

⁹⁸³ *ibid*

⁹⁸⁴ Committee on the Elimination of Discrimination against Women, General Recommendation No. 32 on the Gender-related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, 14 November 2014, paras 33 and 53

migrant children, the CRC contains a specific provision protecting refugee and asylum-seeker children,⁹⁸⁵ according to which State parties must provide protective assistance (including humanitarian) measures to ensure that these children can enjoy the rights contained in the CRC, including the right to education. Thus this Convention may provide refugee children with better protection than the Convention relating to the Status of Refugees, as it appears to protect the right of every child to both primary and secondary education as provided for under the CRC.⁹⁸⁶

In the non-binding New York Declaration for Refugees and Migrants 2016, States committed to providing quality primary and secondary education in safe learning environments for all refugee children within a few months of the initial displacement, and acknowledge that such access ‘gives fundamental protection to children and youth in displacement contexts, particularly in situations of conflict and crisis’. States further committed to support early childhood education for refugee children, and to promoting tertiary education, skills training and vocational education, again acknowledging that in ‘conflict and crisis situations, higher education serves as a powerful driver for change, shelters and protects a critical group of young men and women by maintaining their hopes for the future, fosters inclusion and non-discrimination and acts as a catalyst for the recovery and rebuilding of post-conflict countries’.⁹⁸⁷ The New York Declaration led to two non-legally binding instruments: the Global Compact for Safe, Orderly and Regular Migration (Global Compact for Migrants),⁹⁸⁸ and the final draft of the Global Compact on Refugees.⁹⁸⁹ Objective 15 of the Global Compact for Migrants contains a commitment to provide inclusive and equitable quality education to migrant children and youth, and to facilitate access to lifelong learning opportunities.⁹⁹⁰ Objective 16 sets out a commitment to promote school environments which are safe. According to the Global Compact for Refugees, States are required to ‘contribute resources and expertise to expand and enhance the quality and inclusiveness of national education systems to facilitate access by refugee and host community children (both boys and girls), adolescents and youth to primary, secondary and tertiary education’.⁹⁹¹ The Global Compact for Refugees also calls for additional support to meet the specific needs of refugees, including through ‘safe schools’.⁹⁹²

One of the most aspirational SDGs is the commitment to inclusive and equitable quality education for all, including refugees, asylum seekers and migrants. The specific needs of refugees,

⁹⁸⁵ CRC, Art 22

⁹⁸⁶ Klaus D Beiter (n95), 124

⁹⁸⁷ *New York Declaration for Refugees and Migrants*, 3 October 2016, <www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1>, paras 81-82

⁹⁸⁸ *Global Compact for Safe, Orderly and Regular Migration*, 13 July 2018, <https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf>;

⁹⁸⁹ Report of the United Nations High Commissioner for Refugees, *Part II, Global Compact on Refugees*, 2 August 2018, A/73/12 <www.unhcr.org/gcr/GCR_English.pdf>, This is the final draft of the compact, but unlike the Global Compact for migrants, this has not been adopted yet.

⁹⁹⁰ *Global Compact for Safe, Orderly and Regular Migration*, 13 July 2018, Objective 15

⁹⁹¹ Report of the United Nations High Commissioner for Refugees, *Part II, Global Compact on Refugees*, 2 August 2018, A/73/12, para 68

⁹⁹² *ibid*, para 69

asylum seekers and migrants need to be met, and a well-designed curriculum and well trained teachers, particularly in respect of managing multilingual and multicultural classes, are vital for ensuring their inclusion and effective education.⁹⁹³ In order to achieve inclusive and education for refugees, asylum seekers and migrants, it is essential that these needs are met.

In *Timishev v Russia*,⁹⁹⁴ the ECtHR considered the situation of a Russian national and an ethnic Chechen, who was born and lived in the Chechen Republic. Following the destruction of his property in the Chechen Republic as a result of a military operation, he moved to a Russian province, where he applied for permanent residence. His application was rejected pursuant to the local laws prohibiting former residents of the Chechen Republic from obtaining permanent residence. While he subsequently received compensation for the property he had lost, the applicant had to surrender his migrant's card in exchange for the compensation. The applicant's son and daughter were refused admission to school because the applicant could not produce his migrant's card. The Court declared that Article 2 Protocol 1 prohibits the denial of the right to education, with no exceptions. Further, it plays such a fundamental role in the furtherance of human rights that a restrictive interpretation of it would not be consistent with the aim or purpose of that provision. The Court held that, as Russian law did not allow the exercise of the right to education to be made conditional on the registration of their parents' residence, the children were denied the right to education provided for by domestic law and therefore there was a violation of Article 2 of Protocol 1.⁹⁹⁵

Other relevant human rights provisions relating to the movement of persons include the protection against unlawful expulsion, which is guaranteed under Article 13 ICCPR, and the protection against forcible transfer, guaranteed under Article 12 ICCPR.

As situations of insecurity and armed conflict are usually associated with a dire economic climate, individuals may seek employment elsewhere and become migrant workers. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families contains a number of provisions protecting the right to education of the children of migrant workers, who must be treated in the same way as the children of nationals with regard to education.⁹⁹⁶ Access to public pre-school is specifically mentioned in this treaty as a right that cannot be refused or limited because of the irregular status of either parent. The right of migrant workers, as parents or legal guardians, to choose the religious and moral education of their children in accordance with their own beliefs is also protected under this treaty.⁹⁹⁷ The right of migrant workers themselves and their families to access to educational institutions, vocational guidance and vocational training, on an equal basis with nationals of the State of employment, is also guaranteed.⁹⁹⁸

⁹⁹³ UNESCO, 'Global Education Monitoring Report 2019: Migration, Displacement and Education – Building Bridges, not Walls' (UNESCO, 2018) <<https://unesdoc.unesco.org/ark:/48223/pf0000265866>>, iii, xvii, 1

⁹⁹⁴ *Timishev v Russia*, ECtHR Application Nos 55762/00 and 55974/00, 13 December 2005

⁹⁹⁵ *ibid*, paras 60–66

⁹⁹⁶ Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in 1990, Art 30

⁹⁹⁷ *ibid*, Art 12(4)

⁹⁹⁸ *ibid*, Arts 43(1)(a) and 45(1)(a) and (b)

With regard to the rights of children in the context of migration, the Committee on the Rights of the Child released a report resulting from their ‘Day of Discussion’, highlighting the challenges faced by refugee children in accessing education.⁹⁹⁹ It emphasises the ‘need for additional children’s rights compliant safeguards and measures in migration situations occurring as a result of conflict’ and stresses that even in such situations States must adhere to international children’s rights and human rights standards and ensure the provision of education services.¹⁰⁰⁰

The Convention relating to the Status of Stateless Persons 1954, which has 91 States Parties, provides the equivalent protection in relation to education as in the Convention relating to the Status of Refugees.¹⁰⁰¹ However, in general, the CESCR is of the view that refugees should be treated on same footing as nationals with regard to the enjoyment of the right to education.¹⁰⁰²

4.2 INTERNATIONAL HUMANITARIAN LAW

The protection of students and education staff from education-related violations in armed conflict exists in both IHRL and IHL. This section will set out the rules of IHL that protect students and education staff. It must be recalled that the IHRL identified above continue to apply in armed conflict subject to the usual limitations in a particular IHRL instrument. The relationship between IHRL and IHL protection of students and education staff will be highlighted throughout the IHL discussion and in the conclusion of this chapter. Further, where violation of the principles of protection set out in IHL constitutes a breach of ICL, this will be noted and discussed in more detail in the ICL section of this chapter.

4.2.1 The Principle of ‘No-adverse Distinction’ in IHL

International Armed Conflicts

The fundamental guarantees of humanity and humane treatment contained in IHL apply without adverse distinction on the grounds of race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.¹⁰⁰³

The no-adverse distinction principle means that, in some cases, preferential treatment under IHL is afforded to particularly vulnerable groups in armed conflict. For example, women and children benefit from special protection from particular forms of attack and the effects of hostilities in armed conflict. The Geneva Conventions and Additional Protocols contain many provisions

⁹⁹⁹ Committee on the Rights of the Child, *Rights of all Children in the Context of Migration*, 28 September 2012,

¹⁰⁰⁰ *ibid*, para 55

¹⁰⁰¹ Convention Relating to the Status of Stateless Persons, adopted in 1954, Art 22. This article uses exactly the same wording as Art 22 of the Convention Relating to the Status of Refugees, only replacing ‘refugees’ with ‘stateless persons’.

¹⁰⁰² Klaus D Beiter (n95), 578

¹⁰⁰³ Additional Protocol I, Art 75; Fourth Geneva Convention, Part II; ICRC CIHL Study, Rule 88

ensuring that these groups also benefit from preferred access to, among other things, humanitarian aid and medical care. This special protection is discussed in detail later in the Chapter.

The principle of no adverse distinction under IHL has obvious parallels with the anti-discrimination provisions of IHRL. Both regimes are based on the principle of non-discrimination. However, unlike anti-discrimination in IHRL and national legal regimes, IHL focuses predominantly on the physical protection of vulnerable groups in conflict and does not address issues such as the implementation of broader non-discrimination measures and policies including issues relating to ensuring equal access to education. This is because IHL is an area of law that focuses on the conduct of hostilities and aims to mitigate the consequences of armed conflict on the civilian population.

The aims and purposes of anti-discrimination law are not inconsistent with the object of IHL: to ensure humanity and dignity of victims of armed conflict. In fact, IHRL continues to apply during conflicts¹⁰⁰⁴ and its comprehensive anti-discrimination provisions may be a useful framework for addressing broader issues, including equal access to education, in conflict situations where IHL does not address such issues. Further, the comprehensive gender and disability discrimination rules set out in many IHRL instruments can be useful tools to inform and develop the content of the principle of no adverse distinction in both IHL,¹⁰⁰⁵ and ICL.

Although the principle of no-adverse distinction exists in relation to the application of IHL on the grounds mentioned above, the IHL in regard to IAC is structured in a way that establishes a special regime of protection based on nationality.¹⁰⁰⁶ In Part III of the Fourth Geneva Convention, there is protection for those civilians that ‘find themselves ... in the hands of a Party to the conflict or Occupying Power of which they are not nationals’,¹⁰⁰⁷ in other words, ‘enemy nationals’. This group of civilians is referred to in the Fourth Geneva Convention as ‘protected persons’.¹⁰⁰⁸

It is unsurprising that IHL provides a detailed regulation of the treatment of ‘enemy nationals’ in IAC, as this status makes civilians both more of a security threat to a government or occupying power and also more vulnerable to particular attacks from the forces of the enemy. For example, under Part III it is permissible to detain ‘enemy nationals’ without trial where it is absolutely necessary for security reasons.¹⁰⁰⁹ However, the conditions and treatment of such internees is strictly regulated by Part III and subject to safeguards to ensure that they are treated

¹⁰⁰⁴ Subject to the issues of derogations and extra-territorial application outlined in Chapter 2.

¹⁰⁰⁵ This requirement, it has been argued, is broad enough to take into consideration, and prohibit, both direct and indirect discrimination in the implementation of IHL provisions. IHRL is a useful tool to understanding the content and application of this rule. See Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011)

¹⁰⁰⁶ This is known as the ‘protected person regime’.

¹⁰⁰⁷ Fourth Geneva Convention, Art 4. It should be noted that the phrase ‘in the hands of’ is intended to include those in the territory of a party to a conflict, not merely those in custody: Jean Pictet (ed.) *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952–1960) Vol.4, 47

¹⁰⁰⁸ Unlike the Geneva Conventions, Additional Protocol I, applicable in IAC, does not establish a regime of protection based on nationality.

¹⁰⁰⁹ Fourth Geneva Convention, Art 42

humanely and with dignity. These safeguards and additional protections must be applied without adverse distinction. Where necessary, this Handbook will highlight when a particular protection applies only to students and education staff who are enemy nationals.

Non-international Armed Conflicts

Common Article 3 of the Geneva Conventions, which sets out minimum humanitarian standards in all conflicts not of an international character, and Additional Protocol II which applies to particular NIAC, both apply without adverse distinction to all persons not taking an active part in hostilities (a concept discussed in more detail below).¹⁰¹⁰ However, unlike in IAC, in NIAC there is no ‘protected persons regime’ or differentiation in protection based on nationality.¹⁰¹¹

4.2.2 The Principle of Distinction

The fundamental basis of the protection provided by IHL is the principle of distinction, according to which parties to a conflict are required at all times to distinguish between:

- civilians and those not taking a direct part in hostilities; and
- combatants and those taking a direct part in hostilities.

Parties are prohibited from attacking civilians and the civilian population.¹⁰¹²

The principle of distinction, and the protection it affords, applies across both IAC and NIAC.¹⁰¹³ It is also part of customary international law.¹⁰¹⁴ Education staff and students are protected by the principle of distinction as long as they are civilians.

Distinction is the basis of the following IHL rules that protect students and education staff from attack:

- the prohibition of deliberate attack on civilians and the civilian population; and
- the general prohibition of indiscriminate attacks, including the prohibition on indiscriminate means and methods of warfare.

These rules are considered in detail in this chapter.

¹⁰¹⁰ See Additional Protocol II, Common Art 3, and Art 2(1)

¹⁰¹¹ This is because IAC take place on the territory of a single State and often involve hostilities between groups of nationals of that State. The relevance of nationality as a reason for ill-treatment is significantly reduced in NIAC.

¹⁰¹² Additional Protocol I, Arts 48 and 51; Additional Protocol II, Art 13(2); ICRC CIHL Study, Rule 1 and Rule 7; David Turns, ‘The Law of Armed Conflict (International Humanitarian Law)’ in Malcolm D Evans, *International Law* (5th edn, Oxford University Press 2018)

¹⁰¹³ ICRC CIHL Study, Rule 1 and Rule 7

¹⁰¹⁴ *ibid*

The Principle of Distinction in International Armed Conflict

In order to apply the principle of distinction and the protection that it affords in IAC, it is first necessary to understand who is a ‘civilian’ and who is a ‘combatant’.¹⁰¹⁵ Although the principle of distinction applies in both IAC and NIAC,¹⁰¹⁶ the concept of ‘combatants’, and the rule of ‘combatant’s immunity’, apply only in IAC. In NIAC, discussed below, distinction permits attacks only against those ‘taking a direct part in hostilities’.

The concept of ‘civilian’ is negatively defined by Article 50(1) of Additional Protocol I as any person who is not a combatant.¹⁰¹⁷

A combatant is anyone who is a member of the regular armed forces of a State,¹⁰¹⁸ (other than chaplains and medical personnel);¹⁰¹⁹ or a member of an organised, non-State armed group that meets the following ‘combatant criteria’:

- that the group belongs to¹⁰²⁰ (or is under command responsible to)¹⁰²¹ a State party to the conflict;¹⁰²² and
- that the group be subject to an internal disciplinary system and be capable of implementing and respecting IHL.¹⁰²³

Combatants are also under an obligation to distinguish themselves from the civilian population.¹⁰²⁴

¹⁰¹⁵ Claude Pilloud (ed) (n34), 1911

¹⁰¹⁶ ICRC CIHL Study, Rule 1 and Rule 7

¹⁰¹⁷ See also ICRC CIHL Study Rule 5

¹⁰¹⁸ As defined by Additional Protocol I, Art 43; ICRC CIHL Study, Rule 3

¹⁰¹⁹ Third Geneva Convention, Art 4A(1) and (3); ICRC CIHL Study, Rule 3

¹⁰²⁰ This is the terminology of Art 4A of the Third Geneva Convention.

¹⁰²¹ This is the terminology of Art 43 Additional Protocol I.

¹⁰²² Discussion of the criteria for assessing whether or not a non-State armed group belongs to a party to the conflict is beyond the scope of this Resource. For a fuller discussion of this issue, see Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004), 39-40; Katherine Del Mar ‘The Requirement of “Belonging” under International Humanitarian Law’ (2010) 21 *European Journal of International Law* 150. For discussion of the status of members of non-State armed groups that do not ‘belong to’ or are not ‘under command responsible’ to a party to an IAC, see Dapo Akande ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’, (2010) *International and Comparative Law Quarterly* 59, 183–186. For discussion of the classification of groups that ‘belong to a State’ but do not meet the ‘combatant’ criteria in IAC, see Nils Melzer, *ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) (The concept of civilian), 20.

¹⁰²³ Third Geneva Convention, Art 4A(2); Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, Art 1; Additional Protocol I, Art 43; ICRC CIHL Study, Rule 4

¹⁰²⁴ Third Geneva Convention, Art 4A(2); Additional Protocol I, Art 44(3); ICRC CIHL Study, Rule 4. Under Art 4 Third Geneva Convention, members of a non-State armed group are required to do this by wearing a uniform or having a distinctive symbol, and carrying their arms openly. These requirements are relevant for obtaining POW status under Art 4 Third Geneva Convention: see also ICRC CIHL Study, Rule 106

The definition of combatant also includes those persons who are part of a spontaneous civilian uprising, also known as '*levée en masse*'.¹⁰²⁵

Combatants, as opposed to civilians, may lawfully be targeted and attacked in armed conflict. In addition, combatants are entitled to the following rights which civilians are not:

- the right to POW status upon capture;¹⁰²⁶
- the right to participate in hostilities and to be free from criminal prosecution as a result of that participation (combatant immunity).¹⁰²⁷

In case of doubt, a person is presumed to be a civilian.¹⁰²⁸ This very important rule is designed to prevent parties to a conflict from 'shooting first and asking questions later'.¹⁰²⁹ The presumption in favour of civilian status (and therefore protection from attack) operates where there is serious doubt as to whether a person is a civilian or combatant. This is assessed from the point of view of a soldier on the ground or of a military commander controlling an attack. Whether there is serious doubt is to be assessed on the information available to armed forces at the time of attack and not at a later date with the benefit of hindsight.¹⁰³⁰

The presence of combatants in the civilian population does not deprive the population of its civilian character.¹⁰³¹ This rule ensures that the inevitable minor intermingling of combatants in the civilian population (for example, members of the armed forces on leave) does not impact on the protection afforded to the civilian population by virtue of its civilian status.¹⁰³²

The Principle of Distinction in Non-international Armed Conflict

While the principle of distinction is a fundamental principle of IHL,¹⁰³³ the IHL of NIAC does not use the concept of 'combatant'.¹⁰³⁴ Instead, in NIAC, the protection derived from the principle of distinction is based on conduct rather than status. This means that those persons who

¹⁰²⁵ Hague Regulations 1907, Art 2; Third Geneva Convention, Art 4A(6)

¹⁰²⁶ Additional Protocol I, Art 45. ICRC CIHL Study Rule 3; See also Third Geneva Convention for the rights of POWs.

¹⁰²⁷ Additional Protocol I, Art 45; ICRC CIHL Study, Rule 3

¹⁰²⁸ Additional Protocol I, Art 50(1); ICRC CIHL Study, Rule 6

¹⁰²⁹ Claude Pilloud (ed) (n34), para 2030

¹⁰³⁰ Declarations of Understanding of several NATO forces when ratifying Additional Protocol I cited by Stefan Oeter, 'Methods and Means of Combat', in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 185

¹⁰³¹ Contained in Additional Protocol I, Art 50(1); ICRC CIHL Study, Rule 6.

¹⁰³² Claude Pilloud (ed) (n34), para 1922

¹⁰³³ ICRC CIHL Study, Rule 1; ICRC CIHL Study, Rule 7

¹⁰³⁴ This is because, politically, States parties to the IHL treaties have been reluctant to recognise members of non-State armed groups, often fighting against a State in a NIAC, as combatants and, therefore, entitled to combatant immunity. For discussion of this, see Hans-Peter Gasser, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009); Dieter Fleck, 'The Law of Non-International Armed Conflicts' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009)

do not take part in hostilities are protected from direct attack and the effects of hostilities¹⁰³⁵ and that those persons who take a direct part in hostilities may be subject to attack.¹⁰³⁶ The issue of direct participation in hostilities is discussed in further detail below.

The protection afforded in both IAC and NIAC to civilians, including students and education staff, who do not take part in hostilities is very similar. However, unlike the law of IAC, those persons taking a direct part in hostilities who are not members of the State's armed forces do not benefit from 'combatant immunity' and may be prosecuted under the criminal law for their participation in hostilities. This is true even where such persons are members of an organised non-State armed group in a NIAC.¹⁰³⁷

The ICRC, in its interpretive guidance on the notion of direct participation in hostilities¹⁰³⁸ (discussed in more detail below), seeks to clarify that those taking direct part in hostilities, in NIAC, can further be divided into:

- those civilians who engage in 'sporadic acts of violence';¹⁰³⁹ and
- those persons who are members of a non-State armed group and have a 'continuous combat function'.¹⁰⁴⁰

Those with a 'continuous combatant function' may be targeted at all times and are not considered civilians until they are no longer part of that group. Civilians engaged in 'sporadic acts of violence' can be targeted only for the limited time in which they are engaged in hostilities.¹⁰⁴¹ Where students and education staff engage in hostilities in NIAC, either through sporadic acts of violence or as members of a non-State armed group with a continuous combatant function, they lose their protection against attack in accordance with the rules set out here.

4.2.3 Special Protection of Particular Groups

Just like IHRL, IHL provides special protection for particular groups of people considered particularly vulnerable in armed conflict. Students and education staff do not benefit from special protection generally and may do so only where they also fall into one of the following groups.

¹⁰³⁵ Additional Protocol II, Art 13(1) and (2); Geneva Conventions, Common Art 3

¹⁰³⁶ Additional Protocol II, Art 13(3)

¹⁰³⁷ The situation is different if the non-State armed group is participating in an IAC: see the discussion of combatant status and 'combatant criteria' above.

¹⁰³⁸ Nils Melzer, *ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009)

¹⁰³⁹ *ibid*, 70

¹⁰⁴⁰ *ibid*, 72

¹⁰⁴¹ *ibid*, 70

Special Protection of Children

Parties to an IAC are under a special obligation to respect children and protect them from all forms of indecent assault.¹⁰⁴² In NIAC parties are required to provide children with the care and aid they require.¹⁰⁴³ This protection also forms part of customary international law.¹⁰⁴⁴

The special IHL protection of children in IAC and NIAC is characterised by the following features:

- It applies to all children, regardless of nationality (including an ‘enemy nationals’),¹⁰⁴⁵ in the territory of a party to an IAC or the State on which a NIAC is taking place.
- The age limit of a ‘child’ is left open (except regarding the recruitment of children into armed forces). This open age limit differs from the age limit of 18 in many IHRL instruments and this issue is discussed in further detail in Chapter 3 above.
- It is broad enough to require States to take into consideration children’s special needs that might result from a physical or mental disability or from trauma caused by armed conflict.¹⁰⁴⁶

Article 77 of Additional Protocol I and Article 4(3)(c) contain an obligation on parties to refrain from recruiting children under the age of 15 into the armed forces and allowing them to participate in hostilities. Under Article 77, where a child is between 15 and 18, priority must be given to older children in recruitment into the armed forces.¹⁰⁴⁷

Special provisions of IHL protecting children also apply in situations of internment¹⁰⁴⁸ or detention,¹⁰⁴⁹ evacuation,¹⁰⁵⁰ displacement¹⁰⁵¹ or separation from families,¹⁰⁵² during belligerent occupation,¹⁰⁵³ and NIAC.¹⁰⁵⁴ Further, IHL specifies that in distribution of humanitarian aid priority must be given to children.¹⁰⁵⁵

Additionally, the use of sexual violence, including against children, is prohibited in both IAC and NIAC and forms part of customary international law. This is discussed in detail below.

The special protection of children is an area in which there is substantial convergence between the IHL and IHRL regimes applicable during armed conflict. This overlap in the content of the

¹⁰⁴² Additional Protocol I, Art 77

¹⁰⁴³ Additional Protocol II, Art 4(3)

¹⁰⁴⁴ ICRC CIHL Study, Rule 135

¹⁰⁴⁵ For further discussion on the protected persons regime in IAC, see above.

¹⁰⁴⁶ See Chapter 3.

¹⁰⁴⁷ Additional Protocol I, Art 77

¹⁰⁴⁸ Fourth Geneva Convention, Arts 81, 82, 85, 89, 91, 94, 119, 127 and 132

¹⁰⁴⁹ Fourth Geneva Convention, Art 76; Additional Protocol I, Art 77

¹⁰⁵⁰ Fourth Geneva Convention, Art 49; Additional Protocol I, Art 78; Additional Protocol II, Art 4(3)(e)

¹⁰⁵¹ Fourth Geneva Convention, Art 38; Additional Protocol I, Art 74 (reunion of families)

¹⁰⁵² Fourth Geneva Convention, Arts 24, 25, 26; Additional Protocol II, Art 4(3)(b)

¹⁰⁵³ Fourth Geneva Convention, Art 50

¹⁰⁵⁴ Additional Protocol II, Art 4

¹⁰⁵⁵ Additional Protocol I, Art 70

two regimes provides additional protection for children in circumstances where a situation of armed conflict may raise questions about the application of a particular IHRL treaty.¹⁰⁵⁶ Further, the provisions of IHL specific to children are also expressly incorporated into Article 38 of the CRC and Article 22 of the African Charter on the Rights and Welfare of the Child. This express incorporation limits potential conflict between IHL and those IHRL instruments and makes it clear that the two regimes should be understood as mutually reinforcing and compatible in armed conflict situations. This strengthens the protection of children in armed conflict and ensures comprehensive protection regardless of the classification of the situation of violence in which children find themselves.¹⁰⁵⁷

Special Protection of Women

Female students and education staff benefit from special protection under IHL.¹⁰⁵⁸ This protection forms part of customary international law.¹⁰⁵⁹ Any attack on the honour of women, including rape, enforced prostitution or any form of indecent assault is prohibited by IHL.¹⁰⁶⁰ Such protection is likely to also apply to girls. Wilful violation of this protection which causes great suffering or serious injury to body or health is a grave breach of IHL.¹⁰⁶¹ The use of sexual violence is prohibited regardless of the gender or age of the victim. This prohibition is discussed in further detail, below.

Pregnant women, nursing women and mothers of young children benefit from particular protection.¹⁰⁶² They are to be afforded respect and preferential treatment in the following circumstances: evacuation;¹⁰⁶³ when being transported;¹⁰⁶⁴ in consignment and distribution of medical supplies, food, clothing and other humanitarian aid;¹⁰⁶⁵ in detention and internment;¹⁰⁶⁶ and during belligerent occupation.¹⁰⁶⁷

This special treatment of women, and express prohibition of violence against women in armed conflict, is consistent with the general IHRL prohibition of gender-based violence and discrimination against women. As with the protection of children, the similarity between many aspects

¹⁰⁵⁶ For discussion of these circumstances, see Chapter 2.

¹⁰⁵⁷ For discussion of the relationship between IHRL and the IHL of NIAC. See Lindsay Moir (n185) 219–220.

¹⁰⁵⁸ Note that the protection under IHL is for ‘women’, and is not expressed in a gender-neutral way except in relation to the principle of no adverse distinction, discussed above.

¹⁰⁵⁹ ICRC CIHL Study, Rule 134

¹⁰⁶⁰ Fourth Geneva Convention, Art 27(2); Additional Protocol I, Art 76(1)

¹⁰⁶¹ Fourth Geneva Convention, Art 147. Note, however, that this is not limited to the special protection of women.

¹⁰⁶² Fourth Geneva Convention, Art 16

¹⁰⁶³ *ibid*, Art 17

¹⁰⁶⁴ *ibid*, Arts 21 and 22

¹⁰⁶⁵ Fourth Geneva Convention, Art 23; Additional Protocol I, Art 70

¹⁰⁶⁶ Fourth Geneva Convention, Arts 82, 85, 89, 91, 132; Additional Protocol I, Art 76

¹⁰⁶⁷ Fourth Geneva Convention, Art 50

of IHL and IHRL ensures that women receive comprehensive protection from violence even where the application of an IHRL treaty might be limited in an armed conflict situation.¹⁰⁶⁸

Special Protection of the Sick and Wounded (including Persons with Disability)

IHL provides special protection to the sick and wounded in both IAC and NIAC.¹⁰⁶⁹ This forms part of customary international law,¹⁰⁷⁰ and includes the protection of persons with disabilities in need of medical attention.¹⁰⁷¹ Thus, where students and education staff are sick, wounded or in need of medical attention, whether or not this is the result of a disability, they benefit from this special protection. Further, medical personnel,¹⁰⁷² who may also be teachers in teaching hospitals or stationed in educational facilities, benefit from special status under IHL.¹⁰⁷³

Parties to a conflict are obliged to respect and protect the sick, wounded and infirm, and the medical personnel who treat them in all circumstances. This means that parties are under both negative obligations not to attack the wounded, sick or medical personnel, and also positive obligations to ensure their protection, to minimise the effect on them of hostilities,¹⁰⁷⁴ and to treat them without discrimination.¹⁰⁷⁵ This protection applies in both IAC and NIAC.¹⁰⁷⁶

Unlike IHRL,¹⁰⁷⁷ IHL does not make specific reference to people with disabilities outside the general provisions protecting the ‘sick and wounded’.¹⁰⁷⁸ It is not clear, therefore, the extent to which ‘disability’, as opposed to the need for medical treatment as a result of a disability, is its own grounds for special protection under IHL.

¹⁰⁶⁸ For discussion of these circumstances, see Chapter 2.

¹⁰⁶⁹ See, for example, the Second Geneva Convention; Additional Protocol I, Art 8; Additional Protocol II, Art 7

¹⁰⁷⁰ ICRC CIHL Study, Rule 110

¹⁰⁷¹ Additional Protocol I, Art 8; ICRC CIHL Study, Rule 138. It is not clear, however, the extent to which persons with disabilities not in need of medical attention benefit from special protection.

¹⁰⁷² Note, religious personnel benefit from similar protection see for example ICRC CIHL Study, Rule 27

¹⁰⁷³ Hague Regulations, Art 27; First Geneva Convention, Art 19; Fourth Geneva Convention, Art 18; Additional Protocol I, Art 21; Additional Protocol II, Art 11; ICRC CIHL Study, Rule 25

¹⁰⁷⁴ Fourth Geneva Convention, Arts 16 and 17

¹⁰⁷⁵ First Geneva Convention, Art 12(2); Second Geneva Convention, Art 12 (2); Additional Protocol I, Art 10(2); Additional Protocol II, Art 7. For further discussion regarding this protection, see Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), in particular chapter 6, 329–332

¹⁰⁷⁶ ICRC CIHL Study, Rule 110; See also Additional Protocol II, Art 7

¹⁰⁷⁷ IHRL not only contains extensive provisions relating to disability discrimination, Art 11 of the Convention on the Rights of Persons with Disabilities requires that state parties ‘take all necessary measures’ to ensure the protection and safety of persons with disabilities in armed conflict and other emergency situations.

¹⁰⁷⁸ Although some provisions of IHL are broad enough to require the needs of children with disability to be taken into account: Additional Protocol I, Art 77 and Additional Protocol II, Art 4(3). See the discussion of these provisions in Chapters 3 and 4, above.

4.2.4 Prohibition of Deliberate Attacks on Students and Education Staff

The prohibition on direct attacks against civilians (including students and education staff) is found in Articles 48 and 51 of Additional Protocol I and Article 13(2) Additional Protocol II. It also forms part of customary international law applicable in both IAC and NIAC.¹⁰⁷⁹ These provisions make it clear that it is forbidden to directly and deliberately to attack a civilian.

Definition of “Attack”

An ‘attack’ is ‘any act of violence’ against an adversary, whether in offence or in defence.¹⁰⁸⁰ The rules prohibiting attacks against civilians apply to ‘attacks’ not only on the territory of an enemy, but also to defensive operations on a State’s own territory, whether occupied by an enemy or not.¹⁰⁸¹ This means that the prohibition on deliberate attacks against civilians applies to both enemy forces and the defensive actions of the civilian’s own forces.¹⁰⁸²

The term ‘deliberate and direct’ distinguishes intentional attacks against students and education staff from those which are accidental or incidental. The rules regulating when a civilian may suffer an attack accidentally or incidentally (in that it is not the intended target of the attack) are discussed below.

4.2.5 Prohibition of Deliberate Attacks and the Right to Life

As outlined in Chapter 2, the ICJ considers that the IHRL right to life is complementary to the rules of IHL that embody the principle of distinction. Its view, in the *Nuclear Weapons Advisory Opinion*, was that ‘arbitrarily’ deprivation of life, under Article 4 of the ICCPR ought to be determined in accordance with the rules of IHL.¹⁰⁸³

In addition, the right to life under IHRL and the principle of distinction under IHL - and embodied in the rules of ICL - contain similar and overlapping fundamental prohibitions on the deliberate and direct attack of civilians not directly participating in armed conflict. A number of ECtHR and IACtHR cases confirm this prohibition under the right to life.¹⁰⁸⁴

These cases do not specifically address the protection of students or education staff in armed conflict. The cases make it clear that the deliberate targeting of civilians, including, therefore, students and education staff, are both a breach of the IHL principle of distinction (and therefore, many provisions of ICL) and a violation of the IHRL right to life.¹⁰⁸⁵

¹⁰⁷⁹ ICRC CIHL Study, Rule 6

¹⁰⁸⁰ Additional Protocol I, Art 49(1). ‘Attack’ under IHL had a meaning different from that used by the law that regulates the use of force between States (the *jus ad bellum*).

¹⁰⁸¹ Additional Protocol I, Art 49(2)

¹⁰⁸² Stefan Oeter (n1030), 176

¹⁰⁸³ See Chapter 2 for further discussion.

¹⁰⁸⁴ *Khatsiyeva and others v Russia*, Application No 5108/02, 17 January 2008; *Jose Alexis Fuentes Guerrero et al v Colombia*, Case 11.519, 13 April 1999

¹⁰⁸⁵ *ibid*

4.2.6 Loss of Protection of Students and Education Staff from Deliberate and Direct Attacks

Article 51(3) of Additional Protocol I sets out the very important rule that protection of civilians from deliberate and direct attack, including students and education staff, exists ‘unless and for such time as they take a direct part in hostilities’. Thus a civilian may be deliberately and directly attacked if they, and for the time that they, directly participate in hostilities.

This rule is duplicated in Article 13(3) of Additional Protocol II, applying to NIAC, and it also forms part of customary international law.¹⁰⁸⁶ Common Article 3 sets out that all persons not taking an ‘active’ part in hostilities benefit from its protection in conflicts not of an international character. Under IHL the terms ‘active’ and ‘direct’ mean the same thing.¹⁰⁸⁷

Except for the very rare case of participation in a *levée en masse*,¹⁰⁸⁸ civilians do not have a right to participate in hostilities. This means that even a civilian that no longer directly participates in hostilities, and is protected from attack, is nevertheless liable to arrest and prosecution under criminal law for that participation.¹⁰⁸⁹ If students or education staff do take part in hostilities they may be lawfully targeted, they do not receive POW status when captured, and they do not benefit from ‘combatant immunity’.¹⁰⁹⁰

Direct Participation in Hostilities

The Geneva Conventions and Additional Protocols do not contain a definition of ‘direct participation in hostilities’.¹⁰⁹¹ The ICRC Commentary to Additional Protocol I, setting out the intention of the drafters, states that ‘direct’ participation means ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces’.¹⁰⁹² However, this elaboration does not explain which acts, when undertaken by civilians, including students and education staff, might amount to a direct participation in hostilities.¹⁰⁹³

¹⁰⁸⁶ ICRC CIHL Study, Rule 6; *Prosecutor v Pavle Strugar*, IT-01-42-T, 31 January 2005, para 20

¹⁰⁸⁷ ICRC Interpretive on DPIH, 43–44; See also *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, para 629, interpreting the meaning of ‘active’ under Common Art 3. The position under ICL is slightly different and is discussed below.

¹⁰⁸⁸ This concept describing a spontaneous civilian uprising is discussed above in relation to the definition of combatant in IAC: Hague Regulations 1907, Art 2; Third Geneva Convention, Art 4A(6)

¹⁰⁸⁹ Additional Protocol I, Art 45. See also Claude Pilloud (ed) (n34), para 1944

¹⁰⁹⁰ This is the immunity that combatants have from criminal prosecution for participation in an IAC. For discussion of this immunity, see above.

¹⁰⁹¹ Note that ‘direct’ and ‘active’ as used throughout the Geneva Conventions and Additional Protocols are considered to have the same meaning: ICRC Interpretive on DPIH, 43–44; *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, 629

¹⁰⁹² Claude Pilloud (ed) (n34), para 1944; This was confirmed by the ICTY in *Prosecutor v Pavle Strugar*, IT-01-42-A, 17 July 2008

¹⁰⁹³ Members of the armed forces, and other ‘combatants’ in IAC may be targeted at all times (unless they are *hors de combat*).

The ICRC has published an Interpretive Guidance on the Notion of Direct Participation in Hostilities, which aims to help clarify the concept. Although this is not a legally binding document, it is a useful guide in determining when the conduct of students or education staff might expose them to lawful attack under IHL.¹⁰⁹⁴

The ICRC considers that for an act to be a direct participation in hostilities it must meet three, cumulative, criteria:

- **threshold of harm:** ‘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 or serious injury, or destruction on persons or objects protected against direct attack’;¹⁰⁹⁵ and
- **direct causation:** ‘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’;¹⁰⁹⁶ and
- **belligerent nexus:** 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’.¹⁰⁹⁷

These criteria are important, because they identify when an act of violence undertaken by a student or member of the education staff is, and is not, direct participation in hostilities. If a civilian, including a student or member of education staff, kills an enemy or destroys enemy property, they are directly participating in hostilities. Their conduct meets the above criteria and they are exposing themselves to lawful attack for the duration of that participation. However, not all conduct is as clearly identifiable as direct participation.

The following examples¹⁰⁹⁸ are of conduct that is likely to be ‘direct participation in hostilities’ if undertaken by civilians, including students (regardless of age) or education staff:

- serving as a lookout during an ambush;¹⁰⁹⁹
- delivering ammunition to the front line;¹¹⁰⁰
- the recruitment and training of a person or persons specifically for the execution of a particular predetermined hostile act. This includes persons recruiting children from schools for a particular operation. Note, however, that general recruitment of personnel is not direct participation in hostilities although, where the recruitment is of children under 15, it does constitute a war crime;¹¹⁰¹

¹⁰⁹⁴ There are critical comments on this Guide: see, for example, Michael N Schmitt, ‘The Interpretive guidance on the Notion of direct Participation in Hostilities: A critical analysis’ (2010) *Harvard National Security Journal* 6

¹⁰⁹⁵ ICRC Interpretive on DPIH, 46

¹⁰⁹⁶ *ibid*

¹⁰⁹⁷ *ibid*

¹⁰⁹⁸ Note that these examples are demonstrative only and ought not to be relied on in all circumstances.

¹⁰⁹⁹ ICRC Interpretive on DPIH, 54

¹¹⁰⁰ *ibid*, 56

¹¹⁰¹ *ibid*, 53

- participation in a military operation that results in harm to an adversary.¹¹⁰² This includes the identification and marking of targets, transmission of tactical intelligence to attacking forces, and providing assistance to troops for a specific military operation.

The following are examples of conduct that is likely to be too indirect to be a ‘direct participation in hostilities’ and, therefore, does not expose civilians to lawful direct attack:

- general recruitment and training of children and other persons;¹¹⁰³
- teaching material that constitutes propaganda to students in educational facilities;¹¹⁰⁴
- publication of material by academics that constitutes propaganda;¹¹⁰⁵
- designing, producing and shipping of weapons and other military equipment (not on the front line) in a civilian facility. This includes undertaking a traineeship or apprenticeship in such facilities;¹¹⁰⁶
- undertaking construction or repair of a school which may be used for a military purpose;¹¹⁰⁷
- providing supplies or services (such as training material, textbooks, electricity, fuel, finances and financial services) to a party to a conflict;¹¹⁰⁸
- participation in the general ‘war effort’ or in general war sustaining activities which do not have a direct link to the conduct of hostilities, such as political, media or economic activities in support of a war.¹¹⁰⁹

Similarly, in order to be a direct participation in hostilities, the act must be specifically designed to support or damage a party to the conflict. So, for example, the blocking of roads leading to an important military area by students and education staff fleeing from danger is not designed to cause harm to a party to the conflict, even though it might significantly delay a military operation.¹¹¹⁰

¹¹⁰² *ibid*, 54–55

¹¹⁰³ *ibid*, 53

¹¹⁰⁴ See the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2000) 39 ILM 1278. Note that, while this is not direct participation in hostilities, it may constitute a violation of students’ right to education. See Chapter 3 for further discussion.

¹¹⁰⁵ *ibid*

¹¹⁰⁶ ICRC Interpretive on DPIH, 51

¹¹⁰⁷ See similar analysis regarding roads, bridges and airports in ICRC Interpretive on DPIH, 51. While this conduct does not constitute a direct participation in hostilities, it may expose the school to attack. See discussion of this issue in Chapter 5. Note, however, subsequent use of a school for military purposes may expose it to attack.

¹¹⁰⁸ ICRC Interpretive on DPIH, 53

¹¹⁰⁹ *ibid*, 51

¹¹¹⁰ The example given in ICRC Interpretive on DPIH, 61, is of fleeing refugees. However, the principle remains the same in the case of students and education staff.

Duration of Direct Participation in Hostilities

The ICRC considers that civilians lose their protection from direct attack ‘for the duration of each specific act amounting to direct participation in hostilities’.¹¹¹¹ This means that civilians directly participating in hostilities lose their protection from direct and deliberate attack:

- for the duration of the specific hostile act;
- while they are engaged in preparation for the specific hostile act; and
- ^a while they are being deployed to, or returning from, the location of the specific hostile act.¹¹¹²

At all other times, including when they are engaged in ordinary educational tasks, such as attending an educational facility, civilians are protected from deliberate and direct attack. This means that civilians benefit from the ‘revolving door’ of protection: they lose and regain protection from direct attack ‘in parallel with the intervals of their engagement in direct participation in hostilities’.¹¹¹³

The situation is different for people that are members of a non-State armed group. The ICRC’s Interpretive Guidance states that the question of the duration of direct participation by civilians, and the revolving door of their protection, is a different issue from whether or not a person loses civilian protection because of their membership to a non-State armed group.¹¹¹⁴ The ICRC considers that a person who is a member of a non-State armed group, and has a continuous combat function, is not a civilian, and is, therefore, not entitled to protection from attack while maintaining this function.¹¹¹⁵ However, their civilian protection (but not immunity from prosecution) returns once they have stopped being a member of that group. The revolving door of protection ‘starts to operate based on membership’.¹¹¹⁶ This is known as the ‘functional membership’ approach.¹¹¹⁷

¹¹¹¹ ICRC Interpretive on DPIH, 70

¹¹¹² *ibid*, 65–67

¹¹¹³ *ibid*, 70. An alternative approach to the ICRC’s ‘revolving door’ approach is the concept of ‘continuous direct participation’ supported by Schmitt. See Michael N Schmitt, ‘The Interpretive guidance on the Notion of direct Participation in Hostilities: A critical analysis’ (2010) *Harvard National Security Journal* 6–44. Under this approach a civilian who continuously engaged in hostilities is a lawful target at all times, even when not engaging in specific hostile acts. They can be targeted as long as they haven’t ‘opted out’ of hostilities by a period of non-participation or an affirmative act of withdrawal. This approach is broader than the ‘revolving door’ approach of the ICRC, which ensures protection from attack while a civilian is not participating in a specific hostile act.

¹¹¹⁴ In a NIAC, although it has been suggested that this approach should be extended to those non-State armed groups that do not ‘belong to a State’ in IAC; Dapo Akande, ‘Clearing the Fog of War? The ICRC’S Interpretive Guidance on Direct Participation in Hostilities’ (2010) 59 *International and Comparative Law Quarterly* 180, 186

¹¹¹⁵ The idea of DPIH is designed to apply to sporadic acts of violence: ICRC Interpretive on DPIH, 72

¹¹¹⁶ *ibid*, 72

¹¹¹⁷ *ibid*; Nils Melzer, *Targeted Killings in International Law* (Oxford University Press 2008), 350

Self-defence and Direct Participation in Hostilities

Sometimes violent means are used to protect students and education staff from illegal attacks during armed conflict. For example, assigning private armed guards to protect students and education staff, or arming education staff themselves, is not an unknown practice in armed conflict.¹¹¹⁸ However, this practice must be pursued with caution.

IHL does not prohibit the use of weapons by civilians for the purposes of self-defence or the defence of others.¹¹¹⁹ Where the use of weapons by civilians is in defence against an unlawful attack, such as looting, rape, murder or attempted abduction of children from an educational facility by soldiers,¹¹²⁰ it does not constitute a direct participation in hostilities and, therefore, would not expose guards or education staff to lawful attack. However, there is a real risk that such conduct might be mistaken for a direct participation in hostilities by an enemy's forces and may, therefore, increase the risk of attack. For discussion of the targeting consequences of the presence of military guards at education facilities, see the discussion in Chapter 5 relating to targeting of objects.

The Direct Participation of Children in Hostilities

As already mentioned, the participation of children in armed conflict is a significant education-related violation. Like IHRL and ICL, IHL contains prohibitions on the recruitment of children in hostilities. This prohibition was the subject of the ICC's first judgment in the *Lubanga* case. The recruitment of children under 15 as soldiers in armed forces or in armed groups is prohibited by IHL treaty law¹¹²¹ and customary international law¹¹²² applicable in both IAC and NIAC.

Under Additional Protocol I, parties to a conflict are required to take all feasible measures to prevent children under the age of 15 from directly participating in hostilities.¹¹²³ As already mentioned, IHRL contains similar provisions but sets the age limit at 18 years.¹¹²⁴ Additional Protocol II, applicable in NIAC, also prohibits the participation in hostilities of children below the age of 15.¹¹²⁵

Although IHL does not strictly prohibit the recruitment of children between the ages of 15 and 18, as many IHRL instruments do,¹¹²⁶ Article 77(2) of Additional Protocol I requires that when

¹¹¹⁸ See, for example, the practice in Afghanistan, Pakistan, Thailand and Columbia, noted in Global Coalition to Protect Education from Attack, *Study on Field-based Programmatic Measures to Protect Education from Attack* (Global Coalition to Protect Education from Attack 2010), 10–13

¹¹¹⁹ ICRC Interpretive Guidance on DPIH, 61

¹¹²⁰ Examples given by ICRC Interpretive Guidance on DPIH, 61

¹¹²¹ Additional Protocol I, Art 77(2); Additional Protocol II, Art 4(3); CRC, Art 38

¹¹²² ICRC CIHL Study, Rule 136 and Rule 137

¹¹²³ Additional Protocol I, Art 77

¹¹²⁴ See Optional Protocol to the CRC; ACRWC; ILO Convention on the Worst Forms of Child Labour.

¹¹²⁵ Additional Protocol II, Art 4(3)(c)

¹¹²⁶ For example, see Optional Protocol to the CRC; ACRWC; ILO Convention on the Worst Forms of Child Labour.

children over the age of 15 are recruited into hostilities, priority should be given to the older children.¹¹²⁷

In the *Lubanga* case, the ICC held that the prohibition on the use of children ‘to actively participate in hostilities’ as set out in Article 8(e)(vii) was different from, and broader than, the concept of ‘direct participation in hostilities’ in Additional Protocol I and also the concept of ‘active participation in hostilities’ set out in Common Article 3 of the Geneva Conventions. Discussion of the potential consequences of this decision on the protection of child soldiers is beyond the scope of this Handbook.¹¹²⁸ However, it is important to note that such a decision brings into question the mutually reinforcing nature of the two regimes, as discussed above in Chapter 2.

Despite these prohibitions, the voluntary or involuntary participation of children in armed forces or armed groups causes them to lose their protection from direct attack, regardless of their age. Children of any age, who are members of the armed forces or members of an organised armed group connected to a party in an IAC, or who are directly or actively participate in hostilities¹¹²⁹ (whether members of a non-state armed group or not), in either an IAC or NIAC, lose their protection against direct attack.

