



EDUCATION
ABOVE ALL

Protecting Education in Insecurity and Armed Conflict

An International Law Handbook



British Institute of
International and
Comparative Law

Protecting Education in Insecurity and Armed Conflict:
An International Law Handbook

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**British Institute of
International and
Comparative Law**



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Preface

This publication is the first in a series of legal research documents commissioned by Education Above All (EAA), on the protection of education during insecurity and armed conflict.

EAA is an independent non-governmental organization chaired by Her Highness Sheikha Moza Bint Nasser of Qatar, UNESCO Special Envoy for Basic and Higher Education. A policy, research and advocacy organization, EAA is concerned with the protection of education during insecurity and armed conflict. EAA's Legal Program contributes to such protection through the strategic utilization of international and regional law. Its objective 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.

The British Institute of International and Comparative Law is one of the leading independent research centres for international and comparative law in the world, and is the only organization of its type in the UK. 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.biiicl.org.

All webpages in this document are current at 30 June 2012. An electronic version of this Handbook is available at both:

www.educationaboveall.org/legalresources

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Foreword 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
UNESCO, Special Envoy Basic and Higher Education

Foreword 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
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
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
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

FRY	Federal Republic of Yugoslavia
HRC	United Nations Human Rights Committee
HRCouncil	United Nations Human Rights Council
HRW	Human Rights Watch
IAC	International Armed Conflict
IACCommHR	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
INEE	Inter-Agency Network for Education in Emergencies
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
OSJI	Open Society Justice Initiative
PCIJ	Permanent Court of International Justice
POW	Prisoner of War
SCSL	Special Court for Sierra Leone
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	General Assembly of the United Nations
UNGA Res	United Nations General Assembly Resolution
UNHCR	United Nations High Commission for Refugees
UNICEF	United Nations International Children's Economic Foundation
UNSC Res	United Nations Security Council Resolution
UNSG	United Nations Secretary General
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

1

Introduction

1.1 CONTEXT

Education is the single most vital element in combating poverty, empowering women and promoting human rights and democracy.¹

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.

Alone or combined, these impacts and others have the potential to 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 international criminal law, 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.²

¹ UNICEF, *Rebuilding Hope in Afghanistan* (UNICEF, 2002), 2. Available at www.unicef.org/publications/index_15520.html.

² See J Boyden and P Ryder *Implementing the Right to Education in Areas of Armed Conflict* (Department of International Development University of Oxford, 1996), 10. Available at www.essex.ac.uk/armedcon/story_id/000454.pdf.

Underpinning this Handbook, and noting the complex legal and practical issues 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 human rights, to meaningful participation in society, and to the promotion of universal respect for the dignity of all.³ It is a right deserving of protection by all of us.

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 conflict regarding the obligations 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. Education is the focus of this Handbook and runs throughout each of its chapters, linking legal provisions from various regimes in a novel way: though 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).

Within this canvas, the Handbook will explore in detail the right to education and related rights, and 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 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), 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. The intention is that it will be used primarily as a resource for national and international lawyers seeking to understand

³ See generally, UNICEF *A Human Rights-Based Approach to Educational for All* (UNICEF, 2007), Chapter 2. Available at www.unicef.org/publications/index_42104.html.

better how international law protects education. It is intended to be a useful tool for national 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 may also be 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 organizations, seeking to provide for a better future for a State and its educational system. 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 2012. As laws and practices change and develop, this book should remain the starting point of information. Education Above All and the British Institute of International and Comparative Law, 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 international human rights 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”.⁴ 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).⁵ It not only refers to all types and levels of education but also includes “access to education, the standard and quality of education, and the conditions under which it is given”.⁶

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 “provide educational programmes (for students that fall within the scope of education statistics)”,⁷ 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.⁸ This Handbook focuses primarily on instructional educational institutions but is not limited to consideration of schools alone, though it will examine the broader base of non-instructional education institutions, such as the role of ministries, 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.⁹ This term also includes “staff employed in both public and private

⁴ UNESCO, *International Standard Classification of Education* (UNESCO, 1997). Available at www.unesco.org/education/information/nfsunesco/doc/iscsed_1997.htm. (ISCED 1997).

⁵ Note that the Committee that considers compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR) 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 on Art.13 of the Convention*, 21st Session, 15 November–3 December 1999. (CESCR General Comment 13). Available at www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument.

⁶ Art.1(2) of the Convention Against Discrimination in Education.

⁷ This includes schools and higher education institutions, such as universities.

⁸ UNESCO, *The Data Collection on Education Systems (UOE Data Collection Manual)* (2004) UIS/OECD/EUROSTAT, 41. Available at: www.oecd.org/dataoecd/32/53/33712760.pdf.

⁹ Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Mozambique*, (2002) 29th session, 3 April 2002, Doc. CRC/C/15/Add.172, 57(b). Available at: [http://www.unhchr.ch/tbs/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/2fbbb9bffd3bf07ec1256b5900585dc3/\\$FILE/G0240997.pdf](http://www.unhchr.ch/tbs/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/2fbbb9bffd3bf07ec1256b5900585dc3/$FILE/G0240997.pdf).

schools and other educational institutions,”¹⁰ 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.¹¹

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”.¹² 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 structures.¹³ While the Committee on the Rights of the Child refers to “informal educational settings, including in the home”,¹⁴ this Handbook is not intended to apply to those types of 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,¹⁵ 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.

¹⁰ UNESCO/OECD *Education Trends in Perspective: Analysis of the World Education Indicators*, Vol.794, (OECD Publishing, 2005).

¹¹ However it does not refer to those individuals working in the education sector for the purposes of policy and planning with no teaching or research responsibilities.

¹² CESCR General Comment 13, para.6(a).

¹³ 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* (2002) 31st Session, 9 October 2002, Doc. CRC/C/15/Add.190, para.54(e). Available at daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/454/32/PDF/G0245432.pdf?OpenElement.

¹⁴ Committee on the Rights of the Child *General Comment 1* (2001) Doc. CRC/GC/2001/1, para.10. Available at tb.ohchr.org/default.aspx?Symbol=CRC/GC/2001/1. Therefore, ‘home schooling’ and similar activities are not included in this Handbook.

¹⁵ See for example the UN Security Council’s Presidential Statement of 29 April 2009, 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”: UNSC *Presidential Statement* (2009) UN doc S/PRST/2009/9 29 April 2009.

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

- Where education is expressly recognized 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.

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 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. Chapters 4 and 5 set out how the law protects those essential elements of education, and the conditions necessary for education, including the physical protection of students and education staff, and the protection of educational facilities.

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 does not seek to set out the general law which might apply in ordinary peace-time situations but, rather, 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 organized armed group and a State.¹⁶
- 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 characterized by large-scale arrests, ‘political’ prisoners, and suspension of large judicial guarantees and allegations of disappearances.¹⁷
- Situations of fragility:¹⁸ ‘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.¹⁹

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.

¹⁶ C Pilloud (ed.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987, ICRC), paras 1351–1355. Examples might include the uprisings in 2011 and 2012 in Tunisia and Egypt.

¹⁷ *Ibid.*

¹⁸ INEE Working Group on Education and Fragility. Note from the Working Group on Education and Fragility on Terminology. Available at http://www.ineesite.org/uploads/documents/store/Note_from_the_Working_Group_on_Education_and_Fragility_Terminology1.pdf.

¹⁹ F Stewart and G Brown, *Overview—Fragile States*, Centre for Research on Inequality, Human Security and Ethnicity (Oxford, 2010), 6. Available at www.crise.ox.ac.uk/pubs/CRISE%20Overview%203.pdf. See also World Bank *Definitions of Fragility and Conflict* (World Bank, 2009) available at web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/EXTLICUS/0,,contentMDK:22230573~pagePK:64171531~menuPK:4448982~piPK:64171507~theSitePK:511778,00.html, where a ‘fragile State’ is characterized by “weak institutional capacity, poor governance, and political instability”.

Armed Conflict

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

Different rules of IHL apply in international and non-international armed conflict 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 limitations discussed in Chapter 2). Many provisions of ICL also apply in armed conflict, although, like IHL, different rules apply in international and non-international armed conflict. When, where, and to whom IHRL, IHL, and ICL apply is discussed in detail in Chapter 2.

International Armed Conflict

‘International armed conflict’ describes situations of violence which involve the use of armed force *between* States.²⁰ Where force is used against a State there is no minimum threshold for intensity or amount of force,²¹ no minimum number of casualties, and no time limit²² necessary to qualify a situation as an international armed conflict.²³ Although the use of force between States is uncontroversially an international armed conflict, 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 international armed conflict by IHL treaty law.²⁴ International armed conflict does not depend on a formal declaration of ‘war’²⁵ 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*).²⁶

International armed conflict also includes situations of belligerent occupation, whether partial or total, regardless of whether such occupation meets with any armed resistance.²⁷ ‘Belligerent

²⁰ Common Art.2 Geneva Conventions.

²¹ J Pictet (ed.) *Commentary on the Geneva Conventions of 12 August 1949* (1952-1960, ICRC) Volume 1, 32.

²² See for example the case of *Abella v Argentina Argentina* (1997) Report No 55/97, Case 11.137, 18 November 1997 which involved a 30-hour armed conflict to which the Inter American Commission of Human Rights held IHL applied.

²³ This broad definition of international armed conflict was confirmed by the ICTY in *Prosecutor v Mucic et al* Judgment (1998) (Trial Chamber) No IT-96-21-T Judgment 16 November 1998, para.184.

²⁴ See Art.1(4) Additional Protocol I, as discussed in Chapter 2.

²⁵ Common Art.2 Geneva Conventions.

²⁶ C Greenwood “Scope of Application of Humanitarian Law” in D Fleck (ed.) *The Handbook of International Humanitarian Law*, 2nd edn (OUP, 2009), 51.

²⁷ Common Art.2 Geneva Conventions. The existence of ‘international armed conflict’ is a question of fact, not law: See the 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

occupation' is where the armed forces of one State have effective control over the territory of another.²⁸ This definition of belligerent occupation is discussed in more detail in Chapter 2.

Non-international Armed Conflict

'Non-international armed conflict' 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 non-international armed conflict—as opposed to a situation of internal disturbance or tension that amounts to insecurity (see above),²⁹ to which IHL does not apply. This definition of non-international armed conflict is found in customary international law and is used in this Handbook. Although IHL treaty law sets out other thresholds for non-international armed conflict, 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 non-international armed conflict, triggering the application of those rules of IHL which apply to non-international armed conflicts. A number of different, although converging, definitions of non-international armed conflict 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 application of these regimes and their relationship to one another are discussed in detail in Chapter 2.

IHRL is examined first because it applies throughout all 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.

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

deliberate decision by the drafters in order to avoid a restrictive and overly technical interpretation: J Pictet (ed.) *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1952–1960) Vol.1, 32.

²⁸ E Benvenisti, "Belligerent Occupation" in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition, www.mpepil.com.

²⁹ Art.1(2) Additional Protocol I.

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 recognized. Where the two regimes do overlap, including in cases of the protection of the right to life of students and education staff or 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.

The relationship between IHRL and IHL is theoretically complex and can be difficult to apply in practice. Chapter 2 will examine how different mechanisms, including international and regional human rights bodies, have attempted to reconcile the distinct legal regimes.

ICL is considered after 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 found 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 International Criminal Court (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 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, 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 on 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, the limitations on its exercise, and the obligations as to its protection are explored. Chapter 3 emphasizes that the right to education is directly applicable in situations of both insecurity and armed conflict, subject to any general limitations of IHRL. IHL also contains provisions that

directly address the right to 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 non-international armed conflict. While ICL does not protect 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, examine the international legal protection of other rights that are necessary for the full and effective realization 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 staff 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 staff, 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 IHRL 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 this body of law applies (i.e. its temporal application), where it applies (i.e. its jurisdictional application) and to whom it applies (i.e. its 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, it is 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.¹ 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. Once a State has agreed to (the legal terms being to ‘ratify’ or to ‘accede to’) a treaty then it is legally binding and that State is a ‘party’ to the treaty. Note that a treaty

¹ Vienna Convention on the Law of Treaties (VCLT, adopted 23 May 1969, entered into force on 27 January 1980) United Nations, *Treaty Series*, Vol.1155, 331.

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 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.* This means that the State has done more than signing the treaty—as signing by itself is normally not enough to make the State a party to the treaty²—and is usually by that State making a statement that it is legally bound by the treaty. The State is then a ‘party’ to the treaty. This can usually be discerned by looking at, for example, the website of the UN or the regional organization behind the treaty, or by finding out from the State itself. Note that ratifying (or ‘acceding to’ where the State did not originally sign the treaty) a treaty is *not* the same as either making the treaty part of the national law of the State or indicating 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 (ICCPR) required 35 States to be parties to it before it came into force³ so, while it was finalized and agreed in 1966 (hence its date), it did not come into force until 1976. Any State which becomes party 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 vary between States but it must be made clear by the State when ratifying the treaty.⁴ It is assumed in this Handbook, unless otherwise stated, that the relevant treaty is in force.
- *The right or protection is set out in that treaty.* This may seem obvious but it is crucial to make sure that the right or protection being considered is within the relevant treaty and that there is no limitation on that right or protection in the treaty that may restrict the possibility of applying the treaty to the particular situation. 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.
- *There is no relevant and valid reservation or derogation to the treaty.* In addition to any limitation to a right set out in the specific treaty provision, 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

² 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 Art.18, VCLT.

³ Art.49 ICCPR.

⁴ 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, A Aust, *Modern Treaty Law and Practice* 2nd edn (University of London, 2007).

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 be considered within the national legal system (called an ‘exhaustion of (effective) domestic remedies’) before an international court or tribunal can consider it.

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*’). 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.⁵ 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 Geneva Conventions are customary international law.

2.1.3 *Jus Cogens*

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

[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.⁶

Jus cogens may be characterized as an ‘intransgressible’ norm of international law, the binding force of which is unconditional.⁷ A State must not only desist from entering into a treaty that

⁵ See D Kritsiotis, “On the Possibilities of and for Persistent Objection” (2010) 21 *Duke Journal of Comparative and International Law* 121.

⁶ Art.63 VCLT.

⁷ International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Reports, para.79 (“*Wall Advisory Opinion*”).

would contravene a *jus cogens* norm, it must not adopt laws or policies to such effect.⁸ 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 characterized as *jus cogens* are not always clear or universally agreed. The prohibition against torture⁹ and the prohibition against genocide¹⁰ are generally accepted as being *jus cogens*.

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, there may be some times when ICL applies in situations of insecurity.

The main international human rights treaties that are considered in this Handbook are:

- Convention Against Discrimination in Education 1960 (CDE), which has 97 States parties;
- International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), which has 160 States parties, and its Optional Protocol, which has 8 States parties;
- International Covenant on Civil and Political Rights 1966 (ICCPR), which has 167 States parties, and its Optional Protocols (with the Optional Protocol adopted in 1966 having 114 States parties and the Second Optional Protocol aiming at the abolition of the death penalty having 74 States parties);
- Convention in the Elimination of all Forms of Discrimination against Women 1979 (CEDAW), which has 187 States parties, and its Optional Protocol adopted in 1999 which has 104 States parties;
- Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 (CAT), which has 150 States parties, and its Optional Protocol adopted in 2002 which has 63 States parties;
- Convention on the Rights of the Child 1989 (CRC), which has 193 States parties, and its Optional Protocols (with the Optional Protocol on the Involvement of Children in Armed Conflict adopted in 2000 having 147 States parties and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography adopted in 2000 having 158 States parties);¹¹ and

⁸ See *Prosecutor v Anto Furundzija*, ICTY, Trial Judgment, IT-95-17/1 10 December 1998, para.155.

⁹ See for example *The Prosecutor v Anto Furundzija*, *ibid*.

¹⁰ 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) Provisional Measures*, 13 September 1993 ICJ Reports 325, 440.

¹¹ The Optional Protocol to the CRC on a Communications Procedure, adopted in 2011, has so far only 23 Signatories.

- Convention on the Rights of People with Disabilities 2006 (CRPD), which has 116 States parties, and its Optional Protocol adopted in 2006 having 70 States parties.

The Universal Declaration of Human Rights 1948 (UDHR) is also referred to, though it is not a treaty. However, many of its Articles 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 (HRCouncil), in which the basis for review includes compliance with the UDHR.¹²

The main regional human rights treaties that are considered in this Handbook are:

- European Convention on Human Rights and Fundamental Freedoms 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 32 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 People's Rights 1981 (ACHPR), which has 54 States parties, its Protocol; and
- Arab Charter on Human Rights 2004 (ArabCHR), which has 11 States parties, half of the Members of the League of Arab States.¹³

There is no regional human rights treaty in the Asia/Pacific region.

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 role 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.

¹² HRCouncil Resolution 5/1, 18 June 2007 (A/HRC/5/21).

¹³ The first version of the Arab Charter was adopted in 1994 but it was not ratified by any Member of the League of Arab States.

2.2.1 State Obligations

International human rights law creates obligations for States parties. These obligations can be immediate or they may require to be discharged over time. 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 (progressively) (e.g. provision of social security). 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 realization 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 realized.
- *The obligation to fulfil* requires that States take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of the right to education, including by the provision of appropriate remedies.

There can be different legal obligations on a State under different treaties. A particular aspect of the ICESCR (in which the right to education is specifically protected) 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 realized’ by the State party. This is set out in Article 2 (1) of the ICESCR:

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.

It is clear that the obligation of progressive realization is a positive obligation that requires States to take steps towards the full realization 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.¹⁴ These steps must be taken within a reasonable time following the entry into force of the ICESCR in the State in question.¹⁵ Thus States must take “deliberate, concrete and targeted” steps toward the full realization of this right “within a reasonably short time” after the entry into force of the legally binding right to education on their territory.¹⁶ In addition, State’s obligations are immediate with regard to the core contents (often called ‘minimum core obligations’) of each of the rights protected under the ICESCR. With regard to the right to education, this core content includes the provision of free and compulsory primary education. However, the obligation is on the State to show that it cannot meet its obligations due to scarcity of resources and so it must prove that all efforts have been made to meet this minimum standard, including by the adoption of low-cost programmes.¹⁷ 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.¹⁸ 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,¹⁹ such as in Article 17 of the ACHPR.

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) in situations of insecurity, but its scope of application *may be restricted* in two instances:

- When the terms of the treaty impose limitations on the exercise of the right. Most rights are limited by the rights of others and the general interests of the community. For example, the right to freedom of expression may be limited by the rights of others (such as their privacy)

¹⁴ Art.2, para.1 CESCR General Comment 3: *The nature of States parties obligations* (1990) 14 December 1990. Available at www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument.

¹⁵ *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.

¹⁶ *Ibid.*, at para.9, adds that there is “an obligation to move as expeditiously and effectively as possible towards that goal”.

¹⁷ *Ibid.*, paras 10–11.

¹⁸ Any such international assistance must be in accordance with international law: see for example Arts 55–56 UN Charter.

¹⁹ For example, Art.17 of the ACHPR does not explicitly make a distinction between the types of obligations on a State.

and the general interests of the community (such as national security). However, these limitations must be able to be legitimately justified by the State.²⁰

- When a valid reservation to the treaty has been made by the relevant State. This is discussed below.

Reservations

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.²¹

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.²² In addition, some State pronouncements purported to constitute reservations are in fact ‘declarations’ or ‘understandings’, which 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. The primary rules are set out in the Vienna Convention on the Law of Treaties, 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.

²⁰ Some rights do not have any such limitations, e.g. the prohibition on torture.

²¹ Art.2 VCLT.

²² See M Dixon, R McCorquodale and S Williams, *Cases and Materials on International Law* (OUP, 2011), Ch.3.

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.²³

Derogations

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”;²⁴ and
- the official proclamation of that emergency situation by the State seeking the derogation and informing other parties to the treaty.²⁵

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 applicability of human rights law during situations of armed conflict is discussed below.

Article 4 of the ICCPR requires that:²⁶

[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.²⁷ Indeed, States have to “carefully consider the justification and why such a measure is necessary and legitimate in the circumstances”.²⁸ Given

²³ See, for example, HRC General Comment 24 *Reservations to the Covenant or Optional Protocols or declarations under Art 41 of the Covenant* (1994). Available at www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/69c55b086f72957ec12563ed004ecf7a?Opendocument and its views in *Rawle Kennedy v Trinidad and Tobago* (2000) 7 IHRR 315.