However, although children are not protected from direct attack while they participate in hostilities, IHL does recognise the special vulnerability of children in the hands of the enemy and continues to afford them special protection as a child. This applies even if a State or armed group has breached IHL by recruiting a child in the first place. The following special rules exist to protect children that have participated in hostilities if they are captured:

- Children who qualify as combatants in IAC are entitled to POW status upon capture.¹¹³⁰ Detaining parties must take into consideration the age of any POWs when implementing the Third Geneva Convention (setting out the protection of POWs).¹¹³¹
- Those children that are not combatants in IAC, or who are not members of the armed forces in NIAC, may be subject to criminal prosecution for their participation, depending on the criminal laws of the State (and the age of criminal responsibility).
- Article 77(3) of Additional Protocol I provides that any child under the age of 15 years that falls into the hands of the enemy (whether or not the child has participated in hostilities or is entitled to POW status) is entitled to the special protection afforded by Article 77. In particular, children shall be detained separately from adults.¹¹³²

¹¹²⁷ A similar provision is contained in CRC, Art 38

¹¹²⁸ For a discussion of two potential consequences, see Nicole Urban, ‘Direct and Active Participation in Hostilities the Unintended Consequences of the ICC’s decision in Lubanga’ (2012) <www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/>

¹¹²⁹ Under IHL. The position is different under ICL. See discussion of *Lubanga* in the ICL section of this Chapter.

¹¹³⁰ In accordance with the Third Geneva Convention.

¹¹³¹ Third Geneva Convention, Art 16

¹¹³² Additional Protocol I, Art 77(3)–(4)

- Children who are detained in occupied territory are afforded special protection by Article 76 of the Fourth Geneva Convention. Article 94 also entitles them to, among other things, access to education in internment.¹¹³³ This provision is discussed in Chapter 3.
- If a person under the age of 18 years is sentenced to death for offences relating to participation in armed conflict, then the sentence shall not be carried out.¹¹³⁴

In addition to the IHL protection afforded to children upon capture, Article 6 of the Optional Protocol to the CRC obliges States Parties to take all feasible measures to ensure that children that have been recruited into the military forces are assisted in their physical and psychological recovery and social reintegration. This issue is addressed in detail in Chapter 6.

4.2.7 Protection from Particular Types of Attack

The principle of humanity¹¹³⁵ and the concept of human dignity are foundational concepts in IHL. For this reason, IHL attempts to make armed conflict more humane and places some absolute restrictions on the conduct of parties to a conflict. Even in the fog of war, some types of attack are absolutely disallowed. The following types of attack are prohibited by IHL regardless of whether or not the victim of the attack is a combatant, civilian (including student or education staff), or whether they are taking a direct part in hostilities. These prohibited forms of attack are substantially similar to the obligations and protection contained in most IHRL instruments.

Attacks Intended to Spread Terror among the Civilian Population¹¹³⁶

Article 51 of Additional Protocol I and Article 13(2) of Additional Protocol II prohibit attacks, and threats of attacks,¹¹³⁷ *solely* intended to spread terror among the civilian population.¹¹³⁸ This prohibition also forms part of the customary international law.¹¹³⁹

Attacks prohibited by this rule include those which are designed to intimidate or coerce the civilian population into acting in a particular way.¹¹⁴⁰ This could include attacking female-only

¹¹³³ Forth Geneva Convention, Art 94

¹¹³⁴ *ibid*, Art 68; Additional Protocol I, Art 77(5); Additional Protocol II, Arts 4-6

¹¹³⁵ Discussed in detail in relation to prohibited forms of attack by the ICJ in the *Nuclear Weapons Advisory Opinion*, paras 78–87

¹¹³⁶ Stefan Oeter (n1030), 159

¹¹³⁷ Claude Pilloud (ed) (n34), 1940

¹¹³⁸ Although terrifying, attacks not intended to spread terror among the civilian population are not covered by this provision but governed by ordinary rules of IHL relating to targeting: Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004), 116

¹¹³⁹ ICRC CIHL Study, Rule 2

¹¹⁴⁰ Oeter gives the example of Serb attacks on civilian objects during the conflict in the Federal Republic of Yugoslavia designed to intimidate the local population into expelling ethnic minorities from the area: Stefan Oeter (n1030), 194

civilian educational institutions and facilities,¹¹⁴¹ or female students and education staff on the way to educational institutions,¹¹⁴² in order to intimidate students and education staff into not attending education or to flee from the area. It can also include firing on civilians, systemic rapes, abuse, intimidation and torture of civilians (including particular groups like women and children), designed to terrorise or demoralise them.¹¹⁴³

Similarly, parties to an IAC are prohibited from any attack against a civilian by way of belligerent reprisal (a use of force intended to stop an adversary from violating IHL).¹¹⁴⁴ The ICRC Customary International Humanitarian Law Study concludes that the concept of reprisals (lawful or not) is not known to the law of NIAC.¹¹⁴⁵ Nevertheless, violence against a civilian who is not actively participating in hostilities, whether as a reprisal or not, is prohibited by Common Article 3 to the Geneva Conventions.

Sexual Violence

The use of sexual violence in armed conflict is prohibited, expressly and implicitly, by numerous provisions of IHL that apply in both IAC¹¹⁴⁶ and NIAC.¹¹⁴⁷ This prohibition forms part of the customary international law.¹¹⁴⁸ Women and children benefit from special protection against sexual and indecent assault.¹¹⁴⁹ In addition, the use of sexual violence against men and boys in armed conflict is also a serious issue.¹¹⁵⁰ The prohibition of sexual violence is non-discriminatory and applies equally to men, women, boys and girls.¹¹⁵¹

The prohibition on sexual violence includes rape, indecent assault, forced prostitution, sexual slavery, forced pregnancy and enforced sterilization.¹¹⁵² It can, in conjunction with other factors in armed conflict, amount to an act of genocide or torture.¹¹⁵³ The prohibition has been

¹¹⁴¹ For example, the attacks on girls' schools in Northern Pakistan, and the poisoning of water supplies for girls' schools in Kunduz Province, Afghanistan: EFA, *Global Monitoring Report, The Hidden Crisis: Armed Conflict and Education* (UNESCO 2011), 143

¹¹⁴² For example, the suicide bombings of female students and teachers on the way to schools in Afghanistan, outlined in United Nations Assistance Mission in Afghanistan, 2010 and EFA Report 2011, 143

¹¹⁴³ See the examples listed in ICRC CIHL Study, Rule 2

¹¹⁴⁴ Fourth Geneva Convention, Art 33; Additional Protocol I, Art 51

¹¹⁴⁵ ICRC CIHL Study, Rule 148

¹¹⁴⁶ Fourth Geneva Convention, Art 27(2); Additional Protocol I, Arts 75(2)(b), 76(1), 77(1)

¹¹⁴⁷ Common Art 3(1); Additional Protocol II, Art 4(2)(e)

¹¹⁴⁸ ICRC CIHL Study, Rule 93

¹¹⁴⁹ Children: Additional Protocol I, Art 77; Women: Additional Protocol I, Art 27

¹¹⁵⁰ See the enlightening discussion by Sandesh Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict' (2010) 92 *International Review of the Red Cross* 259, 259

¹¹⁵¹ Except for forced pregnancy. See, for example, the Rome Statute prohibition on rape: Art 8(2)(b)(xxii) and Art 8(2)(e)(vi). Claude Pilloud (ed) (n34), para 3049

¹¹⁵² ICRC CIHL Study, Rule 93

¹¹⁵³ See *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998; *Prosecutor v Alfred Musema*, ICTR-96-13-A, 27 January 2000; and *Prosecutor v Zdravko Mucić et al*, IT-96-21-T, 16 November 1998

found to protect persons in civilian internment. Such situations of prolonged detention have been recognised as taking away the capacity of a victim to consent to any sexual activity.¹¹⁵⁴

In addition to being prohibited by IHL, the use of sexual violence in conflict has been the object of non-binding instruments in order to raise awareness and prevent the issue. In 2013, a 'Declaration of Commitment to end Sexual Violence in Conflict' was eventually endorsed by 122 States.¹¹⁵⁵

The use of sexual violence as a weapon in war has a significantly detrimental impact on education, making sexual violence an education-related violation. The trauma of sexual violence can impede learning, and the fear of, and vulnerability to, sexual violence has a detrimental impact on the attendance at educational facilities, especially by women and girls.¹¹⁵⁶

Prohibition on Torture and Inhumane Treatment

IHL expressly prohibits the use of torture and other inhumane treatment at all times.¹¹⁵⁷ This prohibition applies across nationality and without adverse distinction. In addition, specific provisions protect those persons in POW detention¹¹⁵⁸ and civilian internment.¹¹⁵⁹ ICL prohibits the use of torture and inhumane treatment on similar grounds.¹¹⁶⁰

While there is significant convergence between IHL and IHRL on the issue of torture and inhuman and degrading treatment,¹¹⁶¹ it is important to note that the two regimes are intended to deal with different factual situations and the two legal regimes are not identical in all respects, as the example of corporal punishment demonstrates.

Article 75(2)(a)(iii) of Additional Protocol I expressly prohibits corporal punishment.¹¹⁶² However, this prohibition is only applicable in circumstances related to hostilities.¹¹⁶³ The prohibition of corporal punishment protects those 'affected by a situation' of IAC¹¹⁶⁴ who are in the power of a party to the conflict. IHL prohibits corporal punishment, for example, where

¹¹⁵⁴ For example, see *Prosecutor v Anto Furundžija*, IT-95-17/1-T, 10 December 1998

¹¹⁵⁵ The Declaration of Commitment to End Sexual Violence in Conflict (2013) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/244849/A_DECLARATION_OF_COMMITMENT_TO_END_SEXUAL_VIOLENCE_IN_CONFLICT_TO_PRINT....pdf>; See <<https://www.un.org/sexualviolenceinconflict/press-release/122-countries-endorse-historic-declaration-of-commitment-to-end-sexual-violence-in-conflict/>>; See also the G8 Declaration on Preventing Sexual Violence in Conflict (2013) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/185008/G8_PSVI_Declaration_FINAL.pdf>; see also the UN Security Council Resolution 2106 (2013)

¹¹⁵⁶ See EFA Global Monitoring Report, 132, 144–145 for examples of the use of sexual violence in conflict.

¹¹⁵⁷ Common Art 3; Additional Protocol I, Art 75; ICRC CIHL Study, Rule 90

¹¹⁵⁸ Third Geneva Convention, Arts 13 and 14

¹¹⁵⁹ Fourth Geneva Convention, Art 100

¹¹⁶⁰ See discussion in the next section.

¹¹⁶¹ However, not total convergence, as is discussed further in Sandesh Sivakumaran, 'Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals' (2005) 18 *Leiden Journal of International Law* 541

¹¹⁶² This is also a rule of customary international law: ICRC CIHL Study, Rule 91

¹¹⁶³ See Chapter 2.

¹¹⁶⁴ Additional Protocol I, Art 75(1)

a student is interned under the Fourth Geneva Convention, for security reasons or is a POW under the Third Geneva Convention. It does not, therefore, apply to corporal punishment in educational institutions if it is not inflicted in connection with the conflict, for example as part of the ordinary disciplinary procedures of an institution. The extent to which corporal punishment of students by education staff in education institutions is permissible or prohibited is to be determined with reference to relevant IHRL, discussed in detail above.

Internment of Civilians

In IAC internment of civilians is permissible only when it is absolutely necessary for imperative reasons of security;¹¹⁶⁵ and as a criminal penalty.¹¹⁶⁶ In all cases, decisions regarding internment must be subject to a procedure and subject to review by an independent body.¹¹⁶⁷ The conditions of internment are regulated by the Fourth Geneva Convention,¹¹⁶⁸ which provides that, at a minimum, all internees must be treated humanely.¹¹⁶⁹

In NIAC, arbitrary arrest and detention are prohibited in all circumstances.¹¹⁷⁰

Other Prohibited Forms of Attack

IHL also contains prohibitions on the following forms of attack in both IAC and NIAC, many of which overlap with prohibitions against similar conduct under IHRL:

- the taking of hostages;¹¹⁷¹
- the use of slavery or forced labour;¹¹⁷² and
- forced displacement of civilian populations for reasons other than imperative military necessity.¹¹⁷³

Attacks on Freedom of Thought or Conscience

IHL does not contain an express right to freedom of thought or conscience similar to IHRL.¹¹⁷⁴

¹¹⁶⁵ Fourth Geneva Convention, Arts 41–43 and 78 (relating to belligerent occupation)

¹¹⁶⁶ *ibid*, Art 68

¹¹⁶⁷ *ibid*, Arts 43 and 78

¹¹⁶⁸ *ibid*, Arts 79–141

¹¹⁶⁹ *ibid*, Art 100

¹¹⁷⁰ Additional Protocol II, Art 5(1); ICRC CIHL Study, Rule 99

¹¹⁷¹ Common Art 3; Fourth Geneva Convention, Arts 34 and 147; Additional Protocol II, Art 75(2)(c); ICRC CIHL Study, Rule 96

¹¹⁷² See Instructions for the Government of Armies of the United States in the Field (Lieber Code), Nuremberg Charter, Art 6; Additional Protocol II, Art 4; ICRC CIHL Study, Rule 94 (slavery) and Rule 95 (forced labour)

¹¹⁷³ This must also be temporary and subject to a right to return once the military necessity no longer exists: Fourth Geneva Convention, Art 49 and 147; Additional Protocol I, Art 51(7), 78(1) and 85(4)(a); Additional Protocol II, Art 4(3)(2) and 17; and ICRC CIHL Rule 129 and Rule 132.

¹¹⁷⁴ For discussion of this issue under IHRL, see above.

IHL also does not prohibit the dissemination of propaganda *per se*.¹¹⁷⁵ However, it does contain several provisions that seek to ensure the appropriateness of the content of education, especially of children.

The education of children separated from their families or orphaned by conflict should, as far as possible, be facilitated by persons of a similar cultural tradition.¹¹⁷⁶ Occupying powers must, if possible, ensure that children in occupied territories are educated by persons of their own nationality, language and religion.¹¹⁷⁷ Similar provisions exist for all civilian internees¹¹⁷⁸ in IAC and for children in NIAC.¹¹⁷⁹ More detailed discussion regarding the substantive content of these provisions can be found in Chapter 3.

Similarly, IHL prohibits the incitement to commit murder, robbery, rape, war crimes or crimes against humanity.¹¹⁸⁰ Any educational content that constitutes such incitement is prohibited by IHL, whether it is directed at children or at others. However, teaching of such content does not necessarily amount to a direct participation in hostilities, as outlined above.

4.2.8 Prohibition on Indiscriminate Attacks

Article 51 (4) of Additional Protocol I prohibits indiscriminate attacks. Parties to an armed conflict are prohibited from engaging in indiscriminate attacks against civilians or civilian objects.¹¹⁸¹ In other words, attacks of a nature ‘to strike military objectives and civilians or civilian objects without distinction’.¹¹⁸² This rule means ‘the rights of parties to a conflict to choose means and methods of warfare are not unlimited’¹¹⁸³ in armed conflict.

When students and education staff are civilians, or where an educational facility is a civilian object (discussed in Chapter 5), they benefit from the prohibition of indiscriminate attacks.

Prohibited Conduct

There are three types of indiscriminate attack prohibited in Article 51(4) of Additional Protocol I:¹¹⁸⁴

- those which are not directed at a specific military objective;
- those which employ a method or means of combat which cannot be directed at a specific military objective;

¹¹⁷⁵ Stefan Oeter (n1030), 231

¹¹⁷⁶ Fourth Geneva Convention, Art 24

¹¹⁷⁷ *ibid*, Art 50

¹¹⁷⁸ *ibid*, Art 94

¹¹⁷⁹ Additional Protocol II, Art 4(3)(a)

¹¹⁸⁰ Stefan Oeter (n1030), 232

¹¹⁸¹ Additional Protocol I, Art 51

¹¹⁸² *ibid*, Art 51(4)

¹¹⁸³ *ibid*, Art 35; Hague Regulations, Art 22

¹¹⁸⁴ Additional Protocol I, Art 51(4). See also George H. Aldrich, ‘The Laws of War on Land’ (2000) 94 *American Journal of International Law* 42, 51

- those which employ a method or means of combat the effects of which cannot be limited as required by IHL.

The rule against indiscriminate attacks forms part of customary international law¹¹⁸⁵ and prohibits, among other things, the following conduct by parties to a conflict:

- to fire blindly without an idea of the nature of the intended target;¹¹⁸⁶
- to ‘carpet’ bomb or drop random bombs on a region from the land, sea, or air;¹¹⁸⁷
- to fire imprecise missiles against military objectives located near, or in between, civilian objects;¹¹⁸⁸ and
- to use starvation of civilians as a method of warfare.¹¹⁸⁹

These may impact on safe access to and attendance of educational facilities by students and education staff.

Prohibited Weapons

The rule against indiscriminate attacks also restricts the types of weapon that can be used by parties to a conflict. It is always prohibited to use weapons to attack civilians, including students or education staff, or civilian objects. However, some weapons are nevertheless restricted by IHL, regardless of whom they are used against. The general rule is that parties must never use weapons that do not distinguish between civilians and military targets.¹¹⁹⁰

Weapons such as land mines¹¹⁹¹ and cluster munitions¹¹⁹² are prohibited because they do not discriminate between combatants and civilians, and they have a particularly detrimental effect on the civilian population, especially children. This rule includes an absolute prohibition on parties to a conflict using prohibited weapons, on the grounds of an educational facility, or on public roads used to access an educational facility.

¹¹⁸⁵ ICRC CIHL Study, Rule 11

¹¹⁸⁶ Listed in Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004), 118

¹¹⁸⁷ Additional Protocol I, Art 49(3); Listed in Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004), 118

¹¹⁸⁸ *ibid*, 118

¹¹⁸⁹ Additional Protocol I, Art 54(1) and (2); Additional Protocol II, Art 14; ICRC CIHL Study, Rule 53. However, in IAC this prohibition is subject to the qualification identified in Art 54(5), which permits a party to implement a ‘scorched earth’ policy. This means that parties, in defence of their national territory from invasion, may derogate from the prohibition in Art 54 (1) and (2) and destroy objects necessary for the survival of the civilian population on territory controlled by them where it is required by imperative military necessity. This qualification does not apply to NIAC.

¹¹⁹⁰ *Nuclear Weapons Advisory Opinion*, para 257. ICRC CIHL Study, Rule 71

¹¹⁹¹ Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction 1997, 36 ILM 1507

¹¹⁹² Convention on Cluster Munitions 2008

Parties must never use weapons that cause superfluous injury or unnecessary suffering.¹¹⁹³ This principle prohibits the infliction of harm on combatants or on those directly participating in hostilities greater than that which is unavoidable to achieve legitimate military objectives.¹¹⁹⁴ It requires consideration of both physical injury and psychological suffering.¹¹⁹⁵

This prohibition means that some weapons are prohibited outright because they result in ‘superfluous injury or unnecessary suffering’. Weapons that cause more damage than is ‘necessary’ to put a person out of combat,¹¹⁹⁶ including biological weapons,¹¹⁹⁷ chemical weapons¹¹⁹⁸ and dum-dum bullets (which expand in the human body).¹¹⁹⁹

Finally, parties must contain the effects of weapons within the territories of the belligerent States (and respect the neutrality of those States not involved in an armed conflict).¹²⁰⁰ This rule is the culmination of the two previous rules on indiscriminate weapons and those that cause unnecessary suffering.¹²⁰¹ It incorporates a prohibition on weapons, such as biological weapons, that might spread disease across borders into neutral States,¹²⁰² and weapons that cause widespread, long-term and severe damage to the natural environment.¹²⁰³

4.2.9 Precautions that Must be Exercised during an Attack

Even when an attack against a military objective is permitted, it may still cause damage to civilians and civilian objects, such as a civilian educational facility, near to a military objective, or cause significant disruption to civilian life. The rule prohibiting indiscriminate attacks against civilian objects forms part of the customary international law¹²⁰⁴ and places the following obligations on parties to the conflict when launching an attack against a military objective:¹²⁰⁵

¹¹⁹³ *Nuclear Weapons Advisory Opinion*, para 257; Additional Protocol I, Art 35; ICRC CIHL Study, Rule 70

¹¹⁹⁴ *Nuclear Weapons Advisory Opinion*, para 257. This principle must not be confused with that of lethality. Lethal weapons are not prohibited by IHL.

¹¹⁹⁵ Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004), 59

¹¹⁹⁶ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: Introduction to International Humanitarian Law* (4th edn, Cambridge University Press 2011), 36

¹¹⁹⁷ ICRC CIHL Study, Rule 73

¹¹⁹⁸ *ibid*, Rule 74

¹¹⁹⁹ *ibid*, Rule 77 and Rule 78; See further, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects 1980.

¹²⁰⁰ *Nuclear Weapons Advisory Opinion*, paras 261–262.

¹²⁰¹ *Nuclear Weapons Advisory Opinion*, paras 261–262, Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004), 57

¹²⁰² Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004), 57.

¹²⁰³ Additional Protocol I, Art 35; ICRC CIHL Study, Rule 45

¹²⁰⁴ ICRC CIHL Study, Rule 15; See also Rules 16–24.

¹²⁰⁵ Additional Protocol I, Art 57

- to exercise constant care to spare the civilian population and civilian objects;¹²⁰⁶
- to verify that the objects which are to be the subject of an attack are military and not civilian;¹²⁰⁷
- to choose means and methods of attack which minimise civilian loss of life or damage;¹²⁰⁸
- to cancel or suspend an attack if it becomes clear that the attack is against a civilian or civilian object or is disproportionate;¹²⁰⁹
- to minimise casualties and to refrain from excessive attacks; and ¹²¹⁰
- to issue an advance warning of attacks that may affect the civilian population where circumstances permit.¹²¹¹

An attack against a military objective is also considered indiscriminate if it does not comply with the rule of proportionality, such that the damage to civilians is excessive in relation to the concrete military advantage anticipated.¹²¹² The concept of proportionality is discussed below, in Chapter 5.

4.2.10 The Prohibition on Indiscriminate Attacks and the Right to Life

The relationship between the principle of distinction and the right to life was discussed above. It was concluded that IHRL and IHL both prohibit deliberate and direct attacks against civilians not directly participating in hostilities, including students and education staff. The other prohibition set out by distinction, being the prohibition of indiscriminate attacks, and the IHRL right to life are also highly complementary.

A number of cases in the ECtHR and the IACtHR, many of which are cited above, although not always expressly referring to IHL,¹²¹³ state that the use of indiscriminate violence¹²¹⁴ and weapons¹²¹⁵ in armed conflicts can also constitute a violation of the right to life, consistent with the prohibition on their use under IHL. These overlapping prohibitions strengthen the protection of students and education staff against indiscriminate attacks

¹²⁰⁶ Additional Protocol I, Art 57(1); ICRC CIHL Study, Rule 19

¹²⁰⁷ Additional Protocol I, Art 57(2)(a)(i); ICRC CIHL Study, Rule 16

¹²⁰⁸ ICRC CIHL Study, Rule 7

¹²⁰⁹ Additional Protocol I, Art 57(2)(b); ICRC CIHL Study, Rule 19

¹²¹⁰ Additional Protocol I, Art 57(2)(a)(ii) and Art 57(2)(a)(iii); ICRC CIHL Study Rule 11 and Rule 14

¹²¹¹ Additional Protocol I, Art 57(2)(c). ICRC CIHL Study Rule 20

¹²¹² Additional Protocol I, Art 57(2)(a)(iii); ICRC CIHL Study Rule

¹²¹³ This is typical of ECHR Cases: William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 (4) *European Journal of International Law* 741

¹²¹⁴ See, for example, *Ergi v Turkey*, 32 EHRR 388, 28 July 1998, para 79; IACHR *Jose Alexis Fuentes Guerrero et al v Colombia*, Case 11.519, 13 April 1999, paras 29–43

¹²¹⁵ *Isayeva v Russia*, Application No 57950/00, 24 February 2005, paras 195–199; *Khamzayev and others v Russia*, Application No 1503/02, 3 May 2011, para 253; *Juan Carlos Abella v Argentina (La Tablada case)*, Report No 55/97, 18 November 1997, paras 186–187

Further, these cases make it clear that the IHRL right to life requires authorities engaged in armed conflicts to exercise the following precautions when launching attacks, each of which also constitutes part of the protection afforded by distinction in IHL:

- verification that the intended target is not civilian;¹²¹⁶
- the obligation to issue an advance warning to allow for evacuation;¹²¹⁷ and
- the obligation to exercise constant care not to endanger civilians during the planning and execution of an attack.¹²¹⁸

Each of these rules is crucial to ensuring the safety and well-being of students and education staff in armed conflicts.

Although these cases did not address the provisions of IHL that set out the principle of distinction, it is the case that such conclusions are consistent with the prohibitions under IHL on attacking those not taking a direct part in hostilities¹²¹⁹ and the prohibition on the use of indiscriminate means and methods of warfare.¹²²⁰

4.2.11 Incidental Damage

Incidental loss of civilian life or injury to civilians is not a violation of IHL, provided that the principles of proportionality and necessity are respected. The issue of incidental damage, including the prohibition on the use of human shields, is discussed in Chapter 5.

4.3 INTERNATIONAL CRIMINAL LAW

As mentioned in Chapter 2, ICL refers to the set of rules proscribing conduct considered criminal by the international community. These rules, which prohibit war crimes and crimes against humanity, seek to protect civilians including students and education staff. Students and education staff do not benefit from any specific protection under ICL; however, many of the general ICL rules are applicable to them. These rules prohibit murder, torture and other inhuman and degrading treatment, sexual violence or other specific conduct, such as the use of child soldiers, persecution and deportation—each of which is a serious education-related violation. In establishing a case against an accused for either a war crime or a crime against humanity, the prosecution must make out each element of the offence beyond reasonable doubt.

¹²¹⁶ *Khatsiyeva and others v Russia*, Application No 5108/02, 17 January 2008, para 136; *Khamzayev and others v Russia*, Application No 1503/02, 3 May 2011, para 183

¹²¹⁷ *Khatsiyeva and others v Russia*, Application No 5108/02, 17 January 2008, para 184; *Kerimova and others v Russia*, Application Nos 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05, 3 May 2011, para 252

¹²¹⁸ *Khamzayev and Others v Russia*, Application No 1503/02, 3 May 2011, para 250

¹²¹⁹ See, for example, Rome Statute, Art 8(b)(i), (xvii), (xviii), (xix) and (e)(i)

¹²²⁰ *ibid*, Art 8(b)(xx) and (xix); 8(e)(xii), (xiv) and (xv)

As outlined in Chapter 2, it is not necessary that a criminal act or omission should be performed by the accused himself. ‘Command’ or ‘superior’ responsibility as a form of indirect criminal responsibility also arises in certain circumstances where commanders and superiors may be held liable for the acts of their subordinates, in addition to the subordinates’ own responsibility.¹²²¹ Further, ICL sets out a number of general defences to international criminal charges that the accused may raise.

4.3.1 Protection from Unlawful Killing

Murder and Other Forms of Unlawful Killing as a War Crime

The lives of students and educational personnel (as civilians) are protected in armed conflict by the principle of distinction. Violation of this principle is a grave breach of the Geneva Conventions and, therefore, constitutes a war crime.¹²²² ICL prohibits the wilful killing or murder of those not taking a direct part in hostilities,¹²²³ as well as the launching of attacks targeted at these persons.¹²²⁴ However, as outlined above, not all killing of civilians or those not taking direct part in hostilities is prohibited in armed conflict. Lawful attacks against military objectives can result in the unintended deaths or injury of civilians. The principle of proportionately, also discussed above, establishes that such deaths are unlawful only where they are excessive in relation to the anticipated military advantage of an attack against a military objective. ICL also recognises this principle, through the war crime of causing excessive incidental damage to civilians.¹²²⁵

The principal element required to qualify an offence as a war crime is that the victim of the offence must be a person protected by the Geneva Conventions—in other words, a person who is entitled to protection in accordance with the principle of distinction. This includes those who are: wounded or sick,¹²²⁶ shipwrecked,¹²²⁷ POWs,¹²²⁸ or civilians on the territory of an enemy or subject to occupation.¹²²⁹ Under the ICC’s Elements of Crimes, the accused must also have been aware of the factual circumstances that established the protected status of the victim.¹²³⁰

¹²²¹ See, for example, Rome Statute, Art 28; Convention Against Enforced Disappearances, Art 6

¹²²² First Geneva Convention, Art 50; Second Geneva Convention, Art 51; Third Geneva Convention, Art 130; Fourth Geneva Convention, Art 147; Additional Protocol I, Art 11(4)

¹²²³ Rome Statute, Art 8(2)(a)(i) and (c)(i); ICTY Statute, Art 2(a); ICTR Statute, Art 4(a)

¹²²⁴ Rome Statute, Art 8(2)(b)(i) and (8(2)(e)(i)

¹²²⁵ *ibid*, Art 8(2)(b)(iv)

¹²²⁶ Falling into the categories established in the First Geneva Convention, Art 13

¹²²⁷ Falling into the categories established in the Second Geneva Convention, Art 13

¹²²⁸ Third Geneva Convention, Art 4A

¹²²⁹ Fourth Geneva Convention, Art 4. Originally, this requirement was understood as referring to the protected persons regime in Part III of the Fourth Geneva Convention providing protection only to those enemy nations in the hands of a party to the conflict. However, recent jurisprudence in the ICTY and academic analysis suggests it now refers to allegiance rather than nationality of the civilian: Robert Cryer and others (n344), 287–288

¹²³⁰ The ICC’s Elements of Crimes adds: ‘With respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict’.

A further requirement of all war crimes is that the prohibited conduct took place in the context of, and was associated with, an IAC or NIAC. The perpetrator must also be aware of factual circumstances that established the existence of an armed conflict.¹²³¹

The Rome Statute's Article 8 on war crimes contains three offences that prohibit attacks on persons resulting in loss of life. These are wilful killing or murder,¹²³² intentionally directing attacks against the civilian population (or those not taking a direct part in hostilities),¹²³³ and intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹²³⁴

For each offence, the common elements of all war crimes must be proven. In addition:

- For the offence of murder or wilful killing, it must be proved that the perpetrator killed one or more persons entitled to protection. The elements of the offence of 'wilful killing' in IAC are essentially the same as the crime of 'murder' in NIAC.¹²³⁵
- For the offence of intentionally directing attacks against the civilian population in either IAC or NIAC, it must be proved that the object of the attack was the protected civilian population (or individual civilians not taking direct part in hostilities) and that the perpetrator intended these to be the object of the attack.¹²³⁶
- For the offence of intentionally launching an attack in the knowledge that it will cause incidental loss of life or injury to civilians, it must be proved that the perpetrator launched an attack that would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which was clearly excessive in relation to the concrete and direct overall military advantage anticipated; and that the perpetrator had the requisite knowledge of these elements.¹²³⁷ Although the Rome

¹²³¹ See generally, ICC's Elements of Crimes.

¹²³² Rome Statute, Art 8(2)(a)(i) (wilful killing in IAC); Art 8(2)(c)(i) (murder in NIAC).

¹²³³ Rome Statute, Art 8(2)(b)(i), in the case of IAC, and Art 8(2)(e)(i) in NIAC.

¹²³⁴ Art 8(2)(b)(iv) Rome Statute, Art 8(2)(b)(iv)

¹²³⁵ See Judgment in *Prosecutor v Zdraviko Mucić et al*, IT-96-21-T, 16 November 1998, paras 422–423. Although the Trial Chamber in the case of *Delalic et al* reasoned that there was 'no qualitative difference' between the concepts of murder and wilful killing.

¹²³⁶ See *Prosecutor v Stanislav Galić*, IT-98-29-T, 5 December 2003. The defendant was convicted of ordering the shelling and sniping of civilian areas during the siege of Sarajevo. The Trial Chamber found that such acts were carried out with the requisite intention to direct the attacks against the civilian population (para 596). See also the case of *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-01/07, 25 September 2009, in which the ICC's Trial Chamber made three observations on the elements of this crime. Firstly, that the population against whom the attack is perpetrated must not be under the control of hostile forces (at para 267). Secondly, that there is no requirement for there to be a "material result" from the attack (in other words, harm to civilians), the existence of an attack is sufficient (para 270). Thirdly, that the *mens rea* requires only proof of an intent to direct an attack against a civilian population or against a population which includes a military target but where destruction of the population is also intended (para 272). See also the case of *Prosecutor v Joseph Kony et al*, ICC-02/04-01/05

¹²³⁷ As at the date of writing, there are no cases where this crime is considered in its own right. See also the ICC's Elements of Crimes above.

Statute lists this crime only in relation to IAC, the principle of proportionality (that this crime embodies) is so fundamental to IHL that it is likely to form part of the customary international criminal law and, therefore, to apply to NIAC.¹²³⁸

Murder and Other Forms of Unlawful Killing as a Crime Against Humanity

The elements of the offence of murder as a crime against humanity are identical to those of wilful killing as a war crime, with one exception. Rather than the prosecution being required to prove that the victim was a protected person under the Geneva Conventions or that there was a nexus to an armed conflict, the required elements for murder as a crime against humanity are that the offence was committed as part of a widespread or systematic attack directed against any civilian population, and that the perpetrator had knowledge of this attack.¹²³⁹

It should be noted that, although the attack must have been committed against a civilian population, the jurisprudence of the international courts has not insisted on a particularly strict definition of the term ‘civilian’ in the context of crimes against humanity. For example, it has been held that even where there are combatants amongst the attacked population, or those actively involved in a resistance movement, the population may still be characterised as civilian if it remains predominantly so.¹²⁴⁰

4.3.2 Protection from Torture and Other Inhuman and Degrading Treatment

As already mentioned, the use or threat of torture against students and educational staff in situations of insecurity and armed conflict is a serious education-related violation. Torture under ICL has been defined similarly under IHRL¹²⁴¹ and IHL.¹²⁴² One of the first judgments of an *ad hoc* international criminal tribunal on torture under ICL specifically referred to Article 1(1) CAT and to the decisions of the ECtHR.¹²⁴³ Indeed, it could be said that the articles of the CAT provide a virtual actionable criminal code for the prosecution and punishment of torture worldwide, a rare occurrence in ICL.

¹²³⁸ See discussion of this in Robert Cryer and others (n344), 298

¹²³⁹ *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, para 590. Proof of these two elements are required for every offence charged as a crime against humanity: *Prosecutor v Radislav Krstić*, IT-98-33-A, 19 April 2004, para 485

¹²⁴⁰ See the Trial Chamber Judgment in the case of *Prosecutor v Zoran Kupreškić et al*, IT-95-16-T, 14 January 2000. Another ICTY Trial Chamber, in the case of *Prosecutor v Dragoljub Kunarac et al*, IT-96-23-T & IT-96-23/1-T, 22 February 2001 went further: ‘in case of doubt as to whether a person is a civilian, that person shall be considered a civilian. The Prosecution must show that the perpetrator could not reasonably have believed that the victim was a member of the armed forces’, para 435

¹²⁴¹ In general see Alexander Zahar, ‘Torture’, in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009), 537-538

¹²⁴² See discussion of this in *Prosecutor v Dragoljub Kunarac et al*, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para 467-470; confirmed by the Appeals Chamber Judgment, (12 June 2000); However, for a discussion of the differences between the two areas see: Sandesh Sivakumaran ‘Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals’ (2005) 18 *Leiden Journal of International Law* 541

¹²⁴³ *Prosecutor v Zdravko Mucić et al*, IT-96-21-T, 16 November 1998

The ICTY Trial Chamber in the case of *Prosecutor v Delalic* categorised the general prohibition of torture as a rule of customary international law as well as *jus cogens*.¹²⁴⁴ The Court held that:

[Torture is] an intentional act by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity, which is committed for a particular prohibited purpose and causes a severe level of mental or physical pain or suffering.

Sexual assault can also be considered as torture *per se*, in that rape by definition results in severe pain or suffering for the victim.¹²⁴⁵ The definition of torture was later expanded in the case of *Prosecutor v Kunerac* to include every form of serious mistreatment.

The Trial Chamber in *Kunerac* also stated that it was not necessary to prove the participation of a public official in the torture process and that it is sufficient to prove that the act was committed for a prohibited purpose.¹²⁴⁶ A prohibited purpose in these circumstances would be, for example, obtaining information or a confession, or in order to punish, intimidate or discriminate against the victim.¹²⁴⁷ Further, the CAT sets out a number of prohibited purposes. This list is not, however, exhaustive.¹²⁴⁸

Torture and Inhumane or Cruel Treatment as a War Crime

Under the Rome Statute, several offences relating to torture and violence against the person are envisaged as war crimes: torture *per se* and inhumane treatment under Article 8(2)(a)(ii) relating to offences committed in an IAC, and violence to life and person (further defined as either murder, mutilation, cruel treatment and torture) under Article 8(2)(c)(i) relating to offences committed in a NIAC. The elements necessary for war crimes remain the same – proof of nexus with an armed conflict; proof of the protected status of the victim; and proof that the perpetrator was aware of the circumstances establishing the existence of the armed conflict and the victim's protected status.

¹²⁴⁴ *ibid*, para 454

¹²⁴⁵ The first finding of guilt for an offence of torture with sexual assault under Common Art 3 of the Geneva Conventions was the ICTY case of *Prosecutor v Anto Furundžija*, IT-95-17/1-T, 10 December 1998 in which the victim was threatened with mutilation on interrogation. See also *Prosecutor v Radoslav Brdanin*, IT-99-36-T, 1 September 2004, in which the Trial Chamber stated at para 485 that rape necessarily amounts to torture.

¹²⁴⁶ The Trial Chamber stated that the mere infliction of pain on the victim for no purpose whatsoever was insufficient, a somewhat debatable contention. The Trial Chamber also noted that the court in *Delalic* had based its analysis of torture on IHRL instruments and decisions, and that the definitions are different under IHRL and IHL. The Trial Chamber in *Kunerac* also said that IHRL does not restrict torture to acts committed by or at the instigation of public officials and that under IHL torture is reprehensible in itself, regardless of the identity of the perpetrator, and cannot be justified in any circumstances.

¹²⁴⁷ *Prosecutor v Zdraviko Zdraviko Mucić et al*, IT-96-21-T, 16 November 1998, para 442.

¹²⁴⁸ See *Prosecutor v Mile Mrkšić*, IT-95-13/1-T, 27 September 2007, para 535. Note that although torture is constituted by an act or omission giving rise to severe pain or suffering, whether physical or mental, allegations of torture must be assessed on a case-by-case basis as there is no clear threshold or precise requirement). See *Prosecutor v Mladen Naletilić & Vinko Martinović*, IT-98-34-T, 31 March 2003, para 299

To sustain an allegation of torture as a war crime, the prosecution are required to prove that the accused inflicted:

- ‘severe physical or mental pain or suffering’ upon one or more persons, as discussed above, and
- that this was for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.¹²⁴⁹

Note also that the ‘torture’ element of the war crime of violence to life and person in NIAC is identical to the offence in an IAC.¹²⁵⁰

There is no requirement to prove a specific purpose where the charge is one of inhumane treatment. Inhumane treatment has been defined as ‘an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury and constitutes a serious attack on human dignity’.¹²⁵¹ However, even for the offence of inhumane treatment as a war crime, a requisite level of seriousness is necessary.¹²⁵² In assessing the severity of the pain or suffering the court should take into account several factors including the duration of the suffering inflicted, the nature of the crimes, the physical or mental condition of the victim, the victim’s age, the victim’s position of inferiority to the perpetrator.¹²⁵³

The jurisdiction of certain of the *ad hoc* international criminal courts have encompassed offences of ‘violence to life, health and physical or mental well-being’ including in particular ‘cruel treatment such as torture, mutilation or any form of corporal punishment’ as a war

¹²⁴⁹ See the ICC’s Elements of Crimes, 15. Also see *Prosecutor v Radoslav Brdanin & Momir Talić*, IT-99-36-T, 28 November 2003, and *Prosecutor v Milan Martić*, IT-95-11-T, 12 June 2007.

¹²⁵⁰ The specific offence of mutilation as a war crime under Art 8(2)(c)(1) of the Rome Statute is described as permanent disfigurement or disablement or the removal of an organ or appendage, which is neither justified by medical, dental or hospital nor carried out in the victim’s interests. The specific offence of cruel treatment as a war crime under Art 8(2)(c)(1) is described as the infliction of severe physical or mental pain or suffering upon one or more persons (with no further requirement of ulterior purpose).

¹²⁵¹ *Prosecutor v Zdravko Mucić et al*, IT-96-21-T, 16 November 1998, para 543. The Trial Chamber also referred to judgments of the ECtHR, stating that what makes inhumane treatment distinct from torture is the severity of the intensity of the suffering inflicted (para 535). In *Tomasi v France*, Application No 12850/87, 27 August 1992, the Court held that inhumane treatment had been committed where the victim was punched, slapped, spat on and kicked during a police interrogation; and in *Ribitsch v Austria*, Application No 18896/91, 21 November 1995, the Court found that inhumane treatment had been committed where an individual was beaten whilst in custody and his wife threatened (para 537).

¹²⁵² See the case of *Prosecutor v Milorad Krnojelac*, IT-97-25-T, 15 March 2002, in which the Trial Chamber held that certain incidents of beatings of Muslim civilian prisoners in the KP Dom prison, in which prisoners lost teeth and experienced severe and long-lasting pain, were of the requisite seriousness to constitute the *actus reus* of inhumane treatment as a war crime (paras 316–320). However, the Court also ruled that many other incidents of beatings, although very painful for the victims, were not serious enough to constitute such a crime.

¹²⁵³ See *Prosecutor v Milan Martić*, IT-95-11-T, 12 June 2007, para 75. The Court provided some examples of acts which have caused the requisite pain and suffering, namely severe beatings, administration of electric shocks, forcing victims to watch executions and rape.

crime.¹²⁵⁴ The case law of the *ad hoc* tribunals indicates that there appears to be little difference between cruel treatment as a war crime of violence to life and inhumane treatment.¹²⁵⁵

Torture and Other Inhumane Acts as Crimes against Humanity

Under the Rome Statute there are two distinct offences in this category of crimes against humanity, namely torture (Article 7(1)(f)) and ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’ (Article 7(1)(k)).

The Rome Statute further defines torture in relation to crimes against humanity as ‘the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions’.¹²⁵⁶

‘Other inhumane acts’ are defined under the Rome Statute’s Elements of Crimes as: the infliction of great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; such act was of a character similar to any other act capable of constituting a crime against humanity under Article 7(1);¹²⁵⁷ and the perpetrator was aware of the factual circumstances that established the character of the act.

Both offences must be accompanied by proof of the elements required for an allegation of a crime against humanity, namely that the conduct was committed as part of a widespread or systematic attack directed against a civilian population and the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The Statutes of the *ad hoc* tribunals also classify torture and inhumane acts as crimes against humanity.¹²⁵⁸ In the context of crimes against humanity, as with war crimes, torture has been

¹²⁵⁴ See, for example, ICTY Statute, Art 2(b), relating to breaches of the Geneva Conventions; Statute of the ICTR, Art 4(a); Statute of the SCSL, Art 3(a), both of which pertain to NIAC.

¹²⁵⁵ See, for example: *Prosecutor v Ljube Bošković & Johan Tarculovski*, IT-04-82-T, 10 July 2008, a conviction was entered for cruel treatment for intentional beatings inflicted upon civilians by police, as the beatings were of a sufficiently serious nature being repetitive, violent—some men lost consciousness and were threatened with guns and knives—and committed in the presence of a large number of police: see paras 383–387 of the Trial Judgment; *Prosecutor v Ante Gotovina et al*, IT-06-90-T, 15 April 2011, a conviction was entered for cruel treatment following proof of acts of beating, assaults, firing at, stabbing, threatening and burning the civilian victims who were found to have suffered serious mental and physical suffering and injuries: paras 1796–1799 of the Trial Judgment, currently on appeal; and *Prosecutor v Milorad Krnojelac*, IT-97-25-T, 15 March 2002, in which incidents of beatings civilian prisoners, during which the victims lost teeth and experienced severe and long-lasting pain, were of the requisite seriousness to constitute cruel treatment as a war crime: paras 316–320 of the Trial Judgment.

¹²⁵⁶ Rome Statute, Art 7(2)(e)

¹²⁵⁷ *ibid*: Elements of Crimes states at 12, ‘It is understood that “character” refers to the nature and gravity of the act.’

¹²⁵⁸ See for example Art 5(f) and (e) (where it is perpetrated in connection with an armed conflict). ICTY Statute; ICTR Statute, Art 3(f) and (i)

held to include rape,¹²⁵⁹ as well as severe beatings, electrocutions, threats of death, the witnessing of killings, and sexual assaults in order to extract confessions.¹²⁶⁰ In assessing the gravity of suffering or injury in order to constitute the crime against humanity or other inhumane acts, the case law reveals that the court must take into account all of the factual circumstances including the nature of the act, the context in which it occurs, the duration and/or repetition, the personal affect on the victims and the personal circumstances of the individual. The suffering does not, however, have to be long-lasting, so long as it is 'real and serious'.¹²⁶¹

4.3.3 Protection from Sexual Violence

The term 'sexual violence' in ICL encompasses a broad range of offences relating to non-consensual acts of a sexual nature capable of being categorised as war crimes or crimes against humanity. As noted above, sexual violence can also form part of other offences, including torture.

Rape is one of the most serious sexual violence offences,¹²⁶² although until recently it was not defined under ICL.¹²⁶³ It is now established that the essential elements of the offence of rape require the perpetrator to have 'invaded' the body of a person by conduct resulting in penetration,¹²⁶⁴ that

¹²⁵⁹ On the basis that the rapes inflicted severe pain and suffering on the victims and that they were intentionally perpetrated in order to discriminate on ethnic grounds – paragraphs 578 and 669 of the Trial Chamber Judgment in the case of *Prosecutor v Dragoljub Kunarac et al*, IT-96-23-T & IT-96-23/1-T, 22 February 2001

¹²⁶⁰ See Trial Chamber in the case of *Prosecutor v Radoslav Brdanin*, IT-99-36-T, 1 September 2004, para 524

¹²⁶¹ See Trial Chamber Judgment in the case of *Prosecutor v Milorad Krnojelac*, IT-97-25-T, 15 March 2002, para 131. The Court held that the keeping of non-Serb detainees in 'brutal and deplorable conditions' which included, inter alia, lack of food, cramped and unhygienic living conditions and keeping detainees in prolonged isolation, were acts which, when considered cumulatively, were of the requisite seriousness to satisfy the *actus reus* of inhumane treatment. See also the case of *Prosecutor v Ante Gotovina et al*, IT-06-90-T, 15 April 2011, in which the Trial Chamber held that acts of beating, assaulting, firing upon, stabbing, threatening and burning individuals constituted inhumane acts which amount to a crime against humanity, such acts inflicting great suffering and serious injury on the victims (paras 1796–1799 of the Trial Chamber judgment).

¹²⁶² *Prosecutor v Alex Tamba Brima et al*, SCSL-04-16-T, 31 March 2006, para 111: 'sexual violence is broader than rape and includes such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the Rome Statute as war crimes and crimes against humanity, namely, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation" and other similar forms of violence'.

¹²⁶³ Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 112; See *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, para 597, that rape 'is a physical invasion of a sexual nature, committed under circumstances which are coercive'.

¹²⁶⁴ The concept of 'invasion' is intended to be broad enough to be gender-neutral, and involves the penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body: see generally the ICC's Elements of Crimes, 8

this invasion was committed by force, or by threat of force or coercion, or the invasion was committed against a person incapable of giving genuine consent.¹²⁶⁵

Other discrete crimes under ICL include sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization. The ICC has also added a catch-all offence of ‘other crimes of sexual violence of comparable gravity.’¹²⁶⁶

Sexual Violence as a War Crime

For offences of sexual violence charged as a war crime, the prosecution must prove the sexual offence (rape, sexual slavery etc.) and that such conduct took place in the context of, and was associated with, an armed conflict; and the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹²⁶⁷ The offences of sexual violence apply equally to IAC as well as NIAC.¹²⁶⁸

Sexual Violence as a Crime against Humanity

For an offence of sexual violence charged as a crime against humanity, the prosecution must prove the sexual offence and the elements of a widespread and systematic attack which characterise crimes against humanity, as discussed above.¹²⁶⁹

¹²⁶⁵ The threat or use of force or coercion must be ‘such as caused fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment’ (ICC’s Elements of Crimes, 8), and it is understood that a person may be incapable of giving genuine consent ‘if affected by natural, induced or age-related incapacity’. See also Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008), 112, see above citing; *Prosecutor v Anto Furundžija*, IT-95-17/1-T, 10 December 1998; and *Prosecutor v Dragoljub Kunarac et al*, IT-96-23-T & IT-96-23/1-T, 22 February 2001

¹²⁶⁶ Rome Statute, Art 8(2)(b)(xxii) and Art 2(e)(iv)

¹²⁶⁷ For examples of cases involving sexual violence charged as a war crime, see *Prosecutor v Dragoljub Kunarac et al*, IT-96-23-T & IT-96-23/1-T, 22 February 2001 (multiple rapes had been personally committed by all three defendants); *Prosecutor v Tharcisse Renzaho*, ICTR-97-31-T, 14 July 2009, defendant convicted of rape as a war crime as a superior: as a commander of a military force he was found to have known of the attacks being committed and failed to do anything to prevent or punish such acts committed by subordinates; *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-01/07, 25 September 2009, the defendants are accused of the commission of rape as a war crime, and of sexual slavery as a war crime, in that during an attack on a village, women were forcibly taken to military camps, detained there and subsequently forced to become the wives of commanders and made to undertake domestic duties, engage in acts of a sexual nature and were forcibly raped.

¹²⁶⁸ See, for example, rape and other sexual violence under Art 8 (2)(b)(xxii) of the Rome Statute relating to ‘other serious violations of the laws and customs applicable in international armed conflict’ and under Art 8(2)(e)(vi) relating to ‘other serious violations of the laws and customs applicable in non-international armed conflict’.

¹²⁶⁹ For examples of cases involving sexual violence charged as a crime against humanity, see *Prosecutor v Kunarac et al*; *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, an ongoing case in which it is alleged that the accused knowingly and intentionally participated in a series of rapes of civilian men, women and children conducted as part of a widespread and systematic attack directed against the civilian population

Sexual Violence as Torture

It is now clear that rape can be characterised as a form of torture, and this is discussed above. The ICTY Trial Chamber stated that ‘rape can be resorted to ... as a means of punishing, intimidating, coercing or humiliating a victim or obtaining information or a confession from the victim’ which can constitute torture per se.¹²⁷⁰ In addition, pain and suffering are automatically inferred when the commission of rape has been established, since the act of rape necessarily implies severe pain and suffering.¹²⁷¹ Similarly, an ICTR Trial Chamber has stated that ‘like torture, rape is a violation of personal dignity ... rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.¹²⁷²

4.3.4 Special Protection

Protection against the Use of Child Soldiers

The participation of children in armed conflict is a serious education-related violation. It places children at risk of physical and psychological harm, prevents them from attending educational facilities, and can lead to a denial of the opportunity to receive even a basic education. As noted above, the recruitment and use of children in hostilities is prohibited by both IHRL (under 18 years) and IHL (under 15 years).

ICL prohibits the recruitment of children under the age of 15¹²⁷³ as a war crime.¹²⁷⁴ The Rome

with the intention of terrorizing the population; *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-01/07, 25 September 2009, the Trial Chamber has clarified that coercion does not necessarily have to include physical force but can include ‘threats, intimidation, extortion or other forms of duress which prey on fear or desperation may constitute coercion’: see para 440

¹²⁷⁰ *Prosecutor v Anto Furundžija*, IT-95-17/1-T, 10 December 1998, para 163; See also *Prosecutor v Kunarac, Kovac & Vukovic*, ICTY IT-96-2, in which the Appeals Chamber clarified that the act of rape automatically satisfied the requirement of pain and suffering necessary to establish the crime of torture, without requiring further evidence of such pain and suffering (para 151 of the Appeal judgment), a formulation accepted in *Prosecutor v Radoslav Brdanin*, IT-99-36-T, 1 September 2004, para 485 of the Trial Chamber judgment.

¹²⁷¹ *Prosecutor v Radoslav Brdanin*, IT-99-36-T, 1 September 2004, para 485

¹²⁷² *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, para 597

¹²⁷³ Under ICL and current customary international law, this crime applies only to children under 15 years of age, unlike some human rights instruments (such as the African Charter or the Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts) which put the age limit at 18; note that States that have ratified an instrument that puts the age limit at 18 have to prohibit and criminalise recruitment under that age in domestic law.

¹²⁷⁴ The first international decision on child soldiers was taken by the SCSL in *Prosecutor v Sam Hinga Norman*, SCSL-2004-14-AR72(E), 31 May 2004. Although the accused died in custody before the judgment was issued, the court stated that the Rome Statute and its elements of crime represent customary international law for this crime (as of at least 30 November 1996). The war crime of using child soldiers was affirmed in other SCSL decisions: see *Prosecutor v Alex Tamba Brima et al*, SCSL-04-16-T, 20 June 2007, child soldiers employed on the front line but also in logistical operations and as bodyguards and human shields; *Prosecutor v Issa Hassan Sesay et al*, SCSL-04-15-T, 2 March 2009; *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-T, 26 April 2012

Statute criminalises the recruiting (whether through conscription or enlistment) or use of children to participate actively in either IAC or NIAC.¹²⁷⁵ In sentencing, no distinction has been made by the courts between cases where children voluntarily entered into an armed group and those where they were forced to do so.¹²⁷⁶ The first judgment issued¹²⁷⁷ by the ICC Trial Chamber found Thomas Lubanga Dyilo guilty of conscripting, enlisting and using children actively to participate in hostilities in the Democratic Republic of the Congo.¹²⁷⁸

Mere conscription or enlistment of a child into an armed group is sufficient; there is no need for the child actually to participate in the conflict. A crime may also be committed if a child is ‘used’ to participate actively in hostilities even if this child has not been conscripted or enlisted. Using the child in front-line hostilities is considered ‘active participation’, where the child undertakes acts of war likely to cause actual harm to personnel or equipment of the enemy forces, or if a child is used in military activities linked to combat, such as scouting, spying, sabotage; as a decoy or courier; at military checkpoints, or in direct support functions such as taking supplies to the front line; or activities at the front line.¹²⁷⁹ The court held that ‘active participation’ also includes a ‘myriad of roles that support the combatants’,¹²⁸⁰ but left open the question of how far ‘active participation’ extends beyond combat activity—stating that this ought to be determined on a case-by-case basis.¹²⁸¹ Further, the court did not address whether or not sexual slavery constituted ‘active participation’.¹²⁸² Note that a child who has been recruited or is being used in hostilities nevertheless benefits from protection under IHL upon capture, as outlined above, even though his or her recruitment and use is illegal.

Special Protection against Discrimination (persecution)

As already mentioned, discrimination against students and educational staff on the basis of their political, racial, national, ethnic, cultural, religious or gender identity is a serious education-related violation of international law. Serious, widespread and systemic discrimination against

¹²⁷⁵ Art 8(2)(b)(xxvi) for IAC; Art 8(2)(e)(vii) for NIAC.

¹²⁷⁶ This is in accordance with the ICRC Commentary to Protocol II. In fact, the decision of a child to become a soldier is generally due to external pressure, whether from the people around him (including possibly family members) or from the situation the child is in, such as economic hardship. See for example: No Peace Without Justice and UNICEF Innocenti Research Centre, *International Criminal Justice and Children* (2002) <www.unicef.org/emerg/files/ICJC.pdf>, 73–74

¹²⁷⁷ Note that the ICC is currently still hearing the case of *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-01/07, 25 September 2009, in which the defendants are accused under Art 8 (2) Rome Statute of using children to participate actively in hostilities in an IAC and NIAC. It is contended that the accused ordered, controlled and oversaw the training of children and their use in armed hostilities.

¹²⁷⁸ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, para 1358

¹²⁷⁹ *ibid*, para 628; *Prosecutor v Georges Rutaganda*, ICTR-96-3-T, 6 December 1999, para 100

¹²⁸⁰ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, para 628

¹²⁸¹ *ibid*, note, however, there is a difference between the *meaning* of the term ‘active participation in hostilities’ under ICL and IHL. For further discussion, see see Nicole Urban, ‘Direct and Active Participation in Hostilities the Unintended Consequences of the ICC’s decision in Lubanga’ <www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/>

¹²⁸² *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, paras 629–631

students and educational staff on these grounds may constitute the crime of persecution, a crime against humanity under ICL.

The crime of persecution, and its potential to protect against discriminatory deprivation of education, is discussed in Chapter 2. Here, the Handbook will examine which other acts, impacting on the physical and mental well-being of students and educational staff, might also constitute the crime of persecution.

The crime of persecution requires the proof of ‘persecutory acts’. Although this concept has never been comprehensively defined,¹²⁸³ there appears to be some consensus that the acts underlying persecution must be sufficiently serious, in practice of comparable gravity to other acts criminalised under customary international law.¹²⁸⁴ However, there is no requirement for every individual persecutory act alleged to be of corresponding gravity—as the Appeals Chamber of the ICTR stated: ‘underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity’.¹²⁸⁵

The IMT Charter specified that, in order to constitute persecution, the acts complained of must have been perpetrated in connection with a crime within the jurisdiction of the Tribunal. However, the ICTY has established that the definition of persecutory acts encompasses both those acts listed in Article 5 of the ICTY Statute (crimes against humanity), and those acts enumerated elsewhere in the Statute—and even acts not specifically listed in the Statute.¹²⁸⁶ In contrast, the Rome Statute limits persecutory acts to those perpetrated in connection with any act referred to as a crime against humanity or any crime within the jurisdiction of the ICC.¹²⁸⁷

Examples of acts that could be considered as persecutory and may have a serious impact on students and education staff include attacks on cities, towns and villages; the use of hostages as human shields; wanton destruction and plunder; the destruction or damage of religious or educational buildings;¹²⁸⁸ deliberate and organised detention and killing of particular groups of

¹²⁸³ *Prosecutor v Dario Kordić & Mario Čerkez*, IT-95-14/2-T, 26 February 2001, para 192

¹²⁸⁴ *Prosecutor v Milorad Krnojelac*, IT-97-25-A, 17 September 2003, para 199

¹²⁸⁵ *Prosecutor v Ferdinand Nahimana et al*, ICTR-99-52-T, 3 December 2003, ICTR-99-52-T, 3 December 2003, para 987. The Appeals Chamber also stated that the context in which the acts took place was particularly important when assessing their gravity. See also *Prosecutor v Kupreskic*, in which the Trial Chamber stated that ‘any other acts’ must be of equal gravity or severity to the acts already listed as acts which constitute crimes against humanity (para 619 of the judgment), the test for which being whether such acts constitute a ‘gross and blatant denial of fundamental human rights’ (para 620). The Chamber also went on to emphasise that whilst certain acts, although persecutory, are not of sufficient gravity to establish a crime of persecution, the *actus reus* of persecution can be established by considering the cumulative severity of such acts (para 622)

¹²⁸⁶ *Prosecutor v Dario Kordić and Mario Čerkez*, IT-95-14/2-T, 26 February 2001, para 192. See also *Prosecutor v Zoran Kupreškić et al*, IT-95-16-T, 14 January 2000, para 581

¹²⁸⁷ Rome Statute, Art 7 (1)(h). The Trial Chamber in the case of *Kupreskic* stated that the ICC approach is not consistent with prevailing customary international law.

¹²⁸⁸ *Prosecutor v Kordic and Cerkez*, Trial Chamber judgment, paras 19, 195, 203–205 and 207

victims;¹²⁸⁹ and hate speech broadcast on the radio at the time that attacks were being launched against particular groups of victims.¹²⁹⁰

Persecution is the only crime against humanity that requires proof of the additional element that the underlying acts of persecution be committed with discriminatory intent. Under traditional customary international law, persecution is limited to discrimination on political, religious or racial grounds.¹²⁹¹ The Statute of the SCSL added ethnic grounds to this list.¹²⁹² The Rome Statute also extends the scope of persecution to acts or omissions that discriminate on cultural, national and gender grounds, as well as ‘other grounds that are universally recognised as impermissible under international law’.¹²⁹³ Where an accused is a member of a military or civilian authority that is pursuing a discriminatory policy, the prosecution must prove that the accused himself shares the aim of this policy and is not simply aware of it.¹²⁹⁴

As with all crimes against humanity, persecution requires proof that the acts or omissions were part of a pattern of widespread or systematic crimes directed against a civilian population.¹²⁹⁵

Special Protection against Deportation or Forcible Transfer

Deportation or forcible transfer of people, including students and educational staff, is a serious education-related violation. Such conduct disrupts education and undermines the conditions necessary for the provision of education to students. ICL recognises this conduct as criminal and, therefore, assists to protect education in situations of insecurity and armed conflict.

The crimes of deportation and forcible transfer are defined as the involuntary and unlawful evacuation of individuals from the territory in which they reside, the difference being that deportation refers to transfer beyond State borders whereas forcible transfer relates to displacement within a State.¹²⁹⁶ The crimes may be characterised both as war crimes and as crimes against humanity, the only distinction between the two being the differing elements, as discussed above. The substance of the crimes in each case remains the same: the Rome Statute defines the two concepts as the ‘forced displacement of the persons concerned by expulsion or other coer-

¹²⁸⁹ *Prosecutor v Kupreskic et al*, Trial Chamber judgment, paras 630–631; also see *Office of the Co-Prosecutor v Duch*, Trial Chamber Judgment

¹²⁹⁰ *Prosecutor v Ferdinand Nahimana et al*, ICTR-99-52-T, 3 December 2003, ICTR-99-52-T, 3 December 2003

¹²⁹¹ Nuremberg Charter (Art 6(c) IMT Charter), ICTY Statute, Art 5(h); ICTR Statute, Art 3(h). The Tokyo Charter omitted religious grounds.

¹²⁹² SCSL Statute, Art 2(h)

¹²⁹³ Rome Statute, Art 7(1)(h)

¹²⁹⁴ *Prosecutor v Dario Kordić and Mario Čerkez*, IT-95-14/2-T, 26 February 2001, paras 211–220; *Prosecutor v Dario Kordić and Mario Čerkez*, IT-95-14/2-A, 17 December 2004, paras 110–112; See also *Prosecutor v Tihomir Blaškić*, IT-95-14-T, 3 March 2000, paras 235, 244 and 260; and Appeals Chamber judgment, paras 164–166

¹²⁹⁵ See above, and *Tadić*, para 248. The accused must be aware of the attack on the civil population and intend or consciously assume the risk that his acts comprise part of that attack (*Kunarac*, para 102)

¹²⁹⁶ *Prosecutor v Radislav Krstić*, IT-98-33-A, 19 April 2004, para 521

cive acts from the area in which they are lawfully present, without grounds permitted under international law'.¹²⁹⁷

The crimes of forcible transfer and deportation require the movement of individuals from a place where they live to a place not of their choosing, under coercion.¹²⁹⁸ Coercion is to be determined by examining all the circumstances and the context of the case, specifically considering whether the affected individuals had a 'genuine choice' whether to stay or leave.¹²⁹⁹ An ICTY Trial Chamber has cited such examples as fear of violence, duress, detention, physiological oppression and other such circumstances that may create an environment where there is no choice but to leave, such as the shelling of a town.¹³⁰⁰ Note that evacuation is permitted under the Geneva Conventions where the security of the population or imperative military reasons require it,¹³⁰¹ provided those evacuated are returned to their homes as soon as hostilities in the area have ceased.¹³⁰²

The prosecution must also prove that the accused has the specific intent that the persons in question are removed from an area.¹³⁰³ It would be no defence if the persons originally so removed later returned, as this later act has no bearing on the perpetrator's original intent.¹³⁰⁴ The involvement of an NGO in assisting the transfer does not of itself render an otherwise unlawful transfer lawful.¹³⁰⁵ Finally, it may be possible for forcible transfer to constitute 'other inhumane acts' as a crime against humanity, provided the gravity of harm suffered by the victim passed the appropriate threshold.¹³⁰⁶

4.4 CONCLUSIONS

The protection of students and education staff is essential to ensure that education and the right to education are protected. Situations of insecurity and armed conflict present grave challenges

¹²⁹⁷ HRCCommittee, General Comment 29, para 13 (d); See also *Prosecutor v Milorad Krnojelac*, IT-97-25-T, 15 March 2002, para 474; *Prosecutor v Milomir Stakić*, IT-97-24-T, 31 July 2003, para 672

¹²⁹⁸ *Prosecutor v Mladen Naletilić & Vinko Martinović*, IT-98-34-T, 31 March 2003, para 519. Coercion is not limited to physical violence—the critical aspect is the lack of a genuine choice to remain: *Prosecutor v Milomir Stakić*, IT-97-24-A, 22 March 2006, para 282

¹²⁹⁹ *Prosecutor v Vidoje Blagojević & Dragan Jokić*, IT-02-60-A, 9 May 2007, para 596; See also *Prosecutor v Mladen Naletilić & Vinko Martinović*, IT-98-34-T, 31 March 2003, para 519

¹³⁰⁰ *Prosecutor v Ante Gotovina et al*, IT-06-90-T, 15 April 2011, para 1739

¹³⁰¹ Fourth Geneva Convention, Art 49; Protocol II, Art 17

¹³⁰² Fourth Geneva Convention, Art 49

¹³⁰³ *Prosecutor v Mladen Naletilić & Vinko Martinović*, IT-98-34-T, 31 March 2003, para 520. Note that the Appeals Chamber in *Prosecutor v Milomir Stakić*, IT-97-24-A, 22 March 2006, corrected the Trial Chamber's judgment by ruling that there is no need for the prosecution to prove that the accused intended that the persons should be removed *permanently*: paras 306–307 of the Appeals Chamber judgment.

¹³⁰⁴ *Prosecutor v Milomir Stakić*, IT-97-24-T, 31 July 2003, para 687

¹³⁰⁵ *ibid*, para 286

¹³⁰⁶ *Prosecutor v Dario Kordić and Mario Čerkez*, IT-95-14/2-A, 17 December 2004, para 117: 'the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances'.

to the lives and well-being of students and education staff. If their lives or well-being are threatened, students may not be able to exercise their right to education as it was intended and teachers and professors may not be able to provide education to their students. There has been an increasing recognition of a general negative impact of insecurity and armed conflict on education, particularly in respect to its disproportionate effect on certain vulnerable groups. Such groups include children, women and girls, those with disabilities, minorities and Indigenous peoples, and those who are rendered internally displaced, or as refugees, asylum seekers or stateless persons. There is also increasing recognition of the increase in specific harmful practices during insecurity and armed conflict, such as enforced disappearances, child military recruitment, trafficking, economic exploitation, and sexual violence and other gender based violence, and the impact of such practices on education.

As explained in this chapter, IHRL and IHL contain relevant provisions which protect students and education staff as individuals. ICL criminalises certain conduct which violates the rights of students and education staff. This chapter has identified how these different strands of law protect students and education staff against education-related violations.

IHRL applies to everyone on the territory of a State Party to its treaties, no matter their ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.¹³⁰⁷ This principle of non-discrimination is particularly important as it runs through the application of all human rights. Thus IHRL is also applicable to, for example, refugees or internally displaced persons. In addition, IHRL applies at all times, including in situations of armed conflict. IHRL includes many provisions protecting the lives and well-being of students and education staff. IHRL provides protection against all forms of ill-treatment, including torture. It also increases the protection of certain categories of person deemed more vulnerable to human rights violations, such as children, women and individuals belonging to minorities.

While it is possible for States to take measures derogating from certain human rights in time of public emergency, many of the rights contained in this chapter are non-derogable, such as the right to life and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment.¹³⁰⁸ While measures derogating from human rights provisions can be taken only in limited circumstances, it is still possible for a State to derogate from some of the provisions mentioned in this chapter. IHRL may not be applicable because the State in which the student or teacher or professor has his or her right violated is not a party to the treaty protecting the right in question. In such instances, it is still possible that IHRL applies if the right is a matter of customary international law.

The three regimes interact only in situations of armed conflict, as this is the only situation when IHL applies. When a situation of violence reaches the threshold of IAC or NIAC, IHL applies concurrently with IHRL and ICL. The fundamental IHL protection afforded to students and education staff across both types of conflict is the principle of distinction. Where students and education staff are civilians, they benefit from protection from deliberate and direct attack. All

¹³⁰⁷ ICCPR, Art 2; See also CESCR General Comment 20 (2009)

¹³⁰⁸ For more on derogations, see Chapter 2.

care must be taken to spare students and education staff from the effects of hostilities, including incidental loss of life or injury from attacks on military objects.

This protection, as with all rules of IHL, applies without adverse distinction based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.¹³⁰⁹ IHL also sets out special protection for particular groups, including children, women and those needing medical treatment (including people with disability), and such protection relates to the prohibition of physical mistreatment and access to medical care and humanitarian aid. Unlike IHRL, the provisions of IHL do not expressly contain any broader notions on anti-discrimination or equality of access to, or participation in, society, including about education.

The interaction between IHRL, IHL and ICL can affect the level of protection available to students and education staff. Nevertheless, the general lack of overlap between regimes means that there is usually an absence of conflict between them, and so students and education staff receive the full benefit of the protection provided by a regime, without qualification resulting from uncertain interaction with any other area of law.

Despite the fact that the three regimes are distinct, they each contain many protections that are, at their core, complementary. This ensures that the physical safety and well-being of students and education staff are protected in all circumstances of armed conflict. Each regime contains rules which prohibit outright the deliberate and direct extra-judicial targeting of civilian persons: IHRL sets this out in the right to life; IHL through the principle of distinction; and ICL in several provisions, including the direct prohibition on wilful killing of civilians. Further, all regimes prohibit the use of torture and inhuman treatment. Similar protection from the use of sexual violence, forced displacement and slavery, demonstrate that each of these three regimes seeks to protect the fundamental concepts of humanity and dignity.

The overlap of IHRL, IHL and ICL in armed conflict has a number of effects on the protection afforded by each area of law. Where there is substantive overlap and all three legal regimes provide similar protection, for example from direct and deliberate attack and from other forms of violence, the overall protection of students and education staff is increased. IHL and ICL are non-derogable areas of law and many provisions of IHL apply as customary international law and to all parties in a conflict. States are prevented from derogating from any relevant provisions of IHRL where to do so would be a violation of their obligations under IHL or ICL. This means that students and education staff receive comprehensive protection in all situations of insecurity and armed conflict, and have access to remedies through the mechanisms of each area of law.

Where the three legal regimes overlap but provide inconsistent protection, for example in the area of the prohibition on the use of child soldiers, the protection afforded to students and education staff is unclear. Students and education staff can lose this protection from direct and deliberate targeting when they participate directly in hostilities. This includes children, recruited as soldiers for use in IAC or NIAC. However, the recruitment of children under the age of 15 is

¹³⁰⁹ Additional Protocol I, Art 75; Fourth Geneva Convention, Part II; ICRC CIHL Study, Rule 88

prohibited by IHRL, IHL and ICL. IHL also sets out special protection and rules about the treatment of children under 15 who are captured and detained, whether or not they have been used as child soldiers. Many IHRL instruments also prohibit the recruitment or use of children under the age of 18.¹³¹⁰ Further, the ICC in the *Lubanga* case established that the type of ‘use’ of children in hostilities prohibited under Article 8 is broader than that prohibited by IHL. This finding is contrary to the mutually reinforcing nature and similarity of the two legal regimes and brings into question the role of ICL as an enforcement mechanism of IHL.

Nevertheless, overall, the three regimes generally offer reinforcing protection for students and education staff. We will now consider how these regimes deal with the educational facilities on which the students and staff may be reliant.

¹³¹⁰ For example ILO Convention on the Worst Forms of Child Labour; ACRWC.

5

Protection of Educational Facilities

Chapter 5 addresses the protection of educational facilities, as defined in Chapter 1, under IHRL, IHL and ICL. The destruction and disruption of educational facilities and settings is a significant factor affecting the realization of the right to education in areas affected by insecurity and armed conflict.¹³¹¹ The Special Representative of the Secretary-General for Children and Armed Conflict has ‘consistently noted with concern the increasing trend of attacks on education. Such acts include the partial or total destruction of schools and other educational facilities’.¹³¹²

IHRL will be addressed first as it applies at all times, including during situations of insecurity and armed conflict. IHL applies only to situations reaching the threshold of armed conflict. Its protection of educational facilities is considered after the human rights discussion. This structure assists the reader to consider the differences and similarities between regimes. ICL will be discussed at the end of the chapter as it sets out which human rights and IHL violations attract individual criminal responsibility.

IHRL promotes the rights of individuals and protects them against abuses from States. As the function of IHRL is to protect and promote the rights of individuals, its provisions do not directly protect buildings such as educational facilities. However, as the realization of a number of human rights requires the existence and maintenance of buildings, the protection of physical structures is sometimes implied within human rights law provisions. This chapter thus discusses how certain human rights provisions may be applied with regard to the protection of educational facilities.

¹³¹¹ Global Coalition to Protect Education from Attack, ‘Lessons in War: Military Use of Schools and Other Education Institutions during Conflict’ (Global Coalition to Protect Education from Attack, 2012), <www.protectingeducation.org/sites/default/files/documents/lessons_in_war.pdf>; Global Coalition to Protect Education from Attack, ‘Lessons in War 2015: Military Use of Schools and Universities during Armed Conflict’ (Global Coalition to Protect Education from Attack, 2015), <www.protectingeducation.org/sites/default/files/documents/lessons_in_war_2015.pdf>; reports which look at the military use of schools and other education institutions during conflict around the world, explaining how educational facilities are used by armed forces and armed groups and presents the initiatives taken to address this issue; See also, Human Rights Watch, ‘Classrooms in the Crosshairs: Military Use of Schools in Yemen’s Capital’ (Human Rights Watch, 2012), <http://protectingeducation.org/sites/default/files/documents/hrw_-_classrooms_in_the_crosshairs.pdf#page=2>

¹³¹² *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 3 August 2011, A/66/256, para 38

As IHL applies only during armed conflict, it applies concurrently with both IHRL and some provisions of ICL. The second section of this chapter sets out the rules of IHL and considers how its principle of distinction protects educational facilities in armed conflict. This includes a detailed consideration of when an educational facility is a civilian object, and protected from attack, and when it might become a military object, and loses such protection. Further, the rules relating to, and the consequences of, military use of educational facilities and the use of military guards to defend educational facilities are considered. This chapter also sets out the IHL principles of military necessity and proportionality, and when these principles will permit, or prohibit, incidental damage or destruction of an educational facility as a consequence a lawful attack on a military target. The circumstances in which educational facilities might benefit from additional protection as cultural property or medical facilities is discussed, as well as the potential use of special zones to protect educational facilities in armed conflicts.

Under ICL, which is considered at the end of this chapter, attacking educational facilities may be considered both a war crime and a crime against humanity. However, international criminal prosecution for such offences has been relatively rare.

5.1 INTERNATIONAL HUMAN RIGHTS LAW

The unlawful destruction and/or disruption of educational facilities, including all physical elements that make education possible, such as books and computers, may result in human rights violations. According to the CRC:

States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.¹³¹³

As already mentioned, the CESCR noted that ‘education in all its forms and at all levels’ shall be available as well physically accessible.¹³¹⁴ According to the Committee, this means that:

functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching material, and so on; while some will also require facilities such as a library, computer facilities and information technology.¹³¹⁵

¹³¹³ CRC, Art 3

¹³¹⁴ See Chapter 3; CESCR General Comment 13, para 6

¹³¹⁵ CESCR General Comment 13, para 6

Thus the necessary number of available educational facilities must be assessed on a case-by-case basis. However, States have a duty to ensure the full realization of the right to education. As a result, if the right to education is not fully realised at the time a State enters into a treaty which protects this right, it must take all possible measures to fully realise it within a reasonably short time following accession to the treaty in question. This means that it must establish adequate educational facilities, even in situations of insecurity and armed conflict.¹³¹⁶ During periods of insecurity and armed conflict, in addition to the personal security of students and education staff, the security of existing educational facilities must also be guaranteed in order to ensure that education is provided to students in a continuous manner.¹³¹⁷ An attack on any physical structure or material on which the provision of education depends is likely to interrupt the educational process and thus violate the right to education.

5.1.1 Protection of Educational Facilities under the Right to Education

IHRL offers an indirect protection to educational facilities under the right to education, which is discussed in Chapter 3. As education must be available and accessible, suitable educational facilities must be established and maintained. The protection of schools is thus implied within the right to education as a necessary component for its realization. Article 13(2)(e) ICCPR provides that '[T]he development of a system of schools at all levels shall be actively pursued, ... and the material conditions of teaching staff shall be continuously improved'. Therefore the right to education under IHRL implies the availability of facilities dedicated to education to students and education staff.

Once educational facilities have been made available, it is crucial that the State ensures their continuous availability to students and avoids their closure. The Special Rapporteur on the right to education noted that 'the failure of the State to sustain available schooling constitutes an apparent violation of the right to education'.¹³¹⁸

In *World Organisation Against Torture, Lawyers' Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v Zaire*, the ACommHPR found that the closure of universities and secondary schools for two years constituted a violation of Article 17 of the African Charter on the right to education.¹³¹⁹ As a result, when a State closes a school, it has to make other options available, however makeshift or problematic these alternative arrangements might be.

¹³¹⁶ See also UNESCO, *Protecting Educational from Attack: A State-of-the-Art Review* (UNESCO, 2010), <<https://unesdoc.unesco.org/ark:/48223/pf0000186732165>>, which states that the right to education means that a 'State has a duty to be continually taking measures to build, maintain, improve and when attacked, repair its educational system, and these obligations are to be fulfilled under a "reasonableness" standard'. The reasonable standard means that all reasonable steps necessary to fulfil this duty must be taken.

¹³¹⁷ See Vernor Muñoz Villalobos, *Report submitted by the Special Rapporteur on the Right to Education*, 17 December 2004, E/CN.4/2005/50, para 119, where he noted that 'security in schools forms part of the human right to education'.

¹³¹⁸ Progress report of the Special Rapporteur on the right to education (2000), para 32

¹³¹⁹ *Free Legal Assistance and Others v Zaire*, Communication Nos 25/89, 47/90, 56/91, 100/93, October 1995, para 48

In addition, these alternative options must be appropriate for the student body, including the educational material and the language in which the education is taught. In the *Cyprus v Turkey* case,¹³²⁰ the ECtHR found a violation of Article 2 Protocol No 1 to the ECHR on the right to education. The Court initially noted that there was no denial of the right to education following the closure of Greek secondary schools in northern Cyprus because there were other education options available for the Greek-Cypriot children. However the Court found that these other options for secondary-school facilities were not appropriate. The fact that the children had been provided with Greek primary education in northern Cyprus was a decisive factor, as the Court stated that they should be able to continue to learn in their language locally. Thus, in this case, the inappropriate content of available education, which was taught in another language, resulted in a human right violation as the education provided was not adequate.

With regard to minorities in general, CDE states that '[I]t is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools'.¹³²¹

Adequate educational facilities must not only be available to students but they must also be free from attack. The right to education, like all other human rights, must be guaranteed at all times, even during situations of insecurity and armed conflict. If a particular use of an educational facility inhibits the ability of students to exercise their right to education, such as where there is an extended use of a school for military purposes, then the right to education is denied to these students. In such a situation, where an educational facility can no longer be used for its intended purpose, the State has also to find a suitable alternative facility to avoid a violation of the right to education.

Finding an alternative solution can even mean setting up an educational facility in a temporary location, such as a camp. With regard to the internally displaced, the UN Commission on Human Rights stated that educational and training facilities must be available to all displaced persons, in particular adolescents and women, as soon as practicable, even if they are living in temporary camps.¹³²² This is now reflected in Principle 23 of the Guiding Principles on Internal Displacement.¹³²³

The Committee on the Rights of the Child addressed attacks on schools and destruction of school infrastructure when addressing State reports submitted pursuant to obligations under the CRC.¹³²⁴ With regard to reports submitted by States Parties to the Optional Protocol to the

¹³²⁰ *Cyprus v Turkey*, Application No 25781/94, 10 May 2001

¹³²¹ CDE, Art 5(3)

¹³²² UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, E/CN.4/1998/53/Add.2, Principle 23(3)

¹³²³ See Chapter 4.1

¹³²⁴ See *Concluding Observations of the Committee on the Rights of the Child: Burundi*, 16 October 2000, CRC/C/15/Add.133, paras 64–65; *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, 1 November 2006, CRC/C/ETH/CO/3, paras 27–28; *Concluding Observations of the Committee on the Rights of the Child: Israel*, 9 October 2002, CRC/C/15/Add.195, para 52; Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Art 44 of the Convention*,

CRC on the Involvement of Children in Armed Conflict, the Committee called for an immediate cessation of school occupation by armed forces,¹³²⁵ and for the reparation of the damage to school infrastructure due to military occupation.¹³²⁶

The Committee on the Rights of the Child also provided specific guidance with regard to the right of the child to education in emergency situations:

With reference to the obligation under international law for States to protect civil institutions, including schools, the Committee urges States parties to fulfil their obligation therein to ensure schools as zones of peace and places where intellectual curiosity and respect for universal human rights is fostered; and to ensure that schools are protected from military attacks or seizure by militants; or use as centres for recruitment.¹³²⁷

As mentioned above, IHRL requires States to make reasonable progress towards the full provision of the right to education within a reasonably short time. This requires States to take all reasonable and immediate measures to ensure the safe use of educational facilities, even in times of insecurity and armed conflict. Thus by occupying schools with armed forces (or condoning such occupation by non-State armed groups), a State inhibits the exercise of the right to education. Unless it is unreasonable in the circumstances for the State to take measures ensuring the continuous safe use of educational facilities, the State violates the right to education.

As mentioned earlier, educational facilities include all physical elements that support educational programmes, such as books and computers. A lack of books or computers may also lead to a violation of the right to education.¹³²⁸ The United Nations Fact-Finding Mission on the Gaza Conflict, which assessed human rights violations in Palestine and other occupied Arab territories, considered the impact of the blockade and the military operations on the rights of the inhabitants of Gaza, including their right to education.¹³²⁹ The restrictions imposed by the

second and third periodic reports of States parties due in 2005, Republic of Moldova, 10 July 2008, CRC/C/MDA/3, para 435; Research by Human Rights Watch has also found that the use of schools by military or police disrupts education and may lead to attacks on the schools by other armed groups: see Human Rights Watch, *Schools and Armed Conflict, A Global Survey of Domestic Laws and State Practice Protecting Schools from Attack and Military Use*, (Human Rights Watch, 2011), <www.hrw.org/report/2011/07/20/schools-and-armed-conflict/global-survey-domestic-laws-and-state-practice>, 46

¹³²⁵ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Concluding observations: Colombia*, 11 June 2010, CRC/C/OPAC/COL/CO/1, para 39

¹³²⁶ *ibid*, para 25

¹³²⁷ Committee on the Rights of the Child, *Day of General Discussion on 'The Right of the Child to Educational in Emergency Situations'*, Recommendations, 19 September 2008, para 35

¹³²⁸ See also EFA, *Global Monitoring Report 2011*, 92 which states that '[C]lassrooms lacking desks, chairs and blackboards are not conducive to effective learning, and when children lack access to textbooks, exercise books and writing materials, even the best teachers are likely to face difficulties in providing more equitable learning opportunities'.

¹³²⁹ *Report of the United Nations Fact-Finding Mission on the Gaza Conflict: Human Rights in Palestine and Other Occupied Arab Territories*, 25 September 2009, A/HRC/12/48.

blockade resulted in a lack of educational material and equipment which impeded the maintenance of teaching standards and led to a decrease in attendance and performance at Government schools.¹³³⁰ Reference was also made to the destruction and damage to schools as a result of military operations, leading to deaths, injuries and the need to relocate pupils,¹³³¹ as well as the general closure of schools during hostilities which disrupted the programme of study.¹³³²

The African Commission considered the impact of sanctions and embargos imposed on Burundi by neighbouring States, following the overthrow of the democratically elected leader.¹³³³ Responding to allegations that the embargo resulted in a violation of the right to education under Article 17 of the African Charter, as it prevented the importation of school materials, Tanzania, a respondent State, conceded that, whilst not being the target of sanctions, educational materials were indirectly affected. In recognition of which, as of April 1997, such materials were added to the list of items not subject to the embargo. The African Commission did not address the alleged violation of Article 17 in any detail, as it focused on whether the sanctions were excessive, disproportionate or indiscriminate, which it found was not the case.

Access to computers, when resources are available, can play an important role in contributing to the realization of the right to education by providing, for example, for distance learning.¹³³⁴ The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has even stated that ‘universal access to the Internet should be a priority for all States’ and that ‘States should include Internet literacy skills in school curricula, and support similar learning modules outside of schools’.¹³³⁵ Access to the internet is particularly important for students living in regions which are prone to insecurity and armed conflict. In these regions, access to books and other educational material may be scarce because of, for example, a poor economic situation or a blockade or embargo. Therefore the internet may be a tool to remedy a lack of physical resources and ensure that students have access to a broad source of knowledge.

¹³³⁰ *ibid*, para 1269

¹³³¹ *ibid*, para 1271

¹³³² *ibid*, para 1272; See also paras 1662–1663 in relation to the impact on the right to education of rocket and mortar attacks by Palestinian armed groups on southern Israel.

¹³³³ Association Pour la Sauvegarde de la Paix au Burundi/Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, decided at the 33rd Ordinary Session, Niamey, Niger, May 2003.

¹³³⁴ Annual report of the Special Rapporteur on the Right to Education (2001): ‘Overcoming the digital divide has become a hotly debated global issue and much has been promised to enhance access to up-to-date technology for schools and schoolchildren in poor regions, countries and communities. Such promises may well founder owing to the lack of electricity in many poor schools, closures of village schools in winter because of the lack of heating, gaps in teaching because the teachers’ salaries have not been paid for months, or the absence of children from school because they have to walk far to school and are too hungry to make the trip’, para 58; See also the UNESCO State-of-Art Review (2010), 31: ‘Expanding upon the effect of resource constraints upon the provision and maintenance of facilities, as well as the prioritisation of the kind of facilities to dedicate those resources on, the former Special Rapporteur expressed concern at the commercialisation and expansion of the concept of “webucation”; the provision of on-line educational, and how this might divert resources and attention away from addressing more fundamental resource and facility issues’.

¹³³⁵ HRC, *Report of the Special rapporteurs on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue, 16 May 2011, paras 85 and 88

However, in order to have access to the internet, educational facilities must also have electricity and the necessary IT infrastructures available on a regular and reliable basis.

5.1.2 Protection of Educational Facilities under the Right to Freedom from Discrimination

In addition to the right to education, the protection against discrimination and the limitation to the right to freedom of expression, which are discussed in Chapter 4, can also extend to the protection of physical objects. Expressions of hate or intolerance are prohibited under IHRL. Such expressions, for example offensive graffiti, may result in the vandalism of education facilities or of property belonging to staff or students. Under IHRL, it is prohibited to express ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.¹³³⁶

The prohibition of discrimination also entails the right of everyone to be treated in an equal manner. As a result, educational facilities must be physically accessible to all students and education staff. In particular, reasonable accommodation measures must be taken by States in order to ensure access to educational facilities to persons with disabilities.¹³³⁷ In most circumstances, it is better for persons with disabilities to be educated within the general educational system,¹³³⁸ as separate educational facilities may create or increase a sense of exclusion and be contrary to the prohibition of discrimination. States must take appropriate measure to eliminate all obstacles and barriers to this accessibility.¹³³⁹ Possible measures include the provision of disabled access to all new buildings, the provision of signage in Braille and the provision of assistance and intermediaries to assist students with disabilities to access educational facilities. Access to technology facilities, including the internet, has also to be promoted by States. When students live on campus, student housing facilities must also ensure that buildings are accessible and liveable for students with disabilities.¹³⁴⁰ It is important that students with disabilities are offered the same living conditions as other students.

Therefore, a violation of the rights of people with disabilities with regard to educational facilities also results in an educational-related violation. States must thus take all measures necessary for students and education staff with disabilities to access and enjoy educational facilities, on an equal basis with others. As human rights are applicable at all times, States must protect the rights of persons with disabilities with regard to educational facilities even during insecurity and armed conflict.

¹³³⁶ See Art 20 which states this has to be prohibited by law.

¹³³⁷ CRPD, Arts 9 and 24. See also Chapter 4.

¹³³⁸ CESCR, *General Comment No 5*. See also the *General Comment No 9 on the rights of children with disabilities* (2006).

¹³³⁹ CRPD, Art 9; see also Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, UNGA Resolution 1608 of 7 June 1999, Art 3

¹³⁴⁰ CRPD, Art 19

5.1.3 Protection of Educational Facilities under the Right to Private Property

The right to property can be an important source of protection for educational facilities and materials. It is found in only a few international human rights instruments, including the UDHR and CEDAW; it is not protected by either the ICCPR or the ICESCR. The right to property is protected in many regional treaties.¹³⁴¹

Article 17 of the UDHR (which is not of itself legally binding) provides that '[E]veryone has the right to own property alone as well as in association with others' and that '[N]o one shall be arbitrarily deprived of his property'. CEDAW also protects the right to property,¹³⁴² including both individual and collective ownership.¹³⁴³ For example, if a State confiscates textbooks or a library owned by a women's association it could be violating this right. The Convention relating to the Status of Refugees prohibits discrimination in relation to property rights, where such rights are guaranteed.

It is thus possible that the confiscation of private schools or the confiscation of educational material, at least if done without adequate compensation, could result in a violation of the right to property under IHRL.

5.1.4 Protection of Educational Facilities under the Right to Health

In order for students to be able to attend schools and for education staff to be able to work, their health must be ensured. The right to both physical and mental health, which is protected under IHRL as the right to the highest attainable standard of health,¹³⁴⁴ is discussed in relation to students and education staff in Chapter 4.

The CESCR has noted that the right to health is an inclusive right, which extends 'to the underlying determinants of health, such as access to safe and potable water and adequate sanitation'.¹³⁴⁵ Therefore, access to safe and potable water and sanitation facilities must be part of functioning educational facilities, where students and education staff work. The Committee on the Rights of the Child has specifically urged States parties to ensure that their schools do not pose 'health risks to students, including water and sanitation'.¹³⁴⁶ Sanitation facilities must be

¹³⁴¹ ACHPR, Arts 13, 14 and 21); ACHR, Art 21; Protocol I to the ECHR on the right to peaceful enjoyment of possessions, Art 1

¹³⁴² CEDAW, Art 16

¹³⁴³ *ibid*, Art 5(v)

¹³⁴⁴ ICESCR, Art 12; ICERD, Art 5(e)(iv); CEDAW, Arts 11(1)(f) and 12; CRC, Art 24; Revised European Social Charter, Art 11; ACHPR, Art 16; Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights of 1988, Art 10

¹³⁴⁵ CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICCPR)*, 11 August 2000, E/C.12/2000/4, para 11

¹³⁴⁶ Committee on the Rights of the Child, *General Comment 4, Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4, para 17; See also OHCHR, WHO, *The Right to Health, Factsheet No. 31: The Right to Health* <www.ohchr.org/Documents/Publications/Factsheet31.pdf>; see also revised ESC, Art 11(3); Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights of 1988, Art 10(2)(e); and CEDAW, Art 10(h)

provided for both sexes as the lack of separate sanitation facilities for different sexes in schools may impact on the enjoyment of the right to education and may lead to decreased school attendance for girls.¹³⁴⁷

Situations of insecurity and armed conflict may impair infrastructures, such as water pipes, which are required for functioning sanitation facilities and access to potable water. If this type of structure is damaged and not repaired by the State, it may result in a violation of the right to health and consist of an education-related violation if the structures in question are necessary for the functioning of educational facilities.

In addition to access to safe and potable water and adequate sanitation, the right to health extends to other socio-economic factors, such as food.¹³⁴⁸ As mentioned in Chapter 4, the right to an adequate standard of living also specifically guarantees food, housing and clothing to students and education staff. However, as this right is not directly relevant to educational facilities, it will not be discussed further here. It is worth reiterating, however, that feeding at school can be a crucial element to fulfilling the right to education. Therefore, educational facilities must be able to provide students with school meals and have the necessary functioning infrastructure to do so if those meals are not delivered to them. In *Yakye Axa Indigenous Community v Paraguay*, which is mentioned already in Chapter 4, the IACtHR considered that poor health and access to food and clean water ‘have a major impact on the right to decent existence and basic conditions to exercise other human rights, such as the right to education’.¹³⁴⁹

In relation to the right to work, States need to ensure that education staff benefit from healthy and safe working conditions. The right to safety is also guaranteed to students and education staff generally through the right to health, as it provides for ‘improvement of all aspects of environmental and industrial hygiene’.¹³⁵⁰ This means that States must take measures to prevent accidents within educational facilities.¹³⁵¹

Like other ESCR, the right to health and the right to an adequate standard of living must be fully guaranteed as soon as possible and thus States are required to take immediate steps to ensure this right. States must thus use the maximum available resources, even during times when such resources are scarce. As already mentioned, States must seek assistance and cooperation from other States when necessary. It is even possible for States to implement low-cost measures, in particular if they are effective in facilitating establishment of (and access to) educational facilities for groups at risk of being excluded from them.¹³⁵² It is not only the establishment of educational facilities but also their maintenance, including the upkeep of piped water, which bears significant costs.¹³⁵³

¹³⁴⁷ See *Interim Report of the Special Rapporteur on the Right to Education*, 5 August 2011, A/66/269, para 79

¹³⁴⁸ CESCR General Comment 14, paras 4 and 11

¹³⁴⁹ *Yakye Axa Indigenous Community v Paraguay*, Series C No 125, 17 June 2005, para 166.

¹³⁵⁰ ICESCR, Art 12(2)(b)

¹³⁵¹ CESCR General Comment 14, para 15

¹³⁵² See in general CESCR General Comment 3.

¹³⁵³ Preliminary Report of the Special Rapporteur on the Right to Education, 13 January 1999, E/CN.4/1999/49, para 52

5.2 INTERNATIONAL HUMANITARIAN LAW

The protection of educational facilities from educational-related violations in armed conflict exists in both IHRL and IHL. This section will examine the rules of IHL that protect educational facilities. It must be recalled that the IHRL rules identified above continue to apply in armed conflict subject to derogation and other limitations as set out in Chapter 2. The relationship between IHRL and IHL protection of educational facilities will be highlighted throughout the IHL discussion. Further, where violation of the principles of protection set out in IHL constitute a breach of ICL, this will be noted and discussed in more detail in the ICL section of this Chapter.

5.2.1 The Principle of Distinction

Civilian Objects and Military Objects

The fundamental basis of the protection provided by IHL is the principle of distinction: parties to a conflict are required to distinguish between civilians and military persons and objects and may only directly attack military targets.¹³⁵⁴ Educational facilities are protected by the principle of distinction as long as they are civilian objects.

The principle of distinction, and the protection it provides to civilian objects, apply across both IAC and NIAC as part of customary international law.¹³⁵⁵ Distinction is the basis of the following IHL rules that protect educational facilities:

- the prohibition of deliberate attack on a civilian object; and
- the general prohibition of indiscriminate attacks.

The Principle of Distinction in International Armed Conflict

In order to apply the principle of distinction and the protection that it affords, it is first necessary to understand what civilian and military objects are. The word ‘object’ is used by the Geneva Conventions and Additional Protocols to mean something that is visible and tangible.¹³⁵⁶ This includes buildings, vehicles, and infrastructure such as roads, bridges and school grounds. In an IAC every object is either a military object or a civilian object.

A civilian object is negatively defined as any object that is not a military object.¹³⁵⁷ Typical civilian objects include:

¹³⁵⁴ Additional Protocol I, Arts 48 and 51(2); Additional Protocol II, Art 13(2); Customary IHL Database Rule 1 and Rule 7

¹³⁵⁵ *Tadić*, paras 97–98; Rule 7 Customary IHL Database (ICRC), Rule 7

¹³⁵⁶ Claude Pilloud (ed) (n34), para 2008

¹³⁵⁷ Additional Protocol I, Art 52(1); ICRC CIHL Study, Rule 9

- school buildings;
- school grounds;
- university buildings;
- public transportation or personal transportation; and
- houses and other private property.

Typical civilian objects can become military objects.¹³⁵⁸ Whether or not an object is a ‘military object’ is a two-step test. Military objects are those objects:

- which by their nature, location, purpose or use make an effective contribution to military action; and
- whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹³⁵⁹

Typical military objects are those which by their ‘nature’ make an effective contribution to military action. This includes all objects used by the armed forces, which include:¹³⁶⁰

- weapons;
- other military equipment;
- military bases;
- military barracks;
- military communications centres; and
- military depots or fortifications.