²⁴ For example, Art.4(1) ICCPR.

²⁵ HRC, General Comment 29 Art 4 (Derogations during a state of emergency) (2001) para.2. Available at [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/71eba4be3974b4f7c1256ae200517361?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument). (HRC General Comment 29).

²⁶ This has been interpreted by the HRC in its General Comment 29.

²⁷ *Ibid.*, para.4.

²⁸ *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.

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.²⁹

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).³⁰

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.

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 (HRC) 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);³¹ 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,³² which would mean that it is not possible to derogate in violation of IHL and ICL treaty and customary international law.³³ Non-discrimination and equality can also not be derogated.³⁴

²⁹ *Ibid.*, para.4.

³⁰ Art.4, para.2, ICCPR. See also *ibid.*, paras 11 and 13.

³¹ See also *Habeas Corpus in Emergency Situations Advisory Opinion* (1988), IACtHR No OC-8/87, para.42.

³² HRC General Comment 29, para.9.

³³ See, for example, the prohibition of deporting or forcibly transferring population without legal grounds in Art. 7(1)(d) and 7(2)(d) Rome Statute of the International Criminal Court 37 ILM 1002 (1998), 2187 UNTS 90; (entered into force 1 July 2002).

³⁴ See *Juridical Condition and Rights of the Undocumented Migrants*, (2003) IACtHR, Advisory Opinion, OC-18/03, Series A No.18 2003, paras 100–101.

The Committee that monitors the ICESCR seems to have taken the view that 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.³⁵ 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.³⁶ So it is probably the case that other rights could be derogated from, such as labour rights³⁷ and non-basic education provisions.

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 take 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 realize human rights internationally.³⁸ Not all the international human rights treaties make explicit their territorial scope but, as will be shown, it is now generally accepted that these 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,³⁹ the HRC, which is the relevant treaty monitoring body, has stated that the ICCPR is applicable to “anyone within the power or effective control of that State Party, even

³⁵ See CESCR General Comment 14, *The right to the highest attainable standard of health* (2000), E/C.12/2000/4 11 August 2000, paras 15, 40 and 47. Available at www.unhchr.ch/tbs/doc.nsf/%28symbol%29E.C.12.2000.4.En.

³⁶ See M Baderin and M Ssenyonjo, *International Human Rights Law* (Ashgate, 2010), p.77; and CESCR General Comment 3.

³⁷ See A Muller, “Limitations to and Derogations from Economic, Social and Cultural Rights” (2009) 9 *Human Rights Law Review* 557.

³⁸ See Principle 8 of the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (2011) (Maastricht Principles). Available at www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf. These were drafted by experts in this field and so are persuasive but not legally binding.

³⁹ Art.2(1) ICCPR 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.”

if not situated within the territory of the State Party”.⁴⁰ The International Court of Justice (ICJ) has endorsed this interpretation.⁴¹

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,⁴² and the ICJ endorsed the extra-territorial application of the ICESCR.⁴³ 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.⁴⁴ 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 at the minimum the core economic, social and cultural rights of the people of the targeted State.⁴⁵

The CRC has a provision regarding its application that shows that it covers all people within a

⁴⁰ HRC General Comment 31, *The Nature of the general Legal Obligation Imposed on State Parties to the Covenant* (2004) CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.10 (HRC General Comment 31). Available at www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument. The HRC 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 *Lopez Burgos v Uruguay* (1981) Comm No 52/1979, HRC, 29 July 1981.

⁴¹ *Wall Advisory Opinion*, above n.7 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”.

⁴² CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel* (2003) 05/23/2003. 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.

⁴³ *Wall Advisory Opinion*, above n.7 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*.

⁴⁴ 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*, above n.7 para.112.

⁴⁵ CESCR General Comment 8, *The relationship between economic sanctions and respect for economic, social and cultural rights* (1997) E/C.12/1997/8, 12 December 1997.

State's 'jurisdiction' and so is not territorially limited.⁴⁶ 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.⁴⁷

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.⁴⁸ 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.⁴⁹

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.⁵⁰ This control may be exercised directly, through the State party's armed forces, or through local administration.⁵¹ 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 the remaining local administration.⁵² Similarly, in *Democratic Republic of Congo v Burundi, Rwanda and Uganda*,

⁴⁶ Art.2(1) CRC 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".

⁴⁷ 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*, above n.7 para.113 where the ICJ found that the Convention applied within the occupied Palestinian territory.

⁴⁸ Art.1(1) ACHR.

⁴⁹ Principle 9, *Maastricht Principles*.

⁵⁰ *Al-Skeini & Ors v United Kingdom* (2011) Application No 55721/07, ECHR 1093 (7 July 2011), para.139.

⁵¹ *Al-Skeini*, *ibid* para.138 citing, inter alia, *Cyprus v Turkey* (2001) Application No 25781/94, ECHR (10 May 2001); *Loizidou and Others v Turkey* (1995) Application No 15318/89, ECHR (23 March 1995); *Banković and Others v Belgium and 16 Other Contracting States* (2001) Application No 52207/99, 19 December 2001; *Ilaşcu and Others v Moldova and Russia* (2004) Application No 48787/99, 8 July 2004.

⁵² *Cyprus v Turkey*; *Loizidou v Turkey* *ibid*. Though note that in *Banković*, concerning the NATO bombing of Serbian Radio-Television headquarters in Belgrade, the court adopted a rather restrictive approach in

where it was alleged that armed forces of the respondent States had committed grave violations of human rights on the territory of the DRC,⁵³ the African Commission on Human and Peoples' Rights 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.⁵⁴ 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.⁵⁵ 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".⁵⁶ 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".⁵⁷ 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 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.⁵⁸

2.2.4 Personal Application

International human rights law is applicable to all persons situated within the territory of a

deciding that there was no effective control of the territory of another State but only some control over its airspace.

⁵³ *DR Congo v Burundi, Rwanda and Uganda* (2003) Communication 227/99, 33rd Ordinary Session of the ACommHPR, May 2003, Niamey, Niger, para.63.

⁵⁴ See *Al-Skeini*, above n.50 paras 136–137 citing *Öcalan v Turkey* (2005) Application No 46221/99, 12 May 2005, *Issa v Turkey* (2004) Application No 31821/96, 16 November 2004, *Al-Saadoon and Mufdhi v the United Kingdom* (2010) Application No 61498/08, 2 March 2010 and *Medvedyev and Others v France* (2010) Application No 3394/03, 23 March 2010.

⁵⁵ *Isaak and others v Turkey* (2006) Application No 44587/98, 28 September 2006.

⁵⁶ *Al-Skeini*, para.149. See also M Milanovic, "Al-Skeini and Al-Jedda in Strasbourg", *European Journal of International Law*, Vol. 23, 2012.

⁵⁷ *Saldano v Argentina*, (1998) Report No 38/99, Annual Report of the IACHR 1998, para.17.

⁵⁸ *Al-Skeini*, above n.50, para.142.

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,⁵⁹ and even these are subject to the general principles of non-discrimination, which are customary international law.⁶⁰

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.⁶¹ 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".⁶² 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 education-related violations. These include corporations and other business enterprises (transnational and local), non-State armed groups, non-governmental organisations, cultural and social groups, trade unions and employer groups, and individuals. Inter-governmental organisations, such as the United Nations and its agencies, can be considered as a type of non-State actor. The difficulty in making non-State actors legally responsible for breaches of international human rights law is that human rights treaties are so drafted that the State is the only entity directly responsible for compliance with the treaty.⁶³

⁵⁹ For example, Art.2(3) ICESCR enables developing States to determine the extent to which they would guarantee economic rights to non-nationals.

⁶⁰ CESCR General Comment 20 on *Non-Discrimination in Economic, Social and Cultural Rights* (2009). Available at www2.ohchr.org/english/bodies/cescr/comments.htm.

⁶¹ International Law Commission "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* (2001) UN Doc A/56/10(SUPP) (21 August 2001) (ILC Articles).

⁶² *France v Mexico (Caire Claim)* (1929) 5 Reports of International Arbitral Awards 516.

⁶³ For a fuller discussion, see R McCorquodale, "Non-State Actors and International Human Rights

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 upon 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’).

In addition, changes can occur through developments in international law. For example, in the area of corporation’s legal responsibility for human rights violations, 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.⁶⁴ There are similar developments in regard to international organisations⁶⁵ and, in both instances, international mechanisms for ensuring compliance have yet to be established.

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.⁶⁶ They are:

- A State is responsible for the acts of a non-State actor, where the latter is exercising elements of governmental activity.⁶⁷ 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.⁶⁸ 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.

Law” in S Joseph and A McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar, 2010) 97.

⁶⁴ See HRCouncil Resolution 17/4 16 June 2011. Available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/17/L.17/Rev.1. This is not legally binding but is indicative of the developments in this area.

⁶⁵ See J Wouters, E Brems, S Smis and P Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010).

⁶⁶ See R McCorquodale and P Simons, “Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law” (2007) 70 *Modern Law Review* 598.

⁶⁷ Arts. 5 and 9 ILC Articles.

⁶⁸ Art.8 ILC Articles.

- 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.⁶⁹
- A State is responsible where it is complicit in the activity of the non-State actor.⁷⁰ 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.⁷¹ Thus a non-State armed 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 international human rights law—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 human rights violations by all persons within its jurisdiction.⁷² This obligation was expressed most clearly by the Inter-American Court of Human Rights in *Vélásquez Rodríguez v Honduras*,⁷³ 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 [American Convention on Human Rights]. 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.*⁷⁴

⁶⁹ Art.11 ILC Articles, and see *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* [1980] ICJ Rep 3, 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".

⁷⁰ Art.16 ILC Articles.

⁷¹ Art.10 ILC Articles.

⁷² See A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006).

⁷³ *Vélásquez Rodríguez v Honduras* (1989) 28 ILM 294 (*Rodríguez*). An earlier instance was the views of the HRC in *Herrera Rubio v Colombia*, Application No 161/1983, UN Doc CCPR/C/OP/2 (2 November 1987) where it was not clear if the victims has been murdered or disappeared by State or non-State officials.

⁷⁴ *Rodríguez*, *ibid.* paras 172 and 176 (emphasis added).

The HRC 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 3.⁷⁵

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.⁷⁶ The Court 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.⁷⁷ 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.⁷⁸ 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.⁷⁹ 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

⁷⁵ HRC General Comment 31, para.8 (emphasis added). The HRC 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, HRC, General Comment 20, *Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UN Doc HRI/GEN/1/Rev (10 March 1992), para.4. Available at www.unhcr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5.

⁷⁶ See, for example, *Ergi v Turkey* (1998) 32 European Human Rights Reports 388.

⁷⁷ *A v UK* (1999) 27 European Human Rights Reports 611.

⁷⁸ A 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*, webjcli.ncl.ac.uk.

⁷⁹ See *Jordan v UK* (2001) Application No 24746/94 (Unreported) ECtHR, Trial Chamber, 4 May 2001.

have been dismissed or victimized for joining a trade union,⁸⁰ where the activities of corporations have polluted both air and land,⁸¹ and for failures by the State to protect Indigenous peoples' land and culture from harm caused by corporate activities or from corporate development.⁸² 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.⁸³ This approach has also been endorsed by the HRCouncil in adopting the Special Representative's Guiding Principles on Business and Human Rights.⁸⁴

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.⁸⁵ This is a considerable development in international human rights law in terms of the scope of a State's obligations beyond its own direct actions by State organs and officials.

⁸⁰ *Young, James and Webster v UK* (1982) 4 European Human Rights Reports 38.

⁸¹ See, for example, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication No 155/96 (ACommHPR, 27 October 2001), *Lopez Ostra v Spain* (1994) 20 European Human Rights Reports 277; *Guerra v Italy* (1998) 26 European Human Rights Reports 357.

⁸² See *Yanomami Community v Brazil*, Resolution No 12/85 (Unreported, IACommHR, 5 March 1985); *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment of 31 August 2001, IACtHR, (Ser C) No 79 (2001) and *Hopu and Bessert v France*, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1 (29 December 1997).

⁸³ R Coomaraswamy *Preliminary Report submitted by the Special Rapporteur on Violence against Women* UN Doc E/CN.4/1995/42 (22 November 1994).

⁸⁴ OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations, 2011), UN Doc HR/PUB/11/04 www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. 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.

⁸⁵ See *Ilascu v Moldova and Russia*, (2004) Application No 48787/99 ECtHR Trial Chamber, 8 July 2004.

2.3 INTERNATIONAL HUMANITARIAN LAW

2.3.1 The Scope of Application of International Humanitarian Law

IHL is a body of law which 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.⁸⁶ IHL does not apply to situations of insecurity.

IHL is now largely codified in the following international treaties:

- 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);
- the four Geneva Conventions for the Protection of War Victims of 1949 (the Geneva Conventions);
- the three protocols additional to the Geneva Conventions (Additional Protocols): Additional Protocol I of 1977 applicable in international armed conflict; Additional Protocol II of 1977 applicable in non-international armed conflict; and Additional Protocol III relating to the adoption of a new distinctive emblem (the ‘Red Crystal’);
- various treaties prohibiting the use of particular weapons, including the Ottawa Convention on the Prohibition of Land Mines of 1997; 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.

Interpretation of the Geneva Conventions and the Additional Protocols is aided by reference to the International Committee of the Red Cross (ICRC) Commentaries on these treaties.⁸⁷ 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.⁸⁸

In addition to the above, IHL is comprised of customary international law. In 2005 the ICRC published its Study on Customary International Humanitarian Law⁸⁹ which examines relevant

⁸⁶ D Fleck (ed.), *The Handbook of International Humanitarian Law* 2nd edn (OUP, 2009), xiii.

⁸⁷ J Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949* (1952–1960, ICRC) in four volumes. See also C Pilloud (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987, ICRC) in 26 volumes. The text of both commentaries is available online on the ICRC website: www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp.

⁸⁸ The preparatory documents of treaties are a recognized source of international legal interpretation; the commentaries assist in the understanding of these preparatory documents and, as such, assist with legal interpretation.

⁸⁹ J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules and Volume II: Practice* (CUP, 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 which have attained customary international legal status, including those applicable in non-international armed conflict.⁹⁰ 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 international armed conflict, IHL distinguishes between, on the one hand, those persons who are combatants⁹¹ (members of a State's armed forces) and those participating directly in hostilities⁹² and, on the other hand, those who take no part in hostilities.⁹³ This second group includes civilians (those not in the armed forces of State or organized armed group) who do not engage directly in hostilities and those combatants who are no longer willing or able to fight (*hors de combat*).⁹⁴ In non-international armed conflict, however, IHL distinguishes only between those who participate directly in activities and those who do not; it does not recognize 'combatant' status.⁹⁵ 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 international and non-international armed conflict.⁹⁶

2.3.2 Temporal Application

As outlined in Chapter 1, IHL applies to situations of international armed conflict and non-international armed conflict. Different rules of IHL apply to each type of conflict, although some IHL rules of international conflict as set out in the Geneva Conventions and Additional Protocol I, especially regarding the conduct of hostilities, are widely accepted as applying to non-international conflict as a matter of customary international law.⁹⁷ This Handbook uses the term 'armed conflict' to refer collectively to the two situations of conflict and to distinguish

⁹⁰ Although the methodology of the study has been the subject of criticism: see J Bellinger III and WJ 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: J-M Henckaerts, "*Customary International Humanitarian Law: a response to US comments*" (2007) 89 *International Review of the Red Cross* 866, 473. For general comments and analysis of the ICRC CIHL Study see E Wilmschurst and S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP, 2007).

⁹¹ As defined by Art.43 Additional Protocol I. This definition is discussed in detail in Chapter 4.

⁹² A technical legal concept discussed in detail in Chapter 4.

⁹³ C Greenwood, "Scope of Application of Humanitarian Law" in D Fleck, above n.86, 79.

⁹⁴ *Ibid.*, 96–106.

⁹⁵ The consequences of this are outlined in Chapter 4 in relation to combatant immunity and POW status.

⁹⁶ See discussion of the principle of distinction in Chapters 4 and 5.

⁹⁷ As identified, for example, in the ICRC CIHL Study, above n.89.

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 recognize 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 international armed conflict as including both:

- the use of force between states; and
- situations of belligerent occupation.⁹⁸

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 non-international armed conflict, including one between a State and a non-State armed group, may become an international armed conflict to which the IHL rules of international armed conflict apply. These situations are set out below, in the section entitled “Internationalisation of non-international armed conflict”, after the concept of non-international armed conflict has been discussed.

The Definition of Belligerent Occupation

Partial or total belligerent occupation is a situation of international armed conflict.⁹⁹ The IHL definition of belligerent occupation is found in Article 42 of the Hague Regulations, which has customary international law status:¹⁰⁰

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.¹⁰¹

This means that the occupying power must substitute its own authority for that of the occupied State, without the occupied State’s consent.¹⁰² 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.¹⁰³

⁹⁸ 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.

⁹⁹ Common Art.2(2) of the Geneva Conventions.

¹⁰⁰ *Wall Advisory Opinion*, above n.7 para.78.

¹⁰¹ Art.42 Hague Regulations.

¹⁰² See generally, A Roberts, “What is Military Occupation?” (1984) 55 *British Yearbook of International Law*, 249.

¹⁰³ Common Art.2 Geneva Conventions.

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.¹⁰⁴ 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”.¹⁰⁵ This means that occupying powers must ensure that political institutions and public life continue with as little disturbance as possible.¹⁰⁶ The occupying power is bound by the rules of occupation¹⁰⁷ from the beginning to the end of any such occupation.¹⁰⁸

The Law of International Armed Conflict

The four Geneva Conventions (except for Common Article 3) and Additional Protocol I apply to situations of international armed conflict.¹⁰⁹ 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 international armed conflict apply; however, they also benefit from more specific rules of IHL.¹¹⁰

The rules of the Geneva Conventions are customary international law¹¹¹ and, therefore, apply to all States regardless of whether or not they have been ratified.¹¹² The ICRC Customary International Humanitarian Law Study also identified that many of the provisions of Additional Protocol I are customary international law¹¹³ and, therefore, apply regardless of ratification.¹¹⁴

¹⁰⁴ See the protection offered by Art.43, Hague Regulations, and Arts 29, 47–135 Fourth Geneva Convention.

¹⁰⁵ Art.43 Hague Regulations.

¹⁰⁶ H-P Gasser, “Protection of the Civilian Population” in D Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edn (OUP, 2009), 278.

¹⁰⁷ As found in Sections III and IV of Part III of the Fourth Geneva Convention. The fundamental rules of occupation are set out in Art.6(3) of the Fourth Geneva Convention.

¹⁰⁸ Art.3(b) Additional Protocol I.

¹⁰⁹ Art.2 Common to the Geneva Conventions.

¹¹⁰ 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.

¹¹¹ C Greenwood, “Historical Development and Legal Basis” in D Fleck, above n.86, 28.

¹¹² All States, except for the newly formed South Sudan, have ratified the Geneva Conventions (as of 10 April 2012): [www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

¹¹³ See ICRC CIHL Study, above n.89.

¹¹⁴ 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: C Greenwood “Historical Development and Legal Basis”, in D Fleck, above n.86, 30.

IHRL continues to apply concurrently with IHL during international armed conflict. Further, many provisions of ICL, including under the Rome Statute, apply to situations of international armed conflict.¹¹⁵

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

Chapter 1 set out the definition of non-international armed conflict, 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.

Both situations of non-international armed conflict require a minimum level of intensity of violence (protracted) and a minimum level of organization of the non-State armed group involved. It is these two factors which distinguish non-international armed conflicts 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.

This definition, used by this Handbook, is the customary international legal definition of non-international armed conflict. While other thresholds of non-international armed conflict are set out in IHL treaty provisions, and discussed below, the relevance of these thresholds has been lessened by the development of this customary international law definition. This section will examine the different thresholds of non-international armed conflict, including that set out in customary international law definition, and then consider, in further detail, the meaning of ‘protracted’ and the organizational requirements of non-State armed groups. The rules of IHL applicable in non-international armed conflict 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 non-international armed conflict:

- the threshold in Common Article 3,¹¹⁶ which is applicable to all armed conflict not of an international character, and is relatively low; and

¹¹⁵ See, for example, the provisions of Art.8(b) of the Rome Statute, which apply specifically to international armed conflict.