The definition of ‘military object’ refers to the ‘use’ and ‘purpose’ of objects. This means that objects which are ordinarily civilian objects, such as schools, universities, houses, public buses and trains may become military objects if they are used, or intended to be used,¹³⁶¹ for a military purpose, and make an effective contribution to military action.¹³⁶² Similarly, objects which make an effective contribution to military action by virtue of their location may become military objects.¹³⁶³

The word ‘effective’ may be considered to be a limitation on the definition of military object.¹³⁶⁴

¹³⁵⁸ ICRC CIHL, Rule 10

¹³⁵⁹ Additional Protocol I, Art 52(2); ICRC CIHL Study, Rule 8

¹³⁶⁰ Claude Pilloud (ed) (n34), para 2020

¹³⁶¹ This future use is what is meant by ‘purpose’: Claude Pilloud (ed) (n34), para 2022

¹³⁶² For consideration on the issue of ‘purpose’, see the Eritrea Ethiopia Claims Commission, Partial Award on *Western Front, Aerial Bombardment and Related Claims*, ILM 45, 19 December 2005, paras 106–121

¹³⁶³ Art 52 Additional Protocol I. Claude Pilloud (ed) (n34), para 2021

¹³⁶⁴ Peter Rowe, ‘Kosovo 1999: the Air Campaign – Have the Provisions of Additional Protocol I withstood the Test?’ (2000) 837 *International Review of the Red Cross* 147, 151–152. See also discussion of attacks on Iraqi electricity grids in Christine Byron, ‘International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage’ in (2010) 13 *Yearbook of International Humanitarian Law* 175, 180

It requires that an object be of more than some indirect use to the military before it may be targeted.¹³⁶⁵

The definition of ‘military object’ also includes the requirement that an attack on an object ‘offers a definite military advantage’. The advantage must be ‘concrete and direct’¹³⁶⁶ and not merely ‘hypothetical and speculative’.¹³⁶⁷ This definition of ‘military object’ is customary international law¹³⁶⁸ and binding on all parties to a conflict across both IAC and NIAC.

Dual Use Objects

While typical civilian objects can become military objects if they satisfy this two-step test, some objects may serve both military and civilian purposes. Often this is the case with civilian infrastructure, such as bridges, roads and other communication or transport lines. IHL, however, does not recognise ‘dual use’ status of objects and when an object is used for both military and civilian purposes, it may be targeted if it meets the two-step test for military objective outlined above (being in Article 52(2)). For example, if a civilian television or radio broadcast tower is used as part of a military command and communication system, then it may become a legitimate target for attack.¹³⁶⁹ There is some dispute, however, about the extent to which the potential military use of civilian infrastructure may render it a lawful target under this test,¹³⁷⁰ however, there is no dispute that the test must be satisfied in order to render targeting legal.

This position may present a problem for distance education. Distance learning can be an important mechanism for continuing education during armed conflict.¹³⁷¹ Where educational facilities are damaged or unsafe, it may be possible to broadcast classes and lessons on television, radio and the internet in order to assist students to continue their education in their homes or other safe environments.¹³⁷² Distance learning is, therefore, dependent on civilian infrastructure,

¹³⁶⁵ This issue is disputed by the United States Government who employs a broader approach to the definition of military object: Christine Byron, ‘International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage’ in (2010) 13 Yearbook of International Humanitarian Law 175, 183

¹³⁶⁶ Claude Pilloud (ed) (n34), para 1976

¹³⁶⁷ *ibid*

¹³⁶⁸ Eritrea Ethiopia Claims Commission, 396; ICRC CIHL database, Rule 8

¹³⁶⁹ As was the case in the NATO bombing of a Serbian radio and television station in Belgrade in 1999 (however, the attack was not considered justified by the argument raised by NATO that it was used to transmit propaganda): Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 *ILM* 1278, paras 75–76

¹³⁷⁰ For the view that bridges and other logistical infrastructure are military objectives in a conflict, see the discussion in *ibid*. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2009), 92–93. For the view that such infrastructure needs to be used for military transport to the front line in order to become military objectives, see Michael Bothe, ‘The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY’ (2001) 12 *European Journal of International Law* 531

¹³⁷¹ Global Coalition to Protect Educational from Attack, *Study on Field-based Programmatic Measures to Protect Educational from Attack* (Global Coalition to Protect Education from Attack, 2011), 17

¹³⁷² *ibid*

such as broadcasting facilities and telephone connections. However, where such infrastructure meets the two-step test for a military object given above (i.e. that it makes an effective contribution to military effort and offers a definite advantage if attacked), it may be targeted and destroyed.

Nevertheless, the impact on the civilian population and civilian objects must be taken into account when employing precautions in an attack, as discussed in Chapter 4, and when considering whether an attack on a (dual use) military object is lawful under the principle of proportionality, discussed below. This means that there is scope for armed forces to consider the potential impact on education of targeting a dual-use object, such as a civilian communication object used for distance learning.

However, in case of doubt, an object is presumed to be a civilian object.¹³⁷³ This rule is designed to prevent parties to a conflict from ‘shooting first and asking questions later’.¹³⁷⁴ The presumption in favour of civilian status (and therefore protection from attack) operates where an educational facility appears to be used for a military purpose but:¹³⁷⁵

- the educational facility is ordinarily used for civilian purposes, such as the provision of education and not, for example, as a military training facility or other military purpose;
- there is serious doubt as to whether or not ‘the object in question contributes to military action’.¹³⁷⁶ This is assessed from the point of view of a soldier on the ground or of a military commander controlling an attack.

Generally, in a combat zone where soldiers are under direct fire, serious doubt as to the status of an object is unlikely to arise. Whether or not there is serious doubt is to be assessed on the information available to armed forces at the time of attack and not at a later date with the benefit of hindsight.¹³⁷⁷

In addition, some objects benefit from special protection against attack even where they meet the two-step test for a military object. This includes medical units,¹³⁷⁸ safety zones,¹³⁷⁹ installations containing dangerous forces,¹³⁸⁰ the natural environment,¹³⁸¹ and installations and vehicles used in peace-keeping missions.¹³⁸² Each of these objects is subject to a special, more restrictive, protective regime.

¹³⁷³ Contained in Additional Protocol I, Art 52(3); ICRC CIHL Study, Rule 10

¹³⁷⁴ Claude Pilloud (ed) (n34), 2030

¹³⁷⁵ As outlined by Stefan Oeter (n1030), 188

¹³⁷⁶ *ibid*

¹³⁷⁷ Declarations of Understanding of several NATO forces when ratifying Additional Protocol I, 185.

¹³⁷⁸ Geneva Convention I, Art 19; Geneva Convention II, Art 23; Geneva Convention IV, Art 18; Additional Protocol I, Art 8(e); ICRC CIHL Study, Rule 28

¹³⁷⁹ ICRC CIHL Study, Rule 35

¹³⁸⁰ *ibid*, Rule 42

¹³⁸¹ *ibid*, Rule 45

¹³⁸² *ibid*, Rule 33

Non-binding *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* were developed by the Global Coalition to Protect Education from Attack ('GCPEA') in 2014 to attempt to increase the level of protection of schools. The Guidelines seek to ensure that all parties to an armed conflict, including both States and non-State actors, do not use education facilities for a military purpose or in support of the military effort.¹³⁸³ They provide clear and detailed guidance to all parties to an armed conflict for the planning and execution of military operations affecting educational facilities. While they do not purport to change existing international law, the Guidelines go beyond the current protection given to educational facilities under IHL and seek to restrict the use of educational facilities for military purposes, even in those cases that would not, ordinarily, be prohibited by IHL.

States are encouraged to endorse and implement the non-binding Guidelines by signing the Safe Schools Declaration. The ICRC has noted that the Safe Schools Declaration and the Guidelines are 'useful reference documents in relation to the protection and continuity of education during armed conflict', and has integrated the Guidelines, among other tools, in a training module on the topic of access to education for armed and security forces delegates. The ICRC can also provide technical advice to any parties regarding their implementation in specific contexts, even if they have not yet endorsed the Safe Schools Declaration.¹³⁸⁴

Distinction in Non-international Armed Conflict

Neither Common Article 3 of the Geneva Conventions nor Additional Protocol II (which regulate NIAC) sets out the concepts of civilian or military objects. However, the jurisprudence of the ICTY¹³⁸⁵ and the ICRC Customary International Law Study found that the concepts of civilian and military objects form part of the customary international law applicable in NIAC.¹³⁸⁶ The ICRC Study concludes that State practice supports the application of these concepts to NIAC and also sets out a number of other treaties applicable to NIAC which also use these concepts.¹³⁸⁷

Therefore, although not mentioned in the text of Common Article 3 nor Additional Protocol II, the concepts of civilian and military object apply to NIAC as part of customary international law.¹³⁸⁸

¹³⁸³ At the time of publication (July 2019), 95 States had endorsed the Guidelines, see <www.protecting-education.org/guidelines/support> and <https://www.regjeringen.no/en/topics/foreign-affairs/development-cooperation/safeschools_declaration/id2460245/>

¹³⁸⁴ ICRC, 'The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict' (ICRC, December 2018) <www.icrc.org/en/document/safe-schools-declaration-and-guidelines-protecting-schools-and-universities-military-use>

¹³⁸⁵ *Tadić*, paras 97-98

¹³⁸⁶ ICRC CIHL Study Rule 7

¹³⁸⁷ See for example Amended Protocol II to the Convention on Certain Conventional Weapons, Art 3(7); Protocol III to the Convention on Certain Conventional Weapons, Art 2(1); Second Protocol to the Hague Convention for the Protection of Cultural Property, Art 6(a)

¹³⁸⁸ ICRC CIHL Study, Rule 7. A proposition also supported by Dieter Fleck 'The Law of Non-International Armed Conflicts' in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 628-629

So parties to a NIAC must at all times distinguish between civilian and military objects, and direct attacks only against military objects.

5.2.2 Protection of Educational Facilities from Deliberate Attacks

It is forbidden to directly and deliberately attack a civilian object. Unfortunately, educational facilities are often the targets of deliberate attacks by parties to a conflict. In some conflicts, such as that in Afghanistan, more educational facilities were damaged from deliberate attack than from the general effects of hostilities.¹³⁸⁹ This can have a detrimental impact on the safety of students and education staff and also on attendance. As civilian objects, educational facilities are legally protected from deliberate attacks.

The prohibition on direct attacks against civilian objects, including educational institutions, is found in Articles 48 and 52(2) of Additional Protocol I, applicable to IAC. Although Additional Protocol II (applying to NIAC) does not contain a similar rule, the prohibition on deliberate attacks against civilian objects, including educational facilities, forms part of customary international law and is applicable in IAC and NIAC.¹³⁹⁰

Definition of 'Attack'

An attack is 'any act of violence' against an adversary, whether in offence or in defence.¹³⁹¹ Article 49 of Additional Protocol I makes it clear that the rules prohibiting attacks against civilian objects in the Protocol apply to 'attacks' not only on the territory of an enemy, but also to defensive operations on a State's own territory, whether occupied by an enemy or not.¹³⁹² This means that the prohibition on deliberate attacks against civilian objects protects objects from attacks by both enemy forces and the defensive actions of the forces belonging to the State in which the object is located, as long as they are undertaken 'against an adversary'.¹³⁹³ Assessments about the proportionality and necessity of an attack are discussed below.

The term 'deliberate and direct' distinguishes intentional attacks against educational facilities from those which are accidental or incidental. The rules regulating when an educational facility, as a civilian object, may suffer an attack accidentally or incidentally (in that it is not the intended target of the attack) are discussed below.

The prohibition on attacks designed to spread terror among the civilian population is considered in relation to the protection of civilians in Chapter 4. However, the principles apply equally to attacks against civilian objects, including educational facilities.

¹³⁸⁹ See EFA Global Monitoring Report, 144; Human Rights Watch, *Schools as Battlegrounds* (Human Rights Watch, 2011), <www.hrw.org/world-report-2011/schools-battlegrounds>

¹³⁹⁰ ICRC CIHL Study, Rule 7

¹³⁹¹ Additional Protocol I, Art 49(1)

¹³⁹² *ibid*, Art 49(2)

¹³⁹³ Stefan Oeter (n1030), 176

5.2.3 Destruction, Seizure and Pillage of Civilian Property

IHL forbids wanton destruction and seizure of an enemy's civilian property, including educational facilities, by combatants.¹³⁹⁴ The prohibition on destruction and seizure of civilian property, including civilian educational facilities, is contained in Article 23(g) of the Hague Regulations 1907, Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention and Article 147 of the Fourth Geneva Convention. Wanton destruction and seizure of civilian property is also prohibited by customary international law and, therefore, applies to both IAC and NIAC.¹³⁹⁵ This prohibition is subject to the 'demands' of military necessity, a concept that is discussed below. Additional, specific provisions relating to the protection of property (including educational facilities) in occupied territories are discussed below.

IHL prohibits the pillage (or looting) of real and personal property of enemy nationals in both IAC and NIAC and under occupation.¹³⁹⁶ This rule protects not only private property but also property belonging to the community or the State.¹³⁹⁷ Parties to an armed conflict are forbidden from pillaging, ordering pillaging or authorizing pillaging. This rule has a long history in the laws of war and forms part of customary international law.¹³⁹⁸ In addition to buildings and grounds, educational facilities rely on movable property such as school buses, desks, textbooks and computers to provide education. This type of property is especially vulnerable to pillage during conflict and, therefore, benefits from the general prohibition of pillage of civilian property.

5.2.4 Protection of Educational Facilities in Occupied Territories

IHL contains special rules relating to the use and confiscation of property in occupied territories. In general, private property in occupied territories is subject to more detailed protection than is public property.¹³⁹⁹ This rule forms part of customary international law.¹⁴⁰⁰ Any

¹³⁹⁴ Seizure and confiscation should be distinguished from 'requisitioning', which is permitted in some circumstances outlined in Fourth Geneva Convention, Arts 55 and 57. Note additional provisions applying to the personal property of prisoners of war outlined in Third Geneva Convention, Arts 119 and 130. Discussion of these provisions is beyond the scope of this Handbook.

¹³⁹⁵ ICRC CIHL Study, Rule 50

¹³⁹⁶ Hague Regulations, Arts 28 and 47; Fourth Geneva Convention, Art 33; Additional Protocol II, Art 4(2)(g)

¹³⁹⁷ Jean Pictet (ed) *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952–1960) Vol.4, 226–227

¹³⁹⁸ ICRC CIHL Study, Rule 52

¹³⁹⁹ An occupying force may take possession of cash, funds, movable objects, stores and supplies if those objects are publically owned: Hague Regulations, Art 52. Public buildings and immovable public property must be safeguarded and administered by the occupying power in accordance with the rules of 'usufruct': Hague Regulations, Art 55. However, it is probable that destruction of public buildings may be permitted on the grounds of military necessity: Fourth Geneva Convention, Art 53

¹⁴⁰⁰ ICRC CIHL Study, Rule 51

educational facility, whether part of a public or private educational institution, is treated as if it is private property.¹⁴⁰¹

This means that educational facilities in occupied territory benefit from the following protection:

- they may not be confiscated;¹⁴⁰²
- they may not be seized, destroyed, or wilfully damaged;¹⁴⁰³
- movable objects belonging to educational institutions may not be confiscated or possessed and must be restored (or compensated for) at the conclusion of peace;
- they are protected by the rules relating to confiscation of private property in occupation outlined above; and
- they must be the subject of legal protection. Where this rule is violated, an occupying power must take legal action against the perpetrators.¹⁴⁰⁴

5.2.5 Protection of Educational Facilities from Attack and the Right to Property

As outlined above, IHL protects all property (including educational facilities) from direct and deliberate attack, where such property is a civilian object, and it also prohibits destruction or seizure of an enemy's property (including educational facilities) where this is not justified by military necessity. ICL also contains provisions which establish individual criminal liability for the wanton destruction or seizure of enemy property. These rules apply in relation to civilian property generally (including educational facilities) in IAC¹⁴⁰⁵ and in relation to particular objects (including education facilities) in NIAC.¹⁴⁰⁶ IHRL, on the other hand, protects private property (and occasionally communal property) through the right to property and the right to respect for one's home.¹⁴⁰⁷

The wanton and deliberate destruction of private property (including homes) is prohibited by all three legal regimes, which provide similar and overlapping protection. This prohibition on wanton (or illegal and arbitrary) destruction of personal and private property forms a 'core' of

¹⁴⁰¹ Hague Regulations, Art 56

¹⁴⁰² *ibid*, Art 46. Confiscation should be distinguished from 'requisition' by an occupying power which is in some cases permissible and requires the occupying power to compensate the owner: Hague Regulations, Art 52. This prohibition on confiscation is subject to rules relating to communication equipment, transport and munitions, outlined in Hague Regulations, Art 53.

¹⁴⁰³ It is not clear whether this rule is subject to military necessity or not: ICRC CIHL Study Rule 51 – says it is subject to military necessity

¹⁴⁰⁴ It is noted that legal proceedings is not the same as criminal proceedings and it may refer only to compensation proceedings. Hague Regulations, Art 3

¹⁴⁰⁵ See for example Rome Statute, Art 2(b)(ii), (ix), (xiii), and (xxiv)

¹⁴⁰⁶ *ibid*, Art 2(e)(ii), (iii), (iv), and (xii)

¹⁴⁰⁷ See discussion of IHRL, above.

protection across IHRL,¹⁴⁰⁸ IHL¹⁴⁰⁹ and ICL,¹⁴¹⁰ resulting in strong, non-derogable protection for educational facilities that may fall into this category of property. Although no cases address this issue, this ‘core’ protection has the potential to protect some private schools, home-schools and facilities for apprenticeships taking place in private businesses during armed conflict.

The interaction between IHRL, IHL and ICL is less clear in cases where educational facilities have become military objectives in accordance with the two-step test set out in Article 52 of Additional Protocol I. Under IHL the definition of military objective is broad and fluid¹⁴¹¹ and an educational facility may become a military object at any time depending on its utility to military operations and the advantage offered by attacking it.¹⁴¹² Under IHL and ICL, attacks against facilities qualifying as military objects are permitted (subject to other rules of IHL). However, it is not clear how IHRL might approach this issue and whether this might give rise to a potential conflict between the legal regimes.¹⁴¹³

5.2.6 Military Use and Occupation of Educational Facilities

The use of civilian educational facilities for military purposes results in disruption to education and increases the likelihood of attack on educational facilities. The UN Security Council called for armed forces to refrain from using schools for military operations because of the impact on children’s access to education.¹⁴¹⁴ Similar calls for action have been made by the Committee on the Rights of the Child.¹⁴¹⁵ The use of educational facilities by militaries is a serious education-related violation.

It is crucial, therefore, to understand when IHL permits the military use or occupation of civilian educational facilities. Some civilian objects, such as hospitals and religious buildings, benefit from special protection under IHL and may not be used under any circumstances for military purposes. Civilian facilities used for educational purposes do not benefit from this protection and may be used or occupied for military purposes where it is militarily necessary to do so. The

¹⁴⁰⁸ See discussion above. Also see the ECtHR cases: *Selcuk and Asker v Turkey*, 24 April 1998, para 86; *Bilgin v Turkey*, 16 November 2000, para 108

¹⁴⁰⁹ See for example Hague Regulations, Art 23; First Geneva Convention, Art 50; Second Geneva Convention, Art 51; Fourth Geneva Convention, Art 147; Hague Regulations, Art 46 (applying to occupation). See also discussion above.

¹⁴¹⁰ See for example Art 8(b)(xiii) and Art 8(e)(xii) protecting property of an enemy in IAC and NIAC respectively. See also discussion above.

¹⁴¹¹ Unlike, for example, the protection afforded to civilians from direct attack. In the case of civilians (discussed in Chapter 4) the loss of protection results from deliberate conduct on the part of civilians. This is not the case with civilian objects whose protection depends on their potential utility to military operations and is not within the control of the civilians that inhabit these objects.

¹⁴¹² See discussion of military objects, above.

¹⁴¹³ To the best knowledge of the authors, at the time of printing, no such IHRL cases existed.

¹⁴¹⁴ Statement by the President of the Security Council, 6114th meeting of the Security Council, 29 April 2009, S/PRST/2009/9

¹⁴¹⁵ For example, see the CRC’s Concluding Observations: Colombia, UN Doc CRC/C/OPAC/COL/CO/1 (2010) paras 39-40; CRC’s Concluding Observations: Sri Lanka, UN Doc CRC/C/OPAC/LKA/CO/1 (2010), paras 24-25

analysis below demonstrates that the legality of the use or occupation of an educational facility turns on the crucial question of whether or not an educational facility is a civilian or military object.

When an Educational Facility is a Civilian Object

Civilian educational facilities are protected from military operations by Article 48 of Additional Protocol I, which sets out the principle of distinction. Article 48 states that parties ‘shall direct their operations only against military objectives’. ‘Operations’ are defined as ‘all movements and acts related to hostilities that are undertaken by armed forces’.¹⁴¹⁶ Crucially, this definition contains the limitation that ‘military operations’ must be those actions of armed forces that are ‘related to hostilities’.¹⁴¹⁷ It is nevertheless unclear exactly what types of military activity might be caught by the term “military operations” under IHL.

What is clear, however, is that not all activity by a military fits into the definition of ‘military operations’. For example, administrative tasks of the military which use civilian infrastructure, the movement of troops through a town, or the non-combat related entry of troops into civilian property (for example to stay in a hotel or to eat in a restaurant) should not to be considered ‘military operations’, and therefore are not prohibited by Article 48. This means that where an educational facility is used by the military for non-operational reasons (such as purposes not related to combat), its use may not be prohibited by IHL.¹⁴¹⁸

The term ‘operations’ does include the use or occupation of an educational facility by armed forces if it is done so for reasons ‘related to hostilities’.¹⁴¹⁹ This might include, for example, the use or occupation of an educational facility to store weapons or as a base for troops. This means that parties to a conflict cannot lawfully use or occupy an educational facility where the educational facility is a civilian object and the use or occupation is undertaken for reasons ‘related to hostilities’.

It is also important to note that, under the principle of distinction, a civilian educational facility may not be the object of an attack,¹⁴²⁰ although it might suffer some incidental damage from attacks on surrounding objects. This means that where military forces use violence or cause damage to an educational facility that is a civilian object, it would constitute an illegal attack under Article 52 of Additional Protocol I, and is at all times prohibited.

Directing military operations against a civilian educational facility (that is not military object) is prohibited regardless of whether the educational facility belongs to an enemy or is located on the territory of the forces attempting to use or occupy it.

¹⁴¹⁶ Claude Pilloud (ed) (n34), para 1875

¹⁴¹⁷ *ibid*

¹⁴¹⁸ This issue has not benefited from judicial consideration or much academic analysis, so it is not possible to set out when a military’s activities become ‘operations’ under Art 48 and cannot, therefore, be directed against civilian objects. The exact scope of ‘military operations’ is beyond the scope of this Handbook.

¹⁴¹⁹ However, this term is also ambiguous and is in need of clarification.

¹⁴²⁰ Additional Protocol I, Art 52

When an Educational Facility is a Military Object

Where an educational facility is a military object, it may have military operations directed against it and it may be lawfully attacked, subject to the rules regulating attacks against military objects, including the principle of proportionality. An educational facility can become a military object in accordance with two-step test, set out above.¹⁴²¹ This is where the object can make an effective contribution to military action and attacking it results in a definite military advantage—the principle of military necessity is implicit in this definition.

The principle of military necessity refers to the fact that parties to a conflict are permitted to use armed force that aims to weaken the military operations of the enemy using the most efficient means possible.¹⁴²² This principle may be relied upon by parties to a conflict as an exception to a particular rule of IHL only where the text of the rule permits this.¹⁴²³ Provisions of the Geneva Conventions and Additional Protocols contain both express and implied references to military necessity.¹⁴²⁴

Even when an educational facility is a military object, parties must meet the requirements of military necessity in order to direct military operations lawfully against it. These requirements are:

- the operations must be undertaken against the educational facility (which is a military object) for a legitimate military purpose; and
- the actual action taken (for example, the use of an educational facility) must be necessary for the achievement of that purpose and no less damaging action was possible.¹⁴²⁵

This means that it is not permissible to direct military operations against an educational facility (which is a military object) where it is not necessary for a military purpose. In other words, where the same military purpose can be achieved by the use or occupation of a different building that may not have the same detrimental impact on the surrounding civilian population, then the educational facility should not be a target.¹⁴²⁶

Similarly, parties to a conflict can never use or occupy an educational facility for any of the following reasons:

¹⁴²¹ Additional Protocol I, Art 52(2); ICRC CIHL Study, Rule 10

¹⁴²² American Military Tribunal in *S v List and Others (Hostages Trial)*, 15 Ann Digest 632, 19 February 1948, (part of the ‘Subsequent Proceedings’ at Nuremberg), 1253

¹⁴²³ Nubuo Hayashi, ‘Requirements of Military Necessity in International Humanitarian Law and International Criminal Law’ (2010) 28 Boston University International Law Journal 39

¹⁴²⁴ It is expressly contained in the prohibition on wanton destruction or seizure of enemy property, including educational facilities, (Art 23 of the Hague Regulations 1907, Art 50 of the First Geneva Convention, Art 51 of the Second Geneva Convention and Art 147 of the Fourth Geneva Convention) discussed above, and implicitly contained in the definition of military object, in Art 52(2) of Additional Protocol I.

¹⁴²⁵ Yoram Dinstein, ‘Military Necessity’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008)

¹⁴²⁶ See also, for example, Additional Protocol I, Art 58(a), on the obligation to the maximum extent feasible not to locate military objects in densely populated areas; ICRC CIHL Study, Rule 23

- where such use is intended to terrorise the civilian population;¹⁴²⁷
- where the use is intended to cause destruction of the facility and disrupt educational activity;¹⁴²⁸
- where the use is for a political or ideological, rather than military, purpose;¹⁴²⁹
- to demonstrate military strength;¹⁴³⁰
- to intimidate the political leadership of an adversary;¹⁴³¹ or
- to use the civilian character of the facility to shield the military occupants (human shields).¹⁴³²

The legal consequences of military use of an educational facility, in particular the loss of civilian protection, are discussed in detail below.

5.2.7 Loss of Protection of Educational Facilities from Deliberate and Direct Attack

All civilian objects are protected from deliberate attack. However, as noted above, civilian objects can become military objects if they meet the two-step test for a military object.¹⁴³³ This section will examine two ways in which an educational facility might be in danger of becoming military target: through military use or occupation; and by using military guards for protection.

Consequences of the Military Use or Occupation of Educational Facilities

As outlined in detail above, where military necessity permits, an educational facility may be lawfully occupied or used for military purposes. Under IHL, military occupation and use of a civilian educational facility converts it into a potential military objective and exposes the educational facility to lawful attack by parties to a conflict, regardless of the legality of the military use or occupation in the first instance.

The use of an object, such as an educational facility, for military purposes satisfies the first step of the two-step definition of military object. If attacking an educational facility that is used for a military purpose would result in a definite military advantage, it is permissible under IHL to attack, capture or neutralise it. However, such attacks are subject to the IHL limitations on attacks, including the rules relating to the use of particular weapons and the limiting principle of proportionality, discussed below. Also, if there is serious doubt as to the use military use of

¹⁴²⁷ See also the prohibition on attacks designed to cause terror, in Art 51 of Additional Protocol I and Art 13(2) of Additional Protocol II, as discussed above.

¹⁴²⁸ Art 23 of the Hague Regulations 1907, Art 50 of the First Geneva Convention, Art 51 of the Second Geneva Convention and Art 147 of the Fourth Geneva Convention.

¹⁴²⁹ See Stefan Oeter (n1030), 180

¹⁴³⁰ *ibid*

¹⁴³¹ *ibid*

¹⁴³² See below for discussion of this. See also Fourth Geneva Convention, Art 28, Additional Protocol I, Art 51(7)

¹⁴³³ As set out in Additional Protocol I, Art 52(2); ICRC CIHL Study, Rule 10

an educational facility it benefits from the presumption in favour of civilian object status, discussed above.

The presence of civilians in a military object, such as an occupied educational facility, does not change the military nature of an object, provided the criteria set out in Article 52(2) Additional Protocol I are satisfied.¹⁴³⁴ This means that the object may be attacked, regardless of the presence of civilians,¹⁴³⁵ but subject to the principle of proportionality, discussed below. This places students and education staff in serious physical danger of attack if they remain in an occupied educational facility.

However, IHL places an obligation on the occupying party to evacuate students and education staff from an occupied educational facility where it is feasible to do so in both IAC and NIAC.¹⁴³⁶ This is because of the following:

- Article 57 of Additional Protocol I requires all parties to a conflict to take constant care to protect civilians and civilian objects from the effects of military operations (military operations includes the consequences of simultaneous occupation);
- Article 58(a) of Additional Protocol I requires that “to the maximum extent feasible” parties remove the civilian population, including students and education staff, from the facility of a military object—which includes an educational facility used for a military purpose;¹⁴³⁷
- Article 58(b) of Additional Protocol I requires parties to avoid locating military objects in the vicinity of densely populated areas;
- parties are required to take all necessary precautions¹⁴³⁸ to protect the civilian population: in the case of military use of an educational facility, which would include ensuring the evacuation of students and education staff.¹⁴³⁹

Importantly, the use of ‘human shields’ is strictly prohibited by IHL.¹⁴⁴⁰ This means that military objects (including troops or military weapons) must not be placed in a civilian area in order for those objects to benefit from the protection of the surrounding civilian population or objects. Also, civilians, including students and education staff, must not be deliberately used to protect a military operation.

Consequences of Assigning Military Guards to Educational Facilities

The issue of armed private guards at educational facilities is discussed in Chapter 4. The presence

¹⁴³⁴ As previously outlined, this criteria are also part of customary international law applicable in both IAC and NIAC: ICRC CIHL Study Rule 10

¹⁴³⁵ Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 187

¹⁴³⁶ See ICRC CIHL Study, Rule 22 and Rule 23, and Rule 24

¹⁴³⁷ See also ICRC CIHL Study Rule 24

¹⁴³⁸ To the maximum extent feasible.

¹⁴³⁹ Additional Protocol, Arts 13(1) and 58(2); ICRC CIHL Study, Rule 22

¹⁴⁴⁰ Fourth Geneva Convention, Art 28; Additional Protocol I, Art 51(7)

of private security guards using violence in self defence, or defence of others, is permitted by IHL but must be undertaken with extreme caution. However, the situation may be different if the armed personnel guarding an educational facility are members of an armed force.

The use of members of the armed forces to guard (as opposed to occupy) an educational facility does not cause the facility to lose its civilian character and its protection from direct attack. Nevertheless, any military guards or military machinery, such as their weapons, may be attacked at any time. The presence of military guards, therefore, can endanger a civilian educational facility and its civilian occupants. Any attack on military personnel guarding a civilian object must take into account the possibility of damage to the surrounding civilian population and objects, in accordance with the principle of proportionality, discussed below.

5.2.8 Protection of Access to and Provision of Essential Amenities Necessary for Education

IHL provides protection to more than just the buildings and grounds used for education, it also protects essential amenities necessary to ensure the proper functioning of an educational facility. One of the basic requirements of educational under the right to education is the provision of essential amenities, such as sanitation facilities for both sexes and safe drinking water.¹⁴⁴¹

IHL prohibits the attacking of objects indispensable to the survival of the civilian population with the intent to deprive the population of their supply.¹⁴⁴² This includes food, clothing and water installations. This means that water facilities that supply educational facilities may not be attacked by an enemy.¹⁴⁴³ Further, IHL contains a general prohibition on starvation of the civilian population as a method of warfare,¹⁴⁴⁴ so that deliveries of supplies of drinking water, food and other goods indispensable to the survival of civilians must not be hindered by the enemy.¹⁴⁴⁵ Further, occupying powers must ensure that those civilians within their territory have their basic needs met.¹⁴⁴⁶ The combined effect of these rules is that many of the amenities essential to the functioning of educational facilities are protected from attack in armed conflict. The special protection afforded to children under Article 77 of Additional Protocol I and Article 4(3) of Additional Protocol requires parties to ensure that children be provided with the care

¹⁴⁴¹ CESCR, *Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment 13*, 8 December 1999, E/C.12/1999/10

¹⁴⁴² Additional Protocol I, Art 54(2); Additional Protocol II, Art 14; ICRC CIHL Study, Rule 53. As noted above, this prohibition is not absolute in the case of IAC as Art 54(5) permits parties to derogate from this protection in respect of objects in territory under their control, in defence of their national territory, and where required by imperative military necessity.

¹⁴⁴³ In so far as the supply belongs to the enemy. In IAC attacks may be permissible where the attack occurred in friendly territory and on the grounds of imperative military necessity: Additional Protocol I, Art 54(3) and (5); Additional Protocol II, Art 14; ICRC CIHL Study, Rule 53

¹⁴⁴⁴ Additional Protocol I, Art 54(1); Additional Protocol II, Art 14; ICRC CIHL Study Rule 53. This prohibition is absolute in the case of NIAC.

¹⁴⁴⁵ Additional Protocol I, Art 70; ICRC CIHL Study Rule 55

¹⁴⁴⁶ American Military Tribunal in *S v List and Others (Hostages Trial)*, 15 Ann Digest 632, 19 February 1948, 1253

and aid they require. These provisions are, arguably, broad enough to require parties to ensure sanitation facilities and clean drinking water at those educational facilities which have children as students.

5.2.9 Prohibition of Indiscriminate Attacks Affecting Educational Facilities

The IHL rules prohibiting indiscriminate attacks and particular weapons, including those causing unnecessary suffering or superfluous injury, are discussed in detail in Chapter 4.

5.2.10 Incidental Damage to Educational Facilities from Attacks against Military Objectives

Even though indiscriminate attacks are prohibited by IHL, educational facilities may nevertheless suffer incidental damage during a legal attack on a military object. IHL permits incidental damage to civilian life and objects provided that the attack complies with the principles of military necessity and proportionately.

Military Necessity

The principle of military necessity refers to the fact that parties to a conflict are permitted to use armed force that aims to weaken the military operations of the enemy using the most efficient means possible. This principle may be relied upon by parties to a conflict as an exception to a particular rule of IHL only where the text of the rule permits this.¹⁴⁴⁷ Provisions of the Geneva Conventions and Additional Protocols contain both express and implied references to military necessity.¹⁴⁴⁸

In order to rely on the principle of military necessity when seeking to direct military operations against an object, such operations must meet two criteria (in addition to the other criteria for 'military object' set out in Article 52(2) of Additional Protocol I):

- the operations must be undertaken for a legitimate military purpose; and
- the action taken must be necessary for the achievement of that purpose and no less damaging action was possible.¹⁴⁴⁹

¹⁴⁴⁷ Nubuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 Boston University International Law Journal 39

¹⁴⁴⁸ It is expressly contained in the prohibition on wanton destruction or seizure of enemy property, including educational facilities (Art 23 of the Hague Regulations 1907, Art 50 of the First Geneva Convention, Art 51 of the Second Geneva Convention and Art 147 of the Fourth Geneva Convention), discussed above, and implicitly contained in the definition of military object.

¹⁴⁴⁹ Yoram Dinstein, 'Military Necessity' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008)

The only legitimate military purpose recognised by IHL is the weakening of an enemy's military forces.¹⁴⁵⁰ This means that an attack on a military object can only be undertaken when the military object is the target (and not, for example, the civilians inside), and only where a definite military advantage is likely to be achieved by operation in which the attack takes place.¹⁴⁵¹ The means with which an attack may be undertaken must also comply with the general rules of IHL, including the prohibition on indiscriminate weapons and the principle of proportionality.

Proportionality

Proportionality¹⁴⁵² establishes a limit on the operation of military necessity. Proportionality is the principle that incidental loss of civilian life or injury to civilians resulting from a lawful military action must not be excessive in relation to the concrete and direct military advantage anticipated.¹⁴⁵³ This principle is part of customary international law.¹⁴⁵⁴

This means that 'even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack'.¹⁴⁵⁵ Also, if it becomes clear during the course of an attack that it can no longer be considered proportionate, the attack must be stopped or postponed.¹⁴⁵⁶ Whether or not an attack is excessive is to be assessed on its particular circumstances.¹⁴⁵⁷ There is no mathematical formula for determining this.¹⁴⁵⁸

The principle of proportionality is inherent in the principle of humanity, central to all of the rules of IHL.¹⁴⁵⁹ However, it is not expressly set out in the Geneva Conventions or in the Additional Protocols. Instead, its substance it is reflected in many of the provisions of Additional Protocol I¹⁴⁶⁰ and it forms part of the customary international law.¹⁴⁶¹

A military objective does not lose its military status because of the disproportionate number of civilian casualties that might occur if it was attacked. The question of whether an object is a

¹⁴⁵⁰ This is a long-standing maxim of IHL. See generally Emily Camins, 'The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity' (2008) 90 *International Review of the Red Cross* 872, 853

¹⁴⁵¹ Additional Protocol I, Art 52(2); Claude Pilloud (ed) (n34), para 2028

¹⁴⁵² Proportionality under IHL is different to the concept of proportionality under IHRL.

¹⁴⁵³ Hans-Peter Gasser, 'Protection of the Civilian Population', in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 248; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2010), 119

¹⁴⁵⁴ ICRC CIHL Study, Rule 14

¹⁴⁵⁵ Dissenting Opinion of Judge Higgins in the *Nuclear Weapons Advisory Opinion*, para 587

¹⁴⁵⁶ Additional Protocol I, Art 57(2)

¹⁴⁵⁷ See, for example, the *Nuclear Weapons Advisory Opinion*.

¹⁴⁵⁸ Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008), 362. This makes it very difficult to assess.

¹⁴⁵⁹ See ICRC CIHL Study, Rule 14

¹⁴⁶⁰ Including Additional Protocol I, Art 51(5)(b) and 57

¹⁴⁶¹ Geneva Convention III, Art 23(1); Geneva Convention IV, Art 28; Additional Protocol I, Art 51(5)(b) and 57(2)(a)(iii); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2010), 120; ICRC CIHL Study, Rule 14

military one is distinct from whether or not it may legally be attacked in accordance with the requirement of proportionality.¹⁴⁶²

The requirement of proportionality can be exploited by parties to a conflict. For example, placing of civilians or civilian objects around or in a military object can affect the calculation required by proportionality and, therefore, may render an attack illegal. Where this is done deliberately, in order to deter attacks against legitimate military objectives, it is referred to as using ‘human shields’.

The use of ‘human shields’ is strictly prohibited by IHL.¹⁴⁶³ This means that military objects (including troops or military weapons) must not be placed in a civilian area in order for those objects to benefit from the protection of the surrounding civilian population or objects. Also, civilians, including students and education staff, must not be deliberately used to protect a military operation.

5.2.11 Additional Protection of Educational Facilities

In addition to the general protection afforded to educational facilities by virtue of the fact that they are civilian objects, there are a number of rules which provide for specific protection of institutions dedicated to education.

The Hague Regulations of 1899 and 1907 set out the protection of what would now be considered ‘civilian objects’ from direct attack. Buildings dedicated to education are specifically mentioned and protected from destruction, wilful damage and seizure during both conflict and occupation.¹⁴⁶⁴ Further, parties, were required to spare such buildings, as far as possible, from the effects of bombardment from the land, air and sea.¹⁴⁶⁵ Despite the special mention of institutions dedicated to education, no definition is contained in the Hague Regulations and it is not clear whether or not educational facilities, and other buildings forming part of educational institutions, derive protection from the fact that civilian students and education staff were present or whether the protection was inherent in the facility itself.¹⁴⁶⁶ Nevertheless, it is clear that the Hague Regulations, and other early IHL texts,¹⁴⁶⁷ do not create any special protection for educational facilities but, rather, establish that parties must refrain from attacking educational facilities unless the educational facility has, by virtue of its use, become a military objective. This is equivalent to the modern protection of civilian objects contained in the Geneva Conventions and Additional Protocols.

¹⁴⁶² Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2010), 120

¹⁴⁶³ Fourth Geneva Convention, Art 28; Additional Protocol I, Art 51(7); ICRC CIHL Study, Rule 97

¹⁴⁶⁴ Hague Regulations, Art 56

¹⁴⁶⁵ Hague Regulations, Art 27; Hague Convention IX, Art 5

¹⁴⁶⁶ Gregory R Bart, ‘Ambiguous protection of schools under the law of war: time for parity with hospitals and religious buildings’ in UNESCO, *Protecting Educational from Attack: A State-of-the-Art Review* (UNESCO 2010), 211

¹⁴⁶⁷ Including the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact) (15 April 1935)

Later treaties, based on The Hague Regulations, created specific and additional protection for cultural property; however, educational facilities *per se* are not listed as entitled to this special protection, despite their inclusion in the Regulations. For discussion of the special protection of cultural property, see below.

Under IHL, some facilities and objects benefit from special, additional protection from attack and occupation. Ordinarily, educational facilities are not entitled to this special protection, but where they meet the criteria for protection as cultural property, a religious object or a hospital, they are able to benefit from this additional protection.¹⁴⁶⁸

Cultural Property

Educational facilities are not, in themselves, protected as cultural property.¹⁴⁶⁹ However, some educational facilities may be considered ‘cultural property’ if they fall into one of the categories listed below. Objects considered cultural property may be identified as such with the emblem set out in the Cultural Property Convention.¹⁴⁷⁰ Parties to the Convention must respect cultural property whether it is on their own or an enemy’s territory and in both IAC and NIAC.¹⁴⁷¹

‘Cultural property’ refers to any movable or immovable objects of great importance to the cultural heritage of all people.¹⁴⁷² This includes:

- monuments of architecture or history;
- archaeological sites;
- antiquities;
- works of art;
- some books, collections and archives;
- religious sites;
- any building whose main and effective purpose is to contain cultural property; and
- centres containing large amounts of cultural property.

Protocol 1 to the Hague Convention on Cultural Property extends this list to include religious buildings and prohibits parties from using such buildings in support of the military effort.¹⁴⁷³ This list could include many educational facilities with buildings of historical or religious

¹⁴⁶⁸ For the argument that educational facilities ought to benefit from such special protection, see Gregory R. Bart, ‘Ambiguous protection of schools under the law of war: time for parity with hospitals and religious buildings’ in UNESCO, *Protecting Educational from Attack: A State-of-the-Art Review* (UNESCO 2010)

¹⁴⁶⁹ See Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954), Art 1

¹⁴⁷⁰ Hague Convention on Cultural Property, Arts 6, 16 and 17

¹⁴⁷¹ Hague Convention on Cultural Property, Art 4

¹⁴⁷² Hague Convention on Cultural Property, Art 1. This is a vague and potentially broad definition.

¹⁴⁷³ Hague Convention on Cultural Property, Art 53 Protocol 1. See also ICRC CIHL Study, Rule 40 and Rule 39

importance, and potentially also religious educational facilities; educational facilities containing significant museums or galleries; and those educational facilities, including higher educational facilities, with substantial libraries or archives.

Cultural property benefits from two types of protection in armed conflict: general protection and enhanced protection.¹⁴⁷⁴ Educational facilities benefit from this protection where they are also cultural property.

General Protection must be afforded to all cultural property whether or not on a State's own territory.¹⁴⁷⁵ It requires all parties to a conflict to safeguard their own cultural property against the effects of hostilities. This includes a prohibition on using cultural property in a manner likely to cause it to become a military objective (including military occupation or use)¹⁴⁷⁶ or directly attacking it.¹⁴⁷⁷ However, this general protection may be waived in cases of imperative military necessity. This means that cultural property may be subjected to military use or attack where there is no feasible alternative for obtaining a similar military advantage.¹⁴⁷⁸ Where an educational facility qualifies as cultural property, it benefits from this additional protection against military use or occupation. For general discussion of this issue, see above.

Enhanced protection is afforded to cultural property listed on the 'List of Cultural Property under Enhanced Protection',¹⁴⁷⁹ which is administered by UNESCO.¹⁴⁸⁰ Parties that have control over listed cultural property are prohibited from using the property for a military purpose, without exception.¹⁴⁸¹ Parties must also refrain from attacking the property on the list unless, by virtue of its use, this property has become a military objective. Even then, attack is permitted only where 'it is the only feasible means of terminating such use and if precautions are taken to minimize damage to the property'.¹⁴⁸²

¹⁴⁷⁴ Special protection also exists; however, this regime has not been implemented with any success and will, therefore, not be considered here.

¹⁴⁷⁵ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted 14 May 1954, entered into force 7 August 1956, Art 4

¹⁴⁷⁶ *ibid*; Additional Protocol I, Art 53; and Additional Protocol II, Art 16; ICRC CIHL Study, Rule 39

¹⁴⁷⁷ This includes the requirements to move cultural property away from military objects or not place military objects near cultural property and to refraining from launching an attack that may cause incidental damage to cultural property: Arts 7 and 8 of the Second Optional Protocol to the Hague Convention on Cultural Property; ICRC CIHL Study, Rule 38

¹⁴⁷⁸ Additional Protocol I, Arts 52 and 53; Additional Protocol II, Art 16, Cultural Property Convention, Art 4(1) and (2); Optional Protocol to Hague Convention on Cultural Property, Art 6

¹⁴⁷⁹ Optional Protocol 2 to the Hague Convention on Cultural Property, Art 12; ICRC Factsheet: Criteria for listing are outlined in Art 10 of the Optional Protocol.

¹⁴⁸⁰ There was no educational facility on the list at the time of writing.

¹⁴⁸¹ Optional Protocol 2 to the Hague Convention on Cultural Property, Art 12

¹⁴⁸² ICRC Fact Sheet; Optional Protocol 2 to the Hague Convention on Cultural Property, Art 13

Medical Facilities

Where an educational facility is also a ‘medical unit’. It benefits from special protection under IHL.¹⁴⁸³ Medical units may be fixed or mobile¹⁴⁸⁴ and need not be permanent, and must be marked with a red cross or equivalent symbol.¹⁴⁸⁵ The term ‘medical unit’ includes the following objects, whether or not they are military or civilian:¹⁴⁸⁶

- hospitals and other similar units;
- blood transfusion centres;
- preventive medicine centres and institutes; and
- medical depots and the medical pharmaceutical stores of such units.

This could include hospitals with teaching functions and medical faculties at universities.

Medical units must be respected and protected at all times in both IAC and NIAC.¹⁴⁸⁷ This forms part of customary international law.¹⁴⁸⁸ They cannot be made the object of attack in any circumstances and, as far as possible, medical units should be situated so that they do not suffer incidental damage.¹⁴⁸⁹ Protection of medical units is lost only in limited circumstances.¹⁴⁹⁰

5.2.12 Special Protection of Educational Facilities in Armed Conflict

The importance of education to local communities both during and after hostilities means that all parties to a conflict should respect and preserve educational facilities. One way that this can be done is by the creation of special ‘safety, neutralized or demilitarized zones’ in areas that contain schools, universities, vocational training centres and other educational facilities or where such facilities can be established and attended during the conflict.

Articles 14 and 15 of the Fourth Geneva Convention deal with the issue of safety and neutralised zones for the civilian population. Article 14 provides that parties¹⁴⁹¹ may establish zones, in their own or occupied territory, for the protection of specific groups of vulnerable people, including children under 15. Article 15 provides for the creation of neutralised zones for

¹⁴⁸³ See for example ICRC CIHL Study, Rule 28

¹⁴⁸⁴ Additional Protocol I, Art 8(e)

¹⁴⁸⁵ First Geneva Convention, Arts 38 and 42

¹⁴⁸⁶ Additional Protocol I, Art 8(e)

¹⁴⁸⁷ Hague Regulations, Art 17(1); First Geneva Convention, Art 19(1); Fourth Geneva Convention, Art 18; Additional Protocol I, Art 12(1) and 21; Additional Protocol II, Art 11(1)

¹⁴⁸⁸ ICRC CIHL Study, Rule 28

¹⁴⁸⁹ First Geneva Convention, Art 19(2); Fourth Geneva Convention, Art 18(5); Additional Protocol I, Art 12(4)

¹⁴⁹⁰ They are used outside their humanitarian function to undertake acts harmful to the enemy, warning must be given: First Geneva Convention, Art 21; Fourth Geneva Convention, Art 19; Additional Protocol I, Art 13(1); Additional Protocol II, Art 11(2)

¹⁴⁹¹ It is not only parties to a conflict that can declare safety zones, the UN Security Council has also done so in armed conflicts, for example in Rwanda, Bosnia Herzegovina, Sri Lanka and Iraq.

the protection of civilians by agreement between the parties to a conflict. Both safety zones and neutralised zones should not be subject to military attack.¹⁴⁹²

Article 60 of Additional Protocol I sets out provisions for parties to a conflict to agree to declare tracts of land ‘demilitarised’, or ‘outside’ the area of conflict, so that they cannot not be subject to military operations.¹⁴⁹³ ‘Military operations’ means ‘all movements and activities related to hostilities, carried out by armed forces’.¹⁴⁹⁴ This is different to the use of safety or neutralised zones which are areas of refuge surrounded by hostilities.¹⁴⁹⁵

The IHL of NIAC does not mention safety, neutralised or demilitarised zones. However ‘nothing prevents parties to such an internal conflict from establishing zones or localities through special agreements’.¹⁴⁹⁶ In any event, the ICRC has declared that Articles 14, 15 and 60 are part of customary international law applicable in IAC and NIAC.¹⁴⁹⁷

The use of neutralised or demilitarised zones to protect educational facilities could be a powerful and effective means of protecting these facilities from accidental, incidental and deliberate attacks. However, past experience suggests that consent of parties to a conflict is important to ensure the effectiveness of the special zone provisions.¹⁴⁹⁸ Also, the requirement that no military objects or armed forces be contained within the zone would prevent the military occupation and use of schools and other educational facilities. In the event that education facilities are located in areas that are not neutral or demilitarised zones, it may be possible to relocate or establish temporary educational facilities in these zones to further ensure continued and safe access to educational during armed conflict.

There are no examples of the use of these IHL rules to establish zones to protect educational facilities or areas.¹⁴⁹⁹ However, neutralised zones established under IHL have been used by

¹⁴⁹² ICRC CIHL Study, Rule 35; UNGA Resolution 2675 (XXV) (1970). In practice, however, the use of safety zones has proved to have a limited success, especially in NIAC. For discussion of this issue, including of the declaration of safety zones in Bosnia and Herzegovina (including the one in Srebrenica) by the Security Council in 1995, see Karin Landgren, ‘Safety Zones and International Protection: A Dark Grey Area’ (1995) 7 *Int Journal of Refugee Law* 436

¹⁴⁹³ Hans-Peter Gasser, ‘Protection of the Civilian Population’, in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 255

¹⁴⁹⁴ Claude Pilloud (ed) (n34), para 2304.

¹⁴⁹⁵ H Hans-Peter Gasser, ‘Protection of the Civilian Population’, in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2009), 255

¹⁴⁹⁶ *ibid*

¹⁴⁹⁷ ICRC CIHL Study, Rule 35 and Rule 36

¹⁴⁹⁸ See discussion by Karin Landgren, ‘Safety Zones and International Protection: A Dark Grey Area’ (1995) 7 *Int Journal of Refugee Law* 436

¹⁴⁹⁹ However, in the Nepalese programme ‘Schools as Zones of Peace’, parties to a conflict agreed to depoliticise educational facilities and ensure that they suffered minimal disruption from ongoing violence. These ‘zones’ were not established under IHL but rather through agreement at a national level. However, such programmes may operate as a model for future developments utilizing the zones provisions offered by IHL. For more information on ‘Zones of Peace’ see Save the Children, ‘Case Study: Promoting Schools as Zones of Peace (SZOP Campaign) in Nepal (*Save the Children*, 2011)<<https://resourcecentre.savethechildren.net/library/case-study-promoting-schools-zones-peace-szop-campaign-nepal>>

parties to a conflict to protect particular objects during hostilities. For example, Argentina and Britain agreed to the establishment of a neutralised zone around the Anglican Cathedral in Port Stanley on the Falkland Islands.¹⁵⁰⁰

5.3 INTERNATIONAL CRIMINAL LAW

As mentioned in Chapter 2, ICL refers to the set of rules proscribing conduct considered criminal by the international community. ICL contains some specific provisions protecting educational facilities but also protects educational facilities through the prohibition on attacking civilian facilities (including civilian educational facilities) as a war crime and as a crime against humanity. In establishing a case against an accused for an international crime, the prosecution must make out each element of the offence beyond reasonable doubt. Further, ICL sets out a number of general defences to international criminal charges that the accused may raise. These have been outlined in Chapter 2, above.

5.3.1 Specific Offences relating to Educational Facilities

The statutes of the ICTY and the ICC both provide specific protection to educational facilities under ICL. Educational facilities are not specifically mentioned in other ICL sources.

For specific offences that prohibit attacks on an educational facility, the two relevant provisions are:

- Article 3(d) of the ICTY Statute, which prohibits ‘the seizure of, destruction or wilful damage done to institutions dedicated to ... education’ as a war crime; and
- Article 8(2)(b)(ix) of the Rome Statute, which criminalises acts of ‘intentionally directing attacks against buildings dedicated to ... education ... provided they are not military objectives’.¹⁵⁰¹

Under the Rome Statute, for the specific offence of directing attacks against an educational facility as a war crime, the prosecution must principally prove:

- that the perpetrator directed an attack;
- that the object of the attack was one or more buildings dedicated to education and which were not a military objective; and
- that the perpetrator intended such buildings to be the object of the attack.

¹⁵⁰⁰ See Stefan Oeter (n1030), 217. For more examples of state practice and citations of this rule in military manuals (as well as practice relating to hospital and safety zones) see the ICRC’s Practice relating to Rule 3.

¹⁵⁰¹ Rome Statute, Art 8(2)(e)(iv), criminalises this conduct in NIAC. Also see Law of the Iraqi High Tribunal 2005, Section 4, Art 13: War Crimes Art 13(b)(10)

The prosecution must also prove the ‘chapeau’ elements for war crimes, namely that the conduct took place in the context of and was associated with an armed conflict (whether international or non-international) and that the perpetrator was aware of the factual circumstances that established the existence of such an armed conflict.¹⁵⁰²

5.3.2 Attacking Educational Facilities as a War Crime

Certain general offences within the statutes of the *ad hoc* tribunals and the ICC may be interpreted to provide a measure of protection to educational facilities, in particular the crimes of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly as a war crime;¹⁵⁰³ and the offence of directing attacks against civilian objects as a war crime.¹⁵⁰⁴

The war crime of destruction and appropriation of property requires the prosecution to prove (in addition to the elements for war crimes in an IAC or NIAC):

- that the perpetrator destroyed or appropriated certain property;
- that the destruction or appropriation was not justified by military necessity;
- that the destruction or appropriation was extensive and carried out wantonly;
- that the property was protected under one or more of the Geneva Conventions of 1949; and
- that the perpetrator was aware of the factual circumstances that established that protected status.¹⁵⁰⁵

The war crime of directing attacks against civilian objects similarly requires the prosecution to prove the elements and that the perpetrator directed an attack; the object of the attack was a civilian object (in other words, objects that are not military objectives); and the perpetrator intended such civilian objects to be the object of the attack.

No offence is committed if the educational facility was being used for military purposes at the time of the attack, either lawfully or unlawfully. Examples of such purposes include use as military headquarters, a sniper post, a rocket launch site or an ammunition depot. In all such cases the educational facility becomes a military object subject to attack.¹⁵⁰⁶ It is for the prosecution to prove to the required standard that the educational facility was not being used for military

¹⁵⁰² See the ICC’s Elements of Crimes

¹⁵⁰³ ICTY Statute, Art 2(d); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, Art 6; Rome Statute, Art 8(2)(a)(iv). The ECCC also lists the destruction of cultural property as war crimes from which the destruction of educational property could be inferred, Art 7 of the Law on the Establishment of the ECCC—although the basis of this article is the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.

¹⁵⁰⁴ Rome Statute, Art 8 (2)(b)(ii)

¹⁵⁰⁵ See the ICC’s Elements of Crimes.

¹⁵⁰⁶ See for example *Prosecutor v Milan Martić*, IT-95-11-T, 12 June 2007, who was acquitted on a count of attacks on a school as the Trial Chamber found that the prosecution had not proved that the school was not being used for military purposes.

purposes. No offence is committed if the perpetrator did not intend that civilian property should be the object of attack.¹⁵⁰⁷

If the prosecution fails to prove a sufficient nexus between the attack on the educational facility and an IAC or NIAC, no offence is committed. Equally, if the perpetrator was not aware of the factual circumstances establishing the existence of the armed conflict at the time of the attack, there can be no conviction.

Prosecution of offences of targeting an educational facility as a war crime have been uncommon. Although enumerated in the Rome Statute,¹⁵⁰⁸ no ICC arrest warrant or indictment has contained this specific charge. The ICTY has dealt with several cases in relation to the attack on Dubrovnik, during which a number of educational facilities were destroyed,¹⁵⁰⁹ and there are also a number of ICTY cases involving charges of destruction or wilful damage to institutions dedicated to education.¹⁵¹⁰ Similarly, the Court of Bosnia and Herzegovina¹⁵¹¹ has dealt with war crimes cases involving attacks on educational facilities,¹⁵¹² as has the War Crimes Chamber of the District Court of Belgrade.¹⁵¹³

The ICTY has considered such allegations closely on only a handful of occasions. In the case of *Prosecutor v Kordic and Cerkez*, the history of the offence of attacking educational facilities as a war crime was considered at some length. The Trial Chamber analysed the Hague

¹⁵⁰⁷ See for example Rome Statute, Art 8(2)(b)(ii)

¹⁵⁰⁸ Rome Statute, Arts 8(2)(b)(ix) and 2(e)(iv)

¹⁵⁰⁹ *Prosecutor v Miodrag Jokić*, IT-01-42/1-S, 18 March 2004, accused sentenced to 7 years' imprisonment following a guilty plea for his involvement in this attack; *Prosecutor v Pavle Strugar*, IT-01-42-T, 31 January 2005, accused sentenced to 7½ years upon conviction for, amongst other charges, destruction and wilful damage to institutions dedicated to education during the attack on Dubrovnik.

¹⁵¹⁰ *Prosecutor v Vojislav Seselj*, IT-03-67; *Prosecutor v Jadranko Prlić et al*, IT-04-74; *Prosecutor v Zdravko Tolimir*, IT-05-88/2

¹⁵¹¹ A State court, with jurisdiction over international crimes as well as domestic offences. See the website of the court in English, <www.sudbih.gov.ba>

¹⁵¹² *Prosecutor v Pasko Ljubicic*, X-KR-06/241, First Instance Decision of the State Court of Bosnia and Herzegovina, 28 May 2008. Note that Ljubicic had originally been charged by the ICTY with specific counts of destruction and wilful damage to institutions dedicated to religion or educational as war crimes (See *Prosecutor v Pasko Ljubicic*, IT-00-41, 26 September). When his case was transferred to the BiH State Court there were no separate charges for attacks on educational institutions—this appeared to be subsumed under the general rubric of war crimes charges for attacks on civilian objects and the destruction and looting of property (Art 173(a) and (f) of the Bosnian Criminal Code)—but the facts of the war crimes charged involved command responsibility for attacking a Bosnian Muslim village during which a Muslim primary school was burned (sentenced to 10 years' imprisonment following a plea agreement).

¹⁵¹³ Again, a State Court with jurisdiction over war crimes; See for example the case of *Vladimir Kovacevic*, District Court of Belgrade, War Crimes Chamber, 26 July 2007. VK had originally been indicted at the ICTY (*Prosecutor v Pavle Strugar et al*, IT-01-42, 22 February 2001) but his case was referred to the Serbian authorities under ICTY Rule 11bis. The ICTY specifically indicted him for destruction or wilful damage to institutions for educational (damage to a university graduate centre, a kindergarten, two schools and a music educational centre). Much of this specificity disappeared in the Serbian indictment of 26 July 2007 (available on the website of the Office of the War Crimes Prosecutor, Belgrade) but reference was still made to 'damage to institutions of ... educational' nature. VK has not yet faced trial as he is suffering from mental health problems.

Regulations, Additional Protocol I to the Geneva Conventions and the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, and concluded that, even though these instruments do not refer to educational facilities *per se*,¹⁵¹⁴ educational facilities are ‘undoubtedly immovable property of great importance to the cultural heritage of peoples in that they are without exception centres of learning, arts, and sciences, with their valuable collections of books and works of arts and science’.¹⁵¹⁵ The Appeals Chamber clarified that, in order for educational facilities to qualify as cultural property, their ‘cultural or spiritual heritage...transcends geographical boundaries, and...are unique in character and are intimately associated with the history and culture of a people’.¹⁵¹⁶ Although not all educational buildings would fulfil these requirements, the Appeals Chamber stated that the crime of destruction of educational buildings as a war crime is part of customary international law.¹⁵¹⁷

Another Trial Chamber at the ICTY stated in relation to the offence of destruction or wilful damage to institutions dedicated to religion or education: ‘The damage or destruction must have been committed intentionally to institutions ... which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts’.¹⁵¹⁸ There is conflicting judicial opinion on whether it is a defence to the charge that the educational institutions were in the immediate vicinity of military objects.¹⁵¹⁹

5.3.3 Attacking Educational Facilities as a Crime against Humanity

Additionally, the targeting of educational facilities may be characterised as the crime against humanity of either persecution or, arguably, the commission of ‘other inhumane acts’ provided the specific acts attain the appropriate level of gravity.

The targeting of an educational facility as the crime against humanity of persecution was addressed, albeit tangentially, in the *Kordic and Cerkez* case. The Trial Chamber cited the World War II International Military Tribunal,¹⁵²⁰ the jurisprudence of the ICTY,¹⁵²¹ and the 1991

¹⁵¹⁴ Art 27 of the Hague Regulations specifies buildings ‘dedicated to religion, art, science or charitable purposes...’; Art 53 of Additional Protocol I specifies acts of hostility directed against ‘historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’; Art I of the Hague Convention specifies ‘movable or immovable property of great importance to the cultural heritage of every people’ and ‘buildings whose main and effective purpose is to preserve or exhibit the movable cultural property’.

¹⁵¹⁵ *Kordic and Cerkez* Trial Judgment, 26 February 2001, para 360

¹⁵¹⁶ *Kordic and Cerkez* Appeals Judgment, 17 December 2004, para 91

¹⁵¹⁷ *ibid*, para 92

¹⁵¹⁸ *Prosecutor v Mladen Naletilić & Vinko Martinović*, IT-98-34-T, 31 March 2003. See paras 604-605

¹⁵¹⁹ *ibid*, para 185 of the judgment stated that this would be a defence, although a different Trial Chamber in the same case disagreed.

¹⁵²⁰ The Trial of Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, 1950, 248 and 302. See also *The Attorney General v Adolf Eichmann*, Case 40/61, District Court of Jerusalem Judgement, 1961, para 57

¹⁵²¹ *Prosecutor v Tihomir Blaškić*, IT-95-14-T, 3 March 2000, para 227

International Law Commission Report,¹⁵²² in reaching a conclusion that the destruction of religious buildings is a clear case of persecution as a crime against humanity.¹⁵²³ The Trial Chamber held that the test of persecution is fulfilled through the destruction of institutions ‘dedicated to Muslim religion or education’. This reasoning must also apply to buildings in which students of other faiths are educated, or indeed to buildings in which secular education takes place.¹⁵²⁴ The Appeals Chamber affirmed the Trial Chamber’s ruling that the destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecution of equal gravity to other crimes listed in Article 5 of the ICTY Statute.¹⁵²⁵

Note that in these cases, the prosecution must additionally prove the *mens rea* of special persecutory intent, namely that the acts were carried out in order deliberately to discriminate against a particular group. In other words, an attack on a school might be considered as persecutory if the prosecution can prove that the attack was launched in the knowledge that the students belonged to particular national, ethnic, racial, religious or political groups. Where the attacked school contained several different student groups, the prosecution may find it difficult to establish the specific discriminatory intent of the accused.

It may also be arguable for an attack on an educational facility to constitute evidence of other crimes, for example genocide, although there are no trial or final judgments on this.¹⁵²⁶ A number of other cases have involved schools being used as detention camps and/or places of torture, violence, rape or murder. The use of such protected buildings for an unlawful purpose is contrary to IHL, although the convictions in such cases have been for the principal offences of murder, rape and persecutions as a war crime or a crime against humanity.¹⁵²⁷

¹⁵²² 1991 ILC Report, 268 (persecution may take the form of the ‘systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group’).

¹⁵²³ *Kordic and Cerkez* Trial Judgment, 26 February 2001, para 206

¹⁵²⁴ *ibid*, para 207

¹⁵²⁵ *Prosecutor v Dario Kordić and Mario Čerkez*, IT-95-14/2-A, 17 December 2004, para 108

¹⁵²⁶ In the prosecution’s application for a warrant for the arrest of Omar Al Bashir, the ICC cited bombing of schools as evidence of genocide and crimes against humanity, as well as the rape by Janjaweed militias of schoolgirls and the murder of a school head teacher (see paras 14, 112, 140, 232 and 234 of *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-157-AnxA, July 14 2008)

¹⁵²⁷ *Prosecutor v Vujadin Popović et al*, IT-05-88, 10 June 2010 (life imprisonment/35 years/19 years/17 years/13 years/5 years for charges of genocide, extermination and persecution as crimes against humanity and murder as a war crime for (inter alia) using schools as detention camps); *Prosecutor v Milan Simić*, IT-95-9/2-S, 17 October 2002 (pleaded guilty—5 years for participating in torture of prisoners at a school); *Prosecutor v Dragan Zelenović*, IT-96-23/2-S, 4 April 2007 (pleaded guilty, sentenced to 17 years for his part in torture and rape of women in schools); *Prosecutor v Stevan Todorović*, IT-95-9/1-S, 31 July 2001 (pleaded guilty to torture and beatings at schools, sentenced to 10 years); *Prosecutor v Dragan Obrenović*, IT-02-60/2-S, 10 December (pleaded guilty to persecutions as a crime against humanity, including assaulting and executing civilians at schools, sentenced to 17 years’ imprisonment); *Prosecutor v Vidoje Blagojević & Dragan Jokić*, IT-02-60-T, 17 January 2005 (convicted, VB 15 years, DJ 9 years, for crimes against humanity of persecutions, inhumane acts and aiding and abetting murder which took place in schools); *Prosecutor v Radoslav Brđanin & Momir Talić*, IT-99-36-AR73.9, 11 December 2002 (convicted, sentenced to 30 years for persecutions, torture, deportation, inhumane acts which took place inter alia at schools); *Prosecutor v Enver*

5.4 CONCLUSIONS

The protection of educational facilities is central to ensuring that education and the right to education are protected in situations of insecurity and armed conflict. Protecting educational facilities is also crucial to protecting the life and well-being of students and education staff, who spend most of their time within educational facilities. The importance of protecting educational facilities, particularly in respect of the military use of educational facilities, is highlighted with the endorsement of the Safe Schools Declaration by 95 States to date.

IHRL protects and promotes the rights of individuals and not physical structures. However, as this chapter showed, a number of human rights are relevant to the protection of educational facilities. In particular, the right to education implies the existence of functioning educational facilities. The human rights protection may be extended to the protection of other physical elements which are necessary for the realization of the right to education, such as books and computers, but also sanitation facilities. With regard to buildings, the human rights of people with disabilities must be particularly protected.

When a situation of violence reaches the threshold of IAC or NIAC, IHL applies. The fundamental IHL protection afforded to educational facilities in both types of conflict is the principle of distinction. Where educational facilities are civilian objects they are protected from deliberate and direct attack. This protection is also found under the provisions of ICL.¹⁵²⁸ The right to education is broad enough to include protection from deliberate attack of educational facilities in armed conflict, regardless of their private or public nature, and the combined effect of the right to property and the right to education mean that IHRL, IHL and ICL can provide strong, overlapping protection to civilian educational facilities from direct and deliberate attack.

However, under IHL¹⁵²⁹ and ICL,¹⁵³⁰ where educational facilities meet the two-step test set out in Article 52 of Additional Protocol I, they can become military objects and may be lawfully targeted. An educational facility may become a military object if by its nature, location, purpose or use it makes an effective contribution of military action, and its total or partial destruction, capture or neutralization in the circumstances at the time offers a party to the conflict a definite military advantage.¹⁵³¹

Hadžihasanović & Amir Kubura, IT-01-47-A, 22 April 2008 (Enver Hadžihasanovic convicted for cruel treatment at a Zenica music school, sentenced to 3½ years); *Prosecutor v Ivica Rajić*, IT-95-12-S, 8 May 2006 (pleaded guilty, sentenced to 12 years for his role in beatings and detention of men in schools); *Prosecutor v Dragoljub Kunarac*, IT-96-23 & IT-96-23/1-A, 12 June 2002 (all three defendants convicted and sentenced to 28, 20 and 12 years respectively for the crimes of rape and enslavement as a crime against humanity which took place, inter alia, at schools); *Prosecutor v Milorad Trbić*, IT-05-88/1 (case transferred to Bosnia courts, conviction by the State Court of BiH for genocide upheld by the Appeal Court, sentenced to 30 years for his participation in the detention and murder of civilians at, inter alia, schools).

¹⁵²⁸ See, for example, Art 8(b)(xiii) and Art 8(e)(xii) protecting property of an enemy in IAC and NIAC respectively.

¹⁵²⁹ Additional Protocol II, Art 52

¹⁵³⁰ Rome Statute, Art 8(2)(b)(ix) and (e)(iv), specific to educational facilities, Art 8(b)(xiii) and Art 8(e)(xii), for protection of property more generally.

¹⁵³¹ Additional Protocol I, Art 52

Educational facilities may lose their protection from targeting in situations where the armed forces of a party to a conflict use an educational facility, for example for storage of weapons or troops, when it becomes a military object and may be targeted. This creates significant implications for the safety and education of students and education staff.

IHL does not strictly prohibit the use of educational facilities by the military, and its failure to do so means that in some circumstances this use is permitted. In some circumstances such use of educational facilities by armed forces may result in an outright denial of a student's right to education (for example, where it is the only educational facility in a village) and a serious conflict between IHL and IHRL arises.

IHL prohibits indiscriminate attacks against educational facilities, although it permits incidental damage to civilian life and objects, including educational facilities, provided that the attack complies with the principles of military necessity and proportionately.¹⁵³² ICL sets out similar rules, prohibiting only intentional attacks or use of indiscriminate weapons.¹⁵³³

The avenues for redress for violations of the international law protections of education facilities, as well as the protections of students and education staff and the protection of education itself, are presented in Chapter 6.

¹⁵³² Which is different from the IHRL notion of proportionality. See discussion of the rules of military necessity and proportionality, above.

¹⁵³³ See, for example, Rome Statute, Arts 8(2)(a)(iv); (b)(ii) and (xx); and (e)(iv) and (xii)

6

Remedies and Mechanisms

International law makes clear that there is an obligation on a State to provide for effective remedies, including making reparation in respect of harm where the responsibility for the action can be attributed to the State.¹⁵³⁴ Violation of the right to education, and of other related rights and protections affecting education, is a breach of an international obligation of a State, with resulting harm, as was set out in Chapters 4 and 5.

In order to increase accountability for education-related violations, entities tasked with monitoring and reporting international law violations, such as UN Treaty Bodies and the Human Rights Council,¹⁵³⁵ but also NGOs, must ensure that they consider these types of violations are considered within their work. With regard to attacks against education taking place during armed conflicts specifically, the Guidance Note on Security Council resolution 1998 (2011), issued by the Office of the Special Representative of the Secretary-General, in cooperation with UNICEF, WHO and UNESCO, entitled ‘Protect Schools and Hospitals – End Attacks on Education and Healthcare’, clarifies the monitoring and reporting mechanism currently in place with regard to ‘education-related’ incidents, including by stating what incidents must be listed.¹⁵³⁶ The Guidance Note provides advice on advocacy and dialogue with parties to a conflict, as well as a template for an action plan to halt and prevent attacks (and threats of attacks) against schools and education staff.¹⁵³⁷ It also includes guidance on advocacy to prevent and reduce the military use of educational facilities and advocates for the support of the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict.¹⁵³⁸

¹⁵³⁴ See for example ICCPR, Art 2(3), under which States Parties need to provide remedies for any violation of an ICCPR provision. For further discussion of reparations within international law, see Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012)

¹⁵³⁵ For more on the role of the UN mechanisms, see Takhmina Karimova and others, *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed Conflict* (Geneva Academy of International Humanitarian Law and Human Rights/Protect Education in Insecurity and Conflict 2014)

¹⁵³⁶ This terminology follows that which was adopted in this Handbook, which refers to ‘education-related’ violations, see Guidance Note, p. 7. Annex II of the Guidance Note contains definitions of key terms, including a wide understanding of what can be considered a ‘school’. Note that, also in accordance with this Handbook, the Guidance Note highlights the effects that a general situation of insecurity may have on education, 11.

¹⁵³⁷ See 16–18

¹⁵³⁸ See 20; see also 11

The consequence of education-related violations is that those affected are denied the opportunity to obtain an education which could have substantial repercussions for their social and vocational development in later years.¹⁵³⁹ Given the frequent absence of meaningful social assistance programmes in many situations of insecurity and armed conflict (and post-conflict), some form of appropriately designed reparations programme provides one of the few avenues by which the harm inflicted by such violations can be addressed.

This chapter provides an introduction to the issue of remedies for harm to education and an introduction to the relevant mechanisms. It includes the various institutions, procedures and processes which exist at the international and regional level to provide for reparation for education-related violations. This chapter also briefly discusses various modalities of reparation which are used in practice (or which could be used) to redress harm to education.¹⁵⁴⁰

6.1 REMEDIES UNDER INTERNATIONAL LAW

According to the ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’¹⁵⁴¹ (Basic Principles on the Right to Remedy and Reparation):

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.¹⁵⁴²

While these Basic Principles on the Right to Remedy and Reparation concern mainly gross violations of IHRL and violations of IHL, its Principle 3 underlines that there is a duty to provide effective remedies, including reparation, for all forms of violation, which stems from the obligations to respect, ensure respect for and implement IHRL and IHL.

¹⁵³⁹ See Mark Jordans and others, ‘Systematic Review of Evidence and Treatment Approaches: Psychosocial and Mental Health Care for Children in War’ (2009) 14 Child and Adolescent Mental Health 2.

¹⁵⁴⁰ For a full analysis of reparations for education-related violations, see Francesca Capone and others, Education and the Law of Reparations in Insecurity and Armed Conflict (BIICL/Protect Education in Insecurity and Conflict 2013) <https://www.biicl.org/documents/204_6755_reparations_report21.pdf?show-document=1>

¹⁵⁴¹ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, adopted by UNGA Resolution 60/147: Note that these present a series of guidelines covering matters such as the form and scope of reparation aimed at grave violations of IHRL and IHL, rather than purporting to provide a general declaration of the law in the field of reparation.

¹⁵⁴² *ibid*, Principle 11: Although non-binding, these Basic Principles were adopted by a consensus resolution at the UNGA and thus represent universally accepted standards.

As a result, States shall offer ‘available adequate, effective, prompt and appropriate remedies, including reparation’.¹⁵⁴³ Thus remedies include ‘reparations’, with reparation being defined as the action taken to repair the consequence of a human rights violation including through ‘restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition’.¹⁵⁴⁴ The Human Rights Committee has noted that:

where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.¹⁵⁴⁵

In order to render access to justice equal to all victims of gross violation of IHRL or IHL, States must also provide the necessary assistance to victims.¹⁵⁴⁶

Various regimes, institutions, processes and mechanisms have, to a greater or lesser extent, responsibility for dealing with remedies at the international level. Under international law in general, a breach of an international obligation has two types of consequences for the breaching State:

- the creation of new obligations for the breaching State, being principally duties of cessation and non-repetition;¹⁵⁴⁷
- the creation of a duty to make full reparation.¹⁵⁴⁸

Although the impact of violations of IHRL or IHL on education is not often raised in remedial processes, it must be considered in order to provide for appropriate reparation to the victims of education-related violations. Hence the focus of this section is primarily on reparations.

The Obligation of Reparation

Where an internationally wrongful act occurs, whether in the form of a violation of IHRL or IHL, or a violation of some other rule of international law applicable to a State, an ‘immediate

¹⁵⁴³ *ibid*, Section I. 2 (c)

¹⁵⁴⁴ *ibid*, Principle 18: Note that the ILC Articles on State Responsibility cover the same forms. This was also set out in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1985, adopted by UNGA Resolution A/RES/40/34 (see Principle 8) <www.un.org/documents/ga/res/40/a40r034.htm>. See also Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press 2005), 7–8; See also Pablo de Greiff, *Handbook of Reparations* (Oxford University Press 2006), 452, where the same terminology is used for reparation. De Greiff discusses the juridical context of reparation (i.e. under international law), adding that this concept is also used in the design of programmes by States, i.e. ‘more or less coordinated sets of reparative measures’. These programmes are to benefit the victims directly, but here ‘truth-telling, criminal justice, or institutional reform’ are not part of reparations. He does not distinguish reparation from remedy but only mentions UDHR, Art 8, and its ‘effective remedies’, questioning what this concept means.

¹⁵⁴⁵ HRCCommittee, General Comment No 31, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 16

¹⁵⁴⁶ Basic Principles on the Right to Remedy and Reparation, Principle 12

¹⁵⁴⁷ ILC Articles on State Responsibility, Art 30

¹⁵⁴⁸ *ibid*, Art 31

corollary' of that act is the obligation to make reparation.¹⁵⁴⁹ This obligation of reparation arises regardless of whether an international court or tribunal has jurisdiction and requires a State to make reparation. It is instead an immediate consequence of the internationally wrongful act.

There has been a significant debate in recent years as to whether and in what respect individuals may have a right to reparation where international obligations of which they are beneficiaries have been violated. The position under the framework of IHRL must be distinguished from that in IHL, since the existence of such a right in one of these fields does not imply that there necessarily exists such a right in the other. In considering the different legal regimes which exist at the regional and universal levels regarding reparation, the following analysis will therefore consider whether an individual right to reparation has been recognised within the particular legal framework in question.

Scope of Reparation

Within the framework of international law, a well-established formula is applied to determine the scope of reparation required to remedy the consequences of an internationally wrongful act. This was set out by the Permanent Court of International Justice ('PCIJ') (the predecessor to the ICJ) in *Factory at Chorzów*, where the PCIJ observed that:

reparation must, so far as possible, wipe out all the consequences of the illegal act, and re-establish the situation which would, in all probability, have existed if that act had not been committed.¹⁵⁵⁰

This definition has been applied subsequently on numerous occasions by the ICJ, human rights supervisory mechanisms and a multitude of international tribunals.¹⁵⁵¹

The obligation to make reparation in international law was originally developed in the context of State responsibility, and therefore reparation was owed from one State to another. Thus where a State violates an international obligation, an injured State may invoke the responsibility of the responsible State or States, and require that they make reparation to that State. Therefore, in general, individuals or entities other than the injured State cannot invoke the responsibility of the responsible State under international law to claim reparation. However, where the obligations are *erga omnes*, which means that obligations are owed to the international community as a whole, then any State has a legal interest in the violation of a right enshrined in a treaty it is a party to. The structure of international human rights treaties can be seen as giving rise to *erga omnes* obligations.¹⁵⁵² In addition, within IHRL a number of legal regimes confer upon individuals a legal interest and standing to invoke the international responsibility of a State in order to claim reparation. Within the framework of IHL, a State which

¹⁵⁴⁹ ILC 'Commentary to Articles on State Responsibility' in the *Yearbook of the International Law Commission* (2001) Vol. II, Part Two, 91

¹⁵⁵⁰ *Factory at Chorzów (Germany v. Poland)*, Series A, No. 17, 1928, 47

¹⁵⁵¹ ILC 'Commentary to Articles on State Responsibility', in the *Yearbook of the International Law Commission* (2001) Vol. II, Part Two, 91

¹⁵⁵² HRCCommittee, General Comment 31, para 2

violates a rule of IHL has an obligation to make reparation to an individual harmed irrespective of a court of tribunal having jurisdiction.¹⁵⁵³

An important caveat is necessary: while the obligation to make reparation arises as an immediate corollary of an internationally wrongful act committed by a State, this obligation is not often complied with in practice. Under IHRL, this is because many States have not discharged their obligation to provide for an effective remedy and reparation under their domestic law. In addition, there is often no international court or tribunal with power to award reparation which has jurisdiction over the matter.

Reparation and Non-State Actors

Where education-related violations result from the conduct of non-State actors, the ability of an individual to seek reparation under international law depends on the relationship between the non-State actor and a State. There may, of course, be domestic remedies available.¹⁵⁵⁴

As mentioned in Chapter 2, human rights obligations are directly legally binding upon States rather than upon individuals or other non-State actors. Where victims are denied access to education by a non-State actor, since that actor is not directly bound by IHRL, the victims will not be able to obtain reparation for that violation, unless the conduct in question can be attributed to a State or for which the State has responsibility, as was explained in Chapter 2.¹⁵⁵⁵ The situation is similar under IHL. Although IHL is binding on non-State armed groups which are parties to an armed conflict, there is no practice to support the conclusion that non-State armed groups are liable for reparations for violations of IHL.¹⁵⁵⁶

Accordingly, where the conduct of non-State actors can be attributable to a State under principles of State responsibility, then the State will bear an obligation to make reparation just as it would in respect of a violation perpetrated directly by its officials.¹⁵⁵⁷ In addition, a State which

¹⁵⁵³ Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces', (1991) 40 *International and Comparative Law Quarterly* 827; Christopher Greenwood, 'International Humanitarian Law (Laws of War)', in Frits Kalshoven (ed), *The Centennial of the First International Peace Conference* (Kluwer 2000), 250; and Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', (2003) 85 *International Review of the Red Cross* 498, 506; See also Basic Principles on the Right to Remedy and Reparation.

¹⁵⁵⁴ While this Handbook deals with international legal regimes and their mechanisms, victims of education-related violations may have the possibility of bringing an action against non-State actors for violations of international law under domestic law.

¹⁵⁵⁵ See, for example, the ECtHR case *P.F. and E.F. v United Kingdom*, Application No 28326/09, 23 November 2010, relating to a long-running, at times violent protest in Belfast, which inhibited or prevented schoolchildren attending a local primary school. While recognizing psychological harm and the denial of access to education caused by the protest, the Court found the application inadmissible, as in the Court's view the State, through the police, had done what could be expected of it to ensure the children's access to education.

¹⁵⁵⁶ See, for example, the practice set out in ICRC CIHL Study, Rule 150

¹⁵⁵⁷ The question of attribution is a complex area of international law. See generally, ILC 'Commentary to Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission* (2001), Vol.II Part II, A/CN.4/SER.A/2001/Add.1

fails in its positive obligation to provide reasonable protection where a non-State entity interferes with an individual's human rights or violates IHL, will have an obligation to provide a remedy in respect of it. While most instances to date have involved a human rights monitoring body requiring a State to investigate a situation, other remedies are possible. Thus, for example, where a non-State group, through intimidation and violence, prevents a particular social group, for example women and girls, from accessing education, a State will be under a positive obligation to take reasonable steps to ensure that members of the group in question have access to education. Failure to do so gives rise to the obligation to make reparation, which, in these circumstances, may include an award for educational provision.¹⁵⁵⁸

6.1.1 The Right to Remedy and Reparation

International Human Rights Law

International and regional human rights treaties either impose an obligation on States parties to provide an effective remedy,¹⁵⁵⁹ or specifically provide for a right to an effective remedy.¹⁵⁶⁰ While a violation of a CPR is straightforward to identify given the immediate obligation upon States to fully respect, protect and fulfil CPR, it is more difficult to ascertain an ESCR violation. Given that the immediate obligation on States to take steps towards the full achievement of this right, States may sometimes be able to justify the non-fulfilment of ESCR, such as the right to education.¹⁵⁶¹ However, once a violation of an ESCR is established, victims are entitled to adequate reparation in the same manner as victims of CPR.¹⁵⁶²

The ECHR,¹⁵⁶³ the ACHR,¹⁵⁶⁴ and the Optional Protocol to the African Charter establishing an African Court of Human Rights¹⁵⁶⁵ also provide their respective courts with the power to award reparation to individuals where they find a violation of a right.

The treaty bodies each provide for the indication of 'interim measures', 'provisional measures' or 'precautionary measures', which may be indicated to a State in order to preserve the rights of the parties and avoid irreparable damage until such time as the case can be adjudicated on

¹⁵⁵⁸ Consider the case *Leyla Şahin v Turkey*, 10 November 2005

¹⁵⁵⁹ ICCPR, Art 2 (3)

¹⁵⁶⁰ UDHR, Art 8; ACHR, Art 25; ECHR, Art 13. They do not provide for a 'right to reparation' *per se*.

¹⁵⁶¹ This may be due to a lack of resources, a situation of force majeure or a limitation provided for by law. See Chapters 2 and 3 with regard to the limitation of these rights.

¹⁵⁶² See the Maastricht Guidelines, para 23

¹⁵⁶³ ECHR, Art 41, stipulates that if only partial reparation has been made under the internal law of a State Party 'the Court shall, if necessary, afford just satisfaction to the injured party'.

¹⁵⁶⁴ ACHR, Art 63, requires, in relevant part, that the court "shall rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

¹⁵⁶⁵ Art 27 of the Protocol provides that '[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'. See Protocol to the ACHPR on the Establishment of an African Court on Human and People's Rights, 9 June 1998, entered into force 25 January 2004, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2; The ACtHR issued its first judgment in December 2009

the merits.¹⁵⁶⁶ All of these bodies consider the indication of such measures to be binding on the State to which they are directed.¹⁵⁶⁷

The HRCCommittee, in examining communications relating to the ICCPR, has established a practice of setting out its view of the reparation that it considers ought to be made to affected individuals.¹⁵⁶⁸ Alongside this practice, the HRCCommittee has commented that the obligation to provide an effective remedy as contained in Article 2(3) of the ICCPR ‘requires that States Parties make reparation to individuals whose Covenant rights have been violated’.¹⁵⁶⁹ The Committee also stated that remedies provided pursuant to Article 2(3) “should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children”.¹⁵⁷⁰ States Parties have not always complied with the HRCCommittee’s views.¹⁵⁷¹

Other global supervisory mechanisms have also adopted a broadly similar stance. For example, as regards the CEDAW, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has interpreted Article 2(b) of CEDAW, which provides that States Parties undertake ‘[t]o adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women’, as imposing an obligation on States Parties to provide reparation where a breach of the Convention has caused harm. This includes breaches of Article 10, which guarantees for women the right of equal access to, and enjoyment of, education. Interpreting this obligation, the CEDAW Committee’s view was:

Subparagraph (b) [of Article 2] contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.¹⁵⁷²

¹⁵⁶⁶ See, for example, Optional Protocol on ESCR, Art 5

¹⁵⁶⁷ For example, for the HRCCommittee, such situations that fall under Rule 92 of the Rules of Procedure of the Human Rights Committee.

¹⁵⁶⁸ See, for example, *Lantsova v Russia*, Communication No 763/1997, 26 March 2002, para 11

¹⁵⁶⁹ HRCCommittee General Comment 31, para 16

¹⁵⁷⁰ *ibid*, para 15

¹⁵⁷¹ See Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law Politics and Morals* (3rd edn, Oxford University Press 2007), 913–914, which refers to the ‘consistent’ challenge by Australia of the Human Rights Committee’s views as a case study of State compliance with such views. Australia is noted as having at that time the ‘third highest number of registered cases’ with the Human Rights Commission.

¹⁵⁷² CEDAW, *Committee General Recommendation No 28, Core Obligations of States Parties under Art 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para 32

Article 6 CERD provides that States parties must provide ‘effective protection and remedies’ to all persons within their jurisdiction against violations of the Convention, as well as ‘the right to seek from ... [national] tribunals just and adequate reparation or satisfaction for any damage suffered as a result of...[racial] discrimination’. According to the CERD:

the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.¹⁵⁷³

In addition, Article 14 of the CAT provides that victims of torture must obtain redress and have ‘an enforceable right to fair and adequate compensation’.

The CRC has also stated that:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.¹⁵⁷⁴

Finally, special procedures established by the HRCCommittee are also relevant with regard to reparation within the IHRL framework. In particular, the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, created by the HRC in 2011, has the mandate to make recommendations for the protection of human rights in post-conflict situations, including with regard to the issue of reparations.¹⁵⁷⁵

International Humanitarian Law

As with any other form of internationally wrongful act, violation by a State of an obligation imposed upon it by IHL gives rise to an obligation to make reparation in accordance with the principles discussed above. This obligation forms part of customary international law applicable in both IAC and NIAC.¹⁵⁷⁶

¹⁵⁷³ CERD *General Recommendation No 26: Art 6 of the Convention*, 24 March 2000, para 2

¹⁵⁷⁴ CRC General Comment 5, para 24

¹⁵⁷⁵ HRC Eighteenth Session, *Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence*, 29 September 2011, A/HRC/18/L.22

¹⁵⁷⁶ ICRC CIHL Study, Rule 150

This section specifically examines those provisions of IHL instruments that address the issue of reparations. These IHL instruments exist alongside the general international law obligation to provide reparation.

A number of IHL treaty provisions, applicable in IAC, set out the obligation of a State to make reparation for a violation of IHL, at least as between States. Article 3 of Hague Convention IV provides:

A belligerent party which violates the provisions of the [annexed] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.¹⁵⁷⁷

Article 91 of Additional Protocol I reiterates this obligation, in precisely the same terms, in relation to violations of the Additional Protocol or of the Geneva Conventions. It has been argued that this obligation, as set out in the Hague Convention and Additional Protocol I, also provides for the obligation to make reparation to individuals for violations of IHL in IAC.¹⁵⁷⁸ There is a body of scholarly opinion in favour of its existence,¹⁵⁷⁹ as well as a number of judicial decisions.¹⁵⁸⁰ However, there are no examples of State's affording reparations to individuals under Article 3 of the Hague Convention IV and Article 91 of Additional Protocol I.

The IHL of NIAC is more limited in its recognition of the right to remedy and reparations of victims than the law of IAC. Neither Article 3 Common to the Geneva Conventions nor Additional Protocol II contains references to the right to remedy or reparation.

¹⁵⁷⁷ Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, entry into force 26 January 1910, 9 UKTS (1910)

¹⁵⁷⁸ Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 *International and Comparative Law Quarterly* 827; Christopher Greenwood, 'International Humanitarian Law (Laws of War)' in Frits Kalshoven (ed), *The Centennial of the First International Peace Conference* (Kluwer 2000), 250; and Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 498, 506

¹⁵⁷⁹ Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 536; Riccardo Pisillo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview' (2003) 1 *Journal of International Criminal Justice* 343; Albrecht Randelzhofer, 'The Legal Position of the Individual under Present International Law', in Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (Martinus Nijhof 1999), 231; Robin Hofmann, 'Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation Against States under International Law?' in Pierre-Marie Dupuy and others (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (N P Engel Verlag 2006), 357; Micaela Frulli, 'When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The Markovich Case' (2003) 1 *Journal of International Criminal Justice* 417; Marco Sassoli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *International Review of the Red Cross* 419; Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 5 *International Review of the Red Cross* 497

¹⁵⁸⁰ For example, *Ferrini v Federal Republic of Germany*, *Corte di Cassazione (Sezioni Unite)*, Judgment No 5044, 11 March 2004. This case and the subsequent attachment of German assets by Italian Courts led to Germany's instigating proceedings before the ICJ: *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ Rep. 99, 3 February 2012

In spite of the minimal and uncertain references to remedies and reparations contained in IHL instruments, it is uncontroversial that victims of education-related violations of IHL in both IAC and NIAC have a right to remedy and reparation under general principles of international law and customary international law.

International Criminal Law

Violations of ICL do not give rise to an automatic right to remedy or reparation under international law. This is because, as a criminal law regime, the purpose of ICL is to determine when violations of international law attract individual criminal liability and to establish procedures to prosecute such violations. Through the deterrent effect of its provisions, ICL is, in itself, a mechanism of IHRL and IHL that complements the additional right to remedies and reparations set out in this Chapter. It seeks to provide global justice, which is different from the individual justice for victims which sits at the heart of the mechanisms examined here. For this reason, until very recently with the development of limited reparations processes at the ICC, ICL has not contained mechanisms for providing a general remedy or reparation for violations of its provisions.¹⁵⁸¹

However, in recent years international criminal procedure (most notably within the framework of the ICC) has developed a limited ability for particular persons to receive reparation. Unlike IHRL and IHL, however, this is not automatic and requires that criminal proceedings be brought against an individual for that violation. Only those victims of an education-related violation that has been successfully prosecuted may be entitled to a remedy for that violation if so ordered by the court.¹⁵⁸²

6.2 INTERNATIONAL LEGAL MECHANISMS

As mentioned above, reparation may take different forms depending on the violation and the law that has been breached. The type of reparation is also dependent on the particular forum where reparation is sought. The choice of forum may depend on the type of violation but also on the purpose that the reparation seeks to achieve and on the remedies that the particular court or tribunal is lawfully allowed to make. It is worth noting that, no matter in which forum the reparation is sought, the right to a fair trial is always applicable.¹⁵⁸³ Therefore, this section introduces the main international legal mechanisms and some of the key case law. In keeping with the approach in this Handbook, the focus is on treaty body mechanisms, though there may be some other mechanisms available through general UN bodies.¹⁵⁸⁴

¹⁵⁸¹ Aside from limited access to restitution in the ICTY and ICTR, discussed below.

¹⁵⁸² Rome Statute, Art 75

¹⁵⁸³ ICCPR, Art 14

¹⁵⁸⁴ For example, the HRC has a form of complaints procedure, though it is limited, as discussed below: see UNGA Resolution 60/251 of 15 March 2006 in relation to the complaint procedure with no remedial element before the HRC.

6.2.1 International Human Rights Law Mechanisms

The human rights discussed in Chapters 3, 4 and 5, which are contained in international treaties, are binding legal obligations for their States Parties. These obligations also may give access to complaints at the international level before quasi-judicial bodies (international human rights bodies), as well as at the regional level before quasi-judicial (human rights commissions) and judicial bodies (human rights courts).

Although all of these human rights lead to binding obligations on the States parties to these treaties, States retain the primary obligation to provide for remedy and reparation under domestic law. Thus the issue regarding the justiciability of any human right within a national court should also be taken into account. This will depend on the specific constitutional and legislative approaches to treaties and customary international law obligations within each State. However, where a State has failed to provide for a means of effective remedy for a right under domestic law, for example by limiting its justiciability, it is in breach of its obligations under international law.¹⁵⁸⁵ This must be taken into account when considering claims based on IHRL.

In 2013, the UN Special Rapporteur on the Right to Education published a report on Justiciability and the Right to Education, analysing the enforcement of the right to education at the international, regional and national level in addition to the jurisprudence at these levels.¹⁵⁸⁶ It contains recommendations to make the justiciability of the right to education (and its enforcement) more effective, including through legislation, institutional strengthening, training, etc.¹⁵⁸⁷ Underlining that the ‘basic tenets’ of the right to education (free and compulsory primary education for all, progressive realisation of secondary and tertiary education and the immediate non-discrimination in their application) are universally recognised,¹⁵⁸⁸ it considers it part of customary international law.¹⁵⁸⁹

In addition, as set out in Chapter 2, it is necessary that the State has ratified the treaty; that the treaty is in force; that the relevant right is within the treaty; that all limitations, reservations and derogations are taken into account; and that the person bringing the claim has standing to bring a claim. In addition, if the complainant is taking the matter to an international court or tribunal then they must have legal standing (usually being a ‘victim’ of the violation) and usually they must first have exhausted all effective domestic remedies. This means that a claim must have been first considered within the national legal system, including available appeal procedures, or been subject to undue delay.

¹⁵⁸⁵ VCLT, Art 27: ‘[A] party may not invoke the provisions of its international law as justification for its failure to perform a treaty’.

¹⁵⁸⁶ HRC, *Report of the Special Rapporteur on the right to education, Kishore Singh, Justiciability of the Right to Education*, 10 May 2013. This report also highlights relevant jurisprudence at the international, regional and national levels (including both judicial and quasi-judicial mechanisms).

¹⁵⁸⁷ See XII Conclusions and Recommendations.

¹⁵⁸⁸ See para 13

¹⁵⁸⁹ See paras 55 et seq

Complaint Mechanisms within the International Human Rights Framework

At the international level, a number of UN treaty-monitoring bodies, which are often called ‘committees’, have competence to consider individual complaints or communications on human right matters.¹⁵⁹⁰ These complaints are usually brought by any individual, a group of individuals, or by someone else on behalf of the individual(s), claiming a violation of a right under a particular treaty, depending on the terms of that treaty. The perpetrator must be a State party to that treaty and it must have recognised the competence of the committee to consider such complaints.