¹¹⁶ Common to 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: J Pictet, above n.87 p.39. See also the discussion of this point by L Moir *The Law of Internal Armed Conflict* (CUP, 2002) at 31-34; ICRC *How is the Term “Armed Conflict” Defined in International Humanitarian Law*, Opinion Paper 5 (ICRC, 2008). Available at www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm.

- the threshold set out in Article 1 of Additional Protocol II,¹¹⁷ which is higher. The latter limits its application to any conflict between a State and an organized 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 non-international armed conflict.

This discrepancy has been mitigated by the recognition of a customary international law definition¹¹⁸ of non-international armed conflict by the Appeals Chamber of the ICTY in the *Tadić Case*.¹¹⁹ In that case, The Tribunal held that a non-international armed conflict¹²⁰ exists when there is:

- protracted armed violence between a State and an organized non-State armed group on its territory, or
- protracted armed violence between organized non-State armed groups on the territory of a State.¹²¹

This definition is based on the Common Article 3 threshold, which was already recognized as forming part of customary international law;¹²² however, the judgment in *Tadić* provides further guidance as to its applicability.¹²³ This definition of non-international armed conflict is supported by the ICRC¹²⁴ and has also been adopted by the Rome Statute of the International Criminal Court.¹²⁵ This definition differs from that set out in Additional Protocol II by incor-

¹¹⁷ 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”.

¹¹⁸ 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”.

¹¹⁹ *Prosecutor v Tadić* (1995) Case No IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) (2 October 1995) (*Tadić*).

¹²⁰ Although the Appeal’s Chamber does not explicitly state in para.70 of *Tadić* that it is setting out two definitions, one of international armed conflict and one of non-international armed conflict, a contextual reading of the judgment makes it clear that this was the Chamber’s intention. This issue is expertly argued and summarized in D Kritsiotis, “The Tremors of *Tadić*” (2010) 43 *Israel Law Review* 262.

¹²¹ *Tadić*, para.70.

¹²² See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v US)* (Merits) 76 ILR 5, 179. (*Nicaragua Case*).

¹²³ L Moir, above n.116, 42–43.

¹²⁴ ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper 5 (2008, ICRC). Available at www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm.

¹²⁵ See Art.8(f) Rome Statute. Note, however, the term ‘violence’ is replaced with ‘conflict’.

porating 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.

The significance of this definition is that it provides the threshold for application for the principles that apply in all non-international armed conflict. The higher threshold for non-international armed conflict 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.¹²⁶ 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 non-international armed conflict and recognition of an increasing number of rules as applicable to such conflict through customary international law has significantly increased the level of protection available in non-international armed conflict.

‘Protracted’ Armed Violence and Organization of Non-State Armed Groups

The term ‘protracted’ armed violence is included in the customary international law definition of non-international armed conflict in order to set it apart from situations of insecurity, which do not attain the required intensity of violence to qualify as non-international armed conflict and ought to be considered to be only internal disturbances or tensions. In *Ramush Haradinaj*¹²⁷ the ICTY held that the phrase “protracted armed violence” refers to the intensity rather than duration of the violence.¹²⁸ 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.¹²⁹

The customary international law definition of non-international armed conflict also requires a minimum level of organization of the non-State armed group. This is because a non-international armed conflict, as opposed to an internal disturbance, can only exist between parties that

¹²⁶ 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.

¹²⁷ *Prosecutor v Ramush Haradinaj et al* (2008) ICTY Trial Chamber, Judgment, 3 April 2008, Case No IT-04-84-T.

¹²⁸ *Ibid.*, para.60.

¹²⁹ *Ibid.*, para.60.

are sufficiently organized to confront each other with military means.¹³⁰ The ICTY has identified a number of ‘indicative factors’ relevant to assessing the organization 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.¹³¹

The Law of Non-international Armed Conflict

As addressed throughout this Handbook, the rules of IHL that apply to non-international armed conflict are different from those that apply in international armed conflict. One of the most significant differences between the law of international armed conflict and the law of non-international armed conflict is that the rules relating to combatant immunity and prisoner of war (POW) status do not apply in non-international armed conflict.¹³²

However, in all conflicts “not of an international character”¹³³ (i.e. non-international armed conflicts), 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 non-international armed conflict set out in Common Article 3, Additional Protocol II contains a number of more detailed provisions applicable to non-international armed conflicts 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 all non-international armed conflicts that meet the customary international law definition.¹³⁴

A large number of rules governing conduct of hostilities in respect of international armed conflict are also applicable to non-international armed conflict, by virtue of customary international law.¹³⁵ As is the case with the law of international armed conflict, 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.

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 non-international

¹³⁰ *Ibid.*, para.60.

¹³¹ *Ibid.*, para.60.

¹³² See discussion of this issue in Chapter 4.

¹³³ Common Art.3 Geneva Conventions.

¹³⁴ *Tadić* held that the minimum “core” of Additional Protocol II was customary international law: *Tadić*, para.117.

¹³⁵ See ICRC CIHL Study, above n.89; and *Tadić*, paras 96–127.

armed conflict. The following IHL principles form a significant part of the customary international law applicable in non-international armed conflict:

- the principle of distinction;¹³⁶
- the prohibition on superfluous injury and unnecessary suffering;¹³⁷
- the prohibition of indiscriminate or disproportionate attacks on civilians and civilian objects;¹³⁸
- the requirements to take precautions;¹³⁹ and
- the prohibition of particular means and methods of warfare.¹⁴⁰

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 non-international armed conflict contains provisions encouraging parties to a non-international armed conflict to enter into special agreements that set out the rules of IHL applicable to the hostilities between them.¹⁴¹ Parties can reach agreements about all or some of the provisions relating to non-international armed conflict, including, for example, the setting-up of safety zones or the release of wounded prisoners.¹⁴² It is also encouraged for parties to a non-international armed conflict 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 international armed conflict.¹⁴³

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).¹⁴⁴ This can be done by public statement or, as is often the case, in negotiation with the ICRC.¹⁴⁵

As already noted, IHRL continues to apply concurrently with IHL during non-international armed conflict. Further, many provisions of ICL, including under the Rome Statute, apply to situations of non-international armed conflict.¹⁴⁶

¹³⁶ See ICRC CIHL Study, above n.89, Chapter I, in particular Rules 1–10.

¹³⁷ See *ibid.*, in particular Rule 70.

¹³⁸ See *ibid.*, Rules, Ch.I, in particular Rules 11–14.

¹³⁹ See *ibid.*, in particular Rules 15–24.

¹⁴⁰ See *ibid.*, Rules 2, 13, 17, 46–86.

¹⁴¹ 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.

¹⁴² T Pfanner, “Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims” 874 (2009) 9, 279 p.300.

¹⁴³ D Fleck, “The Law of Non-International Armed Conflicts” in D Fleck, above n.86, 621.

¹⁴⁴ T Pfanner, “Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims” 874 (2009) 9, 279 pp.301–303. See fn.134 of this article for list of examples.

¹⁴⁵ *Ibid.*, 302.

¹⁴⁶ See, for example, the provisions of Art.8(c) and (e) Rome Statute, which apply specifically to non-international armed conflict.

Internationalization of Non-international Armed Conflict

A non-international armed conflict can become an international armed conflict when another State directly¹⁴⁷ or indirectly¹⁴⁸ intervenes on the part of a non-State armed group without the consent of the State on whose territory the conflict is taking place.¹⁴⁹

In addition, Article 1(4) of Additional Protocol I sets out three situations of violence to which the rules of international armed conflict apply, even though they involve violence between a State and a non-State group:¹⁵⁰

- 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.¹⁵¹

It is also possible for two or more conflicts, with different classifications, to exist on the same territory at the same time. In the *Nicaragua Case*¹⁵² the ICJ recognized 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).¹⁵³ A similar situation was recognized by the ICTY in the *Tadić* cases.¹⁵⁴ 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.

¹⁴⁷ For example, by arming and training an armed group, but not by financing them only, *Nicaragua Case*, above n.122, para.115. *Armed Activities on the Territory of the Cong (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, 168 (*DRC v Uganda*). See also *Tadić* and *Prosecutor v Blasić* (2000) ICTY Trial Judgment, 3 March 2000, Case No IT-95-14-T.

¹⁴⁸ C Greenwood, "Scope of Application of Humanitarian Law" in D Fleck, above n.86, 177.

¹⁴⁹ 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.

¹⁵⁰ Art.1(4) of Additional Protocol I has "proved highly controversial and is one of the reasons for the United States' decision not to ratify AP1": C Greenwood, "Scope of Application of Humanitarian Law" in DFleck, above n.86, 48.

¹⁵¹ Art.96(3) Additional Protocol I 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.

¹⁵² *Nicaragua Case*, above n.122.

¹⁵³ *Nicaragua Case*, *ibid.*, para.210.

¹⁵⁴ *Tadić*, above n.119, para.70.

Duration of the Application of International Humanitarian Law

In *Tadić* the ICTY held that IHL applies from the initiation of either an international or non-international armed conflict and extends beyond the cessation of hostilities until peace is restored (in the case of international armed conflict) or until peaceful settlements are achieved (in the case of non-international armed conflict).¹⁵⁵ However, in most cases a ceasefire or cessation of active hostilities will terminate an armed conflict, regardless of any formal confirmation or agreement.¹⁵⁶

The cessation of hostilities brings into effect specific IHL obligations regarding, for example, the release and repatriation of POWs.¹⁵⁷ POWs benefit from the protection of the Third Geneva Convention until their release and repatriation, regardless of the fact that hostilities have ceased.¹⁵⁸ Arguably, until such obligations have been fully complied with, peace has not been restored.¹⁵⁹

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.¹⁶⁰

Derogations and Reservations

While it is possible to derogate from a certain number of the provisions of major international human rights treaties, as seen above, IHL treaties are non-derogable.¹⁶¹ The wording of many

¹⁵⁵ *Ibid.*, paras 65–70.

¹⁵⁶ C Greenwood, "Scope of Application of Humanitarian Law" in D Fleck, above n.86, 72.

¹⁵⁷ For example, Art.118, Third Geneva Convention.

¹⁵⁸ Art.5 Third Geneva Convention. 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 H Fischer, "Protection of Prisoners of War" in D Fleck, above 86, 416–417.

¹⁵⁹ C Greenwood, "Scope of Application of Humanitarian Law" in D Fleck, above 86, 71.

¹⁶⁰ Kolb & Hyde, *An Introduction to the Law of Armed Conflict* (Hart, 2008), 230–231.

¹⁶¹ P Rowe, *The Impact of Human Rights Law on Armed Forces* (CUP, 2006), 119. See also *Cyprus v Turkey* (1982) 4 EHRR 552–553; *Abella v Argentina* Report No 55/97, Case 11.137, 18 November 1997, para.170.

derogation clauses in human rights treaties, including the ICCPR, specifically permits derogation in war or other emergency.¹⁶² 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.¹⁶³ 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.¹⁶⁴

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.¹⁶⁵ 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”.¹⁶⁶ 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 international armed conflict throughout the whole territory of the parties to a conflict, whether or not actual combat is taking place in that whole area.¹⁶⁷ In the case of non-international armed conflict, the ICTY held that IHL applied to the whole of the territory under the control of a party.¹⁶⁸

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.¹⁶⁹ For example, IHL does not regulate ordinary crimi-

¹⁶² Art.4 ICCPR.

¹⁶³ For example, the Rome Statute, the Chemical Weapons Convention (1993), the Mine Ban Convention (1997), and the Cluster Munitions Convention (2008).

¹⁶⁴ See ICRC, *The Domestic Implementation of IHL: A Manual*, 2nd edn (ICRC, 2011), 22. Available at www.icrc.org/eng/resources/documents/publication/p4028.htm

¹⁶⁵ Common Art.1 of the Geneva Conventions.

¹⁶⁶ P Rowe, above n.161, 121. See also UNS-G’s Bulletin: *Observance by United Nations Forces of International Humanitarian Law* (1999) 38 ILM 1656.

¹⁶⁷ *Tadić*, above n.119 paras 65–70.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

nal matters, issues relating to social services, and other judicial functions of State that are part of its normal operation during peacetime.¹⁷⁰

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.¹⁷¹ 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.¹⁷² In addition to applying through the territories of a party to a conflict, IHL also applies to protected persons,¹⁷³ as defined by the Fourth Geneva Convention, and POWs regardless of where they are located.¹⁷⁴

States Parties

The rules of IHL are binding on all to IHL treaties, and their armed forces.¹⁷⁵ 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,¹⁷⁶ including through national legislation,¹⁷⁷ and to punish grave breaches of the Conventions and Protocols.¹⁷⁸

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 non-international armed conflict, IHL applies and binds all

¹⁷⁰ 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.

¹⁷¹ Common Art.1 Geneva Conventions.

¹⁷² ICRC CIHL Study Rule 140, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule140. See also R Wolfrum and D Fleck, "Enforcement of IHL" in D Fleck, above n.86, 689.

¹⁷³ Defined in Art.4 of the Fourth Geneva Convention as, in effect, enemy nationals. This is discussed in further detail in Chapter 4.

¹⁷⁴ See Third Geneva Convention.

¹⁷⁵ C Greenwood, "Historical Development and Legal Basis" in D Fleck, above n.86, 39. The definition of State's armed forces in Art.4A Third Geneva Convention includes those non-State armed groups that form part of a State's armed forces.

¹⁷⁶ Art.80 Additional Protocol I.

¹⁷⁷ See, for example, Art.48, First Geneva Convention; Art.49, Second Geneva Convention; Art.128, Third Geneva Convention; Art.145, Fourth Geneva Convention and Art.84, Additional Protocol I.

¹⁷⁸ Arts. 49–54 First Geneva Convention; Arts. 50–53 Second Geneva Convention; Arts. 129–132 Third Geneva Convention; Arts. 146–149, Fourth Geneva Convention and Arts. 85–89, Additional Protocol I.

belligerents, which includes non-State armed groups.¹⁷⁹ In particular, Common Article 3 and Additional Protocol II are widely considered to be binding on all parties to a non-international conflict, including non-State armed groups.¹⁸⁰ All parties to a non-international armed conflict, including non-State armed groups, must respect and ensure respect for the rules of IHL.¹⁸¹

Individual Participants

The rules of IHL are also binding on every individual participant involved in both international and non-international armed conflict.¹⁸² 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.¹⁸³ 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 organized uprising of civilians.¹⁸⁴

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

IHRL applies *directly* to situations of international and non-international armed conflict and applies concurrently with IHL.¹⁸⁵ The ICJ in the *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”.¹⁸⁶ This was affirmed by the ICJ in the *Wall Advisory Opinion* and *DRC v Uganda*, as well as by human rights treaty bodies.¹⁸⁷

¹⁷⁹ G Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP, 2010), 157; UNSC Res. 1214 (1998), 8 December 1998, para.12.

¹⁸⁰ L Moir, above n.116, 52, 96–97; A Cassese, “The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict” (1981) 30 ICLQ 416 p.424, and UN UNSC Res. 1214 (1998), 8 December 1998, para.12.

¹⁸¹ T Pfanner, “Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims” 874 (2009) *International Review of the Red Cross* 279, 281.

¹⁸² C Greenwood, “Historical Development and Legal Basis” in D Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edn (OUP, 2009), 39. UNSC Res. 1214 (1998), 8 December 1998, para.12.

¹⁸³ For discussion of this, see the ICL section below.

¹⁸⁴ Art.2 Hague Regulations; Art.4(A)(6) Third Geneva Convention.

¹⁸⁵ For discussion of IHRL obligations, see above.

¹⁸⁶ ICJ, *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, 8 July 1996, ICJ Reports 1996, para.25. (*Nuclear Weapons Advisory Opinion*) See also UNGA Res. 2675 (XXV) *Basic principles for the protection of civilian populations in armed conflict* (9 December 1970).

¹⁸⁷ HRC General Comment 31.

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 international and non-international armed conflict. 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 African Charter on the Rights and Welfare of the Child 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 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 Convention on the Rights of Persons with Disabilities 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.¹⁸⁸ 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;¹⁸⁹ 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.

¹⁸⁸ See the *Wall Opinion*, above n.7; HRC *Concluding observations of the HRC: Israel* (2003) 08/21/2003, CCPR/C0/78/ISR, para.11.

¹⁸⁹ Art.43 Hague Regulations 1907.

Non-international Armed Conflict

As there are fewer IHL rules applicable in non-international armed conflict, it means that IHRL is an important source of rights for victims of non-international armed conflict. Also, in non-international armed conflict 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,¹⁹⁰ 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);¹⁹¹
- prohibition on violence to life and person including murder, mutilation, cruel treatment and torture;¹⁹²
- prohibition on outrages to a person's dignity;¹⁹³
- prohibition on the taking of hostages;¹⁹⁴
- particular judicial guarantees;¹⁹⁴
- prohibition on collective punishments;¹⁹⁶ and
- prohibition of slavery.¹⁹⁷

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 non-international armed conflict.

¹⁹⁰ See discussion of these provisions in L Moir, above n.116, Chapter 5.

¹⁹¹ Common Art.3. Art.4(1) Additional Protocol II; ICRC CIHL Study Rule 87 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule87.

¹⁹² Common Art.3(1)(a); Art.4(2) Additional Protocol II. ICRC CIHL, Study Rule 89, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule89; and Rule 90 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule90.

¹⁹³ Common Art.3(1)(c); Art.4(2)(e), Additional Protocol II. 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.

¹⁹⁴ Common Art.3(1)(b); Art.4(2)(c), Additional Protocol II. ICRC CIHL Study, Rule 96, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule96.

¹⁹⁵ Common Art.3(1)(d). ICRC CIHL, Rule 100, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule100.

¹⁹⁶ Art.4(2)(b), Additional Protocol II. ICRC CIHL Study, Rule 103, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule103.

¹⁹⁷ Art.4(2)(f), Additional Protocol II. ICRC CIHL Study, Rule 94, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule94.

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”.¹⁹⁸ However, in the *Wall Opinion* the ICJ recognized 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”.¹⁹⁹

The United Nations Committee on Economic, Social and Cultural Rights 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.²⁰⁰

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.²⁰¹

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. Although the traditional divide between IHL and IHRL has narrowed considerably, IHL and IHRL remain distinct regimes²⁰² designed to regulate different circumstances and power relationships.²⁰³ In particular:

¹⁹⁸ E Mottershaw, “Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law” (2008) Vol.12 No 3 *The International Journal of Human Rights* 449, 449.

¹⁹⁹ *Wall Advisory Opinion*, above n.7, para.134.

²⁰⁰ CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel* (2001) 08/31//2001 UN Doc No: E/C.12/1/Add.6 (31 August 2001), paras 12–13.

²⁰¹ 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.

²⁰² L Moir, above n.116, 193.

²⁰³ C Greenwood, “Scope of Application of Humanitarian Law” in D Fleck, above n.86, 72.

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.²⁰⁴

This means that, although both regimes seek to protect individuals, their “normative framework[s are] often paradoxical and at odds”.²⁰⁵ 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.²⁰⁶ Although the Court clearly recognizes the concurrent application of IHL and IHRL to armed conflict in particular instances before them, there is uncertainty about the Court’s approach beyond that instance.²⁰⁷

The issue of the relationship between IHL and IHRL was first considered by the ICJ in its *Nuclear Weapons Advisory Opinion*.²⁰⁸ In this case, the ICJ was asked to rule on the compatibility of the use or threat of nuclear weapons with international law.²⁰⁹ 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.²¹⁰

²⁰⁴ T Meron, “The Humanization of Humanitarian Law” (2000) 94 *American Journal of International Law* 239, 240.

²⁰⁵ N Prud’homme, “*Lex Specialis*: Oversimplifying a more complex and multifaceted relationship?” (2007) 40(2) *Israeli Law Review* 356, 361.

²⁰⁶ *Nuclear Weapons Advisory Opinion*, above n.186; *Wall Advisory Opinion*, above n.7; and *DRC v Uganda*, above n.147.