The following treaties (listed alphabetically) all allow for individuals to bring complaints to the relevant treaty body:

- CAT: The Committee Against Torture may consider individual communications in relation to CAT regarding States parties that have made the necessary declaration under Article 22 of CAT.
- CEDAW: Pursuant to the First Optional Protocol to CEDAW, the CEDAW Committee may consider individual communications in relation to alleged violations of CEDAW by States Parties to the Protocol.¹⁵⁹¹
- ICERD: The CERD may consider individual communications in relation to ICERD regarding States parties that have made the necessary declaration under Article 14 of ICERD.
- CRC: The Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure allows the Committee on the Rights of the Child to consider individual communications of alleged violations of the CRC by State parties to that Protocol.¹⁵⁹² Both a child and his or her representative can file a complaint. In order for children’s rights to be protected and avoid possible reprisals, as well as to avoid the manipulation of children, protection measures have been put in place in relation to this procedure, including ‘child-sensitive procedures and safeguards’.¹⁵⁹³ With regard to grave or systematic violations, such as the involvement of children in armed conflict, this Optional Protocol also provides for a confidential inquiry procedure, which means that the Committee shall invite the concerned State party to cooperate with its investigation, which may include a visit to its territory.¹⁵⁹⁴

¹⁵⁹⁰ Note that state-to-state complaints are also possible. In 2018, the first inter-state communications were submitted under Article 11 ICERD <<https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx>>

¹⁵⁹¹ See Australian Human Rights Commission, ‘Mechanisms for advancing women’s human rights: a Guide to using the Optional Protocol to CEDAW and other international complaint Mechanisms’ (2011) <www.humanrights.gov.au/our-work/sex-discrimination/publications/mechanisms-advancing-women-s-human-rights-guide-using>

¹⁵⁹² The Third OP to the CRC entered into force in 2014 and currently counts 40 State parties and 20 signatories. So far, there has been two communications concerning education, one in France, which the Committee of the CRC considered inadmissible, and one in Spain, which was discontinued.

¹⁵⁹³ See the background release of the Committee on the Rights of the Child’s sixty-ninth session, 13 May 2015

¹⁵⁹⁴ *ibid*, Art 13

- CRPD: The CRPD Committee may consider individual communications in relation to the CRPD regarding States Parties to the Optional Protocol to the Convention on the Rights of Persons with Disabilities.
- CPRMW: The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families may consider individual communication under Article 77 of the Convention.
- ICAED: The Committee on Enforced Disappearances may consider individual communication under Article 31 of the Convention.
- ICCPR: Pursuant to the First Optional Protocol to the ICCPR, the HRCCommittee may consider individual communications in relation to alleged violations of the ICCPR by States Parties to the Protocol.
- ICESCR: The Optional Protocol to the ICESCR gives competence to the CESCER to receive and consider individual complaints ('communications...by or on behalf of individuals or groups of individuals') concerning violations of ESCRs, including the right to education, by States Parties to the Protocol.¹⁵⁹⁵

The UN treaty bodies have mostly dealt with education through the prohibition of non-discrimination. CERD considered in *D. R. v Australia*¹⁵⁹⁶ whether Australian laws restricting the complainant's rights to education (among other rights) on the basis of his national origin consisted of a violation of ICERD. In *Er v Denmark*,¹⁵⁹⁷ it considered an allegation of discrimination on the basis of the practice of a school to exclude students of non-Danish descent from being recruited as trainees by a carpentry firm. This amounted to a violation of the right of students to training (and thus a form of education).

The HRCCommittee, in *Waldman v Canada*, decided that Canada violated Article 26 ICCPR by providing funding for the schools of one religious group and not another.¹⁵⁹⁸ Again in relation to religion, the HRCCommittee decided that compulsory religious classes must be taught in an impartial manner and students must be able to exempt themselves from such a class.¹⁵⁹⁹ The Human Rights Committee has also stated that restrictions on religious expression in higher educational facilities which may restrict access to education violate Article 18 ICCPR.¹⁶⁰⁰ The HRCCommittee also considered the right to education of non-nationals in a complaint by Iranian

¹⁵⁹⁵ Art 2 of the Optional Protocol to the ICESCR (GA resolution A/RES/63/117) of 10 December 2008, adopted by the HRC by its resolution 8/2 of 18 June 2008. It entered into force in 2013 and currently counts 24 State parties and 25 signatories. In addition to communications, the OP-ICESCR also provides for Inter-State communications are also possible under Article 10 this Protocol and inquiry procedures which allows the CESCER to investigate particular situations, as well as inter-States complaint mechanisms.

¹⁵⁹⁶ *D.R. v Australia*, Communication No 42/2008

¹⁵⁹⁷ *Er v Denmark*, Communication No 40/2007

¹⁵⁹⁸ *Waldman v Canada*, Communication No 694/1996, 5 November 1999

¹⁵⁹⁹ *Unn et al v Norway*, Communication No 1155/2003, 3 November 2004

¹⁶⁰⁰ See *Hudoyberganova v Uzbekistan*, Communication No 931/2000, 8 December 2004, concerning a claim by a student that her right to freedom of thought, conscience and religion was violated as she was excluded from University on the basis of her refusal to remove the headscarf which she wore in accordance with her beliefs.

nationals who had arrived in Australia and were placed in immigration detention as they did not hold the required travel documents for entry into Australia. The complainants argued that the detention of their minor children violated Article 24(1) ICCPR. The HRCCommittee found, ‘...in the light of the State party’s explanation of the efforts undertaken to provide children with appropriate educational, recreational and other programs, including outside the facility, that a claim of violation of their rights under Art 24 has, in the circumstances, been insufficiently substantiated, for purposes of admissibility’.¹⁶⁰¹ On the basis of this case, child migrants fleeing from conflict affected States who may be subject to detention should be provided with appropriate educational programmes.¹⁶⁰²

The Human Rights Committee has also considered three separate communications in respect of Syrian Refugees in Denmark. In each of the communications, Kurds from the Syrian Arab Republic claimed asylum in Denmark, but these claims were rejected as they had first arrived and were registered as asylum seekers in Bulgaria or Greece. It was claimed, among other alleged violations, that if they were to be sent back to Bulgaria or Greece that the right to education would be violated as the children would face difficulties in accessing education because of poor integration for refugees and asylum seekers. However, the Committee held in each instance that they could be removed.¹⁶⁰³

The CESCR has considered a communication regarding a minor whose family had fled the violence in Colombia and lived in Ecuador. The minor in question was not allowed to participate in a sporting tournament in Ecuador as he was not a citizen. It was argued that this was discrimination and a violation of the right to education under Article 13 of the Covenant. The CESCR deemed the case inadmissible because not all available domestic remedies had been exhausted.¹⁶⁰⁴

Regarding the enforcement of the decisions of the human rights treaty bodies, if a body finds that a violation has taken place, it asks for the State party responsible for the violation to inform the body within a specified timescale to give effect to its findings. The human rights body may then engage in follow-up procedures and take further appropriate steps to ensure that the findings of the body are abided by.¹⁶⁰⁵ The level of compliance with the treaty bodies findings is variable.

There is also a complaint procedure, with no remedial element, before the HRC for ‘consistent patterns of gross and reliably attested violations of all human rights and all fundamental free-

¹⁶⁰¹ *D and E, and their Two Children v Australia*, Communication No 1050/2002, 9 August 2006, para 64

¹⁶⁰² See also *Omar Sharif Baban, on his own Behalf and on Behalf of his Son, Bawan Heman Baban, v Australia*, Communication No 1014/2001, 18 September 2003

¹⁶⁰³ *M.A.S., L.B.H. and their Children v Denmark*, Communication No 2585/2015, 18 December 2017; *R.I.H. et al v Denmark*, Communication No 2640/2015, 22 August 2017; *B.M.I. and N.A.K. v. Denmark*, Communication No. 2569/2015, 16 December 2016

¹⁶⁰⁴ United Nations Economic and Social Council, *Communication No. 3/2014 Views adopted by the Committee at its fifty-eighth session*, 6 to 24 June 2016, E/C.12/58/D/3/2014

¹⁶⁰⁵ For further information on individual communications see the website of the OHCHR <www.ohchr.org/EN/pages/home.aspx>

doms occurring in any part of the world and under any circumstances'.¹⁶⁰⁶ This applies to all Member States of the UN, irrespective of whether they are parties to any particular treaty, as the HRC is a UN body. The HRC also has a large number of thematic Special Procedures mechanisms, in the form of Special Rapporteurs, Independent Experts and Working Groups, many of which receive applications from individuals and groups and may attempt a form of remediation through a dialogue with the government. One mechanism, the Working Group on Arbitrary Detention, has a quasi-judicial procedural to determine whether a complainant has been detained arbitrarily. Many of the mechanisms also have urgent action procedures, by which they may intervene with a government to prevent a violation to a potential victim.

Finally, with regard to enforced disappearances, the HRC WGEID has stated that rehabilitation measures should also include access to education for child victims of enforced disappearances.¹⁶⁰⁷ Providing satisfaction to the indirect victims of enforced disappearance, such as with the disclosure of the truth with regard to what happened, can also be achieved through education (e.g. human rights education in the school curriculum, memorials, etc.).

Mechanisms within the Regional Human Rights Framework

This section discusses the principal mechanisms in place within the African system, the Inter-American system, and the European system.¹⁶⁰⁸ However, other systems, such as that under the Arab League,¹⁶⁰⁹ the Association of South East Asian Nations¹⁶¹⁰ and the Organization of Islamic Conference are not presented here, as there is no human rights mechanism in place to enable complaints under these systems. It is worth noting, however, that the Arab League has approved the Statute of the Arab Court of Human Rights in 2014, which has not yet entered into force and has been the object of criticism.¹⁶¹¹

¹⁶⁰⁶ See UNGA resolution 60/251 of 15 March 2006

¹⁶⁰⁷ HRCCommittee WGEID, *General Comment on Children and Enforced Disappearances*, 14 February 2013, A/HRC/WGEID/98/1, para 33

¹⁶⁰⁸ Summaries of Jurisprudence on the right to education was published by the Center for Justice and International Law (CEJIL) in 2014. It includes judgments of the IACtHR, the ECtHR, the African Committee of Experts on the Rights and Welfare of the Child and the UN's Human Rights Committee.

¹⁶⁰⁹ There is an Arab Human Rights Committee to monitor the Arab Charter: see Art 45 Arab Charter of Human Rights. The Arab Human Rights Committee repeatedly calls on States parties to submit their initial reports and on additional States to ratify the Charter: see for example, the Arab News, 16 August 2010, Arab Human Rights Committee Urge Members to send Human Rights Reports, by Halaa Hawari.

¹⁶¹⁰ A Working Group has been given the mandate to set up an intergovernmental human rights commission for ASEAN and to consider the possibility of establishing a human rights Court.

¹⁶¹¹ An unofficial translation of the Statute can be found at pp 35–43 of report of the International Commission of Jurists, 'The Arab Court of Human Rights: a Flawed Statute for an Ineffective Court', <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_law/shared/international_law/Prof_Clapham_website/docs/MENA-Arab-Court-of-Human-Rights-Publications-Report-2015-ENG.pdf>; See also Mervat Rishmawi, 'The League of Arab States Human Rights Standards and Mechanisms: Towards Further Civil Society Engagement – a Manual for Practitioners' (Open Society Foundations and Cairo Institute for Human Rights Studies, 2015), <www.cihrs.org/wp-content/uploads/2015/12/league-arab-states-manual-en-20151125.pdf>

With regard to the below regional mechanisms, additional cases can be found in ‘Education and the Law of Reparations in Insecurity and Armed Conflict’, which was published in 2013.¹⁶¹²

African Mechanisms

The African system for the protection of human rights has a less developed body of jurisprudence than either its Inter-American or European counterparts. This is, in part, because the African Court on Human and Peoples’ Rights was only established in 2004 by means of the Optional Protocol to the ACHPR creating an African Court of Human Rights. Nevertheless, the Optional Protocol does empower the court to make an order for reparation. Indeed, it must do so where it finds a violation.¹⁶¹³

The African Court on Human and Peoples’ Rights is meant to be merged with the Court of Justice of the African Union to form the African Court of Justice and Human Rights, which would also sit in Arusha (Tanzania). A key issue with the Protocol on the Statute of the African Court of Justice and Human Rights is the provision of immunity to heads of state or senior government officials for serious crimes as long as they are in office.¹⁶¹⁴

African Commission of Human Rights

Until the establishment of the African Court of Human and Peoples’ Rights, the African Commission of Human Rights, a quasi-judicial body, would receive complaints of violations of the ACHPR and issue non-legally binding views to the State in question where it was of the view that a violation had occurred. The Commission may undertake investigations,¹⁶¹⁵ and address situations of alleged rights violations through a communications procedure,¹⁶¹⁶ which can be initiated either by States parties to the Charter or by non-State entities.¹⁶¹⁷ For a communication to be considered by the Commission, the applicant State or party must have exhausted all

¹⁶¹² Francesca Capone and others, *Education and the Law of Reparations in Insecurity and Armed Conflict* (BIICL/Protect Education in Insecurity and Conflict 2013) <www.biicl.org/documents/204_6755_reparations_report21.pdf?showdocument=1>

¹⁶¹³ Protocol, Art 27, provides that ‘[i]f the Court finds that there has been violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation’; See Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights, 9 June 1998, entry into force 25 January 2004, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997). The African Court of Human Rights issued its first judgment in December 2009.

¹⁶¹⁴ See Art 46A of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted at the 23rd Ordinary Session of the Assembly of the AU.

¹⁶¹⁵ ACHPR, Art 46

¹⁶¹⁶ *ibid*, Arts 47–59

¹⁶¹⁷ Note that inter-State communications are also possible. Under Art 47, where a State Party (‘A’) to the Charter has good reason to believe that another State Party (‘B’) has violated the provisions of the Charter, State A may first submit in writing a communication to State B outlining in depth the details of the alleged rights violation. This communication should also be addressed to the Secretary General of the OAU and the Chairman of the Commission. State B has three months upon receipt of the Communication to respond, providing an explanation for the matter, and giving details as to the laws and procedure applicable. Should

domestic remedies, or such procedure must have been unduly prolonged.¹⁶¹⁸ In addition, every State Party to the AU is obliged to submit every two years a report to the African Commission¹⁶¹⁹ on the legislative or other measures taken with the view to giving effect to the rights set forth in the ACHPR.¹⁶²⁰

When considering communications, the Commission may mediate between affected parties to arrive at an amicable solution and prepare a report on the facts and findings, which is communicated to the State concerned and the Assembly of the Heads of State and Government.¹⁶²¹ It may also make recommendations to the Assembly as it deems appropriate.¹⁶²² Where the communications relate to a situation of “serious or massive violations”, the Commission draws these to the attention of the Assembly, which can request the Commission to undertake an in-depth study of the situation. The Commission may draw upon relevant regional and international conventions and standards, and, as subsidiary means of consideration, customary international law, general principles of law recognised by African States, African practice that conforms with regional and international law, as well as legal precedent and doctrine.¹⁶²³

The ACHPR does not, like other major modern human rights treaties, make specific provision for an obligation to remedy harm caused by a violation. In its view the African Commission has recognised that ‘[T]he main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the State concerned, which remedies the prejudice complained of’.¹⁶²⁴

Over time the Commission has recommended that States which it viewed as having violated the ACHPR take a range of measures to remedy the harm caused by the violation in question. The forms of reparation recommended have included declarations of wrongfulness,¹⁶²⁵ restitution¹⁶²⁶ and compensation.¹⁶²⁷

three months elapse and the situation has not been adequately addressed or resolved, either State may submit the matter to the Commission (Art 48). In the alternative, State A may also submit the matter directly to the Commission (Art 49). The Commission is also empowered to consider communications submitted by entities that are not States Parties (Art 55). Such communications must abide by the conditions set forth in Art 56. By simple majority, the Commission can consider which of such submitted communications the Commission will consider.

¹⁶¹⁸ ACHPR, Arts 50 and 56(5)

¹⁶¹⁹ *ibid*, Art 45

¹⁶²⁰ *ibid*, Art 62

¹⁶²¹ *ibid*, Art 52

¹⁶²² *ibid*, Art 53

¹⁶²³ *ibid*, Arts 60–61

¹⁶²⁴ *Free Legal Assistance and Others v Zaire*, Communication Nos 25/89, 47/90, 56/91, 100/93, October 1995, para 39

¹⁶²⁵ See *Alhassan Abubakar v Ghana*, Communication No 103/93, 31 October 1996, 833

¹⁶²⁶ *Constitutional Rights Project (in respect of Zamani Lakwot and others) v Nigeria*, Communication No 60/91, 22 March 1995, 133

¹⁶²⁷ *Union InterAfricaine des Droits de l’Homme, Fédération Internationale des Ligues des Droits de l’Homme, Rencontre Africaine des Droits de l’Homme, Organisation Nationale des Droits de l’Homme au Sénégal and Association Malienne des Droits de l’Homme v Angola*, Communication No 159/96, 11 November 1997, 1141

There have been two key communications regarding the right to education, brought before the Commission, involving complaints of many violations of human rights.¹⁶²⁸

Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia concerned the situation in Burundi caused by the embargoes imposed by the respondent States following the overthrow of the democratically elected leader of Burundi and the subsequent installation of a military leader.¹⁶²⁹ The applicants alleged that the embargo violated, inter alia, the right to education under Article 17(1) by preventing the importation of school materials.¹⁶³⁰ Responding to these allegations, Tanzania and Zambia conceded that, whilst not being the target of sanctions, educational materials were indirectly affected, and as a result such materials were subsequently added to the list of items not subject to the embargo.¹⁶³¹ The Commission accepted the submissions by the respondent States, accordingly rejecting the allegations made by the complainants. It held that the sanctions were not indiscriminate, were imposed for an appropriate purpose and did not violate international norms of non-intervention in the internal affairs of a State.¹⁶³²

In *Democratic Republic of Congo v Burundi, Rwanda and Uganda*,¹⁶³³ the Commission deemed that the armed activities that took place in the DRC, involving Uganda, Rwanda and Burundi, violated the right to education, among other human rights. These activities included:

The looting, killing, mass and indiscriminate transfers of civilian population, the besiege and damage of the hydro-dam, stopping of essential services in the hospital, leading to deaths of patients and the general disruption of life and State of war that took place while the forces of the Respondent States were occupying and in control of the eastern provinces of the Complainant State.¹⁶³⁴

The Commission recommended that adequate reparations be paid.

In *Mr. Eid Mohammed Ismil Dahrooj and two others (represented by AED and 4 others) v. Arab Republic of Egypt* it was claimed that coup leaders violated freedom of thinking, especially to that of university lecturers. However, the communication was struck out by the Commission on as the complainant failed to present evidence and arguments on admissibility in the required time.¹⁶³⁵

¹⁶²⁸ See also *Free Legal Assistance Group and Others v Zaire*, 2000. This concerned the closure of secondary schools and universities for a period of two years constituted a breach of the right to education (1991-1993)

¹⁶²⁹ *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Communication No 157/96, 29 May 2003

¹⁶³⁰ *ibid*, para 3

¹⁶³¹ *ibid*, para 24

¹⁶³² *ibid*, paras 75-79

¹⁶³³ *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication 227/99, May 2003

¹⁶³⁴ *ibid*, para 88

¹⁶³⁵ *Mr. Eid Mohammed Ismil Dahrooj and two others (represented by AED and 4 others) v Arab Republic of Egypt*, Communication No 614/16, 22 February 2018

In *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah / DRC*, the Commission found that the closures of universities and secondary schools for two years constitutes a violation of Article 17, the right to education.¹⁶³⁶

ECOWAS Community Court of Justice

One of the institutions of the Economic Community of West African States (ECOWAS), which includes 15 West African States, is the Community Court of Justice. This court has jurisdiction to hear human rights claims for violations committed by States parties to ECOWAS.

In *SERAP v Nigeria*,¹⁶³⁷ the plaintiff, the NGO Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP), rested their claim on violations of the ACHPR, including Article 17 on the right to education. It was argued that, as a result of the mismanagement and looting of funds allocated for basic education, Nigeria was depriving millions of children from access to primary education. The Court found the right to education as justiciable under the ACHPR and decided that all Nigerians are entitled to education as a legal and human right.

African Committee of Experts on the Rights and Welfare of the Child

States parties to the ACRWC are obliged to submit a periodic report to outline the steps that they have taken to give effect to the provisions of the Convention and the advances made in the realization of the rights contained therein. The African Committee of Experts on the Rights and Welfare of the Child (the 'Committee'), established in 2001, can respond to these periodic reports with comments and recommendations.¹⁶³⁸ It may also investigate situations and the steps taken by States to implement the Convention. The Committee has issued a number of observations and recommendations on matters relating to the right to education or access to education in general.

The ACRWC also provides for a complaints procedure which enables any individual, group, State party or the UN to petition the Committee relating to any matter covered by the Charter.¹⁶³⁹ To date, the Committee has received two communications, one of which has been finalised by the Committee. Both involve the right to education.

¹⁶³⁶ *Free Legal Assistance and Others v Zaire*, Communication Nos 25/89, 47/90, 56/91, 100/93, October 1995

¹⁶³⁷ *SERAP v Nigeria*, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10, 30 November 2010

¹⁶³⁸ ACRWC, Art 43

¹⁶³⁹ In contrast to the CRC. Plan and Save the Children 'Advancing Children's Rights: A Guide for Civil Society Organisations on how to engage with the African Committee of Experts on the Rights and Welfare of the Child' (Plan/Save the Children, 2009), <<https://resourcecentre.savethechildren.net/library/advancing-childrens-rights-guide-civil-society-organisations-how-engage-african-committee-0>>

In *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of the Children of Nubian Descent in Kenya v Kenya*,¹⁶⁴⁰ the complainants alleged numerous violations by the Kenyan Government,¹⁶⁴¹ including “consequential violations” of Article 11(3) on equal access to education. The Committee found that the Kenyan Government had violated the rights to a nationality of Nubian children in Kenya, as well as acting contrary to the right of non-discrimination. As a result of these violations, the Committee concluded that the Government had also violated the right to education of these children as they had less access to educational facilities, including fewer schools and a lower share of resources for education than comparable communities who were not comprised of Nubian children. The Committee recommended that the Government of Kenya adopt and implement a strategy to “ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities”.¹⁶⁴² It also appointed a member of the Committee to follow up on the implementation of this decision.

In *Hansungule, Acirokop and Mutangi v Uganda*,¹⁶⁴³ the Committee considered the violations of children’s rights in the northern region of Uganda as a result of the conflict with the Lord’s Resistance Army. This communication documented a series of serious systematic and massive human rights violations, including the deprivation of the right to education caused by the extreme poverty resulting from conflict in the region, notwithstanding the efforts by the Ugandan Government to improve the availability of universal education.¹⁶⁴⁴ The complainants engaged in sustained and detailed account of the various ways in which children in northern Uganda have had their right to education violated, citing General Comment 13 of the CESCR.¹⁶⁴⁵

Inter-American Human Rights System

Inter-American Commission on Human Rights

Established in 1959, the IACHR is an autonomous organ of the OAS,¹⁶⁴⁶ which can consider petitions and communications alleging violations of rights contained under the ACHR and also under the American Declaration of Human Rights (the latter of which covers some States, such as the United States of America, which are not parties to the ACHR) and to draw up a report

¹⁶⁴⁰ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of the Children of Nubian Descent in Kenya v The Government of Kenya*, Communication No.002/Com/2009, 22 March 2011, see in particular paras 63-65

¹⁶⁴¹ ACRWC, Art 6(2), (3) and (4) and Art 3

¹⁶⁴² Para 69(4)

¹⁶⁴³ *Hansungule, Acirokop, and Mutangi v The Republic of Uganda*, Communication, 13 June 2005

¹⁶⁴⁴ *ibid*, para 77

¹⁶⁴⁵ *ibid*, paras 77-98

¹⁶⁴⁶ Its mandate can be found in the OAS Charter, as amended by the 1967 Protocol of Buenos Aires, and ACHR as well as in the American Declaration of the Rights and Duties of Man.

on the basis of its investigations and findings.¹⁶⁴⁷ The IACommHR may also mediate between the applicants and the respondent States to reach an amicable settlement.¹⁶⁴⁸

Although the decisions of the Commission are not legally binding, in the event of non-compliance by a State with the IACommHR's recommendations, the case is referred to the court, provided that the State concerned has accepted its jurisdiction, and unless at least four members of the IACommHR reason against this referral.¹⁶⁴⁹ Generally, compliance with decisions of the IACommHR is not as good as decisions of the IACtHR.¹⁶⁵⁰

The IACommHR can decide whether to conduct country-specific monitoring and reporting.¹⁶⁵¹ In some instances, such general investigations may have enabled the IACommHR to acquire the evidence necessary to resolve a number of the pending individual cases.¹⁶⁵² In the days of authoritarian and military rule in Latin America, where there was little meaningful positive engagement with the quasi-judicial functions of the IACommHR,¹⁶⁵³ these on-site reports and comprehensive country reports were a useful way to clarify the situation.¹⁶⁵⁴

Under Article 44 of the American Convention, any "person or groups of persons, or any non-governmental entity legally recognized in one or more member States of the Organization" may submit petitions or communications to the IACommHR. In addition, States may opt to recognise

¹⁶⁴⁷ On the establishment of a right of private petition by the ACHR, see Par Engstrom and Andrew Hurrell, 'Why the Human Rights Regime in the Americas Matters' in Vesselin Popovski and Monica Serrano (eds), *Human Rights Regimes in the Americas* (United Nations University Press, 2010), 36; For a summary on the jurisprudence of the Inter-American system of human rights pertaining to children, see <www.cidh.oas.org/countryrep/Infancia2eng/Infancia2Cap2.eng.htm#B>

¹⁶⁴⁸ Art 48(1)(f)

¹⁶⁴⁹ Rule 45 (as amended) of the IACHR's Rules of Procedure

¹⁶⁵⁰ Christina M Cerna, 'The Inter-American System For the Protection of Human Rights' (2004) *Florida Journal of International Law* 195, 202

¹⁶⁵¹ The IACHR itself created its competence to undertake such investigations, construing the power to 'hold meetings' in any State into a mandate to conduct investigations into the country visited. See *ibid*, 199

¹⁶⁵² It appears that, in the past, high numbers of unresolved individual cases before the IACHR had been highly persuasive when the IACHR was determining whether to engage in country-specific investigations and general enquiries. Tom Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' (1997) *Human Rights Quarterly* 510, 522 and 530.

¹⁶⁵³ Monica Serrano, 'The Human Rights Regime in the Americas: Theory and Reality', in Vesselin Popovski and Monica Serrano (eds), *Human Rights Regimes in the Americas* (United Nations University Press 2010), 16

¹⁶⁵⁴ See, for example, the fallout of the 1979-80 report into the forced disappearances in Argentina to realise the impact that they had on shifting regional and international opinion and mobilizing the process of democratisation: Christina M Cerna, 'The Inter-American System For the Protection of Human Rights' (2004) *Florida Journal of International Law* 195, 198-199. Cerna goes as far to assert that 'the Inter-American Commission's greatest contribution to the Inter-American system has been in de-legitimizing nondemocratic governments by means of the monitoring conducted during its on-site visits, and as a result of the presentation of its country reports to the OAS political organs and to hemispheric public opinion in general'. Similarly, the former dictator of Nicaragua, Anastasio Somoza himself, expressly referred to a Commission report into Nicaragua as one of the causes of his defeat, see Felipe Gonzalez, 'The Experience of the Inter-American Human Rights System' (2009-2010) *Victoria University Wellington Law Review* 103, 109

the competence of the IACommHR to consider inter-State petitions, whereby one State party submits a petition alleging that another has violated rights set forth in the Convention.¹⁶⁵⁵ Ten States have recognised this inter-State jurisdiction.¹⁶⁵⁶ Applicants must have exhausted all domestic remedies and submitted the petition within six months of the notification of the final judgment of the national proceedings,¹⁶⁵⁷ unless domestic legislation does not provide acceptable levels of due process or there has been an undue delay in the rendering of the final decision.¹⁶⁵⁸

Inter-American Court of Human Rights

The IACtHR, which was also created under the ACHR,¹⁶⁵⁹ has greater powers than the IACommHR to rule on violations of Convention rights, and to order, where appropriate, remedies and reparation.¹⁶⁶⁰ Its decisions are legally binding.¹⁶⁶¹ In addition to rendering decisions, the IACtHR has an advisory function, through which member States and certain organs of the OAS can seek assistance in the interpretation of the Convention or other human rights instruments. When requested, the IACtHR may also advise on the compatibility of national legislation with international and regional human rights instruments.¹⁶⁶²

In addition to ratifying the Convention, it is also necessary for States to make a declaration recognizing the competence and jurisdiction of the IACtHR.¹⁶⁶³ Twenty-two States have accepted the IACtHR's jurisdiction, more than double the number having recognised the competence of the IACommHR.¹⁶⁶⁴ Under Article 68(1), member States also undertake to comply with the IACtHR's judgments. While State Parties and the IACHR are the only ones which have standing before the IACtHR,¹⁶⁶⁵ complainants can now bring their case directly from the IACommHR (which is the main way of access to the Court) to the IACtHR and can argue before the Court.

As noted above, the IACtHR has been wide-ranging in its interpretation of the right to an effective remedy contained in Article 25 of the ACHR, by requiring States parties, where appropriate, to provide reparation to individuals injured by violations of the Convention.¹⁶⁶⁶ Moreover,

¹⁶⁵⁵ ACHR, Art 45(1)

¹⁶⁵⁶ For the list of States, see <www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>

¹⁶⁵⁷ ACHR, Art 46

¹⁶⁵⁸ *ibid*, Art 46(2)

¹⁶⁵⁹ *ibid*, Ch.VIII

¹⁶⁶⁰ *ibid*, Art 63

¹⁶⁶¹ David J Harris, 'Regional Protection of Human Rights: The Inter-American Achievement', in David J Harris and Stephen Livingstone (eds) *The Inter-American System of Human Rights* (Clarendon 1998), 3

¹⁶⁶² ACHR, Art 64

¹⁶⁶³ *ibid*, Art 62

¹⁶⁶⁴ This may evidence the wariness of States towards independent mechanisms allowing the right to individual petitions.

¹⁶⁶⁵ ACHR, Art 61(1)

¹⁶⁶⁶ *Pueblo Bello Massacre v Colombia*, Series C No 140, 31 January 2006, para 212; *19 Tradesmen v Colombia*, Series C No 109, 5 July 2004, para 187; *Las Palmeras v Colombia*, Series C. No 96, 26 November 2002, para 65

the Court has repeatedly held that Article 63 of the ACHR—which obliges the Court to ‘rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party’—codifies a rule of customary international law¹⁶⁶⁷ and that, as a result, where a State party violates the Convention, it is under a ‘duty to make reparation and to have the consequences of the violation remedied’.¹⁶⁶⁸ Where the Court considers that a State party has failed to discharge this duty, it awards reparation pursuant to Article 63.

Despite the ACHR’s textual focus on civil and political rights, the Protocol on ESCR gives some additional jurisdiction to the IACtHR if ratified by the relevant State (for which there are still few ratifications). While the IACtHR has not yet found a State to be in violation of Article 26 of the ACHR, the sole provision of the Convention that refers to ESC rights,¹⁶⁶⁹ it has adopted what has been termed as an ‘integrated approach’ to rights.¹⁶⁷⁰ This is its attempt to make ‘economic and social rights justiciable within the context of the right to life’, using the notion of the *vida digna*, the right to live a dignified life.¹⁶⁷¹

In *Jehovah’s Witnesses v Argentina*,¹⁶⁷² the IACommHR was called upon to determine the legality of a decree passed by the President of Argentina on the closing of all halls of the Kingdom of the Jehovah’s Witnesses (a religious group) and the outlawing of any literature and practice of that religion. As well as the right to religious freedom, the IACommHR considered whether the decree and its enforcement also violated the right to education, as more than 300 children of primary age had been dismissed from school or prevented from enrolling into school because of their religious convictions. Those who continued their education at home were denied the opportunity to sit exams to obtain a qualification, again on the basis of their religious affiliations. The IACommHR concluded that the decree and its implementation violated, inter alia, the right to equal opportunity in education and, more generally, the right to education.¹⁶⁷³ The

¹⁶⁶⁷ *Baldeón-García v Peru*, Series C. No 147, 6 April 2006, para 175; *Velásquez Rodríguez v Honduras*, Series C No 7, 21 July 1989, para 25

¹⁶⁶⁸ *ibid*

¹⁶⁶⁹ Lea Shaver, ‘The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?’ (2010) *Washington University Global Studies Law Review* 639, 661: Thus the IACtHR may be unwilling to enforce ESC rights *per se*.

¹⁶⁷⁰ Monica Feria Tinta, ‘Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’ (2007) *Human Rights Quarterly* 431, 437: stating that the IACHR and the IACtHR ‘consistently developed jurisprudence following what may be called the indivisibility and interdependence of rights approach. The right to life or right to humane treatment appears interwoven with the right to health, the right to livelihood, the right to food, or the right to education in its *jurisprudencia constante*. The right to existence of indigenous populations (with their own social and cultural specificities) has appeared in the interpretation of the right to life, the right to integrity, and the right to property, linked to the right to health, to education, and to the social and cultural rights of such populations’.

¹⁶⁷¹ Jo M Pasqualucci, ‘The Right to a Dignified Life (*Vida Digna*): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American System’ (2008) *Hastings International and Comparative Law Review* 1, 4

¹⁶⁷² *Jehovah’s Witnesses v Argentina*, Report No 45/78, 29 June 1979

¹⁶⁷³ American Declaration on Human Rights, Art XII

Commission recommended to Argentina to repeal the decree, end the persecution of Jehovah's Witnesses, re-establish the observance of religious freedom, and to provide information as to the manner in which it has implemented those recommendations.

In *Monica Carabantes Galleguillos v Chile*,¹⁶⁷⁴ a girl was expelled from a subsidised private school for being pregnant. The applicants in this case alleged that, by virtue of its failure to punish or take appropriate measures against the private school for its conduct, the Chilean State was internationally responsible for violations of the girl's rights. The cases led to a settlement, which included the provision of a scholarship for the girl to complete her education, as well as 'symbolic reparation' by way of the publication of the measures taken by the State, and public recognition of the rights that had been violated. Furthermore, the State undertook to take steps to 'disseminate recent legislation (Law N° 19,688), amending the Education Act, which contains provisions on the rights of pregnant students or nursing mothers to have access to educational establishments'.¹⁶⁷⁵

In the *Case of the Girls Yean and Bosico v Dominican Republic*,¹⁶⁷⁶ two girls born to Haitian mothers, who, despite having being born in the Dominican Republic, had been denied citizenship. It was argued that the officials responsible for the processing of birth certificates had been instructed not to grant certificates to children born of Haitian descent, and whose parents were in the country illegally at the time of the child's birth. As a consequence of her lack of citizenship, one of the girls was prevented from attending school and had to enrol at evening adult classes instead, which violated her right to special child protection.¹⁶⁷⁷ While the application was pending, the IACommHR adopted precautionary (interim) measures to ensure that the two girls did not suffer irreparable harm.¹⁶⁷⁸ The State subsequently provided the girls with birth certificates but refused to acknowledge that its conduct had violated their rights and thus it did not provide compensation for the harm suffered, nor did it take measures to prevent non-repetition.¹⁶⁷⁹

In *Advisory Opinion on the Juridical Condition and Human Rights of the Child*, the IACtHR referred to the right to education in its analysis of other rights of the child, such as the right to a fair trial, the right to judicial protection, and the right to life.¹⁶⁸⁰ The IACtHR considered that the right to life imposes the obligation to 'provide the measures required for life to develop under decent conditions', which includes facilitating the full exercise of the economic, social and cultural rights of children, such as the right to education.¹⁶⁸¹ The right to education was viewed

¹⁶⁷⁴ *Monica Carabantes Galleguillos v Chile*, Case 12.046, 12 March 2002

¹⁶⁷⁵ *ibid*, para 14

¹⁶⁷⁶ *Case of the Girls Yean and Bosico v Dominican Republic*, Case 12.189, 22 February 2001

¹⁶⁷⁷ *ibid*, para 185

¹⁶⁷⁸ Either through being expelled from the country for their lack of paperwork, or prevented from attending school and enjoying their right to receive and education, see <cidh.org/annualrep/2000eng/ChapterIII/Admissible/Dom.Rep12.189.htm> para 4

¹⁶⁷⁹ *Case of the Girls Yean and Bosico v Dominican Republic*, Case 12.189, 22 February 2001, para 27

¹⁶⁸⁰ *Juridical Condition and Human Rights of the Child*, Advisory Opinion, No OC-17/2002, 28 August 2002

¹⁶⁸¹ *ibid*, paras 80–86

by the IACtHR as being the primary means through which ‘the vulnerability of children is gradually overcome’.¹⁶⁸²

In *Juvenile Re-education Institute v Paraguay*, the IACtHR considered conditions of detention and held that one of the specific obligations of States with respect to interned children is to provide children deprived of their liberty with education programmes.¹⁶⁸³ This obligation, it opined, can be derived from the ‘pertinent provisions of the Convention on the Rights of the Child and Article 13 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights’,¹⁶⁸⁴ stating that ‘[s]uch measures are of fundamental importance inasmuch as the children are at a critical stage in their physical, mental, spiritual, moral, psychological and social development that will impact, in one way or another, their life plan’.¹⁶⁸⁵ The State had here failed to provide adequate education programmes to children in detention.

See also *Yakye Axa Indigenous Community v Paraguay*, which is discussed in Chapters 4 and 5, in which the IACtHR considered the alleged mishandling of a land claim by Indigenous peoples and its consequences, including the violation of the community’s right to education.

In another case concerned with Indigenous communities, *Coc Max et al. (Massacre of Xamán) v Guatemala*, the IACtHR considered the attack of the Mayan community of Xamán by the Guatemalan army during the internal armed conflict in 1995, during which 11 people were killed and 29 injured. The IACtHR noted that a 16-year-old was part of the battalion that attacked the community of Xamán. The presence of the minor in the attack was evidenced by the findings of Guatemala’s Commission for Historical Clarification. However, since the child was not one of victims of the community, but was one of the perpetrators, the Court stated that it was impeded from considering him a victim and from examining his situation. Nevertheless, the Court noted that ‘international human rights law requires the imposition of restrictions to the recruitment of children in armed forces’.¹⁶⁸⁶ This case is significant as it acknowledges the higher threshold contained within IHRL, as opposed to IHL, pertaining to the age at which an individual can be recruited and used for military purposes, namely 18 rather than 15. This case is also significant as despite the acknowledged restrictions imposed by IHRL, the IACtHR failed to recognise the child soldier as a victim.

European Mechanisms

The European Court of Human Rights (‘ECtHR’) monitors compliance with the ECHR. In addition there is the ESC, which introduced the protection of social and economic rights into the European human rights framework, and now the Fundamental Rights Charter under the European Union.

¹⁶⁸² *ibid*, para 88

¹⁶⁸³ *Juvenile Re-education Institute v Paraguay*, 2 September 2004

¹⁶⁸⁴ *ibid*, para 172

¹⁶⁸⁵ *ibid*

¹⁶⁸⁶ *Coc Max et al. (Massacre of Xamán) v Guatemala*, Series C No. 356, August 22, 2018, para 114

European Court of Human Rights

The ECHR established the ECtHR, which hears complaints regarding States' violations of the human rights contained within the ECHR and makes binding and final decisions. Complaints can be made either by individuals or by other State Parties. In order for a complaint to be made to the ECtHR regarding the right to education under the Protocol 1, it is necessary for the State in question to have ratified the Protocol as well.¹⁶⁸⁷ If the Court finds that a violation of the Convention has occurred, States are legally bound to execute the judgments by paying compensation, and adopting other measures. These can include: restoring the applicant's rights, reopening domestic proceedings or reviewing domestic decisions, and sometimes will require the respondent State, and possibly other States, to take general measures to comply with the judgment, such as amending national legislation.

The ECtHR has held that, in respect of allegations of serious violations involving death, torture or enforced disappearance by State agents, the right to an effective remedy enshrined in Article 13 of the Convention requires a State Party to provide compensation 'where appropriate' to the individuals concerned.¹⁶⁸⁸ The repeated references by the Court to the provision of compensation 'where appropriate'¹⁶⁸⁹ reflect its general position that Article 13 does not provide an independent right to a remedy.¹⁶⁹⁰ However, the Court has consistently held that:

a breach imposes on the respondent State a legal obligation to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach...[yet States parties are] free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory Statements in this regard.¹⁶⁹¹

The supervision of the implementation of a judgment of the ECtHR is provided for under Article 46(2) of the ECHR, which falls under the supervision of the Council of Europe's Committee of Ministers. This is in contrast to the IACtHR, which retains jurisdiction to see that adequate arrangements have been put in place to implement the terms of its judgment.

¹⁶⁸⁷ Forty-seven Member States of the Council of Europe have signed Additional Protocol 1 of which 45 have also ratified the Protocol. For more information relating to the signing and ratification of Additional Protocol 1, see <conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=7&DF=23/01/2012&CL=ENG>

¹⁶⁸⁸ See *Tanrikulu v Turkey*, 30 EHRR 950, 8 July 1999, para 117; *Aydin v Turkey*, 25 EHRR 251, 25 September 1997, para 103; *T.P. and K.M. v United Kingdom*, 34 EHRR 42, 10 May 2001, para 110

¹⁶⁸⁹ *ibid*

¹⁶⁹⁰ See *McCann and others v United Kingdom*, 21 EHRR 97, 5 September 1995, para 219. However, see also *Kelly and others v United Kingdom*, 37 EHRR 52, 4 May 2001

¹⁶⁹¹ See, for example, *Akdivar and others v Turkey*, Application No 21893/93, 1 April 1998, para 47; *Iatridis v Greece*, Application No 31107/96, 19 October 2000, para 32. As a consequence, in contrast to the IACtHR, the ECtHR does not award forms of reparation such as rehabilitation. But *Assanidze v Georgia*, 39 EHRR 32, 8 April 2004, at para 203, 39

With regard to the right to education, the ECtHR has produced a specific guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, which includes case law.¹⁶⁹² Several of the key cases concerning the interpretation of the right to education under Article 2 of Protocol 1 are discussed below.¹⁶⁹³ In the *Belgian Linguistic Case*, the Court considered the situation of a group of French-speaking parents whose children were denied access to the French schools in some Dutch-speaking suburbs of Brussels in Belgium on the grounds that the families did not live in those districts. However the Dutch-speaking schools were open to anyone, irrespective of where they lived. The Court found that there had been a violation of Article 14 of the ECHR (non-discrimination) as the legislation prohibited the children from having access to French-language schools solely on the basis of the residence of their parents. However the Court did not find a violation of Article 2 Protocol 1 on its own. The Court held that the right to education does not require States to establish at their own expense education of any particular type and therefore does not guarantee children a right to obtain instruction in a language of their choice. The Court added that ‘the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be’.¹⁶⁹⁴ However, the Court went on to make clear:

The negative formulation indicates that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol.¹⁶⁹⁵

In *Cyprus v Turkey*, which is also discussed in Chapter 4.1.3 with regard to the protection from ill-treatment, the ECtHR considered the consequences of the occupation of Northern Cyprus by Turkish armed forces. Cyprus alleged a number of violations by Turkey under the ECHR, including a violation of Article 2 of Protocol 1. Cyprus alleged that Greek Cypriot children living in Northern Cyprus were denied secondary-education facilities and that Greek-Cypriot parents of children of secondary-school age were in consequence denied the right to ensure their children’s education in conformity with their religious and philosophical convictions. The Court drew attention to the fact that there was actually no denial of the right to education in the strict sense, due to the fact that children in Northern Cyprus, on reaching the age of 12, could continue their education at a Turkish or English-language school. The Court also declared that Article 2 of Protocol 1 does not have a language component as it does not specify the language in which education must be provided for the right to education to be respected.

¹⁶⁹² ECtHR, Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, Right to education, Updated on 31 August 2018

¹⁶⁹³ See also *Kjeldsen and others v Denmark*, Application No 5095/71, 7 December 1976; *Timishev v Russia*, Application No 55762/00 and 55974/00, 13 December 2005.

¹⁶⁹⁴ *Case Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium v Belgium*, Application No 1474/62, 23 July 1968, para 3

¹⁶⁹⁵ *ibid.*

However, the Court declared that the option for the children to continue their education in Turkish was unrealistic given that the children had already received their primary education in Greek. Therefore, the failure of the Turkish Republic of Northern Cyprus to make continuing provision for education in Greek at secondary school level was considered a denial of the substance of Article 2 of Protocol 1.¹⁶⁹⁶ The Court also reasoned that the provision of secondary education in Greek in the South did not fulfil the obligation laid down in Article 2. This was in part due to the fact that Greek-Cypriot children attending schools in the South were not allowed to return permanently to the North after attaining the age of 16 in the case of males and 18 for females. Prior to reaching this age-limit, certain restrictions applied to the visits of students to their parents in the North.¹⁶⁹⁷ A violation of Article 10 was also held to have occurred in so far as school books destined for use in primary schools had been subject to excessive measures of censorship.¹⁶⁹⁸

This judgment would have been clearer if the Court had, in line with the reasoning in the *Belgian Linguistic Case*, held that the restrictions were unreasonable and inappropriate and therefore discriminatory.¹⁶⁹⁹ As it is, the main reason for the breach of the right to education—the absence of Greek-language secondary education—could, in theory, be overcome by abolishing all education in Greek, which could not be the intent of the ECHR. This case also demonstrates that an occupying State can be held responsible for the provision of education to the citizens of the State it is occupying.

In *Catan and others v Moldova and Russia*,¹⁷⁰⁰ the ECtHR found that Russia violated the right to education of ethnic Moldovans living in Transnistria. It awarded compensation for the violation of this right. The applicants (children, parents and teachers) brought the claim as a result of the adoption of a law by the separatist administration in Transnistria banning and criminalising the use of Latin script in schools. The case was brought against Moldova, where the territory is situated, and Russia, as Russian support is essential to the establishment and maintenance of the separatist administration in the region.

In another case linked to education in a specific language, namely *Çölgeçen and Others v Turkey*, university students of Kurdish ethnic origin were suspended or excluded as a result of them petitioning for Kurdish language classes to be introduced as an optional module. It found that the denial of the right to education on account of the disciplinary sanctions imposed on them admissible and that there had been a violation of the right to education under Article 2 of Protocol No. 1 to the Convention.¹⁷⁰¹

¹⁶⁹⁶ *Cyprus v Turkey*, Application No 25781/94, 10 May 2001, para 278

¹⁶⁹⁷ *ibid*, para 43

¹⁶⁹⁸ *ibid*, para 254

¹⁶⁹⁹ See the Open Society Institute, 'The right to education and minority language', <www.soros.org/resources/articles_publications/articles/education-minority-language-20042501/edminlang.pdf>, 2

¹⁷⁰⁰ *Case of Catan and Others v Moldova and Russia* (Applications nos 43370/04, 8252/05 and 18454/06) ECtHR Grand Chamber Judgment (Merits and Just Satisfaction) 19 October 2012

¹⁷⁰¹ *Çölgeçen and Others v Turkey*, Application Nos. 50124/07, 53082/07, 53865/07, 399/08, 776/08, 1931/08, 2213/08 and 2953/08, 28 May 2018, at [5–9], 15

In addition, in *Eğitimve Bilim Emekçileri Sendikası v Turkey*,¹⁷⁰² the ECtHR considered a claim involving the dissolution of a trade union of education-sector employees on the ground that its statute prohibits teaching in a mother tongue other than Turkish. The union removed this provision to avoid being dissolved. The Court held that there was a violation of Article 11 (freedom of assembly and association).

The ECtHR also heard a number of cases that considered violations of the right to education based on other forms of discrimination. In *Çam v Turkey*, the applicant alleged a violation of the right to education on account of suffering discriminatory treatment due to her blindness. She applied to university to study music, but her application for enrolment was rejected as her course was considered as necessitating eyesight. The Court found that there had been a violation of Article 14 of the Convention taken in Conjunction with Article 2 of Protocol No 1.¹⁷⁰³

In *Sampani and Others v Greece*,¹⁷⁰⁴ the ECtHR considered for the first time the application of Article 46 (binding force and execution of judgments) in relation to a violation of the right to education. After finding that Roma children had been discriminated against, the ECtHR held that Greece should take action to provide them with schooling.

Finally, in *Kjeldsen, Busk Madsen and Pedersen v Denmark*,¹⁷⁰⁵ the Court considered whether the provision of education had itself violated the right to education under Article 2 of Protocol 1 to the ECHR, which provides that ‘the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions.’ The applicants had argued that the Danish Government had violated this provision by refusing to exempt the applicants’ children from compulsory sex education lessons in school. The Court rejected the applicants’ claim that an integrated sex education curriculum violated their right to choose the religious and moral education of their children. However, the Court emphasised the need for such information, if included in the curriculum, to be ‘conveyed in an objective, critical and pluralistic manner’.