²⁰⁷ See, for example, discussion of the confusion that the ICJ’s decisions have caused, in P Eden and M Happold, “Symposium: The Relationship between International Humanitarian Law and International Human Rights Law” (2010) Vol.14 No 3 *Journal of Conflict and Security Law* 441.

²⁰⁸ *Nuclear Weapons Advisory Opinion*, above n.186.

²⁰⁹ *Ibid.*, para.13.

²¹⁰ *Ibid.*, para.25.

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.²¹¹

In the *Legal Consequences of the Construction of a Wall Advisory Opinion*²¹² the Court considered the application of human rights treaties to the Occupied Palestinian Territories and their relationship with the simultaneously applicable IHL.²¹³ It confirmed that the ICCPR, and other human rights treaties including the Convention on the Rights of the Child, apply in situations of armed conflict.²¹⁴ 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.²¹⁵

Its finding that the construction of the wall violated both IHRL, including the right to education under the ICESCR,²¹⁶ and IHL,²¹⁷ 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*²¹⁸ the ICJ considered the provisions of IHRL and IHL applicable to territory of the Democratic Republic of the Congo 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”.²¹⁹

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.

²¹¹ 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: E 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 N Prud'homme, above n.205, 367.

²¹² *Wall Advisory Opinion*, above n.7.

²¹³ *Ibid.*, para.104.

²¹⁴ *Ibid.*, paras 105–111.

²¹⁵ *Ibid.*, para.106.

²¹⁶ *Ibid.*, paras 133–135.

²¹⁷ *Ibid.*, para.138.

²¹⁸ *DRC v Uganda*, above n.147.

²¹⁹ *Ibid.*, para.216. The same approach is taken by HRC General Comment 31, paras 2, 10, 11.

Two potential approaches can be discerned. One is that neither legal regime is automatically the *lex specialis* and resolution of a potential conflict must be taken on a case-by-case basis.²²⁰ For example, the Court in the *Nuclear Weapons Case* 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.²²¹ This interpretation of the principle of *lex specialis* avoids a conflict arising between the rules of IHL and IHRL²²² 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.²²³ 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.²²⁴ This approach is consistent with the statement of the Court in the *Wall 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.²²⁵ 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.

²²⁰ I Scobbie, “Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict” (2009) 14(3) *Journal of Conflict and Security Law* 449, p.451.

²²¹ C Greenwood, “Scope of Application of Humanitarian Law” in D Fleck, above n.86, 75.

²²² *Ibid.*, 74–75. C Droegge, “Elective affinities? Human rights and humanitarian law” (2008) Vol.90 No 871 *International Review of the Red Cross*, 501.

²²³ M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP, 2011), 234.

²²⁴ For example, in the *Wall Advisory Opinion*, above n.7, 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: para.135.

²²⁵ C Droegge, above n.222, 501; Koskenniemi, ILC Report of the study group on the fragmentation of international law (2006), para.117. See also M Milanovic, above n.223, 234.

International Human Rights Treaty Bodies

The HRC has pronounced on relevant provisions of IHL and the application of the ICCPR in armed conflict in a number of its General Comments.²²⁶ In its General Comment 31, the HRC 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.²²⁷

It does not, however, elaborate on this statement.²²⁸ The HRC 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 HRC'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,²²⁹ especially because Article 38, and the CRC's Optional Protocol, expressly deal with the application of the CRC in times of armed conflict 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 realization of the rights of the child in armed conflict.²³⁰ It emphasizes 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

²²⁶ HRC General Comments 29 and 31.

²²⁷ HRC General Comment 31, 11.

²²⁸ 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 HRC, 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), para.507. Available at www.state.gov/j/drl/rls/179781.htm.

²²⁹ See for example HRC General Comment 1 *Reporting Obligations* (2001); General Comment 6 *Right to Life* (2005); General Comment 9 *Humane treatment of persons deprived of their liberty* (2009). Available at www2.ohchr.org/english/bodies/hrc/comments.htm.

²³⁰ Committee on Rights of the Child, *General Discussion on children in armed conflict* (1992) CRC/C/10, 1992, para.68.

fill gaps in IHL. In the *Kunarac Case*²³¹ 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”.²³² However, the tribunal emphasized 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”.²³³

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.²³⁴ The Charter is unique among regional human rights instruments in that it contains provisions allowing it to consider²³⁵ and “draw inspiration from”²³⁶ other areas of international law including IHL.

Similarly, the African Charter on the Rights and Welfare of the Child 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”.²³⁷

Unlike the African Commission, the Inter-American Court of Human Rights has doubted its competency to determine whether or not there has been a violation of IHL by a State party.²³⁸ In *Bamaca Velasquez*²³⁹ 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 *Ituango Massacres v Colombia* the Court considered the application and violation of Additional Protocol II in relation to destruction of civilian property, and “observes” that the Protocol was violated and concluded that this violation renders the simultaneous violation of the right to property under the Convention particularly serious.²⁴⁰

²³¹ *Prosecutor v Kunarac (Trial Judgment)* ICTY-96-23-T (22 February 2001).

²³² *Ibid.*, para.467. Those cases cited by the tribunal all used IHRL in the context of the definition of torture.

²³³ *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 recognized as a reason for exercising caution by the Tribunal. This approach was upheld by the ICTY Appeals Chamber in the later case of *Krnjelac Prosecutor v Krnjelac (Judgment)* ICTY-97-25-T (15 March 2002), para.181.

²³⁴ *DRC v Burundi, Rwanda and Uganda* ACommHPR Com 227/99 May 2003, para.64.

²³⁵ Art.61 ACHRP.

²³⁶ Art.60 ACHRP.

²³⁷ Art.22 ACHRP.

²³⁸ IACtHR, *Las Palmeras Case*, Preliminary Objections, Judgment, 4 February 2000.

²³⁹ IACtHR, *Bámaca Velásquez v Guatemala*, Judgment, 25 November 2000.

²⁴⁰ For discussion of the approaches of the Commission and the Court, see further L Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, 2011), 111–115.

In contrast, the Inter-American Commission on Human Rights has tried to interpret the two bodies of law consistently to avoid conflict.²⁴¹ 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".²⁴²

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.²⁴³ A notable exception, however, is the case *Varnava and others v Turkey*,²⁴⁴ 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 international armed conflict 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.²⁴⁵

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 Article 2, and flesh out its content, in the circumstances of international armed conflict.²⁴⁶ This approach is similar to that taken by the ICJ in the *Nuclear Weapons Case*.

In two recent cases before the ECtHR, occurring in situations of armed conflict: *Al-Skeini* and *Al-Jedda*, 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.²⁴⁷

²⁴¹ *Abella v Argentina*, para.161.

²⁴² *Ibid.*, paras 164–165. This approach was confirmed by the Commission in IACoMHR, *Coard et al v United States* Case10.95, 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.

²⁴³ For example, see the "Chechen Cases": *Isayeva, Yusupova and Bazayeva v Russia* ECtHR Judgment, 24 February 2005; *Khashiyev and Akayeva v Russia* ECtHR Judgment, 24 February 2005; and *Isayeva v Russia*, ECtHR Judgment, 24 February 2005. Also see L Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, 2011), 115.

²⁴⁴ *Varnava and others v Turkey* ECtHR Judgment (Grand Chamber), 18 September 2009.

²⁴⁵ *Ibid.*, para.185.

²⁴⁶ L Doswald-Beck, above n.240, 17.

²⁴⁷ In the Case of *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, this was because the detention was deemed unlawful under both regimes so no conflict arose: para.107. In the case of *Al-Skeini*, above n.50, the

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.²⁴⁸ Sometimes 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.²⁴⁹ At its core, ICL foresees that individuals rather than States

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.

²⁴⁸ 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 S Sivakumaran, “Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals” 18 (2005) *Leiden Journal of International Law* 541.

²⁴⁹ See A Cassese, *International Criminal Law*, 2nd edn (OUP, 2008), 3–10; Khan and Dixon (eds), *Archbold International Criminal Courts, Practice Procedure and Evidence*, 3rd edn (London: Sweet & Maxwell, 2009), 21–22.

should be held accountable for conduct that “shocks the conscience of humanity”.²⁵⁰ 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.²⁵¹

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.²⁵² 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.²⁵³

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.²⁵⁴ Foremost are the rules in international treaties and other binding international instruments, such as the resolutions of the United Nations Security Council. 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 International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were both established through United Nations Security Council Resolutions.²⁵⁵ The provisions of these resolutions are 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 United Nations 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 creation of the International Criminal Court in The Hague (ICC) by the Rome Statute (Rome Statute) in 1998. To date, 139 States have signed the Rome Statute, of which 121 have ratified it.²⁵⁶ 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.²⁵⁷

²⁵⁰ A phrase most recently cited in the Rome Statute to describe international crimes: Preamble, Rome Statute, para.2.

²⁵¹ See A Cassese, “International Criminal Law”, in MD Evans, *International Law*, 2nd edn (Oxford: OUP, 2006) at 719; *Archbold International Criminal Courts*, 21–22.

²⁵² A Cassese, above n.249, 30–31.

²⁵³ *Ibid.*, 30–31.

²⁵⁴ *Ibid.*, 15–27.

²⁵⁵ United Nations Security Council Resolution 827 of 1993 (UN Doc. S/RES/827 (1993)) establishing the ICTY and United Nations Security Council Resolution 955 of 1994 (UN Doc. S/RES/955 (1994)) establishing the ICTR.

²⁵⁶ Source: *Coalition for the International Criminal Court*, website www.iccnw.org.

²⁵⁷ Preamble, Rome Statute, paras. 5 and 11.

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 1948; the Geneva Conventions 1949 and their Additional Protocols; and the Convention Against Torture 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 international human rights law. One example is the principle of legality, which requires the law to be clear, ascertainable and non-retroactive.

All courts exercising jurisdiction over international crimes have made important contributions to the development of both international criminal law and customary international law. Some of its provisions, such as the prohibition on genocide, war crimes and crimes against humanity, are generally considered to also be part of *jus cogens* (see above).²⁵⁸

ICL is therefore particularly relevant for victims seeking justice for education-related violations in insecurity and armed conflict. Conduct deemed criminal under ICL can have a direct or indirect impact on the full and effective realization 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 and the general principles of ICL and of customary international law to bring to justice those who have committed such crimes.²⁵⁹ 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.²⁶⁰ Exactly how this happens in practice will depend on the applicable national

²⁵⁸ MC Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", 59 (1996) *Law and Contemporary Problems*, 63, 68.

²⁵⁹ See for example Principles 19 and 20 of the UN 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 available at ap.ohchr.org/documents/alldocs.aspx?doc_id=10800 (UN Updated Set of Principles on Impunity.) As Principles, these are not legally binding, but are reflective of many principles of international law.

²⁶⁰ For example, Art.49 First Geneva Convention; Art.50 Second Geneva Convention; Art.129 Third Geneva Convention; Art.146 Fourth Geneva Convention.

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.²⁶¹

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.²⁶²

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.²⁶³ 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.²⁶⁴

A State's obligation to prosecute in any specific case may be limited by principles of international human rights law. 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.²⁶⁵ In addition, the ICC has jurisdiction over the crimes specified in Article 5 of the Rome Statute that are

²⁶¹ See for example the Dutch International Criminal Court (Implementation) Act 2002; the International Criminal Court Act 2001 of England and Wales.

²⁶² See, for example, *Bosnia and Herzegovina v Serbia and Montenegro, Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide*, Judgment of the ICJ, 26 February 2007.

²⁶³ For example, the Geneva Conventions, see above. This is also the case with IHRL, see above.

²⁶⁴ See for example: Art.1 of the Statute of the ICTY restricting the competence of the Tribunal to acts "committed in the territory of the former Yugoslavia since 1991"; Art.1 of the Statute of the Special Court for Sierra Leone similarly restricting the jurisdiction of the Special Court to "the territory of Sierra Leone since 30 November 1996".

²⁶⁵ Art.12(2) Rome Statute.

referred to the Prosecutor by the United Nations Security Council acting under Chapter VII of the United Nations Charter,²⁶⁶ irrespective of whether the acts were committed by nationals of or within the territory of States parties.

Outside the international courts, jurisdiction has traditionally been asserted by the State upon whose territory the international crime was committed;²⁶⁷ 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 an accused person (*active personality jurisdiction*)²⁶⁸ and, more controversially, on the nationality of the victim (*passive personality jurisdiction*).²⁶⁹ 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.²⁷⁰ 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.²⁷¹

Where one State declines to exercise jurisdiction and 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,²⁷² basis upon which a State is authorized to prosecute international crimes is the doctrine of universal jurisdiction. Universal jurisdiction is the principle that 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. First, 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.²⁷³ In order to exercise universal jurisdiction over a

²⁶⁶ Art.13(c) Rome Statute.

²⁶⁷ See *Lotus Case (France v Turkey)* Permanent Court of International Justice, judgment of 7 September 1927, Series A No 10. See also A Cassese, *International Criminal Law*, 2nd edn (OUP, 2008), 27. See also Principles 19 and 20 of the UN Updated Set of Principles on Impunity.

²⁶⁸ See discussion of this principle in R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edn (CUP, 2010), 47–49.

²⁶⁹ See *ibid.*, 50.

²⁷⁰ IBA *Report of the Task Force on Extraterritorial Jurisdiction*, (IBA) at 148. Available at tinyurl.com/taskforce-etj-pdf.

²⁷¹ See discussion of this principle in R Cryer, H Friman, D Robinson and E Wilmshurst, above n.268, 47–48.

²⁷² *Ibid.*, 50.

²⁷³ 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 authorized their courts to exercise universal jurisdiction over one or more international crimes. For more detail see *Universal Jurisdiction: A Preliminary Survey of Legislation around the World* (Amnesty International Publications, October 2011), 1. Available at www.amnesty.org/en/library/asset/IOR53/004/2011/en/d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdf.

particular international crime, a State must have expressly criminalized it in the relevant domestic legislation.

2.4.4 Individual Criminal Responsibility

Under the Rome Statute, the basic form of individual criminal responsibility is commission, where an accused commits a crime individually, jointly or through another person.²⁷⁴ Individual criminal responsibility accrues regardless of whether a person acts in a private capacity or as an agent of the State.²⁷⁵

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.²⁷⁶ Under the doctrine of command or superior responsibility,²⁷⁷ 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.²⁷⁸ 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.²⁷⁹ 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.²⁸⁰

The statutes and jurisprudence of the ICC and the other *ad hoc* international courts continue to establish the circumstances in which criminal liability may be excluded, many of which are also found in national criminal laws. For example, an accused may have complete defence (of

²⁷⁴ Art.25(3)(a) Rome Statute.

²⁷⁵ For the irrelevance of official capacity, see for example Art.27 Rome Statute.

²⁷⁶ For more on the scope of individual criminal responsibility see for example Art.7(1) ICTY Statute, Art.6(1) ICTR Statute and Art.25(3) Rome Statute. See A Cassese, “International Criminal Law” in MD Evans, above n.251, 733.

²⁷⁷ See for example Art.28 Rome Statute; Art.6 Convention Against Enforced Disappearances.

²⁷⁸ See *Tadić*, above n.119 para.199. See also, generally, A Cassese, *International Criminal Law*, 2nd edn (Oxford: OUP, 2008), 236–252.

²⁷⁹ 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 organized 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* (Sweet & Maxwell, 2009), 873–887, and A Danner and J Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law”, 93 *California Law Review* 2005, 75–170.

²⁸⁰ A Cassese, “International Criminal Law”, in MD Evans, above n.251, 735.

the whole alleged crime) to criminal liability on the grounds of mental incapacity (insanity);²⁸¹ involuntary intoxication;²⁸² self-defence, defence of others or defence of property;²⁸³ where the accused was acting under duress or out of necessity.²⁸⁴ 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;²⁸⁵ 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,²⁸⁶ ‘military necessity’ is not a defence to an international crime.

The limited defence of ‘superior orders’ is controversial. The ICC 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.²⁸⁷ As outlined above, the person giving the order may also be criminally responsible whether or not this defence applies.²⁸⁸

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.²⁸⁹

²⁸¹ Art.31(1)(a) Rome Statute.

²⁸² Art.31(1)(b) Rome Statute. Voluntary intoxication is only a defence when the accused did not know that they were likely to commit the alleged crime.

²⁸³ Art.31(1)(c) Rome Statute.

²⁸⁴ Art.31(1)(d) Rome Statute.

²⁸⁵ Art.32(1) and (2) Rome Statute. 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 R Cryer, H Friman, D Robinson and E Wilmschurst, above n.268, 415.

²⁸⁶ For example, in some offences listed in Art.8(2) Rome Statute.

²⁸⁷ Art.33(2) Rome Statute.

²⁸⁸ R Cryer, H Friman, D Robinson and E Wilmschurst, above n.268, 417.

²⁸⁹ A Cassese, above n.249, 302–304.

The scope of such immunities from prosecution is being eroded.²⁹⁰ It is now accepted as customary international law that functional immunities cannot apply to international crimes.²⁹¹ 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.²⁹² 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.²⁹³ Similarly, ICL does not permit limitation periods or amnesty laws that may limit the prosecution of international crimes.²⁹⁴

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 CAT. Immunity from prosecution is also directly prohibited in the statutes of the ICTY and ICTR,²⁹⁵ and in the Rome Statute.²⁹⁶ The Rome Statute also obliges States parties to amend their national legislation to remove,²⁹⁷ or allow the circumvention of, any immunity provisions relating to crimes over which the ICC would have jurisdiction.²⁹⁸ For officials of those States that have not ratified the Rome Statute, their personal immunities under traditional international law persist, unless an indictment is authorized by the United Nations Security Council under Article 13(2) and (3) of the Rome Statute.²⁹⁹

²⁹⁰ *Ibid.*, 305–314.

²⁹¹ *Ibid.*, 305–308.

²⁹² Immunity no longer applies once a person ceases to be an incumbent head of State or representative of a State: *ibid.*, 304.

²⁹³ This was set out in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* 2002 ICJ 3, para.61.

²⁹⁴ See for example Art.29 Rome Statute. However, statutes of limitation or amnesty laws may exist at the domestic level.

²⁹⁵ Art.7(2) ICTY Statute and Art.6(2) ICTR Statute. 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 A Cassese, *International Criminal Law*, 2nd edn (Oxford: OUP, 2008), 311. See also A Cassese, “International Criminal Law”, in MD Evans, above n.251, 734.

²⁹⁶ Art.27 (2) Rome Statute.

²⁹⁷ A Cassese, above n.249, 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

²⁹⁸ See B Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP, 2003), 139. Note that this is what France had to do, its constitutional court declaring that the removal of immunities would be unconstitutional.

²⁹⁹ 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 authorized 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 D Akande, “Working Paper”: www.csls.ox.ac.uk/documents/Akande.pdf.

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.³⁰⁰ 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.³⁰¹

In contrast, the ICC operates according to the principle of 'complementarity'. The ICC has jurisdiction over international crimes considered the "most serious crimes of concern to the international community as a whole".³⁰² 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".³⁰³

Under the terms of the Rome Statute, the ICC is only authorized to exercise its jurisdiction over the crimes under its jurisdiction pursuant to Article 7 of the ICC Statute, including genocide, war crimes, crimes against humanity, and aggression, thereby overriding a State's sovereignty

³⁰⁰ See Rule 9 of the Rules of Procedure and Evidence of the ICTY, Rule 8 of the Rules of Procedure and Evidence of the ICTR.

³⁰¹ See for example Rule 11*bis* and the Completion Strategy of the ICTY.

³⁰² According to Art.1 Rome Statute, these are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

³⁰³ Preamble to the Rome Statute, para.6.

and its domestic courts, in limited circumstances. Two conditions are required: first 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.³⁰⁴

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.³⁰⁵ Non-State parties have also sought agreements with States parties in relation to the application of the Rome Statute on non-State party nationals.³⁰⁶

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 an 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 breaches' regime of IHL³⁰⁷ 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",³⁰⁸

³⁰⁴ Arts 15, 17, 18 and 19, Rome Statute. For a more detailed discussion, see A Cassese, above n.249, 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.

³⁰⁵ 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: treaties.un.org/Home.aspx?lang=en.