European Committee of Social Rights

The European Charter established the European Committee of Social Rights, which is responsible for monitoring compliance of States parties to the Charter and revised Charter. In 1995, an Additional Protocol to the Charter was adopted to introduce a system of collective complaints for violations of the Charter.¹⁷⁰⁶ It does not allow for individual complaints. Rather,

¹⁷⁰² *Eğitimve Bilim Emekçileri Sendikası v Turkey*, 25 Sep 2012

¹⁷⁰³ *Çam v Turkey*, Application No 51500/08, 23 May 2016, at [6–15], 15

¹⁷⁰⁴ *Sampani and Others v Greece*, 11 December 2012

¹⁷⁰⁵ *Kjeldsen and others v Denmark*, Application No 5095/71, 7 December 1976, para 53. This was confirmed in several other ECtHR cases regarding the second sentence of Art 2, including *Hasan and Eylem Zengin v Turkey*, Application No 1448/04, 9 October 2007, which concerned the question of religious teaching based on a Sunni interpretation of Islam clashing with religious convictions of parents of Alevi faith, and the *Folgero and Others v Norway*, Application No 15472/02, 29 June 2007, which concerned the religious teaching of Christianity clashing with the philosophical convictions of non-Christian parents.

¹⁷⁰⁶ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Additional Protocol) 1995, in force since 1998; it has 12 States Parties.

the complaints are collective in two ways: firstly, only certain categories of non-governmental organizations, trade unions and employers' organizations can lodge a complaint and, secondly, a complaint may only concern a general situation; individual situations may not be submitted. The Committee has established a number of rules concerning the interpretation of the Charter in the course of examining collective complaints. The general approach was most fully laid out in the *International Federation of Human Rights Leagues (FIDH) v France* case,¹⁷⁰⁷ in which the Committee affirmed that the Charter was to be interpreted in accordance with the VCLT and as a human rights instrument to complement the ECHR. The Committee documented the interaction between the two sets of rights and recognised that the Charter must be interpreted so as to give life and meaning to fundamental social rights and that restrictions on rights are to be read narrowly in such a manner as to preserve intact the essence of the right and the overall purpose of the Charter.¹⁷⁰⁸

One serious criticism of the European Committee of Social Rights is the fact that the Committee has no power to order remedies.¹⁷⁰⁹ As a system of collective complaints, the 1995 Additional Protocol does not give the Committee the capacity to order remedies; it only has the power to declare situations to be incompatible with the Charter and revised Charter. It has stayed strictly within the limits of its powers and makes declaratory decisions, rejecting claims for compensation.¹⁷¹⁰ Nonetheless, the Committee has established itself as the sole body with competence to provide authoritative legal interpretations of the Charter and revised Charter, both in the reporting process and in complaints.

European Court of Justice

The CFR applies to EU bodies and institutions and Member States of the EU, solely in the context of their activities within the scope of EU law.¹⁷¹¹ Under the Charter, EU nationals

¹⁷⁰⁷ *International Federation for Human Rights Leagues (FIDH) v France*, No 14/2003, paras 27–29. All Committee decisions may also be found on the Council of Europe website <www.coe.int> The case concerned a restriction in French law by which illegal immigrants with very low incomes did not qualify for free medical assistance in the same way that others with very low incomes did. The committee held that this legislation which denies entitlement to medical assistance to foreign nationals, even if they are within the territory of the State party illegally, is contrary to the Charter.

¹⁷⁰⁸ *International Federation for Human Rights Leagues (FIDH) v France*, Complaint No 14/2003, 3 November 2004, paras 27, 28 and 29; See also *International Commission of Jurists v Portugal*, Complaint No 1/1998, 9 September 1999; *Mental Disability Advocacy Centre (MDAC) v Bulgaria*, Complaint No 41/2007, 3 June 2008

¹⁷⁰⁹ See Holly Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 Human Rights Law Review 61; Tonia Novitz, 'Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter' (2002) European Human Rights Law Review 50

¹⁷¹⁰ For example, a claim for compensation was made in *Confederation Francaise de l'Encadrement v France*, Complaint No. 9/2000, 6 November 2000, para 58. However, it has made requests to the Committee of Ministers to make a contribution to the costs of a successful complaint in *European Roma Rights Centre v Greece*, Complaint No 15/2003, 8 December 2004, although the Committee did not agree to these requests.

¹⁷¹¹ Charter of Fundamental Rights of the European Union, Art 51

cannot claim a right to education in their home State, but can do so if they move to another Member State.¹⁷¹²

The case law of the ECJ on the right to education has generally concentrated on the right to equal access and non-discrimination.¹⁷¹³ Students, workers or workers' dependants who are EU nationals are not required to pay higher enrolment or administrative fees in another Member State as compared with nationals of that Member State. The right to equal treatment therefore applies to admission to education as well as to measures which facilitate attendance at educational establishments. EU nationals also have equal access to vocational training,¹⁷¹⁴ the scope of which the ECJ has interpreted in a broad manner to include any form of education which prepares for a qualification or provides the necessary training and skills for a particular profession, trade or employment irrespective of both the age and level of training or of whether the training programme includes an element of general education,¹⁷¹⁵ including university education.¹⁷¹⁶

6.2.2 International Humanitarian Law Mechanisms

It is now well established that IHRL applies alongside IHL in situations of armed conflict and that IHL affords protection to education that is complementary to that provided by both IHRL and ICL. In both IAC and NIAC, IHL provides the main legal rules for protecting persons and objects; however, it contains very few mechanisms for those seeking remedy or reparation for breach of its rules. Most mechanisms related to violations of IHL are State-based, relate to IAC, and do not address the issue of the rights of individual victims. This has a significant impact on those affected by education-related violations, particularly in NIAC. For example, the protective powers regime, the never-used enquiry procedure established under the Geneva Conventions; and the never-used International Humanitarian Fact-Finding Commission established under Article 90 of Additional Protocol I, which has no power to make legal determinations and does not accept petitions from individuals. It is beyond the scope of this Handbook to provide a comprehensive list of all State-based mechanisms related to violations of IHL.¹⁷¹⁷

The Geneva Conventions and Additional Protocols set out many instances in which an individual might be responsible for a violation of a rule of IHL; however, they do not contain any

¹⁷¹² Commentary of the Charter of Fundamental Rights of the European Union, 144

¹⁷¹³ See, for example, *Gravier v City of Liège*, Case 293/83, 13 February 1985; *Casagrande v Landeshauptstadt München*, Case 9/74, 3 July 1974. The right of equal access to education is separately covered under EU legislation such as Regulation 1612/68 OJ L 257, 19 October 1968, which provides children of EU migrant workers with access to education on the same basis as nationals in the host State. For further information, see 'Developing indicators for the protection, respect and promotion of the rights of the child in the European Union', European Union Agency for Fundamental Rights, November 2010

¹⁷¹⁴ Some assistance given by Member States to their nationals to undertake vocational training may fall outside the scope of EU law. See *Sylvie Lair v University of Hannover*, Case 39/86, 21 June 1988

¹⁷¹⁵ *Gravier v City of Liège*, Case 293/83, 13 February 1985, para 30

¹⁷¹⁶ *Blaizot v University of Liège*, Case 24/86, 2 February 1988

¹⁷¹⁷ For more information on these and other State based mechanisms, see Toni Pfanner (n211), 279

express remedy for victims of these violations.¹⁷¹⁸ At an international level, the victims of violations of IHL have very few mechanisms available to them to seek a remedy or reparation.

The International Committee of the Red Cross

The ICRC is an independent and neutral international body that works towards the protection and assistance of victims of armed conflict and improved compliance with IHL among parties to conflicts. Its position is recognised under the Geneva Conventions and its delegates receive special protection and benefit from particular rights assisting them to further the ICRC's mandate.¹⁷¹⁹ Although in NIAC the legal recognition and protection of the role of the ICRC is more limited in the text of the relevant treaties,¹⁷²⁰ the ICRC is still a vital mechanism for protecting the rights of victims of NIAC.

The ICRC does not provide individuals with a remedy procedure for violations of IHL. However, its work with parties to conflicts and the armed forces of these parties aims to ensure their compliance with IHL.¹⁷²¹ In this respect, the activities of the ICRC are wide-ranging and include, for example, gathering first-hand information in the field, including by receiving complaints or observing violations of IHL,¹⁷²² engaging in confidential dialogues with parties to the conflict, and ensuring a general protective presence in armed conflicts, including undertaking visits to potential or actual victims of conflict, especially those in detention.¹⁷²³ These processes can result in practical, informal and, often, the most immediate form of resolution for individual victims of education-related violations; facilitation of the provision of remedies and reparations by authorities; and overall improved compliance by parties with IHL.¹⁷²⁴ However, the need for confidentiality, and its neutral and independent position, means that the ICRC has adopted the policy of not publicizing breaches of IHL. It also does not operate on a formal level to restore victims' rights.

Nevertheless, the ICRC is an important mechanism for reducing instances of violations of IHL, mitigating their effects, and ensuring that violations of IHL are addressed on a practical and individual level, albeit in a confidential and non-judicial way.

¹⁷¹⁸ However, see the discussion of reparations under IHL.

¹⁷¹⁹ See for example, Third Geneva Convention, Art 126; Fourth Geneva Convention, Art 143; Also, First, Second and Third Geneva Conventions, Art 9; and Fourth Geneva Convention, Art 10

¹⁷²⁰ For example, Common Art 3 recognises a 'humanitarian right of initiative' but not, for example, other rights such as a right to visit detained persons. For further discussion on the issue of the role of the ICRC in NIAC., see Michael Veuthey, 'Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross' (1983) 33 *American University Law Review* 83

¹⁷²¹ For more information of the work of the ICRC, please see its website <www.icrc.org>

¹⁷²² In accordance with the ICRC's Assistance Policy, available at <www.icrc.org/eng/assets/files/other/irrc_855_policy_ang.pdf>

¹⁷²³ See the description of the ICRC's 'protection and assistance activities' in Toni Pfanner (n211), 290–299

¹⁷²⁴ Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 498, 515

Special Agreements with Non-State Armed Groups

In situations of NIAC between a State and a non-State armed group or between non-State armed groups, Common Article 3 and Additional Protocol II provide for the possibility of ‘special agreements’ or ‘unilateral declarations’ regarding the implementation of the rules of IHL.¹⁷²⁵ It is possible for these agreements or declarations to contain provisions relating to the making of reparations to individual victims of NIAC. There is some practice to suggest that non-State armed groups may agree to make such reparations,¹⁷²⁶ for example, the agreement concluded in 1998 between the Government of the Philippines and the National Democratic Front of the Philippines, in which parties to the NIAC in the Philippines agreed to comply with IHRL and IHL during the conflict¹⁷²⁷ and to provide justice, including compensation, to victims of violations.¹⁷²⁸ Practice does not support the conclusion that non-State armed groups are liable for reparations for violations of IHL in NIAC outside of agreements or declarations setting out their consent for such liability.¹⁷²⁹

While IHL contains only a few mechanisms for individuals to seek remedy or reparation for violations of its provisions, the close and concurrent relationship between IHL, IHRL and ICL mean that many education-related violations of IHL may also give rise to related and concurrent remedies through IHRL and ICL mechanisms. In particular, claims commissions, discussed below, have proved to be an effective mechanism for victims to seek remedy for violations of IHL.

6.2.3 International Criminal Law Mechanisms

The ICC has jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes and crimes of aggression.¹⁷³⁰

The International Criminal Court and Children

While almost all crimes within the jurisdiction of the Court affect children, certain provisions in the Rome Statute make explicit reference to children. There are also crimes directed specifically

¹⁷²⁵ Common Art 3(2), as discussed in Chapter 2 of this Handbook.

¹⁷²⁶ See discussion set out in ICRC CIHL Study, Rule 150

¹⁷²⁷ Art 6 of Part I of the Comprehensive Agreement of Respect for Human Rights and International Humanitarian Law between the Government of the Philippines and the National Democratic Front of the Philippines.

¹⁷²⁸ Comprehensive Agreement of Respect for Human Rights and International Humanitarian Law between the Government of the Philippines and the National Democratic Front of the Philippines, Art 2(3) of Part III

¹⁷²⁹ See for example the practice set out in ICRC CIHL Study, Rule 150

¹⁷³⁰ The ICC has gained jurisdiction over the crime of aggression on 17 July 2018, with regard to ICC Member States which have ratified or accepted the amendment to the Rome Statute. This crime can include invasion, military occupation, and annexation by the use of force, blockade by the ports or coasts (Art 8bis 1 and 2).

against children or those that disproportionately affect them, including: conscription, enlistment and use of children under the age of fifteen years to participate actively in hostilities; forcible transfer of children and prevention of birth; trafficking of children as a form of enslavement; attacks against buildings dedicated to education and healthcare; torture and related crimes; persecution; sexual and gender-based crimes.

In 2012, the ICC found Thomas Lubanga Dyilo guilty of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities as child soldiers. He was convicted to 14 years of imprisonment.¹⁷³¹ Similarly, *Bosco Ntaganda*, the military chief of staff of the National Congress for the Defence of the People, has been charged with the war crimes of rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities. At his trial, which opened on 2 September 2015, he pleaded not guilty to all charges against him although evidence from over 2,000 alleged victims, including former child soldiers, had been gathered.¹⁷³²

In *The Prosecutor v Dominic Ongwen*, the Prosecution has recognised children born out of rape as a specific category of victims.¹⁷³³ Dominic Ongwen, who is on trial for crime committed as an adult, was also a former LRA abductee and child soldier. Therefore this case raises the question of the duality of victim and perpetrator and whether being a victim, as well as a perpetrator, should be treated as a mitigating factor. Children may also be involved in the commission of crimes or may witness the commission of crimes against others, including members of their own families.

In order to ensure that children's needs are addressed at all stages of the criminal process, a specific policy on children was adopted in November 2016, which adopts a child-sensitive approach that recognises a child's specific vulnerabilities and capabilities.¹⁷³⁴ In line with the CRC and Article 26 of the Statute, 'children' are those under the age of eighteen. The policy focuses on crimes against or affecting children that occur in armed conflict and in other contexts within the jurisdiction of the Court.¹⁷³⁵ The policy 'promotes respect for children's rights, and seeks to strengthen both accountability for, and the prevention of, crimes against or affecting children.'¹⁷³⁶ It also considers the Court's own interaction with children.¹⁷³⁷

¹⁷³¹ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 <<https://www.icc-cpi.int/drc/lubanga>>

¹⁷³² At the time of writing, the trial Chamber had not yet pronounced its decision, see *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 <www.icc-cpi.int/drc/ntaganda>

¹⁷³³ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen, see <www.icc-cpi.int/pages/item.aspx?name=2016-12-06-otp-stat-ongwen>

¹⁷³⁴ ICC, *Policy on Children* (November 2016), 1, at [13]: The policy was informed by consultations with children and youth, carried out with the assistance of partner organisations including Education Above All Foundation (EAA)/Protect Education in Insecurity and Conflict (PEIC), see 11

¹⁷³⁵ *ibid*, at [8]

¹⁷³⁶ *ibid*, at [10]

¹⁷³⁷ *ibid*, at [15]

In respect of crimes against or affecting children, the policy outlines how it will go about conducting preliminary examinations,¹⁷³⁸ investigations,¹⁷³⁹ and prosecutions.¹⁷⁴⁰ The policy also examines cooperation and external relations,¹⁷⁴¹ and institutional development.¹⁷⁴²

The International Criminal Court and Reparations for Victims

The Rome Statute allows victims who have suffered harm to participate in proceedings independently of the Prosecution or Defense. However, a victim does not need to have participated in the proceedings in order to seek reparations. In recent years, procedural mechanisms within the framework of the ICC have been established to develop principles relating to reparations for victims.¹⁷⁴³ However, as outlined above, victims of violations of ICL do not have a general or automatic right to reparation and may be awarded reparation only upon successful prosecution of an individual. In each case, the ability of a victim to obtain reparation depends on the decisions of the ICC.

Article 75(2) of the Rome Statute empowers the Court to make a reparations order against a convicted person, ‘specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’. In addition, according to Article 75 (2), second paragraph, the Court may ‘order that the award for reparations be made through the Trust Fund’. This scheme raises the possibility of court-ordered reparations within the ICC system in respect of victims of crimes within the jurisdiction of the Court.

Article 79 of the Rome Statute establishes a Trust Fund for Victims, which is funded by contributions from States, intergovernmental organizations, corporations and individuals. According to Rule 98(5) ‘[o]ther resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79’ (which provides for the creation of regulations as to the administration of the Trust Fund by the ICC Assembly of States Parties). Finally, Regulation 48 of the Regulations of the Trust Fund provides that ‘[O]ther resources of the Trust Fund shall be used to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes’. Thus, the Trust Fund has an independent mandate to provide support to victims of crimes within the jurisdiction of the Court.

Rule 85(b) provides that ‘[V]ictims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes’. Therefore, in accordance with Rule 85, those to whom

¹⁷³⁸ *ibid*, 25–27

¹⁷³⁹ *ibid*, 28

¹⁷⁴⁰ *ibid*, 33–40

¹⁷⁴¹ *ibid*, 41–43

¹⁷⁴² *ibid*, 43–44

¹⁷⁴³ For further discussion of reparations in the ICC, see Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012)

reparation could be given may include both natural and certain legal persons, including educational institutions, which have sustained “direct harm” to their property.

Thus, in the framework created by the Rome Statute, both natural persons, such as child soldiers, and legal persons, such as schools, technical colleges, vocational training institutions etc., may all, in principle, receive reparations in respect of the harm caused to them through the commission of crimes within the jurisdiction of the Court.

Following the conviction of *Lubanga* for conscripting, enlisting and using children to actively participate in armed conflict, the ICC issued a decision with regard to the procedures and principles of reparations.¹⁷⁴⁴ It specifically recognised educational harm as it stated that:

The victims, in addition to suffering from violations of their fundamental rights, were also denied basic needs. The denial of their rights and needs can have enduring and sometimes lifelong repercussions, for example when children have lost access to education.¹⁷⁴⁵

The ICC made explicit the importance of education as a means to redress the harm suffered by the victims of the crimes in question, including when there is a collective group of victims.¹⁷⁴⁶ It also set *Lubanga*’s liability for collective reparations at USD 10,000,000;¹⁷⁴⁷ the next steps regarding the implementation of the collective reparations have yet to be determined.¹⁷⁴⁸

In the case of *Prosecutor v Germain Katanga* (‘*Katanga*’), some of the victims of an attack on a village in the Ituri region of the DRC alleged that they were robbed of the opportunity to pursue education or vocational training. Trial Chamber II awarded both individual and collective reparations, specifying that the ‘collective reparations designed to benefit each victim shall specifically take the form of support for education’.¹⁷⁴⁹ The *Katanga* case is also significant as it was the first time that the ICC awarded individual reparations.¹⁷⁵⁰

In the case of *Prosecutor v Ahmad Al Faqi Al Mahdi*, the ICC ordered a combination of individual and collective reparation for causing physical damage to protected buildings, namely a mosque and mausoleums. In respect of collective reparations, the ICC specifically referred to ‘community-based educational and awareness raising programmes to promote Timbuktu’s

¹⁷⁴⁴ Decision of 7 August 2012 <www.icc-cpi.int/iccdocs/doc/doc1447971.pdf>; on 12 September 2012, BIICL hosted a seminar on this decision <www.biicl.org/files/6103_icc_7_august_2012_decision_-_rapid_response_seminar_report.pdf>; See also REDRESS, *No Time to Wait: Realising Reparations for Victims before the International Criminal Court* (REDRESS 2019), 10, 25

¹⁷⁴⁵ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 10 May 2012, para 2

¹⁷⁴⁶ See *Decision Establishing the Principles and Procedures to be Applied to Reparations*, para 221

¹⁷⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 21 December 2017, para 281

¹⁷⁴⁸ For more information, see <www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf>

¹⁷⁴⁹ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, 24 March 2017, paras 136, 304 and 306

¹⁷⁵⁰ REDRESS, *No Time to Wait: Realising Reparations for Victims before the International Criminal Court* (REDRESS 2019), 25

important and unique cultural heritage’,¹⁷⁵¹ highlighting the importance of education in the peace-building process and for the protection of cultural rights and human rights more widely.

***Ad Hoc* and Mixed Tribunals Regimes**

The ICTY and ICTR did not have jurisdiction to award a remedy or reparation to victims of violations of international law. There is no direct reference to remedy or reparation in the statutes of the ICTY and ICTR and these *ad hoc* tribunals had no jurisdiction to award compensation to victims of violations of their statutes. However, both statutes contain references to restitution of property: Article 24(3) of the ICTY Statute and Article 23(3) of the ICTR Statute state:

In addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner.

In accordance with ICL, a request for restitution had to be made by the prosecution in each Tribunal, and could not be made by the victim.¹⁷⁵² As with reparations under the ICC regime, such claims could only follow a successful criminal conviction. For more serious forms of damage, such as loss of life, the statutes of the ICTY and ICTR contain no remedy. Victims seeking compensation for violations of ICL heard at the ICTY and ICTR must seek it from national systems or other competent bodies.¹⁷⁵³

Victims of violations of international law, including education-related violations, heard by the mixed tribunals of the ECCC and the STL have a limited entitlement to remedy and reparation. Victims of violations prosecuted in the ECCC are able to claim reparation.¹⁷⁵⁴ These provisions are based on the Cambodian Criminal Code because the court, a mixed tribunal, is constituted of a hybrid of international and national legal provisions.¹⁷⁵⁵ However, like the ICC reparations regime, this opportunity is available only to those victims whose harm is part of a criminal prosecution as this is not a general right to reparation. Nevertheless, it has been stated that victims ‘have a right to satisfaction as reparation, including [...] the inclusion of an accurate account of violations that occurred in educational materials at all levels’ and that reparation awards may take the form of educational projects.¹⁷⁵⁶

It is worth noting that the ECCC addressed so-called policies of ‘re-education of bad elements’. According to a witness, ‘people would be monitored and if they were considered to be lazy when they were working they would [...] be taken away and killed, that is after they had been

¹⁷⁵¹ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, 17 August 2017, para 83

¹⁷⁵² *Rules of Procedure and Evidence* for both Tribunals, Rule 105

¹⁷⁵³ *Rules of Procedure and Evidence* for both Tribunals, Rule 106

¹⁷⁵⁴ Internal Rules of Extraordinary Chambers in the Courts of Cambodia (Rev 2), as revised on 6 March 2009 (‘ECCC Internal Rules’), Rules 23, 100(2), 110(3) and 113(1)

¹⁷⁵⁵ Liesbeth Zegveld, ‘Victims’ Reparations Claims and International Criminal Courts’ (2010) 8 *Journal of International Criminal Justice* 79, 90

¹⁷⁵⁶ Civil Party Lead Co-Lawyers’ Interim Report on Reparations in Case 002/02 and Related Request (filed to Trial Chamber, 17 June 2015), paras 20–21

educated and they did not reform'. During re-education, the persons 'who would be arrested would be locked up for two days or more, depending on the necessary re-education...[and] [d]uring that person's detention in the cage that person would be subjected to psychological testing and if through these tests he proved that he had been well re-educated that person would be released'.¹⁷⁵⁷

Similarly, the Statute of the STL permits the Tribunal to identify victims who have suffered harm as the result of a crime prosecuted under its auspices and recognises that a victim may bring an action for compensation in a national court or other competent body based on the Tribunal's judgment, which is deemed binding as to the guilt of the accused.¹⁷⁵⁸ The Tribunal itself does not determine the nature or quantum of any remedy sought.

ICL will also apply and will be enforced in the territorial jurisdiction of international tribunals as defined by their constitutive instruments. The ICTY was endowed with the power to apply ICL and prosecute individuals within the territory of the Former Yugoslavia since 1991,¹⁷⁵⁹ and similarly the ICTR had jurisdiction to prosecute breaches of ICL committed within the State of Rwanda and those committed by Rwandan citizens in the territory of neighbouring States.¹⁷⁶⁰

Similarly the mixed tribunals like those in Cambodia, Lebanon, East Timor and Sierra Leone apply ICL, in addition to domestic law, in the territory in which they are located, as set forth in the instruments which have established such courts. It is still open to the UN Security Council to establish *ad hoc* and mixed tribunals in the future, notwithstanding the advent of the ICC. It is worth noting that UN General Assembly established the International, Impartial and Independent Mechanism, known as the "IIIM", in order to assist in the investigation and prosecution of those responsible for the international crimes committed in Syria since March 2011.¹⁷⁶¹

Regional Court with Jurisdiction over International Crimes

While the ECtHR and its Inter-American counterpart do not have jurisdiction over international crimes, the not yet established African Court of Justice and Human Rights would also act as a criminal court.¹⁷⁶² It has jurisdiction to prosecute the alleged perpetrators of genocide, crimes against humanity, or war crimes such as the recruitment and use of child soldiers. It is unclear how the Court would function in relation to the ICC, with several AU States being also parties to the Rome Statute.

¹⁷⁵⁷ Extraordinary Chambers in the Courts of Cambodia, Transcript of Trial Proceedings of Case 002/19-09-2007-ECCC/TC, 25 May 2015, 88, 92, 93

¹⁷⁵⁸ Statute of STL, Art 25: Note, however, that absent a finding by the Tribunal a victim is still entitled to bring a compensation claim in the national courts or other competent body.

¹⁷⁵⁹ Security Council Resolution 808, 22 February 1993, para 1

¹⁷⁶⁰ Security Council Resolution 995, 8 November 1994, para 1

¹⁷⁶¹ UNGA Resolution 71/248 (21 December 2016)

¹⁷⁶² The Protocol on the Statute of the African Court of Justice and Human Rights must be deposited by 15 Member States before it enters into force, to date it has been deposited by 7 States.

6.2.4 Other Relevant Mechanisms for Reparation

International Court of Justice

Although the ICJ is not dedicated to IHRL or IHL issues, it has a broad jurisdiction and the Court has considered IHRL and IHL issues, and found IHRL and IHL to have been violated in a number of cases before it.¹⁷⁶³

A significant difference between the ICJ and the human rights treaty monitoring bodies is that the ICJ settles, in accordance with international law, legal disputes which are submitted to it by States alone. Individuals cannot be party to contentious cases before the Court. In order for an individual who is a victim of a human rights violation to have his or her case heard before the ICJ, that person's State of nationality must take the case before the Court on behalf of the individual by exercising the State's right to diplomatic protection. For a State to be party to a contentious case, it must have accepted the jurisdiction of the Court. However, the State is under no obligation to pass to its own national any award made by the Court.

The Court also gives advisory opinions on legal questions which authorised UN organs and specialised agencies refer to it.¹⁷⁶⁴ This is another way in which human rights may be considered by the Court.

The judgments of the Court in contentious proceedings are 'final and without appeal' and legally binding on the States parties in respect of the particular case.¹⁷⁶⁵ Advisory proceedings are essentially non-binding, however, an Advisory Opinion is an 'authoritative statement of the applicable law'.¹⁷⁶⁶

An example of reparations by the ICJ is its finding in the *Wall Advisory Opinion*. In that Opinion its view was that Israel was obliged to make reparation to natural and legal persons in the Occupied Palestinian Territory 'in accordance with the applicable rules of international law'. While the Court was faced with the unusual situation in which there was no injured State to which reparation could be made, it is nevertheless an important statement.¹⁷⁶⁷

Claims Commissions

An effective mechanism for obtaining access to a remedy for a violation of IHRL or IHL is the operation of claims commissions. Claims commissions are international legal mechanisms

¹⁷⁶³ See for example *Wall Advisory Opinion*; and *DRC v Congo*

¹⁷⁶⁴ ICJ Statute, Art 65

¹⁷⁶⁵ ICJ Statute, Arts 59 and 60. Pursuant to Art 94 of the UN Charter: '1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'.

¹⁷⁶⁶ Rosalyn Higgins, 'Human Rights in the International Court of Justice' (2007) 20 *Leiden Journal of International Law* 745, 750

¹⁷⁶⁷ See Roger O'Keefe, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary' (2004) 37 *Revue Belge de Droit International* 92, 136–140

established by the international community, such as by UN resolution or by agreement between parties, which can hear and determine claims for loss or damage sustained as a result of violations of international law, including IHRL and IHL, during armed conflict. The scope and procedure of these commissions is determined by the establishing body. Several examples exist: the United Nations Compensation Commission, established in 1991 by the UN Security Council (Resolution 687 (1991) of 8 April 1991) to implement Iraq's liability for the invasion and occupation of Kuwait; and the Eritrea-Ethiopia Claims Commission established in 2000 by the Eritrea-Ethiopia Peace Agreement to hear claims of loss or damage resulting from, among other things, violations of IHRL and IHL related to the conflict between the two States.

Claims commissions are an important mechanism for both States and individuals to obtain remedies for violations of IHL, including for education-related violations. For example, the Ethiopia-Eritrea Claims Commission made a number of awards for damage caused to educational facilities,¹⁷⁶⁸ including damage caused to an educational building, educational fixtures, desks, books and other educational materials as the result of a cluster bomb attack.¹⁷⁶⁹ However, Eritrea's general claim for harm to its educational system caused through violation by Ethiopia of its international obligations failed for lack of evidence.¹⁷⁷⁰

Some claims commissions recognise the right of individuals to receive a remedy but require that, procedurally, the claims be submitted by the government of the individual.¹⁷⁷¹ This procedural rule exists in order to facilitate the processing of mass claims relating to particular violations.¹⁷⁷² Although this recognition of the right to remedy and reparation by individuals is significant, it is nonetheless problematic, as such procedure denies victims of violations of IHRL and IHL, including education-related violations, the ability to participate in proceedings.

In general, the establishment of claims commissions can be a useful tool for ensuring that victims of education-related violations of IHRL and IHL are able to access a remedy for such violation, but the *ad hoc* nature of these commissions means that the ability to seek a remedy is dependent on the discretion of the international community.¹⁷⁷³

¹⁷⁶⁸ Eritrea-Ethiopia Claims Commission, Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, para 378–379

¹⁷⁶⁹ *ibid*, paras 160–161

¹⁷⁷⁰ Eritrea-Ethiopia Claims Commission, Final Award, Eritrea's Damages Claims, Decision of 17 August 2009, para 196, 204–205

¹⁷⁷¹ For example, the United Nations Compensation Commission (Iraq) and the Eritrea-Ethiopia Claims Commission: Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 498, 521–523

¹⁷⁷² It does not support a conclusion that individuals have no right to compensation: Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 498, 522.

¹⁷⁷³ *ibid*

National Post-Conflict Reparations Programmes

Numerous national reparations programmes have been established in periods of transition at the national level. Examples include Argentina (in respect of the junta period between 1976 and 1983); Chile (relating to atrocities committed in the period 1973–1990); Brazil (relating to arbitrary killings perpetrated in the junta period between 1964 and 1985); and Malawi (concerning the period 1964–1994).¹⁷⁷⁴ Such national programmes have been heterogeneous, varying widely in the manner of their administration, the forms of assistance they have provided, the range of victims to whom assistance has been afforded and in the amount of funding available. Major transnational reparations programmes have also been established in relation to the Second World War and the Third Reich, including the German Remembrance, Responsibility and Future Foundation;¹⁷⁷⁵ the Austrian Fund for Reconciliation, Peace and Cooperation;¹⁷⁷⁶ the Swiss Banks Settlement reached in connection with the *Holocaust Victims Assets* litigation in the United States;¹⁷⁷⁷ and the related humanitarian assistance programmes administered by the International Organization for Migration. In general these national programmes have dealt with reparations in respect of grave human rights violations rather than addressing attacks on education in particular.

Furthermore, it should be noted that a new phenomenon which has developed in recent years is the establishment of voluntarily funded reparations programmes, that is to say, reparations programmes funded voluntarily by third parties out of solidarity with victims rather than as a function of any obligation to do so under international law.¹⁷⁷⁸ However, discussion of these national programmes is outside the scope of this Handbook.

6.3 CONCLUSIONS

The Basic Principles on the Right to Remedy and Reparation, state that ‘remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law’.¹⁷⁷⁹ As a result, States shall offer ‘available adequate, effective, prompt and appropriate remedies,

¹⁷⁷⁴ See generally, Pablo de Greiff (ed) *The Handbook of Reparations* (Oxford University Press 2006)

¹⁷⁷⁵ See the website of the Foundation Remembrance, Responsibility and Future <www.stiftung-evz.de/eng>

¹⁷⁷⁶ See the website of the Fund for Reconciliation, Peace and Cooperation <www.reconciliationfund.at/>

¹⁷⁷⁷ *Re Holocaust Victims Assets*, 96 Civ 4849, 9 August 2000. In addition to refugees, slave labourers and those whose assets were looted, a range of other victims of Nazi persecution were assisted by the humanitarian assistance programmes established by the settlement fund.

¹⁷⁷⁸ For example, the ICC Trust Fund for Victims solicits resources for redress from States, intergovernmental organisations as well as natural and legal persons. See Regulation 21, Regulations of the Trust Fund for Victims. A range of NGOs have also become active in the field of reparations e.g. CIVIC which has established a ‘Making Amends’ programme to provide redress to civilian victims of violations of international humanitarian law.

¹⁷⁷⁹ Basic Principles on the Right to Remedy and Reparation, Principle 11

including reparation'.¹⁷⁸⁰ Reparation may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

To bring a claim under IHRL before an international body, it is necessary that the State alleged to have violated the provision in question is a party to the treaty containing that provision. The treaty must be in force and all possible limitations, reservations and derogations must be taken into account. The person bringing the claim must also have standing to bring the matter to appear before that Court. In addition, to bring the matter to an international court or tribunal, the complainant must first have exhausted all effective domestic remedies. This means that a claim must first have been considered within the national legal system, including available appeal procedures, or been subject to undue delay.

At the regional level, the ECtHR¹⁷⁸¹ allows for individuals and NGOs to bring claims for violation of IHRL, and therefore to seek remedy or reparation, directly against a State. The IACtHR, in contrast, does not afford individuals standing, as only States can bring an action against another State party. Individuals under the inter-American system must first bring their claim to the IACHR. The African Court of Human and Peoples Rights, like the ECtHR, permits individuals to bring claims directly.

In addition to the judicial mechanisms, many of the international human rights treaties are monitored by expert committees, which have the competence to consider individual complaints or communications on human right matters. These types of complaint may be brought by any individual, a group of individuals, or by someone else on behalf of the individual(s), claiming a violation of a right under a particular treaty, depending on the terms of that treaty. The perpetrator must be a State party to that treaty and it must have recognised the competence of the committee to consider such complaints.

The following treaties all allow for individuals to bring complaints to the treaty body: the ICCPR, CAT, CEDAW, CERD, CRPD, ICESCR and the CRC, with both the Optional Protocol to the ICESCR and of the Third Optional Protocol on the Convention of the Rights of the Child having now entered into force. Regarding the enforcement of the decisions of the human rights treaty bodies, if a body finds that a violation has taken place, it asks for the State party responsible for the violation to inform the body within a specified timescale to give effect to its findings. The human rights monitoring body may then engage in follow-up procedures and take further appropriate steps to better ensure that the findings of the body are abided by.¹⁷⁸²

IHL is a body of law with few mechanisms allowing victims of violations of its rules to seek remedy or reparation. The ICRC and, in the case of NIAC, special agreements, can provide individuals with resolutions of particular violations of IHL and, in the case of special agreements, potentially access to a mechanism through which to seek a remedy. Neither of these mechanisms establishes a permanent or judicial process by which individuals have a procedural entitlement to hold violators of their IHL rights to account. This lack of IHL mechanisms means that the

¹⁷⁸⁰ *ibid*, Section I. 2 (c)

¹⁷⁸¹ ECHR, Art 34

¹⁷⁸² For further information on individual communications, see the website of the OHCHR <www.ohchr.org/EN/Pages/Home.aspx>

mechanisms of IHRL and ICL have an important role to play in assisting victims of IAC and NIAC.

Similarly, ICL is also a regime that provides concurrent protection of victims of education-related violations alongside IHRL and IHL. As examined previously, in Chapter 2, there is now a range of international and hybrid courts and tribunals that have jurisdiction in matters of ICL. Where an individual is a victim of a crime under ICL, and also a victim of a violation of IHRL or IHL, he or she may be entitled to a remedy or reparation through the mechanisms of ICL. However, the mechanisms of ICL are tailored to address the issue of individual criminal responsibility of an accused and are not established to allow victims to bring claims directly, or to seek reparation without the need to establish the criminal liability of an accused. This significantly undermines the ability of victims of education-related violations to obtain access to the remedy and reparation mechanisms of ICL. Nevertheless, there have been considerable advancements in respect of the issue of reparation at the ICC, flowing from the decisions on reparations in respect of *Lubanga* and *Katanga*. In particular, the ICC has made clear that conscripting, enlisting and using children to actively participate in armed conflict can result in lost educational opportunities for those children; it also recognised a loss of educational opportunities for children victims of an attack. Finally, it also acknowledged that education itself can be an important means to redress the harm suffered.

7

Conclusions

The breadth and depth of the extent to which situations of insecurity and armed conflict affect education has been shown throughout this Handbook. However, the detailed examination of the three key regimes of international law—IHRL, IHL and ICL—offers hope for a way forward for the long-term protection from education-related violations in those situations.

This Handbook has considered education and education-related violations occurring in situations of insecurity and armed conflict. This means that it has been concerned with the impact on, and challenges to, education that may arise in a situation of insecurity—being all forms of internal disturbances and tensions—and a situation of armed conflict—being a situation of intense violence that is either international (between States) or non-international (between a State and non-State armed group(s) or between armed groups). In so doing it focused on identifying and addressing how international law responds, or might be used to prevent, education related-violations in these situations.

By exploring the human right to education and related rights, the protection of students and education staff and the protection of educational facilities, this Handbook has provided new insights into issues that have not previously been considered in the existing literature on education. It has examined and analysed the relevant case law at the international and regional level; important international materials, such as multilateral treaties and other agreements; customary international law; statements and practices of States, inter-governmental bodies, non-governmental bodies (such as the ICRC), non-State actors and international experts; as well as undertaking a close review of the academic literature. In many instances, the current legal rules protecting education are comprehensive, yet there remain many aspects that require clarification and improved implementation at the international and regional levels.

This chapter summarises the main conclusions from this research and in so doing it illustrates how the three regimes of international law might be used to provide better protection from education-related violations in insecurity and armed conflict.

7.1 PROTECTION OF EDUCATION

Education is protected under IHRL, as it guarantees the right to education. The realization of the right to education is crucial for the realization of other human rights, such as the right to

work and the right to access health care. Like other human rights, the right to education is applicable to all—without discrimination—and it is also applicable at all times, including in situations of insecurity and armed conflict.

As a legally binding right enshrined in international and regional treaties, the right to education must be respected by the States Parties to these treaties. States must take the necessary concrete steps to achieve the full realization of the right to education, immediately or, where allowed, within a reasonable time period. Even in situations of insecurity and armed conflict, every effort to satisfy the minimum core obligations associated with the realization of the right to education must be undertaken by States. When necessary, a State must use international assistance and cooperation to achieve the realization of the right to education.

One of the core elements for the right to education to be fully realised is the provision of free and compulsory primary education. The provision of primary education to all must be given continuous priority. Secondary education must be available and accessible to all and higher education must be accessible to all on the basis of capacity and not on the basis of, for example, financial resources. The principle of non-discrimination is also applicable to the content of education itself, which must not discriminate against any group, such as with recourse to stereotypes. The content of education is also protected under IHRL from any expression of hate or intolerance.

It is clear from the analysis in this Handbook that the right to education benefits from comprehensive legal protection under IHRL at both international and regional levels. However, under the principles of international law, States are bound by these legal rules protecting education only when they have agreed and ratified the relevant international instrument. Unless such provisions form part of customary international law, States that have not acceded to and ratified a treaty are not bound by its rules.

The global protection of education under IHRL, in situations of both insecurity and armed conflict, is effective only where States have ratified the relevant treaties and taken national measures to implement their provisions. Such measures must be designed to ensure full realization of the right to education and the need to ensure that the most comprehensive expression of that right is protected, respected and fulfilled. For example, States ought to develop and implement national policies to ensure the provision of basic education, education that can be accessed equally across gender and disability, and to protect the content of education from discriminatory material, hate-speech and war propaganda.

All States should ensure not only the full realization of the right to education but also its justiciability within national, regional or international legal frameworks. This can take political will and can be supported by knowledgeable government and non-government bodies. Participation on an international level in the monitorial mechanism of education-related treaties to which they are parties, compliance with decisions of such bodies, and encouragement of compliance with such mechanism by other States are all necessary to ensure that the legal framework of protection against education-related violations operates effectively and comprehensively.

The analysis in this Handbook makes it clear that protection of education under IHRL requires more than just ensuring the realization of the right to education. The fulfilment of civil, political, economic, social and cultural rights creates the conditions necessary to ensure education. It is

often a combination of these rights that is challenged in situations of insecurity and armed conflict and thus they must all be protected. In addition to ensuring compliance with education-specific obligations, national, regional and international judicial IHRL mechanisms need to consider the education-related impact of the violation of these rights and to ensure the provision of education-specific remedies for these education-related violations.

In armed conflict IHRL applies concurrently with IHL. IHL strengthens the legal framework for the protection of education in IAC and NIAC and seeks to ensure that, where education was provided before an armed conflict, it continues uninterrupted. IHL specifically addresses education in relation to four instances. First, Article 24 of the Fourth Geneva Convention sets out the obligation of parties to an IAC to take the necessary measures to ensure the education of children under 15 who have been orphaned or separated from their families as a result of armed conflict. Second, Article 94 of the Fourth Geneva Convention provides that, in situations of civilian internment in IAC, the detaining power must encourage educational pursuits among internees, take practical measures and provide facilities to ensure education. In particular, the detaining power is under a special obligation to ensure the continuation of education of children and young people in internment. Third, Article 50 of the Fourth Geneva Convention requires occupying powers (in situations of belligerent occupation) to cooperate with the national and local authorities to ensure facilitation of educational institutions for children. Fourth, Article 4(3)(a) of Additional Protocol II, applicable in NIAC, demands that children receive the care and aid they require, including education. These provisions do not address the education of all groups at all times during conflict, but they do nevertheless ensure the educational needs of particularly vulnerable groups in situations where their education is at great risk from the circumstances of armed conflict.

In each of these four instances, the education protected includes moral and religious education in addition to physical and basic education.¹⁷⁸³ In addition, each rule of IHL applies without adverse distinction, including on grounds of gender,¹⁷⁸⁴ so any education provided under these provisions must apply equally to male and female students, although, except for Article 4(3)(a) of Additional Protocol II,¹⁷⁸⁵ there is no clear requirement under IHL to ensure appropriate education for persons with disability. However, the CRPD contains provisions seeking to ensure the protection and safety of persons with disabilities that specifically apply during armed conflict.¹⁷⁸⁶ Further, under IHL, education should, wherever possible, be provided in a culturally sensitive way.¹⁷⁸⁷

¹⁷⁸³ See discussion of this in Chapter 3 above, and also Jean Pictet (ed) *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952–1960) Vol.4, 187; Additional Protocol II, Article 4(3)(a), expressly provides for this.

¹⁷⁸⁴ Common Art 3; Additional Protocol I, Article 75, Fourth Geneva Convention, Part II; ICRC CIHL, Rule 88

¹⁷⁸⁵ See discussion of this issue in Chapter 3 above.

¹⁷⁸⁶ Convention on Rights of Persons with Disabilities, Art 11

¹⁷⁸⁷ See, for example, Fourth Geneva Convention, Art 24, (children orphaned or separated from their families), which provides that, where possible, education should be provided by persons of the same cultural tradition as the child. See discussion in Chapter 3 above.

In order for education to receive the full benefit of IHL protection, violations of IHL that adversely impact on education need to be recognised as education-related violations by the parties to armed conflict. Improved awareness of the education-related application of IHL, and of the impact on education of its violations, is a key element to ensuring protection of education in all situations. This can be achieved in a number of ways, including the development and dissemination of international guidelines addressing the scope of these education-related IHL provisions and clarification of their applicability to issues such as non-discriminatory provision of education in the four situations identified above. Further, the use of education itself is a vital tool for improving awareness of the education-related consequences of violations of IHL. The inclusion of IHL rules in general human rights education of populations and inclusion of the application of particular IHL rules on the provision of education in armed conflict in the training of national armed forces would drastically improve awareness of the impact of education-related violations of IHL among the general public, and also among the soldiers on the ground in armed conflicts.

So far, there are no ICL provisions dealing with the protection of education itself. Education is only mentioned within the targeting and/or destruction of “educational property”, listed as a war crime in the Rome Statute. This significantly undermines the need, at an international level, to recognise the effect of insecurity and armed conflict on education. Further, it emphasises that many violations of ICL which impact on the protection of education need to be recognised as education-related violations.

However, certain provisions of ICL have the potential to be used to protect education, and this possibility needs to be considered by those with the power to bring such cases. For example, the widespread and systemic, discriminatory denial of education to a group of people, with a particular political, racial, national, ethnic, cultural, religious or gender identity, may amount to the crime against humanity of persecution. Furthermore, the application of the crime of incitement of genocide to educational content needs to be considered.¹⁷⁸⁸ The full protective power of ICL has not yet been realised in relation to education, notwithstanding some important advancements in recent law.

There is great scope for the three legal regimes, IHRL, IHL and ICL, to coordinate their provisions to ensure a more comprehensive response to education-related violations. Clarification of this interaction, beginning with this Handbook, would significantly improve the international legal protection of education in situations of insecurity and armed conflict.

7.2 PROTECTION OF STUDENTS AND EDUCATION STAFF

The protection of students and education staff is essential to ensure the protection of education. Situations of insecurity and armed conflict present grave challenges to the life and well-being of students and education staff. If their lives or well-being are threatened, students may not be able to exercise their right to education and education staff may not be able to provide education to their students.

¹⁷⁸⁸ See discussion of these issues in Chapter 3 above.

Each of the three legal regimes contain rules protecting the lives of students and education staff. For example, because IHRL applies at all times (within the framework discussed in Chapter 2), including in insecurity and armed conflict, all human rights remain protected. For example, the right to life protects the lives of students and education staff in all circumstances. The only possible limitation to the right to life under IHRL is where the death penalty is still legally applicable,¹⁷⁸⁹ and where the deprivation of life results from a lawful use of force. Other rights that have been shown to affect education include the right to liberty and security of person from detention (including by hostage-takers), where detention is lawful only in limited circumstances, and rights of non-discrimination.

In situations of armed conflict the concurrent application of IHRL, IHL and ICL provides complementary protection of students and education staff. IHL protects the lives and liberties of students and education staff through the principle of distinction between civilians and those taking a direct part in hostilities. The principle sets out two main rules for parties to an IAC or NIAC: the prohibition of deliberate attacks on civilians and the civilian population; and the prohibition on indiscriminate attacks. Where they are civilians, or do not directly participate in hostilities, students and educational personnel benefit from the protection of the principle of distinction. The rules of ICL also establish individual criminal liability for violation of this principle,¹⁷⁹⁰ and contain several provisions which protect the lives of students and education staff, such the direct prohibition on wilful killing of civilians.

However, some practices common in armed conflict, including the arming of education staff to prevent illegal attacks on educational facilities, run the risk that the use of force in such cases could be seen as a direct participation in hostilities by parties to a conflict, which exposes education staff, and the students around them, to potential attack. Increased awareness of these consequences is necessary to improve the overall physical protection of students and education staff in armed conflict.

The interaction of these three legal regimes in situations of armed conflict affects the effectiveness of overall protection to which students and educational staff are entitled. The overlap between the three regimes results in strong legal protection for students and education staff from deliberate or indiscriminate attacks across all situations of insecurity and armed conflict. All three legal regimes protect against intentional and direct attacks upon students and educational staff as long as they are civilians. Similarly, torture is prohibited, without exception, under IHRL, IHL and ICL.

Each regime also sets out special protection for particularly vulnerable groups and each contains strong, mutually reinforcing provisions that emphasise the importance of such protection. This includes children, women and persons with disabilities.

Situations of insecurity and armed conflict may not only lead to an increased risk of violence towards children but may lead to the economic exploitation of children, who then also miss out on education opportunities. Thus the CRC provides protection:

¹⁷⁸⁹ The death penalty is however being progressively abolished universally. In addition, the death penalty is prohibited in a number of instances under IHRL, such as with regard to children. See Chapter 4.