³⁰⁶ 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 Scheffer, "Article 98(2) of the Rome Statute: America's Original Intent", *Journal of International Criminal Justice*, Vol.3, Issue 2, 333–353.

³⁰⁷ Those breaches of the Geneva Conventions and Additional Protocols identified as "grave breaches" constitute war crimes under IHL: Art.50 First Geneva Convention; Art.51 Second Geneva Convention; Art.130 Third Geneva Convention; Art.147 Fourth Geneva Convention; Art.85 Additional Protocol I; Art.11 Additional Protocol II.

³⁰⁸ Art.1 Rome Statute.

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 non-international armed conflict, 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 crimes³⁰⁹ or to supplement gaps in their own jurisprudence.³¹⁰ 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.³¹¹ 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 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

³⁰⁹ See *Prosecutor v Nahimana, Barayagwize and Ngeze (Judgment)* 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”.

³¹⁰ See, for example, the ICTY Cases: *Prosecutor v Furundžija* IT-95-17/1 (2000), *Prosecutor v Kunarac et al* IT-96-23 and 23/1 (2002); *Prosecutor v Delalic, Mucic, Delic and Lando (Celebici Camp Case)* No IT-69-21-T, (1998).

³¹¹ The ILA recently rejected the proposition that States might be liable for criminal responsibility.

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; protection of students and education staff; and the protection of educational facilities.

3

Protection of Education

This chapter presents 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 realization 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”,¹ crucial to the realization of other human rights and of democratic societies in general.² Similarly, in order for the right to education to be realized, other human rights must also be realized, 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. As neither Asia nor the Pacific regions have a regional human rights system, these regions are not discussed in this Handbook, and there is only brief mention of the Arab human rights system, as it is not fully operational. Most of the relevant case law for these various mechanisms can be found in Chapter 6.

¹ K Tomasevski, *Education Denied* (Zed Books, 2003), 32.

² KD Beiter, *The Protection of the Right to Education by International Law* (Martinus Nijhoff, 2006), 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:

- the Universal Declaration of Human Rights (UDHR);³
- the International Covenant on Civil and Political Rights (ICCPR); and
- the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴

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. It is thus the source of the binding right to education and other associated human rights which are now contained in other treaties. 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.⁵

The UDHR first enshrined the right to education at the universal level. 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.⁶

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

³ The UDHR, adopted in 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 the 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.

⁴ Both the ICCPR and the ICESCR were adopted in 1966 and entered into force in 1976.

⁵ As Chapter 6 explains, States parties must report, for example, to the Human Rights Committee (HRC) with regard to the ICCPR and to the Committee on Economic, Social and Cultural Rights (CESCR) with regard to the ICESCR.

⁶ The UDHR was adopted by the UN General Assembly on 10 December 1948 and is available online at: www.un.org/en/documents/udhr/history.shtml.

[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 international human rights law 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,⁷ the ICESCR and the ICCPR,⁸ as well as all the major international human rights treaties.⁹ Furthermore, the Committee on Economic, Social and Cultural Rights (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.¹⁰ 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 realization 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 UNESCO Convention against Discrimination in Education (CDE). 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.¹¹ Providing education in a non-discriminatory manner also means that States must provide “equality of opportunity and treatment for all in education”.¹²

⁷ See the Preamble, Art.1 para.3, and Art.55 of the UN Charter.

⁸ Art.2(1), 3 and 26 ICCPR; Art.2(2) and 3 ICESCR.

⁹ See, in addition, the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Convention on the Rights of Persons with Disabilities.

¹⁰ CESCR General Comment 20, para.7.

¹¹ Art.5 CDE. See also Art.31 ILO Convention on Indigenous and Tribal Peoples (1989) 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 by UNGA Res 47/135, 18 December 1992, and the *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by UNGA Res 61/295, 13 September 2007.

¹² See the Preamble to CDE. Consideration of some specific groups is given below.

The Right to Education as a Legally Binding 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 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, in respect of minimum educational standards, a liberty which is also affirmed in the other Covenant, the ICCPR. As it provides for the right to freedom of thought, conscience and religion, 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 recognizes 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 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.¹³ 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”.¹⁴ 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;
- (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 important of a “qualitative dimension” to the right to education and “the need for education to be child-centred, child-friendly and empowering”.¹⁵

¹³ Arts 28 and 29 CRC, 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.

¹⁴ Art.1, CRC.

¹⁵ 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.

The Right to Education in Other International Agreements

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. 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.¹⁶

Some of these instruments have a specific focus on education, such as the *World Declaration on Education for All* (also known as the ‘Jomtien Declaration’) which refers to the educational opportunities required to meet basic learning needs.¹⁷ These include:

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.

Other instruments mention education in relation to education about, and of, human rights. This is the case with the *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.¹⁸ The *Plan of Action for the United Nations Decade for Human Rights Education*¹⁹ includes both “human rights *through* education”²⁰ and “human

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.

¹⁶ The CESCR has maintained that “[t]hese new elements are implicit in, and reflect a contemporary interpretation of article 13 (1)”. See CESCR, General Comment 13 (1999), para.5.

¹⁷ 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, is available at: www.unesco.org/education/pdf/JOMTIE_E.PDF. The Jomtien Declaration marked the beginning of global policy making with the Education for All (EFA) process and made education a ‘need’ rather than a ‘right’, see Beiter (fn.342 above), 2. This process was initiated by UNESCO. Note also that the Dakar Conference, which took place ten years after Jomtien, was criticised for adopting similarly vague terms and choosing low common denominators, see K Tomasevski, above n.1, 3.

¹⁸ UNGA, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, para.33. Available at: www.unhcr.org/refworld/docid/3ae6b39ec.html.

¹⁹ Plan of Action for the United Nations Decade for Human Rights Education. Doc. A/51/506/Add.1, 12 December 1996, available at: daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/51/506/Add.1&Lang=E.

²⁰ *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”.

rights *in* education”,²¹ defining human rights education as “education, training and information aimed at building a universal culture 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.²²

Other international commitments, while also not directly (or entirely) focused on education, contain provisions on education given its importance for international development in general. This is the case of some action plans such as 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.²³ 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.²⁴ One of the eight Millennium Development Goals, adopted in 2000, is the achievement of universal primary education for boys and girls.²⁵ This goal, like the others, is meant to be reached by 2015. 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 realization 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.²⁶

The Content of the Right to Education

The core 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.²⁷ According to this framework, the core components of the right to education consist of:

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

²¹ *Ibid.*, Section 2: “human rights of all members of the school community” must be respected.

²² *Ibid.*, Section 1.

²³ 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. Available at www.c-fam.org/docLib/20080625_Rio_Declaration_on_Environment.pdf.

²⁴ Section 3, Chapter 24 of Agenda 21, *ibid.*

²⁵ These development goals (and their associated targets) are based on the UN *Millennium Declaration* adopted by UNGA Res 55/2 on 8 September 2000.

²⁶ Guideline 11 on “Education and awareness raising” of the *Voluntary Guidelines*, adopted by the Food and Agriculture Organization Council in November 2004. Available at: ftp.fao.org/docrep/fao/meeting/009/y9825e/y9825e01.pdf.

²⁷ This framework was developed by the Commission on Human Rights, see K Tomasevski, *Annual Report of the Special Rapporteur on the right to education*, UN Doc E/CN.4/1999/49, paras.51–74; E/CN.4/2000/6, paras.32–65; E/CN.4/2001/52, paras.64–77, and 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. It is also a useful tool to understand the various facets that this right entails in practice.

The CESCR applies the core component of education in a broad manner as it stated that they “are common to education in all its forms and at all levels”.²⁸ This framework and its core components will thus be used in this Handbook as a framework to analyse the content of education in all its forms and at all levels.²⁹

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.³⁰

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 core components assists with the understanding of the content of the right to education, the section below presents each of the four concepts 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.³¹

²⁸ CESCR General Comment 13, The right to education (1999), para.8.

²⁹ 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 discussed in Chapter 6 below.

³⁰ CESCR General Comment 13, para.50.

³¹ *Ibid.*; also the 2000 Report of the Special Rapporteur on Education.

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.³² According to the CESCR, “functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party”.³³ 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”.³⁴

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. These basic requirements with regard to educational facilities will be further developed in Chapter 5.

Accessibility

Accessibility may be divided into two characteristics:

- economic accessibility, and
- physical accessibility.

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 compulsory. States must also take all possible measures to render post-primary education levels progressively free for all.³⁵

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.³⁶

³² K Tomasevski, above n.1, 51.

³³ CESCR General Comment 13, para.6(a).

³⁴ *Ibid.*

³⁵ 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.

³⁶ CESCR General Comment 11, *Plans of action for primary education* (1999), E/C.12/1999/4, para.7. Available at www.unhcr.ch/tbs/doc.nsf/0/59c6f685a5a919b8802567a50049d460?Opendocument.

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.³⁷ 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)”.³⁸ 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.³⁹ As a consequence, the obligation of States to ensure the physical accessibility of schools extends to transport.⁴⁰ 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.⁴¹ 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.

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.⁴² 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 girls’ sanitation.

³⁷ V Muñoz, *Report of the Special Rapporteur on the right to education: Right to education in emergency situations*, Doc. A/HRC/8/10, 20 May 2008, para 107. (‘Report of the Special Rapporteur Education (2008)’) Available at www.right-to-education.org/sites/r2e.gn.apc.org/files/Emergencies%202008.pdf.

³⁸ CESCR General Comment 13, para.6(b)(ii).

³⁹ 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”.

⁴⁰ KD Beiter, above n.2, 489–490.

⁴¹ Report of the Special Rapporteur on Education (2008).

⁴² K Tomasevski, above n.2, 51.

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.⁴³ This means that propaganda for war (or armed conflict), or incitation to hatred through educational material (books or educational programmes) or through the education personnel (a teacher's speech, for example) is never allowed, even in a state of emergency.⁴⁴ Teaching methods must also not allow any form of violence, such as corporal punishment, an education-related violation which is prohibited under IHRL.⁴⁵

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.⁴⁶

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 normalized 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.

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

⁴³ See the discussion above on derogation of ICCPR and the HRC General Comment.

⁴⁴ 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.

⁴⁵ Art.19 CRC, 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.

⁴⁶ CESCR General Comment 13, para.50.

within their diverse social and cultural settings”.⁴⁷ In accordance with 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.⁴⁸ 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.⁴⁹ States also have immediate obligations, including non-discrimination in the provision of education, and obligations for which they must take steps to realize the right progressively, 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 realization 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.⁵⁰ Situations of insecurity and armed conflict may limit the availability of such resources and thus affect a State’s ability to realize 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 by a State to realize this right, but to all the resources which could be allocated to realize 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 realization of the right to education, States also have an immediate obligation to meet 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

⁴⁷ CESCR General Comment 13, para.6(d).

⁴⁸ Report of the Special Rapporteur on Education (2008), paras 135–136.

⁴⁹ K Tomasevski, above n.1, 36. The right to education provides for both entitlements and prohibitions and thus it can be considered as both “positive” and “negative”.

⁵⁰ Art.2(1) ICESCR. See also Art.4 CRC.

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)).⁵¹

These minimum core obligations correspond to the essential elements of the rights, 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. 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”.⁵² 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 prioritize the use of available resource to meet these obligations.⁵³ States must prioritize the minimum core obligations of the right to education over the non-core obligations. Prioritization must, of course, take into account the need to satisfy everyone’s subsistence requirements and to provide essential services.⁵⁴

One minimum core obligation is the provision of primary education.⁵⁵ As a result, primary education must be given continued priority, even in times of economic or other constraints.⁵⁶ 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”.⁵⁷ 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”⁵⁸ or costly school meals. In addition, within two years of the entry into force of the ICESCR in the State concerned,⁵⁹ a detailed plan of action to secure the right to education has to be adopted, even when resources are lacking.⁶⁰ Finally, basic (or ‘fundamental’)

⁵¹ CESCR General Comment 13, para.57.

⁵² *Maastricht Guidelines*, paras 9–10. See also the non-binding *Limburg Principle on the Implementation of the ICESCR*, Maastricht, 2–6 June 1986.

⁵³ CESCR General Comment 3, para.10.

⁵⁴ See for example *Limburg Principle*, above n.52, 28.

⁵⁵ ICESCR Art.13(2)(a); CRC Art.28(1)(a); UDHR Art.26. As already mentioned, this was also one of the eight Millennium Development Goals (MDGs) that world leaders committed to achieving by 2015.

⁵⁶ 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.”

⁵⁷ CESCR General Comment 11, para.6.

⁵⁸ CESCR General Comment 11, para.7.

⁵⁹ “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.

⁶⁰ CESCR General Comment 11, paras.8–9.

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”.⁶¹ 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.⁶²

In addition, a minimum core obligation of the right to education, is that States parties have the obligation to establish a comprehensive educational strategy, meaning 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”.⁶³ An educational system needs to be developed as a whole and include educational facilities, qualified teachers and educational materials.

In relation to other obligations on a State, Article 13(2)(b) requires 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”.⁶⁴ 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”.⁶⁵ 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.⁶⁶

Under Article 13(2)(c), tertiary 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”.⁶⁷ 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”.⁶⁸ 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.⁶⁹

⁶¹ Art.13(2)(d) ICESCR. See also CESCR General Comment 13, para.23.

⁶² CESCR General Comment 13, para.24.

⁶³ Art.13(2)(e) ICESCR. The CESCR General Comment 13, para.25: explains that “[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.”

⁶⁴ Art.13(2)(b) ICESCR.

⁶⁵ CESCR General Comment 13, para.13

⁶⁶ *Ibid.*

⁶⁷ Art.13(2)(c) ICESCR. 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”.

⁶⁸ CESCR General Comment 13, para.19.

⁶⁹ 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. Available at www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-DEU-CO6.pdf.

Technical and vocational education and training, as an essential component for the realization of the right to work, needs to be part of secondary and tertiary education.⁷⁰ Note, however, that informal education is not mentioned in the relevant general comments of the CESCR.⁷¹

Limitations on a State's Obligations

There are few situations under which the right to education 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”.⁷² Any limitation must thus also abide by the principle of proportionality and not exceed what is required by its aim. The harm and the purpose of a limitation must then be balanced. 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.⁷³

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”.⁷⁴ In fact, even during periods of constraints due to “a process of adjustment, of 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”.⁷⁵

The Right to Education of Refugees and Displaced Persons

According to the Convention relating to the Status of Refugees 1951, which has 145 States

⁷⁰ Art.6(2) ICESCR: “[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. Available at www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/E.C.12.GC.18.En; Art.6 ICESCR, 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.

⁷¹ Informal educational settings, such as the home, are not the object of this book.

⁷² Art.4 ICESCR. Note that, as mentioned in Chapter 2, this does not amount to a general derogation clause.

⁷³ KD Beiter, above n.2, 456–457.

⁷⁴ CESCR General Comment 31, *The nature of States parties' obligations* (1990), para.9. Available at www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument. CESCR.

⁷⁵ General Comment 31, para.12.

parties, these persons shall be given the same treatment as nationals with respect to elementary education.⁷⁶ 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.⁷⁷

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).⁷⁸ The Convention relating to the Status of Stateless Persons 1954, which has 74 States parties, provides the equivalent protection in relation to education as in the Convention relating to the Status of Refugees.⁷⁹ 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.⁸⁰

The CRC contains a specific provision protecting children who are seeking refugee status or who are considered refugees.⁸¹ It provides that States 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 the CRC may provide refugees 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.⁸²

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 the Human Rights Council, has 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”.⁸³ The need to ensure full and

⁷⁶ Art.22 Convention relating to the Status of Refugees (1951). Note that this Convention also protects religious freedom and freedom as to the religious education of refugees’ children (Art.4).

⁷⁷ 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. See www.unhcr.org/3d9abe177.html.

⁷⁸ KD Beiter, above n.2, 124.

⁷⁹ Art 22 Convention relating to the Status of Stateless Persons.

⁸⁰ KD Beiter, above n.2, 578.

⁸¹ Art 22 CRC.

⁸² KD Beiter, above n.2, 124.

⁸³ UNHCR *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), available at: www.unhcr.org/refworld/docid/3d4f95e11.html. 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.

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.⁸⁴ 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”.⁸⁵

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 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.⁸⁶ 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 realization of other human rights.

African Charter on Human and Peoples’ Rights

Adopted in 1981 and entered into force five years later, the African Charter on Human and Peoples’ Rights (ACHPR)⁸⁷ has been ratified by all 54 member states of the African Union.⁸⁸ It incorporates in one text all CPR and ESCR present in the major international human rights

⁸⁴ *Ibid.*, Principle 23 (4).

⁸⁵ KD Beiter, above n.2, 125.

⁸⁶ These instruments recognize the particular experiences and challenges faced by African nations and their peoples. See, for instance, paras 3, 4, 5 and 8 of the Preamble to the ACHPR; paras 3 and 5 of the Preamble to the ACRWC (1990). The OAU focused on the process of decolonization and liberation, and the defence of newly acquired African sovereignty. See GJ Naldi, “Future Trends in Human Rights in Africa: The Increased Role of the OAU”, in MD Evans and R Murray (eds), *African Charter on Human and Peoples’ Rights: The System in Practice: 1986-2000* (CUP, 2002), 2. 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. See as 3 and 35.

⁸⁷ *African (Banjul) Charter on Human and Peoples’ Rights*, (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 ((1982) 21 ILM 58), available at: http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf.

⁸⁸ African Union, “List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and Peoples’ Rights” (2 August 2011) available at www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf.

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.⁸⁹ The ACHPR rejection of the bifurcated structure 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”.⁹⁰ 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.”⁹¹ 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.

African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC)⁹² was designed to complement the CRC by addressing the specificities of the rights of children in the African

⁸⁹ Found in Chapter II of the Charter. Discussed at MW Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties” (1995) 35 *Virginia Journal of International Law* 339.

⁹⁰ C Anselm Odinkalu, “Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples’ Rights”, in MD Evans and R Murray (eds), *African Charter on Human and Peoples’ Rights: The System in Practice: 1986-2000* (CUP, 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 J Mouangue Kobila, “Comparative Practice on Human Rights: North-South” in J-M Coicaud, MW Doyle and A-M Gardener (eds), *Globalization of Human Rights* (United Nations Publications, 2002), 93.

⁹¹ Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004), a non-binding agreement, available at: www.achpr.org/instruments/pretoria-declaration/.

⁹² African Charter on the Rights and Welfare of the Child (adopted 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49, available at: www.acerwc.org/wp-content/uploads/2011/04/ACRWC-EN.pdf.

context.⁹³ Adopted in 1990, it entered into force in 1999,⁹⁴ and is applicable to children, i.e. individuals under the age of 18, being the same age threshold as provided for in the CRC.⁹⁵ The right to education is more extensive in the ACRWC than it is in the ACHPR. Its Article 11, for example, provides for “free and compulsory basic education”,⁹⁶ the need to take specific measures for “female, gifted and disadvantaged children to ensure equal access to education”,⁹⁷ and the protection of parental liberty in choosing their children’s education.⁹⁸

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”.⁹⁹ 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 (Maputo Protocol)¹⁰⁰ consolidates the rights of women of all ages, including female children,

⁹³ Para.8 of the Preamble of the ACRWC; GJ Naldi, above n.86, 14–17; D Olowu, “Protecting Children’s Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child” (2002) *International Journal Children’s Rights* 127, 128.

⁹⁴ 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’, available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>.

⁹⁵ Art.2 ACRWC.

⁹⁶ Art.11(3)(a) ACRWC.

⁹⁷ Art.11(3)(e) ACRWC.

⁹⁸ Art.11(4) ACRWC.

⁹⁹ Art.11 (2) ACRWC.

¹⁰⁰ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa

building upon the existing African provisions found in the ACHPR and the ACRWC. It entered into force in November 2005.¹⁰¹ 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.¹⁰² 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.¹⁰³ It also reiterates the prohibition of all forms of abuse, including “sexual harassment in schools and other education institutions”.¹⁰⁴

African Youth Charter

The African Youth Charter, adopted in July 2006, entered into force in August 2009.¹⁰⁵ Classifying ‘youths’ as persons between the ages of 15 and 35 years, the Charter recognizes the importance of quality education and the value of all educational formats including non-formal, informal, distance learning and life-long learning.¹⁰⁶ It also expresses particular concerns regarding “illiteracy and poor quality educational systems”.¹⁰⁷ 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 recognizes 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.

(adopted 11 July 2003, entered into force 25 November 2005), available at www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf.

¹⁰¹ As of February 2011, it has been ratified by 30 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 (12 February 2011) available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf>. The states having not signed or ratified the Protocol being Botswana, Egypt, Eritrea and Tunisia. Note that with 29 States that have signed but not yet ratified, the jurisdictional scope of the Protocol is more limited than either the Banjul Charter or the ACRWC.

¹⁰² Art.1(g) and Art.2(2) Maputo Protocol.

¹⁰³ Art.12(1)(b).

¹⁰⁴ Art.12 (1)(c).

¹⁰⁵ As of July 2011, the Charter has so far been ratified by 28 member states of the AU: see the African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Youth Charter (13 July 2011) available at <http://www.africa-union.org/root/au/Documents/Treaties/list/Youth%20Charter.pdf>. The Charter is available at: www.africa-union.org/root/au/Documents/Treaties/Text/African_Youth_Charter.pdf.

¹⁰⁶ Art.13 on Education and Skills Development, in particular paras 1 and 2.

¹⁰⁷ Para.11 of the Preamble to the African Youth Charter.

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 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 African Union adopted this Convention (also called the Kampala Convention) on 22 October 2009, but it is not yet in force.¹⁰⁸ 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”.¹⁰⁹

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.¹¹⁰

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.¹¹¹

¹⁰⁸ According to its Art.17, 15 member States have to ratify (or access) the Convention for it to enter into force.

¹⁰⁹ Art.9(2)(b).

¹¹⁰ Art.18 VCLT.

¹¹¹ Art.XII. According to Bieter, 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”, see KD Beiter, see above n.2, 205.

Article XXXI of the Declaration further states that “it is the duty of every person to acquire at least an elementary education”.¹¹² 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 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 Inter-American Commission on Human Rights (IACommHR) 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.¹¹³ 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, can be 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”.¹¹⁴ 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.¹¹⁵

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.¹¹⁶ The prominence

¹¹² *Ibid.*

¹¹³ 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. See also KD Bieter, above n.2, 206.

¹¹⁴ Art.30 OAS Charter.

¹¹⁵ 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.”

¹¹⁶ 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:

with which education features in the Charter suggests that the member States view education 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, discussed in 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.¹¹⁷ 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,¹¹⁸ the ACHR places this right of the parent within Article 12 on the right to freedom of conscience and religion.¹¹⁹

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.¹²⁰

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, includ-

- 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."

¹¹⁷ The United States of America has only signed it, eight States have neither signed nor ratified it, and Trinidad and Tobago has now denounced it: see www.oas.org/juridico/english/sigs/b-32.html.

¹¹⁸ Art.2 First Additional Protocol.

¹¹⁹ Art.12(4).

¹²⁰ See Art.27(2) for the list of exceptions.

ing the right to education at Article 13. It was adopted in 1988 and entered into force in 1999, having now been ratified by 15 States.¹²¹

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 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.¹²²

Inter-American Democratic Charter

Adopted by the General Assembly of the OAS in 2001,¹²³ the Inter-American Democratic Charter, a non-binding instrument, seeks to reaffirm the commitment to, and strengthening of, representative democracy within the Americas.¹²⁴ Furthermore, it “identifies democracy with a set of integral values and rights”, which include respect for and enjoyment of human rights.¹²⁵ 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.

¹²¹ It has been signed only by another two States, leaving 15 States having neither signed nor ratified it, see: www.oas.org/juridico/english/sigs/a-52.html.

¹²² 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”.

¹²³ Sitting in a special session.

¹²⁴ Introduction by Secretary General Jose Miguel Insulza to the Inter-American Democratic Charter, at 2, available at: www.oas.org/en/democratic-charter/pdf/demcharter_en.pdf.

¹²⁵ *Ibid.*

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”.¹²⁶ The Charter of Fundamental Rights of the European Union, 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 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.¹²⁷

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.¹²⁸ Any measures taken by States parties pursuant to Article 15 are subject to the review of the European Court of Human Rights 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.¹²⁹ However, the Court has been more stringent in its review of the requirement that the measures taken were strictly necessary.¹³⁰ 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.¹³¹ 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 A2P1.¹³² However, the majority of derogations made

¹²⁶ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351, para.304.

¹²⁷ The Additional Protocol has been ratified by 45 out of the 47 Council of Europe members; Switzerland and Monaco have not ratified.

¹²⁸ See Art.15(2) ECHR for the list of exceptions to the derogation clause.

¹²⁹ R White, C Ovey, FG Jacobs, *The European Convention on Human Rights*, 5th edn (OUP, 2010), 118.

¹³⁰ *Aksoy v Turkey* Application No 21987/93, judgment of 18 December 1996; *A and others v United Kingdom*, Application No 3455/05, judgment of 19 February 2009.

¹³¹ R White, C Ovey, FG Jacobs, above n.129, 119.

¹³² Art.5 Additional Protocol 1 ECHR.

to date have been in relation to the right to liberty and security (Article 5) and the right to fair trial (Article 6).¹³³

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.¹³⁴ Nevertheless, 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.¹³⁵ 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, 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.¹³⁶

The bulk of case law in the ECtHR has concerned the second sentence.¹³⁷ 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.¹³⁸ The case law on A2P1 is briefly presented in Chapter 6.

European Social Charter

The European Social Charter (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.¹³⁹ In order to update some of the provisions in the Charter and to supplement the existing rights protected,¹⁴⁰ the Charter was revised in 1996.¹⁴¹ The revised Charter includes the rights set out in the Charter

¹³³ R White, C Ovey, FG Jacobs, above n.129, 113.

¹³⁴ This negative construction of the first sentence is supported in the *travaux préparatoires* of the Protocol, see KD Beiter, above n.2, 162, where it is noted 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”.

¹³⁵ See *Belgium Linguistics (No.2)* 1 EHRR 252; *A v Essex* [2010] UKSC 33 on appeal from: [2008] EWCA Civ 364.

¹³⁶ 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.

¹³⁷ See *Orsus and others v Croatia*, referred to the Grand Chamber, 1 December 2008.

¹³⁸ See KD Beiter, above n.2, 160.

¹³⁹ 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.

¹⁴⁰ D Harris and J Dancy, *The European Social Charter, Second Edition* (Transnational Publishers Inc., 2001), 18.

¹⁴¹ The revised Charter came into force in 1999 and is gradually replacing the initial Charter. The Charter has been signed by all 47 members of the Council of Europe and has been ratified by 43 of those

and the 1988 Additional Protocol to the Charter,¹⁴² with updates reflecting new standards, as well as additional rights not previously included in these instruments.¹⁴³

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.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶

members. The revised Charter has been signed by 45 members of the Council of Europe and ratified by 31 of those members. European Social Charter (revised) CETS No: 163.

See Council of Europe website: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp. Information as to the signature and ratifications of the revised European Social Charter can be found at conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&CL=ENG.

¹⁴² The 1988 Additional Protocol, which came into force in 1992, extends the rights guaranteed by Charter.

¹⁴³ 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.

¹⁴⁴ K D Beiter, above n.2, 175.

¹⁴⁵ 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, available at: www.coe.int/t/dGHl/monitoring/Socialcharter/Theme%20factsheets/FactsheetEducation_en.pdf.

¹⁴⁶ Art.30(a).

In addition, the education system must be both accessible and effective. The accessibility component of education is discussed earlier, under the '4As' 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.¹⁴⁷ 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.¹⁴⁸ Accessibility must be ensured through fair geographical distribution of schools, in addition to 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.¹⁴⁹

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.¹⁵⁰ It must be provided free of charge by qualified and sufficient staff and to a significant number of persons.¹⁵¹ 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.¹⁵² 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.¹⁵³

¹⁴⁷ 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".

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ See Council of Europe Information, "The Right to Education under the European Social Charter", above n.147, 3, and Conclusions of the European Committee of Social Rights Conclusions XIV-2, Statement of Interpretation on Art.9, at 55.

¹⁵¹ Council of Europe Information Document, "The Right to Education under the European Social Charter", above n.147, 3.

¹⁵² Art.10(4).

¹⁵³ This is concurrent with Rule 6 of the UN Standard Rules on the Equalization of Opportunities for

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.¹⁵⁴

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".¹⁵⁵ However, it appears that to date no State has relied on the right to derogate.¹⁵⁶ 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.¹⁵⁷ Of the substan-

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." available at: www.wcpt.org/policy/end-UN-persons-disabilities.

¹⁵⁴ Art.E. See D Harris and J Dancy, above n.140, 21.

¹⁵⁵ 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).

¹⁵⁶ D Harris and J Dancy, above n.140, 377; Digest of the Case Law of the European Committee of Social Rights, Council of Europe, 1 September 2008, 176, available at: 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 <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=163&CM=8&DF=&CL=ENG&VL=1> website (see in respect of the Charter: conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=035&CM=1&DF=&CL=ENG&VL=1 and in respect of the revised Charter: conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=163&CM=8&DF=&CL=ENG&VL=1).

¹⁵⁷ 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.

tive rights analysed above, only Article 7 is included as a ‘core’ right in the ESC.¹⁵⁸ 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.¹⁵⁹

EU Charter of Fundamental Rights

The Charter of Fundamental Rights (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.¹⁶⁰

Under Article 14 of the CFR, access to education and vocational training should be non-discriminatory.¹⁶¹ 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.¹⁶² 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.¹⁶³ 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

¹⁵⁸ 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.

¹⁵⁹ For a list of accepted provisions, see www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevOct2011.pdf.

¹⁶⁰ This means that the Court of Justice of the European Union, 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 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.

¹⁶¹ 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.

¹⁶² 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.

¹⁶³ *Ibid.*, 146.

parents to ensure the teaching of their children in conformity with their religious, philosophical and pedagogical views.¹⁶⁴

The Preamble to the CFR states that the CFR reaffirms rights recognized 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 European Court of Human Rights. 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.¹⁶⁵ 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 European Court of Human Rights; 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 European Court of Human Rights and the Court of Justice of the European Union.¹⁶⁶

Human Rights Framework 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.¹⁶⁷ 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 Organization 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 Arab Charter on Human Rights was adopted in 2004 and entered into force on 15 March 2008,¹⁶⁸ two months after seven Arab States ratified it.¹⁶⁹ It affirms international instruments as positive applicable norms by providing in its Article 43 that:

¹⁶⁴ *Ibid.*, 148.

¹⁶⁵ Explanations relating to the Charter of Fundamental Rights, document CONVENT49 of 11 October 2000, 49.

¹⁶⁶ *Ibid.*, 48.

¹⁶⁷ 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.

¹⁶⁸ Arab Charter on Human Rights, available at www.umn.edu/humanrts/instreet/loas2005.html.

¹⁶⁹ The first States to ratify were Jordan, Bahrain, Algeria, Palestine, Syria, Libya and UAE, followed by Saudi Arabia, Yemen, Qatar and Lebanon, bringing the number of ratification by the middle of 2011 to half the member States of the League. 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

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.¹⁷⁰

The Arab League Charter on Human Rights recognizes 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”.¹⁷¹ 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”.¹⁷²

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”.¹⁷³ The Charter also requires 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”.¹⁷⁴ 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”.¹⁷⁵

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 recognize 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 recognize the right of the child “to be protected from economic exploitation and from

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 Arab Charter on Human Rights..

¹⁷⁰ For background information about the revision process of the Charter, see M Rishmawi, “The Revised Arab Charter on Human Rights: A Step Forward?” (2005) 5(2) *Human Rights Law Review* 361–376.

¹⁷¹ Art.41, Arab Charter on Human Rights.

¹⁷² 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.

¹⁷³ Art.41.2.

¹⁷⁴ Art.14.6.

¹⁷⁵ Art.40.4.

being forced to perform any work that is likely to be hazardous or to interfere with the child's education".¹⁷⁶

Covenant on the Rights of the Child in Islam

The Covenant on the Rights of the Child in Islam (the 'CRCI'), adopted by the OIC in 2005,¹⁷⁷ 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.¹⁷⁸ 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".¹⁷⁹ 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 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.¹⁸⁰ It is the obligation of the States to respect the rights stipulated in the CRCI,¹⁸¹ 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".

¹⁷⁶ 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.

¹⁷⁷ Information regarding ratification of the CRCI is not published by the OIC. For the OIC as a regional human rights mechanism, see Chapter 6.

¹⁷⁸ Art.24 CRCI.

¹⁷⁹ Art.1.

¹⁸⁰ However, this protection may be limited, as it is put under the requirements of national legislation or Shari'a law. See A Smagadi, *Sourcebook of International Human Rights Materials* (BIICL, 2008), 74.

¹⁸¹ See Art.4, para.1 of the Covenant on the Rights of the Child in Islam, available at www.oic-oci.org/english/convention/Rights%20of%20the%20Child%20in%20Islam%20E.pdf.

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.¹⁸² 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.¹⁸³ 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.

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".¹⁸⁴ 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.¹⁸⁵ This provision should be read in conjunction with the prohibition of discrimination on basis of "gender, colour, nationality, birth, religion and 'any other consideration'".¹⁸⁶

The CRCI further protects children by prohibiting the exercise of torture or humiliating treatment in all circumstances and conditions.¹⁸⁷ It stresses that a child, when deprived of liberty, should always be treated with dignity, respect for human rights and basic freedoms.¹⁸⁸

¹⁸² 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.

¹⁸³ Art.16(2).

¹⁸⁴ Art.17, para.5 CRCI.

¹⁸⁵ *Ibid.* See Art.21.

¹⁸⁶ Art.2, para.4.

¹⁸⁷ Art.17(2).

¹⁸⁸ Art.19(2).

However, Article 17 does not echo Article 40¹⁸⁹ 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”.¹⁹⁰

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”,¹⁹¹ and “in accordance with the national legislations”¹⁹² 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 international human rights law, including with regard to education, there are a range of views.¹⁹³

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 international and non-international armed conflict. 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-

¹⁸⁹ Art.40(a) of UNCRC 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.”

¹⁹⁰ Art.19(3.f).

¹⁹¹ See for example Arts 16 and 21 CRCI.

¹⁹² Or other similar formulations. See for example Arts 4, 7, 8, 10, 12, 14 and 20 CRCI.

¹⁹³ For a fuller discussion, see N Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (BIICL, 2008) and N Abiad and F Zia Mansoor, *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective* (BIICL, 2010).

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 international and non-international armed conflict 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.¹⁹⁴ Students, educational staff, 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,¹⁹⁵ when civilian protection may be lost,¹⁹⁶ circumstances and conditions of internment¹⁹⁷ and special protection of children and vulnerable people in times of armed conflict.¹⁹⁸ 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’.¹⁹⁹ 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.²⁰⁰

¹⁹⁴ Arts 48 and 51(2), Additional Protocol I; Art.13(2) Additional Protocol II; Rule 1 Customary IHL Database (ICRC), available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1.

¹⁹⁵ See, for example, prohibition on indiscriminate attacks: Art.51(4) Additional Protocol I; Art.85(3)(b) Additional Protocol II; Rule 11 Customary IHL Database (ICRC), available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule11.

¹⁹⁶ See, for example, Art.51(3) Additional Protocol I; Art.13(3) Additional Protocol II. Rules 6 and 10 Customary IHL Database (ICRC), available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6 and www.icrc.org/customary-ihl/eng/docs/v1_rul_rule10.

¹⁹⁷ See, for example, Parts 3 and 4 of the Fourth Geneva Conventions.

¹⁹⁸ For example, the special protection of children: Arts 23, 24, 38, 50, 76, 89 Fourth Geneva Convention; Arts 8(a); 10(1); 77(1) Additional Protocol I; Art.4(3) Additional Protocol II.

¹⁹⁹ C Pilloud (ed), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), 3179 (Additional Protocol I), and 4549 (Additional Protocol II); J Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1952–1960) Vol.4, 285.

²⁰⁰ See, for example, the discussion of this issue by J Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Clarendon, 1997), 9 and 80. See also ICRC CIHL Study Rule 150, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule135.

Protection of Education in International Armed Conflict

Orphaned Children and Those Separated from their Families²⁰¹

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 families. It requires that parties to an international armed conflict take the necessary measures to ensure that the maintenance and education of children under 15²⁰² 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.²⁰³

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 24.²⁰⁴

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”.²⁰⁵ This interpretation is consistent with the other uses of the term ‘education’ in the Geneva Conventions, in particular Article 50²⁰⁶ and Article 94.²⁰⁷

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.

²⁰¹ Art.24, Fourth Geneva Convention.

²⁰² The ICRC Commentary makes it clear that 15 was deliberately chosen by the drafters: J Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1952–1960) Vol.4, 186.

²⁰³ ICRC CIHL Study Rule 150, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule135.

²⁰⁴ J Pictet (ed), above n.202, 188.

²⁰⁵ *Ibid.*, 187.

²⁰⁶ 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.

²⁰⁷ 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.

Internment²⁰⁸

During international armed conflict, parties are entitled to detain civilians where security makes it ‘absolutely necessary’.²⁰⁹ Article 94 of the Fourth Geneva Convention sets out a detaining party’s obligations in relation to the education of internees (in particular children and young people) in situations of internment. Aspects of this rule are customary international law.²¹⁰ Its 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.

²⁰⁸ Art.94, Fourth Geneva Convention.

²⁰⁹ Art.42, Fourth Geneva Convention. ICRC CIHL Study Rule 99, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99. However, this applies only to protected persons (enemy aliens) within the meaning of Art.4, Fourth Geneva Convention.

²¹⁰ Art.94 is not discussed in the ICRC CIHL study; however, elements of its protection are recognized in various rules: Relating to children see ICRC CIHL Study Rule 135, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule135; 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, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule104; as it relates to other basic necessities of internees including clothing, food and medical treatment, see ICRC CIHL Study Rule 118, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule118.

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.²¹¹ This means that Article 94 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 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.²¹² 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,²¹³ 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.²¹⁴ 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.

²¹¹ J Pictet (ed.), above n.202, 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 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 recognized by higher educational institutions or technical schools outside the camps.

²¹² *Ibid.*

²¹³ *Ibid.*, 409.

²¹⁴ *Ibid.*, 409–411.

Special Protection for Children²¹⁵

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 international armed conflict. This special protection is customary international law.²¹⁶ The specific content of Article 77 is considered 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.²¹⁷ 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”.²¹⁸ The purpose of this Article is broad enough to support the argument that this includes the provision of facilities necessary for all children in international armed conflict 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”.²¹⁹ This phrase was deliberately included by the drafters to ensure that children with physical and mental disabilities²²⁰ were provided with the care and aid that they need, including, it is argued here, appropriate education.

Belligerent Occupation²²¹

Article 50 of the Fourth Geneva Convention sets out an occupying power’s obligations in relation to the education of children.²²² 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.

²¹⁵ Art.77, Additional Protocol I.

²¹⁶ ICRC CIHL Study Rule 135, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule135.

²¹⁷ C Pilloud (ed.), above n.199, 3176.

²¹⁸ *Ibid.*, 3185; J Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Oxford: Clarendon Press, 1997), 80.

²¹⁹ Art.77(1), Additional Protocol I.

²²⁰ C Pilloud (ed.), above n.199, 3180.

²²¹ Art.50 Fourth Geneva Convention. See ICRC CIHL Study Rules 135 (protection of children), available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule135; and Rule 104 (respect for convictions and religious practices), available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule104.

²²² The meaning of “children” is not defined in Art.50, nor in IHL more generally: J Pictet, above n.202, 285.