¹⁷⁹⁰ See discussion in Chapter 4.

from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.¹⁷⁹¹

The ILO has also adopted instruments to protect children from forced labour, including the worst forms of child labour, such as slavery, prostitution, drug trafficking, dangerous activities or the use of children in armed conflict.¹⁷⁹²

The participation of children in armed conflict is a significant education-related violation. Recruitment of children into conflict places them at serious physical and psychological risk, prevents them from attending educational facilities, and can lead to many of them missing out on education entirely. The use of child soldiers in IAC and NIAC is prohibited by all three legal regimes.¹⁷⁹³ Children who are used as soldiers are denied the opportunity to receive education and the threat of abduction or forcible recruitment keeps many children away from educational facilities. The first full trial decision of the ICC in *Lubanga* dealt with the issue of the illegality of recruitment of child soldiers.¹⁷⁹⁴

Gender-based discrimination is prohibited under IHRL, in particular under CEDAW. As a result, States must establish policies and take measures to eliminate any discrimination against women, including in education.¹⁷⁹⁵ Equal treatment within education staff also requires equal opportunities to attend the first levels of school and all subsequent levels without any form of discrimination. Similarly, IHL requires that its rules have to be implemented by parties without adverse distinction, including on the grounds of gender. Although IHL contains several provisions which seek to protect women in armed conflict situations, they predominantly focus on protecting pregnant mothers and protecting women from violence. The special protection of IHL for women is thus less concerned with the implementation of broader social-equality measures and policies than ensuring their physical safety. Nevertheless, there is scope for the argument that the principle of no-adverse distinction is broad enough to incorporate issues of direct and indirect discrimination in the application of IHL rules.¹⁷⁹⁶ This means that, potentially, IHL can at least take into account (although it

¹⁷⁹¹ CRC, Art 32

¹⁷⁹² ILO Convention on the Worst Forms of Child Labour, Art 3(a)

¹⁷⁹³ Though there are differences in the age of a 'child'. For example, CRC's Optional Protocol on the Involvement of Children in Armed Conflict (2000); ILO Convention on the Worst Forms of Child Labour; ACRWC set the age at 18; IHL sets the age at 15: Additional Protocol I, Art 77(2); Additional Protocol II, Art 4(3); and the Rome Statute also sets the age at 15: Art 8(2)(b)(xxvi) and Art 8(2)(e)(vii)

¹⁷⁹⁴ For example, the definition of 'active' under the Rome Statute was considered to be broader than the term 'direct' under IHL: *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, para 627. Under IHL both terms are treated as synonymous. For further discussion of this issue see Nicole Urban, 'Direct and Active Participation in Hostilities: The Unintended Consequences of the ICC's decision in Lubanga', <www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/#comments>

¹⁷⁹⁵ CEDAW, Arts 2 and 10

¹⁷⁹⁶ See Chapter 4 above.

cannot seek to remedy) wider issues of social inequality in relation to, for example, the allocation of humanitarian aid,¹⁷⁹⁷ or the provision of education.

Persons with disabilities are also more vulnerable to human rights violations in situations of insecurity and armed conflict. Moreover, these situations are also often the cause of disabilities, both physical and mental. In order to ensure that persons with disabilities benefit from the same educational opportunities as others, the CRPD provides specific protection and seeks to ensure that the needs of persons with disabilities are met in both insecurity and armed conflict. While all the rules of IHL apply without adverse distinction (which may include disability), and set out special protection for the sick and wounded and those in need of medical care, they do not specifically address the needs of people with disability. Improved recognition of the vulnerability and needs of people with disability is needed in IHL.

As outlined above, where discrimination against a particular group reaches widespread and systemic proportions, ICL may protect against this through its provisions against the crime of persecution.

It is clear from this analysis that the legal protection of students and education staff under the three legal regimes is strong and complementary. However, the effectiveness of these provisions can be improved through increased implementation and enforcement at an international, regional and national level. Further, the protection of students and educational staff could benefit from further clarification as to how the relationship between the relevant provisions of IHRL, IHL and ICL ought to be considered by the mechanisms charged with enforcing each of them.

7.3 PROTECTION OF EDUCATIONAL FACILITIES

As the function of IHRL is to protect and promote the rights of individuals, its provisions do not directly protect buildings such as educational facilities. However, as the realization of a number of human rights requires the existence and maintenance of buildings, the protection of physical structures is sometimes implied within IHRL provisions, such as the right to education and the prohibition of discrimination. The protection of education under IHRL would benefit from clarification as to how educational facilities are protected within existing rights. Further, there is scope for greater recognition of the impact on education of particular violations of civil, political, economic, social and cultural rights which result in the destruction or damage of educational facilities.

In contrast, IHL protects all property, including educational facilities, from direct and deliberate attack where such property is civilian and is not a military objective. Further, IHL prohibits destruction or seizure of an enemy's property where this is not justified by military necessity. IHL also contains provisions for establishing special zones of neutrality which may be able to

¹⁷⁹⁷ Women receive priority in aid distribution of medical supplies if they are pregnant or nursing mothers: Fourth Geneva Convention, Art 23; Additional Protocol I, Art 70, however, the potential to broaden this and to target aid to women on the basis of discriminatory practices in a local area is yet to be explored.

provide additional protection for educational facilities. However, IHL does not provide special protection for educational facilities themselves, similar to that for medical facilities or cultural property. Only where an educational facility qualifies as a medical facility or as cultural property does it benefit from this protection. Recognition of a special protection for educational facilities would improve recognition of the importance of education under IHL, as well as reducing the vulnerability of education in armed conflict. To this end, broad international support of non-binding initiatives, such as the *Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict* and the Safe Schools Declaration is essential to improving protection of educational facilities in armed conflict.

ICL contains provisions which establish individual criminal liability for violations of the principle of distinction, including the wanton destruction or seizure of enemy property (including facilities) in IAC¹⁷⁹⁸ and in relation to particular objects (including education facilities) to NIAC.¹⁷⁹⁹ These provisions are based in part on, and complement, the protection set out under IHL.

The legal protection offered by IHL is more uncertain where an educational facility has become a military object, which is when it is used (or occupied) for a military purpose and its destruction offers a definite military advantage.¹⁸⁰⁰ Under IHL the definition of military object is broad and fluid.¹⁸⁰¹ Thus an educational facility may become a military object at any time depending on its utility to military operations and the advantage offered by attacking it.¹⁸⁰² As such, where it is militarily necessary to do so, educational facilities may be used by armed forces in a way that exposes such facilities to lawful attack by the enemy.¹⁸⁰³ The vague definition of military operations, and the general lack of clarity as to when military necessity might permit the use of education facilities, means that clarification of the legal position is needed. Further, due to the adverse impact of military use of educational facilities on education, consideration ought to be given to the possibility of an outright ban on, or more restrictive rules relating to, the military use of educational facilities.

As discussed in Chapter 5 above, the interaction between IHRL, and IHL and ICL in relation to the protection of educational facilities is unclear. There is a strong core of protection under each regime against the deliberate and direct destruction of private (and to some extent) communal property, including, therefore, some educational facilities, in situations of armed conflict. However, outside of this core position, few IHRL cases exist and it is not possible to say to what extent the provisions of IHRL, IHL and ICL might diverge in relation to, for example,

¹⁷⁹⁸ See, for example, Rome Statute, Art 2(b)(ii), (ix), (xiii) and (xxiv)

¹⁷⁹⁹ *ibid*, Art 2(e)(ii), (iii), (iv) and (xii)

¹⁸⁰⁰ See discussion of the two-step test of military objective in Additional Protocol I, Art 52, in Chapter 5 above.

¹⁸⁰¹ Unlike, for example, the protection afforded to civilians from direct attack. In the case of civilians (discussed in Chapter 4 above) the loss of protection results from deliberate conduct on the part of civilian. This is not the case with civilian objects whose protection depends on their potential utility to military operations and is not within the control of the civilians that inhabit these objects.

¹⁸⁰² See discussion of military object above, in Chapter 5.

¹⁸⁰³ For a detailed discussion of this issue, see Chapter 5.

incidental damage to a public educational facility for primary age students during an armed conflict. Such ambiguity means that the exact obligations imposed on an individual, or on a State, in relation to this situation are difficult to ascertain and impossible to predict. This leaves little guidance for those making operational decisions during armed conflict as to the legality of their conduct. Where such potential gaps in protection exist, education is placed at serious risk from education-related violations. There is considerable scope for clarification in this area through, for example, the development of guidelines and pressure for international legal protection of educational facilities.

7.4 REMEDIES AND MECHANISMS

The ability to seek a remedy for an education-related violation is a significant element of protecting education in situations of insecurity and armed conflict. For this reason, it is essential that States ensure that mechanisms for seeking remedies (including reparation) for education-related violations are available and effective. This includes not only ensuring the effective and fair functioning of the mechanisms discussed below, but also providing assistance to those victims seeking to access such mechanisms.

Further, not only it is important that victims have access to these mechanisms, but also that such mechanisms recognise when violations of international law, including those of education-related rights, are *education-related violations*, and make relevant and appropriate orders which address and seek to remedy the damage to education. In this respect, reparations are of particular significance, and greater clarification and analysis is needed to identify the most effective and appropriate reparations for addressing education-related violations.

According to the Basic Principles on the Right to Reparation:

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.¹⁸⁰⁴

As a result, States should offer 'available adequate, effective, prompt and appropriate remedies, including reparation'.¹⁸⁰⁵ Reparation may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

In addition to the mechanisms which have to be available within national systems, there are a number of mechanisms at the international and regional level to obtain remedies. In particular, those alleging a violation of the right to education can submit an individual communication to the CESCR if the alleged violation falls under the jurisdiction of a State that has ratified the

¹⁸⁰⁴ Basic Principles on the Right to Remedy and Reparation, Principle 11

¹⁸⁰⁵ *ibid*, Section I. 2 (c)

Optional Protocol to the ICESCR. More in general, to bring a claim under IHRL before an international supervisory body, the specific requirements of the relevant treaty must be complied with and the complainant must first have exhausted all effective domestic remedies. This means that a claim must first have been considered appropriately within the national legal system, including available appeal procedures. These bodies can recommend a variety of remedies, including a range of reparation measures to deal with the consequences to the victim of the human rights violation by the State.

While there are some regional human rights mechanisms, there are still regions where these mechanisms are not in place or contain no complaint process. It is desirable that all people in all regions have access to mechanisms to enable remedies for human rights violations.

There are few mechanisms under IHL for perpetrators of its violations to be held accountable to victims of education-related reparations. The ICRC and *ad hoc* claims commissions can provide individuals with resolutions of particular violations of IHL and, in the case of claims commissions, potential access to a remedy. However, none of these mechanisms establishes a permanent or a judicial process by which individuals have a clear entitlement to hold violators of their IHL rights to account.

However, ICL is a regime in which a number of its crimes involve serious or grave breaches of IHL and so it provides possible protection of victims of armed conflict. As observed in this Handbook, there is now a range of international and hybrid courts and tribunals that have jurisdiction in matters of ICL. Where an individual is a victim of a crime under ICL, and also a victim of a violation of IHL, he or she may be entitled to a remedy or reparation through the mechanisms of ICL. The ICC case of *Lubanga* demonstrates this overlap and the impact it can have on access to remedies, including reparations. Yet the primary purpose of ICL mechanisms is the punishment of individual criminals—not States—and these mechanisms are not focused on the rights of victims or their access to remedies. An individual does not have an automatic right to remedy under ICL, but rather, may have access to reparation if he or she is the victim of a successfully prosecuted crime. These problems highlight the lack of mechanisms in which persons can see remedy or reparation under IHL for education-related violations.

Nevertheless, victims of violations of IHL, including education-related violations, in both IAC and NIAC, can benefit from IHRL mechanisms and remedies. This can be in two ways: first, where an IHRL instrument, court or tribunal expressly takes into consideration principles of IHL so that a violation can be addressed directly and its effects can be recognised through the remedy provided by the relevant court or tribunal.¹⁸⁰⁶ Second, where a violation of a rule of IHL also amounts to a violation of a rule of IHRL: for example where students or education staff are deliberately attacked, then a court or tribunal may grant a remedy for such a violation under IHRL which also, in effect, provides a remedy for a violation of IHL, albeit without

¹⁸⁰⁶ For further discussion of relevant cases see Chapter 4 above in relation to the right to life and the principle of distinction under IHL.

express reference to IHL.¹⁸⁰⁷ The use of IHRL mechanisms is especially useful for victims of education-related violations of IHL in NIAC, as this will be within the territory of one State. However, there are many areas of protection under IHRL that do not overlap with those under IHL, including, for example, the rules relating to incidental damage of educational facilities or deliberate targeting of students, education staff or facilities where they are military objects. In such cases, remedies for breaches of IHL through IHRL mechanisms are limited.

7.5 SUMMARY

The examination of IHRL, IHL and ICL in relation to education-related violations in insecurity and armed conflict reveals a considerable number of similarities in their protective role. They can work together as a strong framework of protection, yet there are also gaps that can lead to areas where protection is lacking, there is confusion or inconsistency, or the mechanisms for remedies are unavailable. In addition, there is always the need for improved compliance by States and other parties with their existing legal obligations.

In recognition of the international and universal importance of education, States must ratify and implement all relevant IHRL treaties at the international and regional levels and they must engage fully and cooperatively with all relevant treaty monitoring bodies and procedures. In turn, relevant treaty monitoring bodies and other supervisory bodies should demonstrate their combined and coordinated will to offer coherent guidance to States as to measures required to implement their education-related obligations and, where breached, measures required to remedy such breach.

In addition, States and non-State armed groups must demonstrate a shared commitment to upholding IHL and to recognizing more fully, and giving effect to, the protection of education inherent within its rules. Improved compliance with the rules protecting students, educational staff and educational facilities from direct and deliberate attack; the rules relating to incidental damage, and the special protection afforded to particular categories of people and objects would significantly improve the overall protection of education in armed conflict.

International criminal courts and tribunals should acknowledge and respond to education-related violations within their mandates. They should seek ways of recognizing the effect of violations of ICL on education at all stages in their processes, including initial investigation, sentencing and awards of reparation.

Underpinning this Handbook, and the complex legal and practical issues that it tackles, is the foundational view that education is not only an important end in itself, it is an enabling right, empowering access to other fundamental human rights, to meaningful participation in political, economic, social and cultural activities, and to the promotion of universal respect for the dignity of all. It is a right deserving of all our protection.

¹⁸⁰⁷ An example of this is the jurisprudence of the ECHR, which, although influenced by, does not refer to IHL. For further discussion of relevant cases, see Chapter 4 above in relation to the right to life and the principle of distinction under IHL.

8

Appendix A: International and Regional Treaties and other Relevant Instruments

8.1 GENERAL INTERNATIONAL TREATIES AND INSTRUMENTS

1945

United Nations Charter, adopted 26 June 1945, entered into force on 24 October 1945, available at un.org/en/charter-united-nations/index.html

1969

Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force on 27 January 1980, available at treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf

2001

International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, 2001, available at legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

8.2 STATUTES OF INTERNATIONAL COURTS AND TRIBUNALS

1945

Statute of the International Court of Justice, adopted 26 June 1945, entered into force on 24 October 1945, available at <https://www.icj-cij.org/en/statute>

1993

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted 25 May 1993, entered into force 14 March 1994, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

1994

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such

Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted 8 November 1994, entered into force 29 June 1995, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx>

1998

Statute of the International Criminal Court (Rome Statute), adopted 17 July 1998, entered into force on 1 July 2002, available at <https://ohchr.org/EN/ProfessionalInterest/Pages/InternationalCriminalCourt.aspx>

2002

Statute of the Special Court for Sierra Leone, adopted 16 January 2002, entered into force 12 April 2002, available at http://legal.un.org/avl/pdf/ha/scsl/scsl_e.pdf

2004

The Law of the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea, adopted 27 October 2004, entered into force 29 April 2005, available at www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf

2010

Amendment to article 8 of the Rome Statute of the International Criminal Court, adopted 10 June 2010, entered into force 26 September 2012, available at <https://treaties.un.org/doc/Treaties/2010/10/20101011%2005-46%20PM/CN.533.2010.pdf>

Amendment on the crime of aggression to the Rome Statute of the International Criminal Court (articles 8bis, 15bis and 15ter), adopted 11 June 2010 (activation entered into force 17 July 2018), available at <https://treaties.un.org/doc/Treaties/2010/06/20100611%2005-56%20PM/CN.651.2010.pdf>

2017

Amendment to article 8 of the Rome Statute of the International Criminal Court (Weapons which use microbial or other biological agents, or toxins), adopted 14 December 2017, not yet in force, available at <https://treaties.un.org/doc/Publication/CN/2018/CN.116.2018-Eng.pdf>

Amendment to article 8 of the Rome Statute of the International Criminal Court (Weapons the primary effect of which is to injure by fragments undetectable by x-rays in the human body), adopted 14 December 2017, not yet in force, available at <https://treaties.un.org/doc/Publication/CN/2018/CN.125.2018-Eng.pdf>

Amendment to article 8 of the Rome Statute of the International Criminal Court (Blinding laser weapons), adopted 14 December 2017, not yet in force, available at <https://treaties.un.org/doc/Publication/CN/2018/CN.126.2018-Eng.pdf>

8.3 INTERNATIONAL HUMAN RIGHTS LAW

1921

International Labour Organization Convention 14 Concerning the Application of the Weekly Rest in Industrial Undertakings, adopted 25 October 1921, entered into force 19 June 1923, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312159:NO

1948

Charter of the Organization of American States, adopted 30 April 1948, entered into force on 13 December 1951, available at www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm

American Declaration on the Rights and Duties of Man, adopted 2 May 1948, available at https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf

Universal Declaration of Human Rights, adopted 10 December 1948, available at <https://www.un.org/en/universal-declaration-human-rights/index.html>

1950

European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf

1951

Convention relating to the Status of Refugees, adopted 28 July 1951, entered into force on 22 April 1954, available at [https://www.ohchr.org/EN/Professional Interest/Pages/ StatusOfRefugees.aspx](https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx)

1952

Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 20 March 1952, entered into force 18 May 1954, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006377c>

1954

Convention relating to the Status of Stateless Persons, adopted 28 September 1954, entered into force 6 June 1960, available at https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=en

1957

International Labour Organization Convention 106 Concerning Weekly Rest in Commerce and Offices, adopted 5 June 1957, entered into force 4 March 1959, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312251:NO

1960

Convention against Discrimination in Education, adopted 4 December 1960, entered into force 22 May 1962, available at www.unesco.org/education/information/nfsunesco/pdf/DISCRI_E.PDF

1965

International Convention on the Elimination of All Forms of Racial Discrimination, adopted 7 March 1965, entered into force 4 January 1969, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en

1966

International Covenant on Economic Social and Cultural Rights, adopted 16 December, entered into force 3 January 1976, available at <https://ohchr.org/en/professionalinterest/pages/cescr.aspx>

International Covenant on Civil and Political Rights, 16 December 1966, entered into force 23 March 1976, available at <https://ohchr.org/en/professionalinterest/pages/ccpr.aspx>

Optional Protocol I to the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>

1967

Protocol relating to the Status of Refugees, adopted 31 January 1967, entered into force 3 October 1967, available at https://treaties.un.org/doc/Treaties/1967/10/19671004%2007-06%20AM/Ch_V_5p.pdf

1969

American Convention on Human Rights, adopted 22 November 1969, entered into force 18 July 1978, available at www.oas.org/dill/access_to_information_American_Convention_on_Human_Rights.pdf

1970

International Labour Organization Convention 132 Concerning Annual Holidays with Pay, adopted 3 June 1970, entered into force 30 June 1973, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312277:NO

1979

International Convention against the Taking of Hostages, adopted 17 December 1979, entered into force 3 June 1983, available at <https://treaties.un.org/doc/db/Terrorism/english-18-5.pdf>

Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, entered into force 3 September 1981, available at <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

1981

International Labour Organization Convention 155 Concerning Occupational Safety and

Health and the Working Environment, adopted 3 June 1981, entered into force 11 August 1983, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312300:NO

African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, available at <http://www.achpr.org/instruments/achpr/>

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted 25 November 1981, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ReligionOrBelief.aspx>

1984

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en

1985

International Labour Organization Convention 161 Concerning Occupational Health Services, adopted 7 June 1985, entered into force 17 February 1988, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312306:NO

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted 29 November 1985, available at <https://www.un.org/documents/ga/res/40/a40r034.htm>

Inter-American Convention to Prevent and Punish Torture, adopted 9 December 1985, entered into force 28 February 1987, available at <https://www.oas.org/juridico/english/treaties/a-51.html>

1988

Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol), adopted 17 November 1988, entered into force 16 November 1999, available at [https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20\(Protocol%20of%20San%20Salvador\).pdf](https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20(Protocol%20of%20San%20Salvador).pdf)

United Nations Body of Principles and for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted 9 December 1988, available at www.un.org/documents/ga/res/43/a43r173.htm

1989

ILO Convention 169 on Indigenous and Tribal Peoples, adopted 27 June 1989, entered into force 5 September 1991, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered

into force 2 September 1990, available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

1990

African Charter on the Rights and Welfare of the Child, adopted 11 July 1990, entered into force 29 November 1999, available at <http://www.achpr.org/instruments/child/>

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted 18 December 1990, entered into force 1 July 2003, available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-13&src=IND

1992

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted 18 December 1992, available at www.ohchr.org/en/professionalinterest/pages/minorities.aspx

1993

Vienna Declaration and Programme of Action, adopted 25 June 1993, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

1994

Arab Charter on Human Rights, adopted 22 May 2004, entered into force 15 March 2008, available at <https://www.unicef.org/tdad/arabcharterhumanrights.doc>

1995

Protocol to European Social Charter Providing for a System on Collective Complaints, adopted 9 November 1995, entered into force 1 July 1998, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158>

1996

European Social Charter (Revised), adopted 3 May 1996, entered into force 1 July 1999, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163>

1998

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted June 1998, entered into force 25 January 2004, available at <http://www.achpr.org/instruments/court-establishment/>

1999

International Labour Organization Convention No 182 on the Worst Forms of Child Labour, adopted 17 June 1999, entered into force 19 November 2000, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted 6 October 1999, entered into force 22 December 2000, available at https://treaties.un.org/doc/Treaties/1999/10/19991006%2005-18%20AM/Ch_IV_8_bp.pdf

2000

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted 25 May 2000, entered into force 12 February 2002, available at <https://www.ohchr.org/en/professionalinterest/pages/opaccrc.aspx>

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted 25 May 2000, entered into force 12 February 2002, available at https://treaties.un.org/doc/Treaties/2000/05/20000525%2003-16%20AM/Ch_IV_11_cp.pdf

Charter of Fundamental Rights of the European Union, adopted 2 October 2000, entered into force 1 December 2009, available at www.europarl.europa.eu/charter/pdf/text_en.pdf

2001

Inter-American Democratic Charter, adopted 11 September 2001, available at www.oas.org/charter/docs/resolution1_en_p4.htm

2002

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 18 December 2002, entered into force 22 June 2006, available at https://treaties.un.org/doc/Treaties/2002/12/20021218%2002-38%20AM/Ch_IV_9_bp.pdf

2003

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 1 July 2003, entered into force 25 November 2005, available at <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>

2005

Covenant on the Rights of the Child in Islam, adopted June 2005, available at [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/3CovenantontheRightsOftheChildinIslam\(2005\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/3CovenantontheRightsOftheChildinIslam(2005).aspx)

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted 16 December 2005, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

2006

International Labour Organization Convention 187 Concerning the Promotional Framework for Occupational Safety and Health, adopted 31 May 2006, entered into force 20 February 2009, available at www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312332:NO

African Youth Charter, adopted 2 July 2006, entered into force 8 August 2009, available at <https://au.int/en/treaties/african-youth-charter>

Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, entered into force 3 May 2008, available at <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>

Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, entered into force 3 May 2008, available at <https://treaties.un.org/doc/Publication/CTC/Ch-15-a.pdf>

International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, entered into force 23 December 2010, available at www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx

2007

United Nations Declaration on the Rights of Indigenous Peoples, adopted 13 September 2007, available at <https://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx>

Association of Southeast Asian Nations Charter, adopted 20 November 2007, entered into force 15 December 2008, available at <https://asean.org/storage/2012/05/The-ASEAN-Charter-26th-Reprint.pdf>

2008

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted 10 December 2008, entered into force 5 May 2013, available at https://treaties.un.org/doc/Publication/CTC/Ch_IV_3_a.pdf

2009

Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted 22 October 2009, entered into force 6 December 2012, at <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>

2011

Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted 19 December 2011, entered into force 14 April 2014, available at <https://treaties.un.org/doc/Treaties/2011/12/20111219%2003-15%20PM/CTC%204-11d.pdf>

2012

Association of Southeast Asian Nations Human Rights Declaration, adopted 18 November 2012, available at <https://asean.org/asean-human-rights-declaration/>

2016

New York Declaration for Refugees and Migrants, adopted 3 October 2016, available at www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1

8.4 INTERNATIONAL HUMANITARIAN LAW

1863

Instructions for the Government of Armies of the United States in the Field (Lieber Code), adopted 24 April 1863, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/110?OpenDocument>

1899

Hague Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, adopted 29 July 1899, entered into force 4 September 1900, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/150?OpenDocument>

1907

Hague Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Regulations), adopted 18 October 1907, entered into force 26 January 1910, available at ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/195?OpenDocument

Hague Convention IX concerning Bombardment by Naval Forces in Time of War, adopted 18 October 1907, entered into force 26 January 1910, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/220?OpenDocument>

1935

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), adopted 15 April 1935, entered into force 26 August 1935, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/325>

1949

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva Convention I), adopted 12 August 1949, entered into force 21 October 1950, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument>

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949 (Geneva Convention II), adopted 12 August 1949, entered into force 21 October 1950, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/370?OpenDocument>

Geneva Convention relative to the Treatment of Prisoners of War 1949 (Geneva Convention III), adopted 12 August 1949, entered into force 21 October 1950, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument>

Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (Geneva Convention IV), adopted 12 August 1949, entered into force 21 October 1950, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380?OpenDocument>

1954

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted 14 May 1954, entered into force 7 August 1956, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/400?OpenDocument>

Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted 14 May 1954, entered into force 7 August 1956, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/410?OpenDocument>

1977

Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted 8 June 1977, entered into force 7 December 1978, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470?OpenDocument>

Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted 8 June 1977, entered into force 7 December 1978, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>

1980

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, adopted 10 October 1980, entered into force 2 December 1983, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en

Protocol on Non-Detectable Fragments (Protocol I), adopted 10 October 1980, entered into force 2 December 1983, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=CFCC9F92E14E1945C12563CD002D6DA9&action=openDocument>

Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, adopted 10 October 1980, entered into force 2 December 1983, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=6258BAB1CD31AD0EC12563CD002D6DC9&action=openDocument>

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), adopted 10 October 1980, entered into force 2 December 1983, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=1E37E38A51A1941DC12563CD002D6DEA&action=openDocument>

1993

Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, adopted 13 January 1993, entered into force on 29 April 1997, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/553?OpenDocument>

1995

Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), adopted 13

October 1995, entered into force 30 July 1988, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=70D9427BB965B7CEC12563FB0061CFB2&action=openDocument>

1996

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, entered into force 3 December 1998, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=82CF2C7C75E37C5AC12563FB006181B4&action=openDocument>

1997

Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention), adopted 18 September 1997, entered into force 1 March 1999, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en

1999

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted 26 March 1999, entered into force 9 March 2004, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/590?OpenDocument&redirect=0>

2003

Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention), adopted 28 November 2003, entered into force 12 November 2006, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=22EFA0C23F4AAC69C1256E280052A81F&action=openDocument.com>

2005

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), adopted 8 December 2005, entered into force 14 January 2007, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/615?OpenDocument>

2008

Convention on Cluster Munitions, adopted 30 May 2008, entered into force 1 December 2010, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-6&chapter=26&clang=_en

2009

International Committee of the Red Cross Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, adopted 26 February 2009, available at <https://www.icrc.org/en/doc/assets/files/other/irrc-872-reports-documents.pdf>

2017

Treaty on the Prohibition of Nuclear Weapons, New York, adopted 7 July 2017 (not yet in force), available at https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf

8.5 INTERNATIONAL CRIMINAL LAW

1945

Charter of the International Military Tribunal (Nuremberg Charter), adopted 8 August 1945, available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

1948

Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), adopted 9 December 1948, entered into force 12 January 1948, available at <https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx>

8.6 LINKS TO TREATY RATIFICATION

Treaty	Ratification
United Nations Charter 1945	https://treaties.un.org/Pages/ViewDetails.aspx?src=%20TREATY&mtdsg_no=I-1&chapter=1&lang=en
Vienna Convention on the Law of Treaties 1969	https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-r=23&Temp=mtdsg3&clang=_en
Statute of the International Court of Justice 1945	https://treaties.un.org/Pages/ViewDetails.aspx?src=%20TREATY&mtdsg_no=I-1&chapter=1&lang=en
Statute of the International Criminal Court 1998	https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en
Amendment to article 8 of the Rome Statute of the International Criminal Court 2010	https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10-a&chapter=18&clang=_en
Amendment to article 8 of the Rome Statute of the International Criminal Court (Weapons which use microbial or other biological agents, or toxins) 2017	https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10-d&chapter=18&clang=_en

Amendment to article 8 of the Rome Statute of the International Criminal Court (Weapons the primary effect of which is to injure by fragments undetectable by x-rays in the human body) 2017	https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10-e&chapter=18&clang=_en
Amendment to article 8 of the Rome Statute of the International Criminal Court (Blinding laser weapons) 2017	https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10-f&chapter=18&clang=_en
International Labour Organization Convention 14 Concerning the Application of the Weekly Rest in Industrial Undertakings 1921	https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312159
Charter of the Organisation of American States 1948	http://www.oas.org/en/sla/dillinter_american_treaties_A-41_charter_OAS_signatories.asp
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950	https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005
Convention relating to the Status of Refugees 1951	https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en
Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1952	https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009
Convention relating to the Status of Stateless Persons 1954	https://treaties.un.org/Pages/ViewDetailsII.aspx?src=IND&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en
International Labour Organization Convention 106 Concerning Weekly Rest in Commerce and Offices 1957	https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312251
Convention against Discrimination in Education 1960	www.unesco.org/eri/la/convention.asp?KO=12949&language=E
International Convention on the Elimination of All Forms of Racial Discrimination 1965	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en
International Covenant on Economic Social and Cultural Rights 1966	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en
International Covenant on Civil and Political Rights 1966	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

Optional Protocol to the International Covenant on Civil and Political Rights 1966	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en
Protocol relating to the Status of Refugees 1967	https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&clang=_en
American Convention on Human Rights 1969	https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm
International Labour Organization Convention 132 Concerning Annual Holidays with Pay 1970	https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312277
International Convention Against the Taking of Hostages 1979	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-5&chapter=1&lang=en
Convention on the Elimination of All Forms of Discrimination against Women 1979	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en
International Labour Organization Convention 138 Concerning Minimum Age for Admission to Employment 1973	https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283
International Labour Organization Convention 155 Concerning Occupational Safety and Health and the Working Environment 1981	https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312300
African Charter of Human and Peoples' Rights 1981	http://www.achpr.org/instruments/achpr/ratification/
United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en
International Labour Organization Convention 161 Concerning Occupational Health Services 1985	https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312306
Inter-American Convention to Prevent and Punish Torture 1985	https://www.oas.org/juridico/english/sigs/a-51.html
Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988	https://www.oas.org/juridico/english/sigs/a-52.html
ILO Convention 169 on Indigenous and Tribal Peoples 1989	https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314

United Nations Convention on the Rights of the Child 1989	https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en
African Charter on the Rights and Welfare of the Child 1990	http://www.achpr.org/instruments/child/ratification/
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990	https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-13&src=IND
Protocol to European Social Charter Providing for a System of Collective Complaints 1995	https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=INa3xl52
European Social Charter (Revised) 1996	https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=INa3xl52
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998	http://www.achpr.org/instruments/court-establishment/ratification/
International Labour Organization Convention No 182 on the Worst Forms of Child Labour 1999	https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted 6 October 1999	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&clang=_en
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&clang=_en
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&clang=_en
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003	http://www.achpr.org/instruments/women-protocol/ratification/

International Labour Organization Convention 187 Concerning the Promotional Framework for Occupational Safety and Health 2006	https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312332
African Youth Charter 2006	https://au.int/sites/default/files/treaties/7789-sl-african_youth_charter_1.pdf
Convention on the Rights of Persons with Disabilities 2006	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4
Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=_en
International Convention for the Protection of All Persons from Enforced Disappearance 2006	https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 2008	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en
Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009	https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf
Optional Protocol to the Convention on the Rights of the Child on a communications procedure 2011	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en
Hague Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1899	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=150
Hague Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1907	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195
Hague Convention IX concerning Bombardment by Naval Forces in Time of War 1907	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/220?OpenDocument
Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments 1935	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=325
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva Convention I)	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949 (Geneva Convention II)	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/370?OpenDocument
Geneva Convention relative to the Treatment of Prisoners of War 1949 (Geneva Convention III)	www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf
Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (Geneva Convention IV)	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380
Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=400
Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=410
Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts 1977 (Protocol I)	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470
Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts 1977 (Protocol II)	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects 1980	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en
Protocol on Non-Detectable Fragments (Protocol I) 1980	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=505
Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices 1980	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=510
Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) 1980	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=515
Convention on the Prohibition of the Development, Production, Stockpiling and	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORM

Use of Chemical Weapons and on their Destruction 1993	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=553
Protocol on Blinding Laser Weapons (Protocol IV) 1995	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=570
Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=575
Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction 1997	https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en
Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=590
Protocol on Explosive Remnants of War 2003	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=610
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) 2005	https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=615
Convention on Cluster Munitions 2008	https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-6&chapter=26&clang=_en
Treaty on the Prohibition of Nuclear Weapons 2017	https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=_en
Charter of the International Military Tribunal 1945	https://ihl-databases.icrc.org/ihl/INTRO/350?OpenDocument
Convention on the Prevention and Punishment of the Crime of Genocide 1948	https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en

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Appendix B: Relevant Cases

9.1 INTERNATIONAL COURTS, TRIBUNALS AND SUPERVISORY BODIES

Committee Against Torture

V.L. v Switzerland, CAT/C/37/D/262/2005

Committee on the Elimination of Racial Discrimination

D.R. v Australia, Communication No 42/2008

Er v Denmark, Communication No 40/2007

Eritrea-Ethiopia Claims Commission

Final Award, Eritrea's Damages Claims, Decision of 17 August 2009

Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009

Western Front, Aerial Bombardment and Related Claims, ILM 45, 19 December 2005

Extraordinary Chambers in the Courts of Cambodia

Closing Order, Case 002, Case 002/19-09-2007-ECCC-OCIJ

Office of the Co-Prosecutor v Duch, Trial Chamber Judgment

French-Mexican Claims Commission

France v Mexico (Caire Claim) (1929) 5 Reports of International Arbitral Awards 516

Human Rights Committee

B.M.I. and N.A.K. v. Denmark, Communication No 2569/2015, 16 December 2016

D and E, and their Two Children v Australia, Communication No 1050/2002, 9 August 2006

Erkki Hartikainen v Finland, Communication No 40/1978, 9 April 1981

Herrera Rubio v Colombia, Application No 161/1983, 2 November 1987

Hopu and Bessert v France, Communication No 549/1993, December 1997
Hudoyberganova v Uzbekistan, Communication No 931/2000, 8 December 2004
Lantsova v Russia, Communication No 763/1997, 26 March 2002
Lopez Burgos v Uruguay, Communication No 52/1979, 29 July 1981
M.A.S., L.B.H. and their Children v Denmark, Communication No 2585/2015, 18 December 2017
Omar Sharif Baban, on his own Behalf and on Behalf of his Son, Bawan Heman Baban, v Australia, Communication No 1014/2001, 18 September 2003
Rawle Kennedy v Trinidad and Tobago, Communication No 845/1998, 26 March 2002
R.I.H. et al v Denmark, Communication No 2640/2015, 22 August 2017
Unn et al v Norway, Communication No 1155/2003, 3 November 2004
Waldman v Canada, Communication No 694/1996, 5 November 1999

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)), ICJ Reports 1993, 13 September 1993
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)), ICJ Reports 2007, 26 February 2007
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005, 19 December 2005
Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), ICJ Reports 2002, 14 February 2002
Barcelona Traction, Light and Power Company (Belgium v Spain), ICJ Reports 1970, 5 February 1970
Continental Shelf (Libyan Arab Jamahiriya v Malta), ICJ Reports 1985, 3 June 1985
Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), ICJ Reports 2012, 3 February 2012
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 9 July 2004
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, 8 July 1996
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), ICJ Reports 1986, 27 June 1986
United States Diplomatic and Consular Staff in Tehran (United States of America v Iran), ICJ Reports 1980, 24 May 1980

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v Ante Gotovina et al, IT-06-90-T, 15 April 2011
Prosecutor v Anto Furundžija, IT-95-17/1-T, 10 December 1998

Prosecutor v Dario Kordić & Mario Čerkez, IT-95-14/2-T, 26 February 2001
Prosecutor v Dario Kordić & Mario Čerkez, IT-95-14/2-A, 17 December 2004
Prosecutor v Dragan Obrenović, IT-02-60/2-S, 10 December 2003
Prosecutor v Dragan Zelenović, IT-96-23/2-S, 4 April 2007
Prosecutor v Dragoljub Kunarac et al, IT-96-23-T & IT-96-23/1-T, 22 February 2001
Prosecutor v Dragoljub Kunarac et al, IT-96-23 & IT-96-23/1-A, 12 June 2002
Prosecutor v Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Prosecutor v Enver Hadžihanović & Amir Kubura, IT-01-47-A, 22 April 2008
Prosecutor v Ivica Rajić, IT-95-12-S, 8 May 2006
Prosecutor v Jadranko Prlić et al, IT-04-74-T, 11 June 2008
Prosecutor v Ljube Bošković & Johan Tar ulovski, IT-04-82-T, 10 July 2008
Prosecutor v Milan Martić, IT-95-11-T, 12 June 2007
Prosecutor v Milan Simić, IT-95-9/2-S, 17 October 2002
Prosecutor v Mile Mrkšić, IT-95-13/1-T, 27 September 2007
Prosecutor v Milomir Stakić, IT-97-24-T, 31 July 2003
Prosecutor v Milomir Stakić, IT-97-24-A, 22 March 2006
Prosecutor v Milorad Krnojelac, IT-97-25-T, 15 March 2002
Prosecutor v Milorad Krnojelac, IT-97-25-A, 17 September 2003
Prosecutor v Milorad Trbić, IT-05-88/1
Prosecutor v Miodrag Jokić, IT-01-42/1-S, 18 March 2004
Prosecutor v Mladen Naletilić & Vinko Martinović, IT-98-34-T, 31 March 2003
Prosecutor v Pasko Ljubičić, IT-00-41, 26 September 2000
Prosecutor v Pavle Strugar et al, IT-01-42, 22 February 2001
Prosecutor v Pavle Strugar, IT-01-42-T, 31 January 2005
Prosecutor v Pavle Strugar, IT-01-42-A, 17 July 2008
Prosecutor v Radislav Krstić, IT-98-33-A, 19 April 2004
Prosecutor v Radoslav Brđanin & Momir Talić, IT-99-36-AR73.9, 11 December 2002
Prosecutor v Radoslav Brđanin, IT-99-36-T, 28 November 2003
Prosecutor v Radoslav Brđanin, IT-99-36-T, 1 September 2004
Prosecutor v Ramush Haradinaj et al, IT-04-84-T, 3 April 2008
Prosecutor v Stanislav Galić, IT-98-29-T, 5 December 2003
Prosecutor v Tihomir Blaškić, IT-95-14-T, 3 March 2000
Prosecutor v Stevan Todorović, IT-95-9/1-S, 31 July 2001
Prosecutor v Vidoje Blagojević & Dragan Jokić, IT-02-60-T, 17 January 2005
Prosecutor v Vidoje Blagojević & Dragan Jokić, IT-02-60-A, 9 May 2007
Prosecutor v Vojislav Seselj, IT-03-67
Prosecutor v Vujadin Popović et al, IT-05-88, 10 June 2010
Prosecutor v Zdravko Mucić et al, IT-96-21-T, 16 November 1998
Prosecutor v Zdravko Tolimir, IT-05-88/2
Prosecutor v Zoran Kupreškić et al, IT-95-16-T, 14 January 2000

International Criminal Tribunal for Rwanda

Prosecutor v Alfred Musema, ICTR-96-13-A, 27 January 2000
Prosecutor v Callixte Kalimanzira, ICTR-05-88, 22 June 2009
Prosecutor v Ferdinand Nahimana et al, ICTR-99-52-T, 3 December 2003
Prosecutor v Georges Ruggiu, ICTR-97-32-I, 1 June 2000
Prosecutor v Georges Rutaganda, ICTR-96-3-T, 6 December 1999
Prosecutor v Jean-Paul Akayesu, ICTR-96-4, 2 September 1998
Prosecutor v Tharcisse Renzaho, ICTR-97-31-T, 14 July 2009

Special Court for Sierra Leone

Prosecutor v Alex Tamba Brima et al, SCSL-04-16-T, 31 March 2006
Prosecutor v Alex Tamba Brima et al, SCSL-04-16-T, 20 June 2007
Prosecutor v Charles Ghankay Taylor, SCSL-03-01-T, 26 April 2012
Prosecutor v Issa Hassan Sesay et al, SCSL-04-15-T, 2 March 2009
Prosecutor v Sam Hinga Norman, SCSL-2004-14-AR72(E), 31 May 2004

International Criminal Court

Prosecutor v Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 17 August 2017
Prosecutor v Bosco Ntaganda, ICC-01/04-02/06, 15 July 2017
Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, 25 September 2009
Prosecutor v Germaine Katanga, ICC-01/04-01/07, 24 March 2017
Prosecutor v Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 21 March 2016
Prosecutor v Joseph Kony et al, ICC-02/04-01/05
Prosecutor v Omar Hassan Ahmad Al Bashir, ICC-02/05-157-AnxA, 14 July 2008
Prosecutor v Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-397-Corr, 6 May 2019
Prosecutor v Ongwen, ICC-02/04-01/15
Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06, 15 December 2008
Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06, 14 March 2012
Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06, 10 May 2012
Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06, 21 December 2017

International Military Tribunal Nuremberg

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Lotus Case (France v Turkey), Series A No 10, 7 September 1927

9.2 REGIONAL COURTS AND OTHER SUPERVISORY BODIES

African Commission on Human and Peoples' Rights

Alhassan Abubakar v Ghana, Communication No 103/93, 31 October 1996
 Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, Communication No 157/96, 29 May 2003
 Constitutional Rights Project (in respect of Zamani Lakwot and others) v Nigeria, Communication No 60/91, 22 March 1995
 Curtis Francis Doeblbler v Sudan, Communication No 236/2000, 4 May 2003
 Free Legal Assistance and Others v Zaire, Communication Nos 25/89, 47/90, 56/91, 100/93, October 1995
 Huri-Laws/Nigeria, Communication 225/98, 6 November 2000
 Institute for Human Rights and Development in Africa/ Republic of Angola, Communication No 292/04, 22 May 2008
 Kazeem Aminu v Nigeria, Communication No 205/97, 11 May 2000
 Media Rights Agenda v Federal Republic of Nigeria, Communication No 224/98, 6 November 2000
 Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso, Communication No 204/97, 7 May 2001
 Mr. Eid Mohammed Ismil Dahrooj and two others (represented by AED and 4 others) v Arab Republic of Egypt, Communication No 614/16, 22 February 2018
 Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, Communication No 155/96, 27 October 2001
 Union InterAfricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v Angola, Communication No 159/96, 11 November 1997

African Committee of Experts on the Rights and Welfare of the Child

Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of the Children of Nubian Descent in Kenya v The Government of Kenya, Communication No.002/Com/2009, 22 March 2011
 Hansungule, Acirokop, and Mutangi v The Republic of Uganda, Communication, 13 June 2005

European Court of Justice

Blaizot v University of Liège, Case 24/86, 2 February 1988
 Casagrande v Landeshauptstadt München, Case 9/74, 3 July 1974
 Gravier v City of Liège, Case 293/83, 13 February 1985
 Sylvie Lair v University of Hannover, Case 39/86, 21 June 1988
 Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Joined Cases C-402/05 P and C-415/05 P, 3 September 2008

ECOWAS Community Court of Justice

SERAP v Nigeria, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10, 30 November 2010

European Committee of Social Rights

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European Roma Rights Centre v Greece, Complaint No 15/2003, 8 December 2004

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International Federation for Human Rights Leagues (FIDH) v France, Complaint No 14/2003, 3 November 2004

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Akdivar and others v Turkey, Application No 21893/93, 1 April 1998

Aksoy v Turkey, Application No 21987/93, 18 December 1996

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Al-Saadoon and Mufdhi v United Kingdom, Application No 61498/08, 2 March 2010

Al-Skeini and others v United Kingdom, Application No 55721/07, 7 July 2011

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Aydin v Turkey, 25 EHRR 251, 25 September 1997

Banković and others v Belgium and 16 Other Contracting States, Application No 52207/99, 12 December 2001

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Çam v Turkey, Application No 51500/08, 23 May 2016

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 Hasan and Eylem Zengin v Turkey, Application No 1448/04, 9 October 2007
 Hassan v United Kingdom, Application no 29750/09, 16 September 2014
 Iatridis v Greece, Application No 31107/96, 19 October 2000,
 Ilaşcu and Others v Moldova and Russia, Application No 48787/99, 8 July 2004
 Ireland v United Kingdom, 2 EHRR 25, 18 January 1978
 Isaak and others v Turkey, Application No 44587/98, 28 September 2006
 Isayeva v Russia, Application no. 57950/00, 24 February 2005
 Issa v Turkey, Application No 31821/96, 16 November 2004
 Jalloh v Germany, Application No 54810/00, 11 July 2006
 Jordan v United Kingdom, Application No 24746/94, 4 May 2001
 Kelly and others v United Kingdom, 37 EHRR 52, 4 May 2001
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 Kerimova and others v Russia, Application Nos 17170/04, 20792/04, 22448/04, 23360/04,
 5681/05 and 5684/05, 3 May 2011
 Khamzayev and others v Russia, Application No 1503/02, 3 May 2011
 Khashiyev and Akayeva v Russia, 57942/00; 57945/00, 24 February 2005
 Khatsiyeva and others v Russia, Application No 5108/02, 17 January 2008
 Kjeldsen and others v Denmark, Application No 5095/71, 7 December 1976
 Lautsi and others v Italy, Application No 30814/06, 18 March 2001
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 1999
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 Öcalan v Turkey, Application No 46221/99, 12 May 2005
 P.F. and E.F. v United Kingdom, Application No 28326/09, 23 November 2010
 Raninen v Finland, Application No 152/1996/771/972, 16 December 1997
 Ribitsch v Austria, Application No 18896/91, 21 November 1995
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 Selmouni v France, Application No 25803/94, 28 July 1999
 Sorguç v Turkey, 23 June 2009
 T.P. and K.M v United Kingdom, 34 EHRR 42, 10 May 2001
 Tanrikulu v Turkey, 30 EHRR 950, 8 July 1999
 Timishev v Russia, Application Nos 55762/00 and 55974/00, 13 December 2005
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 Varnava and others v Turkey, 18 September 2009
 Young, James and Webster v United Kingdom, 4 EHRR 38, 13 August 1981

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Education is not only an important end in itself; it enables access to other human rights, to meaningful participation in society, and to the promotion of universal respect for the dignity of all.

Situations of insecurity and armed conflict affect education in many ways, such as through threats or physical harm inflicted on students and education staff, the forced displacement of populations whether within or outside the boundaries of their respective states, the recruitment of children in to the armed forces of states and non-state armed groups, and the destruction of education facilities or their use as training grounds. Education itself is affected when it is used as a tool for war propaganda or a vehicle for discrimination or incitement to hatred between various groups. Education may also be discontinued entirely as a result of insecurity or armed conflict.

This International Law Handbook on Protecting Education in Insecurity and Armed Conflict explains how key international law regimes (international human rights law, international humanitarian law, and international criminal law) protect education, students, teachers, and schools. It also considers the mechanisms that can be used to obtain reparation for education-related violations. Such examination is essential for both the protection of education itself and for the benefits that derive from it. This Second Edition of the Handbook has been fully revised and updated, including the latest legal developments and case-law.



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