The special protection of children and respect for the cultural tradition of children (including through their education) is customary international law.²²³ 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 obligation to encourage local authorities to fulfil their educational obligations, or to ensure fulfilment themselves where local authorities are unable.²²⁴

The phrase “proper working of institutions devoted to the education of children” places the following obligations on the occupying power:²²⁵

- 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.²²⁶ This means that education ought to be provided by an occupying power in a manner consistent with the removed Government.²²⁷ 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.²²⁸

Protection of Education in Non-international Armed Conflict²²⁹

As outlined in Chapter 2, in most cases the rules of IHL that apply to non-international conflict are different from those that apply in international armed conflict, although the basic principles of IHL, including distinction, remain the same. Article 4(3)(a) of Additional Protocol II, which applies to non-international armed conflict, states that children shall be provided with the care and aid they require, and that, in particular, they shall receive an education, including religious

²²³ See ICRC CIHL Study, Rules 135 (protection of children), available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule135; and Rule 104 Respect for convictions and religious practices available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule104.

²²⁴ J Pictet, above n.202, 286.

²²⁵ *Ibid.*, 286–287.

²²⁶ J 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.

²²⁷ *Ibid.*, 254.

²²⁸ Art.50, Fourth Geneva Convention.

²²⁹ Art.4(3)(a) Additional Protocol II.

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.²³⁰

Additional Protocol II contains no other express reference to education in non-international armed conflict, although students and educational personnel benefit from the general protection afforded to those who do not participate in hostilities (distinction) in non-international armed conflict.

The purpose of this Article is to “ensure the continuity of education, so that children retain their cultural identity and link with their roots”.²³¹ For this reason, education is to be broadly understood²³² 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,²³³ ensuring that education remains acceptable and protects an important part of a child’s identity, even where their lives have otherwise been disrupted by non-international armed conflict.

Article 4(3)(a) applies only to children, in recognition of their acute vulnerability and need for special protection in armed conflict, including non-international armed conflict.²³⁴ It deliberately does not specify an age limit so that different cultural traditions might be taken into account when assessing childhood.²³⁵

The individual needs of children must be considered when a party to a non-international armed conflict seeks to fulfil its obligations under Article 4(3)(a).²³⁶ 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 recognized in Article 77 of Additional Protocol I. This would ensure parity in protection of children across international and non-international armed conflict.

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 recognize that education is also an important implementation and enforcement mechanism of IHL. Parties to both international and non-international

²³⁰ ICRC CIHL Study, Rule 150, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule135.

²³¹ C Pilloud, above n.199, 4552.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*, 4244.

²³⁵ *Ibid.*, 4549.

²³⁶ 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.

armed conflicts 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.²³⁷ 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.²³⁸

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.²³⁹ IHL emphasizes 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 international criminal law 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.²⁴⁰ The only mention found of the violation of education itself within an international setting has so far been at the internationalized Extraordinary Chambers in the Courts of Cambodia (ECCC), where the Co-Investigating Judges, in their Closing Order in Case 002, found that workers at Trapeang Thma Dam were also denied schooling.²⁴¹ 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* tribunals²⁴² as well as the ICC.²⁴³ The Rome Statute defines persecution as the “intentional and

²³⁷ Art.47, First Geneva Convention; Art.48, Second Geneva Convention; Art.127, Third Geneva Convention; Art.144, Fourth Geneva Convention; Art.83, Additional Protocol I; Art.19, Additional Protocol II.

²³⁸ ICRC CIHL Study, Rule 143, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule143.

²³⁹ For an interesting discussion of this issue, see S Tawil, “International humanitarian law and basic education” (2000) Vol.82 No 839 *International Review of the Red Cross* 581.

²⁴⁰ See Chapter 5 below, which contains case law on the matter. See also Art.56 of the Hague Regulations of 1907.

²⁴¹ See the ECCC case *Closing Order, Case 002*, 002/19-09-2007-ECCC-OCIJ, para.345.

²⁴² Art.5(h) ICTY Statute; Art.3(h) ICTR Statute.

²⁴³ Art.7(1)(h) Rome Statute.

severe deprivation of fundamental rights contrary to international law by reason of the identity of the group of collectively”.²⁴⁴ Unlike other expressions of the crime, the Rome Statute also requires that persecution be committed in connection with another crime or at least one inhuman 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 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:²⁴⁵

- 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 recognized 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.²⁴⁶

International criminal jurisprudence has so far recognized examples of persecution including murder, imprisonment, deportation and other related conduct.²⁴⁷ However, persecution can include other conduct that “severely deprives political, civil, economic or social rights”.²⁴⁸ In particular, the ICTY has recognized 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.²⁴⁹ This demonstrates the potential protection that the crime of persecution offers to ensuring education in situations of insecurity and armed conflict.

²⁴⁴ Art.7(2)(g) Rome Statute.

²⁴⁵ ICC, Elements of Crimes, UN Doc PCNICC/2000/1Add.2 (2000). Available at www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (ICC’s Elements of Crimes), 10.

²⁴⁶ Jurisprudence of the ICTY suggests that intention to discriminate is also required: *Prosecutor v Krnojelac* ICTY Trial Chamber (15 March 2002) para.435 and *Prosecutor v Kordic* ICTY Trial Chamber (26 February 2001) para.212. However, this requirement is not contained in the Rome Statute.

²⁴⁷ R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edn (CUP, 2010), 262.

²⁴⁸ *Ibid.*

²⁴⁹ Citing the example of the *Justice Case* of the IMT (Case No 3 *US v Josef Altstotter et al. (The Justice Case)*), Trials of War Criminals (before the Nuremberg Military Tribunal, Vol.III) in which the Tribunal considered that the passing of laws excluding Jews from, inter alia, educational institutions, constituted persecution: *Prosecutor v Kupreskic* ICTY Trial Chamber (14 January 2000), para.612.

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 ICL, both under the statutes of the ICTR and ICTY and the Rome Statute.²⁵⁰ 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.²⁵¹ 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 ...”,²⁵²
- The incitement must be direct, which is to be assessed in light of its cultural and linguistic context;²⁵³
- Incitement must be coupled with the intention that the incitement should create in others a state of mind necessary to commit genocide.²⁵⁴

The purpose and context of the communication is important and the effect on the audience is irrelevant.²⁵⁵ It does not require the actual commission of genocide or proof that anyone actually attempted to commit genocide as a result of the incitement.²⁵⁶

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

²⁵⁰ Art.4(3)(d) ICTY Statute; Art.2(3)(c) ICTR Statute; Art.25(3)(e) Rome Statute.

²⁵¹ *Prosecutor v Akayesu* ICTR Trial Judgment, (2 September 1998), para.555.

²⁵² *Prosecutor v Kalimanzira* ICTR Trial Chamber (22 June 2009), para.515.

²⁵³ *Akayesu*, above n.251, para.557; *Kalimanzira*, para.514.

²⁵⁴ *Nahimana, Barayagwiza, and Ngeze* ICTR Trial Chamber (3 December 2003) paras 1000–1010. (The *Media Case*), para.1012.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*, para.678.

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.²⁵⁷ Its application to educational material and content has not yet been considered.

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 realized 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 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

²⁵⁷ See generally *Prosecutor v Ruggiu* ICTR Trial Chamber (1 June 2000); the *Media Case* (fn.595 above).

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.¹ 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.²

The chapter begins with the protection under IHRL, as it applies at all times, including during armed conflict situations.³ As mentioned in Chapter 3, education is the “key to unlock other human rights”. However, as human rights are “indivisible, interrelated and interdependent”,⁴ 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 realized. 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

¹ 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.

² 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.

³ Subject to the issues of derogation and extraterritorial application set out in Chapter 2.

⁴ See, for example, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, para.5, available at: www.unhcr.org/refugees/1993/06/19930625/vienna-declaration-and-programme-of-action.html. 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”.

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 international and non-international armed conflict, is set out after discussion of IHRL. This enables comparisons to be made between the 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;⁵ and the prohibition of torture and other inhuman and degrading treatment.

⁵ HRC General Comment 29, para.13 (b).

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.

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,⁶ 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.⁷ 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.⁸

The prohibition of the arbitrary deprivation of life also means that a deprivation of life which is not arbitrary may be allowed under international human rights law 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.⁹ 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.¹⁰ IHRL prohibits the imposition

⁶ Art.6 ICCPR, Art.4 ACHPR, Art.4 IACHR, Art.2 ECHR and Art.5 of the Arab Charter. See also Art.6 CRC according to which States Parties shall not only ensure the survival but also the development of the child. See also the HRC, *General Comment 6: the Right to Life* (16th Session 4/30/1982), available at www.unhchr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3 and HRC *General Comment 14: Nuclear Weapons and the Right to Life* (23rd Session 11/09/1984) available at www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/9c882008fd898da7c12563ed004a3b08?Opendocument, which both refer to armed conflicts and the “supreme duty” of States to prevent wars.

⁷ Art.4(2) ICCPR.

⁸ See *Makarazis v Greece* (2004) ECtHR Judgment of 20 December 2004, para.49. See also the ACommHPR in *Kazeem Aminu v Nigeria* (2000) Com 205/97 of 11 May 2000, para.18.

⁹ The ICCPR and the IACHR both have a Protocol abolishing the death penalty.

¹⁰ Art.6 ICCPR and Art.4 paras 2–6 IACHR, Art.4 ACHPR and Arts 6–7 Arab Charter. 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).

of the death penalty to someone who is below 18 years of age or carrying out this sentence on a pregnant woman.¹¹

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”.¹² 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*,¹³ 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.¹⁴

The African Commission followed the same reasoning in *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*.¹⁵ In this case, which concerned the deaths of two 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.¹⁶

In order to assess the degree of necessity of the use of force, courts consider the way the operation in question was planned and carried out. In *Ergi v Turkey*,¹⁷ 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-fire during the attack. It thus concluded that Article 2 ECHR had been violated. This analysis is consistent with the view of the HRC that the right to life includes a positive obligation for the State: a duty to protect life.¹⁸

¹¹ Art.6 (5) ICCPR. Some treaties also provide for an upper age limit for carrying out the death penalty.

¹² Art.2(2) ECHR.

¹³ (1995) 21 ECHR 97 GC.

¹⁴ 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.

¹⁵ (2001) AComHPR Com 204/97 of 7 May 2001, para.43.

¹⁶ On the various means available to the authorities and their risks, in particular tasers and tear gas, see L Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, 2011), 171.

¹⁷ (1998) ECtHR Judgment of 28 July 1998, para.79.

¹⁸ HRC General Comment 6, paras 3 and 5.

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*,¹⁹ 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”.²⁰ Within these circumstances, the use of force may then be deemed necessary if armed resistance from rebel forces is to be expected.

The right to life of students and education staff is guaranteed through these provisions of international human rights law. 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.²¹ 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 still be held responsible for not having ensured the protection of the human life in question.

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,²² is protected by the same key human rights treaties.²³

As it is the *arbitrary* arrest or detention that is not permitted under international human rights law,²⁴ the deprivation of liberty may be permissible if there is a legal basis and if a legal procedure is followed.²⁵ The ECHR includes detention following “conviction by a competent court” as a permissible deprivation of liberty.²⁶ 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.²⁷

¹⁹ (2005) ECtHR Judgment of 24 February 2005, para.181.

²⁰ *Ibid.*, para.180.

²¹ *Makaratzis v Greece* (2004) ECtHR Judgment of 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 Vélez et al v Ecuador* (2007) IACtHR Judgment of 4 July 2007, paras 86–87.

²² These rights may even be protected by the same provision, see Art.5, Arab Charter.

²³ Arts 9 and 10 ICCPR; Art.6 ACHPR; Art.14 para.1, Arab Charter; Art.7 IACHR, Art.5 para.1 ECHR.

²⁴ In *Chaparro Álvarez and Lapo Iñiguez v Ecuador* (2007) Judgment of 21 November 2007, para.93, the IACtHR stated that detention is arbitrary if it is contrary to the IACHR or if it is not essential or appropriate. The principle of proportionality must thus be respected.

²⁵ Art.9 para.1 ICCPR; Art.6 ACHPR; Art.14 para.1, Arab Charter; Art.7 para.2 IACHR; Art.5 para.1 ECHR.

²⁶ Art.5 para.1 ECHR.

²⁷ L. Doswald-Beck, above n.16, 257–260.

An individual may be deprived of his or her liberty by authorities through arrest or detention.²⁸ 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”.²⁹ 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.³⁰

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.³¹ 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).³² 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.³³

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.³⁴ 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 educa-

²⁸ Art.9 para.1 ICCPR.

²⁹ Art.5 para.1 ECHR. 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.

³⁰ HRC *General Comment 8: Right to Liberty and Security of Persons (Art 9)* (16th Session 6/30/1982) para.1, which makes a non-exhaustive list of possible detention situations. Available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument).

³¹ Art.9 para.2 ICCPR, for example. For more on the guarantees against arbitrary arrest and detention, see NS Rodley (with M Pollard), *The Treatment of Prisoners under International Law* (Oxford: OUP, 2009), 449–493.

³² The safeguards are listed in the UN 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. Available at: www.un.org/documents/ga/res/43/a43r173.htm.

³³ 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.”

³⁴ Art 12 ICCPR.

tion 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.³⁵ 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.³⁶ For example, it requires States to cooperate in the prevention of hostage-taking and, if a hostage is being detained, to take all possible measures to secure his or her release.³⁷ 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.³⁸ 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 many individuals, including a large number of children, were taken hostage in Beslan in North Ossetia.³⁹

The liberty of students and education staff is also protected through the IHRL prohibition against slavery and forced or compulsory labour.⁴⁰ 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 treaties⁴¹

³⁵ UN Guiding Principles on Internal Displacement, 2001.

³⁶ International Convention Against the Taking of Hostages, adopted by UNGA Res 146, A/34/46 (1979), entered into force on 3 June 1983. Available at: treaties.un.org/doc/db/Terrorism/english-18-5.pdf.

³⁷ Arts 3 and 4 of the International Convention Against the Taking of Hostages, *ibid*.

³⁸ See the HRC General Comment 29, *States of Emergency* (8/31/2001) para.(13).(b). Available at www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/71eba4be3974b4f7c1256ae200517361?Opendocument.

³⁹ This three-day siege led to the deaths of close to 400 individuals. Relatives of the victims lodged a complaint with the ECtHR against Russia.

⁴⁰ Art.8 ICCPR.

⁴¹ Art.7 ICCPR: “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.” Art.37(a) CRC: “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 Art.3 ECHR, Art.5 IACHR, Art.5 ACHPR.

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 HRC 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”.⁴² 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”.⁴³

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 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.⁴⁴

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”.⁴⁵ It also decided that sexual abuse by police may be a form of torture.⁴⁶ 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”.⁴⁷ While torture may be defined as an “aggravated form of cruel, inhuman or degrading treatment or punishment”,⁴⁸ 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.⁴⁹ Unlike torture, cruel and inhuman treatment or punishment does not have to be intentional or inflicted

⁴² HRC General Comment 20, paras 4–5.

⁴³ *Ibid.*

⁴⁴ Art.1(1) CAT. 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 M Nowak and E McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP, 2008), 28.

⁴⁵ This is recognized 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.

⁴⁶ *V.L. v Switzerland* (CAT/C/37/D/262/2005).

⁴⁷ Art.16(1) CAT.

⁴⁸ M Nowak and E McArthur, above n.44, 28.

⁴⁹ *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”.

for a particular purpose. Degrading treatment or punishment, also an infliction of pain or suffering, is aimed at humiliating the victim.⁵⁰

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.⁵¹ 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”.⁵² 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.⁵³

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.⁵⁴ In addition to the level of intensity, the ECtHR requires intention for a conduct to qualify as torture.⁵⁵ 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.⁵⁶ 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’.⁵⁷

As the IACHR 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.⁵⁸ When considering cases involving children, the Inter-American Commission on Human Rights 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”.⁵⁹

⁵⁰ M Nowak and E McArthur, above n.44, 558.

⁵¹ *Ireland v UK* (1978) ECtHR Series A, No 25, 90, para.162.

⁵² *Ireland v UK*, *ibid.*, para.162. See also *Jalloh v Germany* (2006) ECtHR (App. No 54810/00) 11 July 2006 (GC), paras 67–68.

⁵³ *Jalloh v Germany*, *ibid.*, para.68, referring, inter alia, to *Raninen v Finland*, (1997) ECtHR (App no 152/1996/771/972) 16 December 1997.

⁵⁴ *Ireland v UK*, above n.51. para.167.

⁵⁵ See *Aksoy v Turkey* (1996) ECtHR (Application No 21987/93), 18 December 1996, para.63, referring to *Ireland v UK*, above n.51, para.167.

⁵⁶ *Gafgen v Germany* (2010) ECtHR (Application No 22978/05), 1 June 2010 (GC), para.90.

⁵⁷ *Selmouni v France* (1999) ECtHR (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”.

⁵⁸ *Tibi v Ecuador*, 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs), para.145, citing Art.2 of the Inter-American Convention to Prevent and Punish Torture.

⁵⁹ *Jailton Neri Da Fonseca v Brazil* (report No 33/04, Case 11.634, merits, March 11, 2004), para.64.

In other cases, the IACtHR has also referred to Article 1 CAT when considering the scope of torture.⁶⁰ As neither the IACHR 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”.⁶¹ 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.⁶² It highlighted that these terms have to be interpreted as widely as possible in order to ensure protection against all kinds of abuses.⁶³ 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 (The Robben Island Guidelines)*, which exhort member States to ensure that acts of torture are offences within their national legal systems.⁶⁴

The relation between education and inhuman and degrading treatment or punishment has been considered by the ECtHR in *Cyprus v Turkey*.⁶⁵ 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.⁶⁶

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”,⁶⁷ respect for their human dignity was violated. The Court thus concluded that the “discriminatory treat-

⁶⁰ *Maritza Urrutia v Guatemala*, Judgment of 27 November 2003, paras 90–91.

⁶¹ *Caesar v Trinidad and Tobago*, Judgment of March 11, 2005, Inter-Am Ct. H.R., (Ser. C) No 123 (2005), para.67.

⁶² Communication 225/98 Huri-Laws/Nigeria, 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.

⁶³ Communication 292/2004 *Institute for Human Rights and Development in Africa/Republic of Angola*; (23rd and 24th Activity report), para.52, citing Communication 224/1998, *Media Rights Agenda v Federal Republic of Nigeria*. See also Communication 236/2000 *Curtis Francis Doebbler/Sudan*, paras 36–38.

⁶⁴ Available at www.achpr.org/sessions/32nd/resolutions/61/.

⁶⁵ *Cyprus v Turkey*, (2001) ECtHR Judgment of 10 May 2001 (Application No 25781/94).

⁶⁶ *Ibid.*, para.307.

⁶⁷ *Ibid.*, para.309.

ment attained a level of severity which amounted to degrading treatment”.⁶⁸ 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 HRC 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”.⁶⁹

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 discomfort, however light”.⁷⁰ 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”.⁷¹ 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”.⁷² 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.⁷³ 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.⁷⁴ 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 IACHR, which prohibits torture or cruel, inhuman or degrading treatment or punishment, when considering

⁶⁸ *Ibid.*, para.310.

⁶⁹ HRC General Comment 20, para.5.

⁷⁰ 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, CRC/C/GC/8, 2 June 2006.

⁷¹ Art.28 CRC.

⁷² Art.19 CRC.

⁷³ *Campbell and Cosans v UK* (1982) 4 EHRR 293; *Y v United Kingdom* (1992) 17 EHRR 238; *Costello-Roberts v UK* (1993) 25 EHRR 112.

⁷⁴ *A v UK* [1998] (ECtHR) EHRLR 82. In this case, the corporal punishment was inflicted by a family member.

the application of physical violence to individuals for the commission of offences.⁷⁵ 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.⁷⁶ 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 sentencing⁷⁷ 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.⁷⁸ There are forms of punishment inflicted 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”.⁷⁹

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”.⁸⁰ In accordance with

⁷⁵ *Caesar v Trinidad and Tobago* IACtHR (ser. C) No 123 (2005), which regarded the sentencing to strokes (flogging) for a conviction of rape.

⁷⁶ See the Resolution of the IACtHT of 27 January 2009, available at: www.corteidh.or.cr/docs/asuntos/opinion.pdf.

⁷⁷ African Commission on Human and Peoples’ Rights, *Curtis Francis Doebbler v Sudan* Comm No 236/2000 (2003).

⁷⁸ HRC General Comment 20.

⁷⁹ 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, CRC/C/GC/8, 2 June 2006. Available at tb.ohchr.org/default.aspx?Symbol=CRC/C/GC/8.

⁸⁰ Arts 2(1), 3, 17 and 26 ICCPR; Arts 2(2) and 3 ICESCR; Art.2 CRC. See also CESCR General Comment 20 on Non-discrimination in economic, social and cultural rights (2009). Available at www2.ohchr.org/english/bodies/cescr/comments.htm. Non-discrimination is also not permitted in the private sphere and thus, for example, girls cannot be prohibited by their family from attending school.

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”.⁸¹ 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,⁸² treaties on this matter have also been adopted, such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD).⁸³ All three of these treaties contain specific provisions protecting the right to education and training from discrimination, whether on the basis of race or gender.⁸⁴ 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.⁸⁵ The Committee on the Elimination of Racial Discrimination 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.⁸⁶ 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.⁸⁷

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

⁸¹ See Art.20 ICCPR which states this has to be prohibited by law.

⁸² 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).

⁸³ The International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965 and entered into force on 4 January 1969, available at: www2.ohchr.org/english/law/cerd.htm. Art.10 CEDAW 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.

⁸⁴ Art.5(e)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination and Art.10 CEDAW.

⁸⁵ KD Beiter *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers, 2005), 106.

⁸⁶ General Recommendation XXVII (Fifty-Seventh Session, 2000) Discrimination against Roma and General Recommendation XXIX (Sixty-First Session, 2002) Art.1(1) CERD (descent). See KD Beiter, above n.85, for discussion of the need to adopt “active non-discrimination” policy, 108–109.

⁸⁷ General Recommendation No 5 (Seventh Session, 1988) and General Recommendation No 25 (Thirtieth Session, 2004), both on temporary special measures.

order to ensure that they benefit from equal educational opportunities.⁸⁸ 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.⁸⁹ 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.⁹⁰ 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.⁹¹

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.⁹² 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”.⁹³

In addition to treaties protecting against discrimination in general, the CDE, already mentioned in Chapter 3 as it was the first treaty to codify the right to education, seeks to eliminate and prevent discrimination and to ensure equality in education.⁹⁴ 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.⁹⁵

In protecting against discrimination, IHRL 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”.⁹⁶

⁸⁸ 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).

⁸⁹ Art.2 CRPD.

⁹⁰ Art.3(1) CRC.

⁹¹ 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 M Bossuyt *The Concept and Practice of Affirmative Action*, Final Report by Special Rapporteur, E/CN.4/Sub.2/2002/21.

⁹² See ECtHR *Case relating to certain aspects of the laws on the use of languages in education in Belgium (merits)* Judgment of 23 July 1968, Series A, Vol.6, 34, para.10.

⁹³ Art.1 CDE.

⁹⁴ CDE. See also KD Beiter, above n.85, 245.

⁹⁵ Art.2 CDE. The matter of separate schools remains a debated issue as it may reinforce stereotypes for example. See also KD Beiter, above n.85.

⁹⁶ See, for example, General Recommendation XXIX (Sixty-First Session, 2002) Art.1(1) CERD (descent) at para.vv.

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.⁹⁷ 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.⁹⁸

This right means that anyone may exercise this freedom by manifesting his religion or belief in teaching.⁹⁹ It also means that the content of education itself must be neutral and objective.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² A school may also offer teaching of a particular religion but it must then offer an exemption (or an acceptable alternative) to this religious instruction if it goes against a child's beliefs.¹⁰³

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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ While parents can object to a particular religious education, they cannot oppose other educational matters or demand that a State provide a specific

⁹⁷ Art.2 ICCPR; Art.1 CDE.

⁹⁸ Art.18 ICCPR and Art.4(2) ICCPR; Art.14 CRC.

⁹⁹ Art.18(1) ICCPR.

¹⁰⁰ HRC General Comment 22: The Right to Freedom of Thought Conscience and Religion, Art.18 (Forty-eighth session, 1993), paras 6–8. Available at www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/9a30112c27d1167cc12563ed004d8f15?Opendocument.

¹⁰¹ *Lautsi and others v Italy* (2011) ECtHR, Judgment of 18 March 2011, Application No 30814/06.

¹⁰² See, for example, ECtHR in *Folgero and others v Norway*, (2007) ECtHR, Judgment of 29 June 2007, Application No 15472/02. In this case, the court deemed that an emphasis on Christian instruction violated the right of freedom of religion.

¹⁰³ HRC General Comment 22 (fn.698 above), paras 6–8. See also the HRC in *Erkki Hartikainen v Finland*, Communication No 40/1978, 09/04/1981, UN Doc CCPR/C/12/D/40/1978.

¹⁰⁴ Art.18(4) ICCPR.

¹⁰⁵ Art.13(3) ICESCR.

¹⁰⁶ *Martins Casimiro and Cerveira Ferreira v Luxembourg* (1999) ECtHR Judgment of 27 April 1999, Application No 44888/98. This case concerned Seventh Day Adventists who wished to take their children out of school on Saturdays on religious grounds.

school to cater for their religion, as long as knowledge is provided in a neutral and objective manner.¹⁰⁷

The Right to Freedom of Expression

The right to freedom of expression includes the right to freedom of speech and all forms of expression.¹⁰⁸ 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.¹⁰⁹

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”.¹¹⁰ 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. 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.¹¹¹ 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”.¹¹² However, the right to academic freedom is also subject to the restrictions mentioned above. As

¹⁰⁷ *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1976) ECtHR Judgment of 7 December 1976, Application No 5095/71, para.53.

¹⁰⁸ Art.19(2) ICCPR.

¹⁰⁹ Art.19(3) ICCPR.

¹¹⁰ See Art.20 ICCPR which states that this must be prohibited by law.

¹¹¹ 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”.

¹¹² *Sorguç v Turkey* (2009) ECtHR, Judgment of 23 June 2009, para.35.

a result, a teacher or professor must not make discriminatory comments or incite hatred among the student body.¹¹³

The restrictions on the right to freedom of expression can only be applied in accordance with IHRL.¹¹⁴ 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.¹¹⁵ 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”.¹¹⁶

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 IHRL.¹¹⁷ 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. 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.¹¹⁸

Furthermore, the right to work also entails rights *at work*, such as the enjoyment of safe and healthy working conditions.¹¹⁹ The ILO has adopted a number of treaties which specifically provide for such conditions and the prevention of occupational hazards, including

¹¹³ For example, a teacher or professor cannot deny the Holocaust to his or her students.

¹¹⁴ See in particular Arts 19 and 20 ICCPR.

¹¹⁵ Art.22 ICCPR.

¹¹⁶ Art.22 (2) ICCPR, Art.8(1)(a) and (c) ICESCR.

¹¹⁷ Art.6 ICESCR.

¹¹⁸ CESCR General Comment 18: the right to work, (24 November 2005), at para.4. Available at www2.ohchr.org/english/bodies/cescr/comments.htm.

¹¹⁹ Art.7(b) ICESCR.

accidents.¹²⁰ 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.¹²¹ 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.¹²²

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.

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”.¹²³ 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.

In *Kjeldsen, Busk Madsen and Pedersen v Denmark*,¹²⁴ the applicants argued that the Danish

¹²⁰ ILO Convention No 155 on Occupational Safety and Health Conditions (1981), ILO Convention No 161 on Occupational Health Services (1985), ILO Convention No 187 on Promotional Framework for Occupational Safety and Health (2006).

¹²¹ Art.8 ICESCR.

¹²² Art.8(1)(a) and (c) ICESCR.

¹²³ Art.12 ICESCR. See also Art.16 ACHPR, Art.10 of Additional Protocol to the IACHR in the Area of ESCR and Art.11 ESC.

¹²⁴ (1976) 1 E.H.R.R. 737 (Application No 5095/71; 5920/72; 5926/72), 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 (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 (2007), which concerned the religious teaching of Christianity clashing with the philosophical convictions of non-Christian parents.

Government had violated Article 2 of Protocol 1 to the ECHR 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 emphasized the need for such information, if included in the curriculum, to be "conveyed in an objective, critical and pluralistic manner".

According to the Committee on Economic Social and Cultural Rights, 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, for example.¹²⁵

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 adequate standard of living, which includes their right to clothing, food and housing.¹²⁶

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.¹²⁷ 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.¹²⁸

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.

¹²⁵ CESCR, General Comment No 14, The right to the highest attainable standard of health (2000) para.35. Available at www2.ohchr.org/english/bodies/cescr/comments.htm.

¹²⁶ Art.11 ICESCR.

¹²⁷ Art.15 ICESCR; Art.31 CRC.

¹²⁸ 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 ILO Convention No 14 and ILO Convention No 106. With regard to annual leave, see ILO Convention No 132.

Special Protection for Children

Children are particularly vulnerable to all kinds of human rights abuses.¹²⁹ Situations of insecurity and armed conflict, when the rule of law is often less present, increase the likelihood of these abuses to occur and their subsequent impunity for lack of accountability and remedy. The CRC, being the human rights treaty protecting all children under 18 years of age, contains specific provisions protecting children against violence. 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”.¹³⁰ The Committee on the Rights of the Child has highlighted the long-term implications of not protecting children from violence.¹³¹ 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 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 realize 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”.¹³² 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”.¹³³ It adds that a State “whose economy and educational facilities are insufficiently developed may ... initially specify a minimum age of 14”.¹³⁴ The ILO has also adopted a treaty concerned with the elimination of the worst forms of child labour.¹³⁵ This treaty, which applies to all persons under 18 years of age, highlights particularly odious forms of child labour, including slavery,

¹²⁹ See for example the IACtHR *Case of the “Street Children” (Villagrán Morales et al) v Guatemala* (Judgment of 19 November 1999) on illegal acts perpetrated by State security agents against “street children”.

¹³⁰ Art.19 CRC. See also Art.34 CRC, which protects children from sexual exploitation and sexual abuse.

¹³¹ Committee on the Rights of the Child, General Comment No 13 (2011): The right of the child to freedom from all forms of violence, para.16. Available at www2.ohchr.org/english/bodies/crc/comments.htm.

¹³² Art.32 CRC.

¹³³ Art.2 para.3 of the ILO C138 on Minimum Age, 1973, which entered into force on 19 June 1976.

¹³⁴ Art.2 para.4 of the ILO C138 on Minimum Age. Available at <http://www.unhcr.org/refworld/docid/421216a34.html>.

¹³⁵ ILO C182 on Worst Forms of Child Labour 1999, which entered into force on 19 November 2000. Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:195887263317704::NO:12100:P12100_INSTRUMENT_ID:312327:NO.

prostitution, drug trafficking, dangerous activities or the use of children in armed conflict, which is discussed separately below.¹³⁶

The European Committee of Social Rights considered the illegal employment of under-age children in *International Commission of Jurists v Portugal*.¹³⁷ 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.¹³⁸ 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.¹³⁹

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. The UN Security Council has addressed this issue several times through the adoption of resolutions condemning specifically the recruitment and use of children in hostilities.¹⁴⁰

The CRC contains a provision specifically dealing with children in armed conflict.¹⁴¹ 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.¹⁴²

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.¹⁴³ According to this

¹³⁶ Art.3 (a) of ILO C182 on the Worst Forms of Child Labour.

¹³⁷ Complaint No 1/1998, *International Commission of Jurists v Portugal* (1999) European Committee on Social Rights (No 1/1998) September 9, 1999 decision on the merits, para.32

¹³⁸ *Ibid.*, para.26

¹³⁹ *Ibid.*, para.37

¹⁴⁰ Resolutions 1261 (1999), 1314 (2000) 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005) on children and armed conflict.

¹⁴¹ Art.38(2) CRC 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”.

¹⁴² See ICRC CIHL Study Rule 136, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule136; Rule 137, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule137. For further discussion of this, see the IHL section, below.

¹⁴³ Art.2 of the Optional Protocol to the CRC on the involvement of children in armed conflict, adopted by the UN General Assembly on 25 May 2000 and entered into force on 12 February 2002. It is available at: www2.obchr.org/english/law/crc-conflict.htm.

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”.¹⁴⁴ While voluntary recruitment under the age of 18 remains allowed,¹⁴⁵ this Protocol prohibits compulsory recruitment under the age of 18.¹⁴⁶ It further provides that non-State armed groups should not recruit or use in hostilities children under the age of 18, no matter what the circumstances.¹⁴⁷ 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.¹⁴⁸

The African Charter on the Rights and Welfare of the Child is the only regional treaty which addresses the issue of child soldiers. Its protection extends to all children under the age of 18 years.¹⁴⁹ 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”.¹⁵⁰

Finally, 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.¹⁵¹ IHL concerning child soldiers is dealt with below.

Special Protection for Women

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. 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.¹⁵² The right to education is thus also protected through this prohibition on discrimination on grounds of gender. As 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.¹⁵³

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

¹⁴⁴ Art.1 Optional Protocol to the CRC on the involvement of children in armed conflict.

¹⁴⁵ Art.3 *ibid.*

¹⁴⁶ Art.2 *ibid.*

¹⁴⁷ Art.4 para.1 *ibid.*

¹⁴⁸ 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 demobilization and social reintegration of child soldiers in Africa”, adopted in 1997. Close to 100 States have adopted these principles.

¹⁴⁹ Art.2 ACHPR.

¹⁵⁰ Art.22(2) ACHPR.

¹⁵¹ See Arts 2 and 22 ACHPR. Arts 2 and 3 ILO Convention.

¹⁵² Art.1 CEDAW.

¹⁵³ Art.2 CEDAW.

- (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.¹⁵⁴ 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.¹⁵⁵

This form of discrimination is an obstacle to women's equal enjoyment of their rights and freedoms, including the right to education.¹⁵⁶ 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.

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

¹⁵⁴ Committee on the Elimination of Discrimination against Women, General Recommendation 19, para.11. See also Art.4 UNGA Declaration on the Elimination of Violence Against Women, which states that prohibiting gender discrimination includes eliminating gender-based violence, UN Doc A/RES/48/104 Dec 20 1993.

¹⁵⁵ *Ibid.*

¹⁵⁶ 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) (2005), para.27. Available at www2.ohchr.org/english/bodies/crc/comments.htm.

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. Moreover, such situations are also often the cause of disabilities, whether physical and/or mental. Within its section on target areas for participation, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities encourage States to recognize the principle of equal educational opportunities at all levels of education for all persons with disabilities.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ This includes taking positive measures to reduce all structural disadvantages.¹⁶¹ 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.

With 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.¹⁶²

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

¹⁵⁷ Rule 6 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted on 20 December 1993. Available at: www.un.org/esa/socdev/enable/dissre00.htm.

¹⁵⁸ Art.24 CRPD.

¹⁵⁹ See Chapter 3 and Arts 2 and 24 CRPD.

¹⁶⁰ See CESCR General Comment 5 on Persons with disabilities (1994), para.35. Available at www2.ohchr.org/english/bodies/crc/comments.htm.

¹⁶¹ Ibid, para 9 states that "additional resources will need to be made available for this purpose".

¹⁶² Art 23(3) CRC.

disabilities. In *International Association Autism-Europe (IAAE) v France*,¹⁶³ 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 supported placements in specialized 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 criticized the use of a more restrictive definition of autism than that adopted by the WHO and the lack of official statistics by which to measure progress through time. This decision emphasizes 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.¹⁶⁴ 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*,¹⁶⁵ 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.

Special Protection for Minorities and Indigenous Peoples

An individual who belongs to a minority group within a society benefits from the general protection against discrimination mentioned above. Individuals belonging to a minority must be able to exercise their right to education. Of particular relevance to any minority group is the general principle of equality and non-discrimination.¹⁶⁶ In addition, 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 language.¹⁶⁷

Indigenous peoples have often become minority groups within their own territories. During and following acts of colonization, Indigenous children were sometimes been taken away from their families and placed in institutions set up by the settlers’ society with a view to ‘integrating’ those

¹⁶³ (2003) European Committee on Social Rights, 4 November 2003, Decision on the Merits (Complaint No 13/2002).

¹⁶⁴ Autism-Europe *Autism and Case law: Protecting the Right to Education for Children with Autism Spectrum disease*, 5. Available at www.autismeurope.org/files/files/caselaw-uk.pdf.

¹⁶⁵ The European Committee of Social Rights, 26 June 2007 (Complaint No 41/2007).

¹⁶⁶ Art.2(2) ICESCR; CERD.

¹⁶⁷ See also the right to cultural life (Art.15 ICESCR), mentioned above.

children into the settler societies.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ 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.¹⁷² 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.¹⁷³ It even specifies that Indigenous persons living outside their community shall also have access to education in their culture and language when possible.¹⁷⁴

In *Yakye Axa Indigenous Community v Paraguay*,¹⁷⁵ 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 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.¹⁷⁶ 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,¹⁷⁷ 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”.¹⁷⁸ The IACtHR concluded on the facts

¹⁶⁸ See for example the Residential School Programmes in Canada.

¹⁶⁹ Art.7(2) ILO C169 of 1989. Available at: www.scribd.com/doc/25977767/Indigenous-People.

¹⁷⁰ Art.27(2) and (3) ILO C169.

¹⁷¹ Art.28(1) ILO C169.

¹⁷² Art.8 UNDRIP. See also Art.15 UNDRIP which specifies that Indigenous cultures, traditions, histories and aspirations must be appropriately reflected in education.

¹⁷³ Art.14 (1) and 12 UNDRIP.

¹⁷⁴ Art.14 (3) UNDRIP.

¹⁷⁵ (2005) IACtHR (Judgment of 17 June 2005), para.2.

¹⁷⁶ *Ibid.*, para.39.

¹⁷⁷ *Ibid.*, para.157.

¹⁷⁸ *Ibid.*, paras 162–163.

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 and Non-nationals

Situations of insecurity and armed conflict are likely to result in individuals being forced to move away from their homes and sometimes away from their own State. It is important that the children of non-nationals and internally displaced persons do not miss out on education in order for them not to suffer even further from their vulnerable status. The ICESCR, including the right to education, “applies to everyone, including non-nationals such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation”.¹⁷⁹ Therefore States parties have also to protect, respect 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.

While non-binding, the Guiding Principles on Internal Displacement reiterate the right to free and compulsory education for all, including internally displaced children, and state that such education should respect their “cultural identity, language and religion”.¹⁸⁰ The Principles also highlight the importance of women and girls’ participation in education programmes, and that education and training facilities must be made available to the internally displaced as soon as conditions permit, even if they live in temporary accommodation, such as camps.¹⁸¹ 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.

The Convention for the Protection and Assistance of Internally Displaced Persons in Africa, which is not yet in force, 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”.¹⁸²

The right of non-nationals to education is also protected. The right to education of refugees, for example, is specifically protected under the Convention Relating to the Status of Refugees.¹⁸³ According to this treaty, it is only elementary education which has to be guaranteed by States,

¹⁷⁹ CESCR General Comment 20, para.30. On the application of ESCR to children unlawfully on the territory of a State, see *DCI v Netherlands*, European Committee of Social Rights, 47/2008, on the right to adequate shelter in accordance with the respect for human dignity.

¹⁸⁰ Principle 23 of the Guiding Principles on Internal Displacement, adopted in 1998. Available at: ochanet.unocha.org/p/Documents/GuidingPrinciplesDispl.pdf.

¹⁸¹ *Ibid.*, Principle 23(3) and (4),.

¹⁸² 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.”

¹⁸³ Art.22 of the Convention Relating to the Status of Refugees of 1951. Available at: www2.ohchr.org/english/law/refugees.htm.

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.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶

Under the Convention Relating to the Status of Stateless Persons, stateless persons benefit from exactly the same protection as the ones guaranteed to refugees above.¹⁸⁷

In *Timishev v Russia*,¹⁸¹ 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 1.¹⁸⁹

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.

Finally, 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

¹⁸⁴ See Chapter 3.1.

¹⁸⁵ Art.22(2) of the Convention Relating to the Status of Refugees.

¹⁸⁶ *Ibid.*

¹⁸⁷ Art.22 of the Convention Relating to the Status of Stateless Persons, adopted in 1954. Available at: www2.ohchr.org/english/law/stateless.htm. 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".

¹⁸⁸ (2005) ECtHR (Applications nos. 55762/00 and 55974/00) Judgment of 13 December 2005.

¹⁸⁹ *Ibid.*, paras 60–66

regard to education.¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

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 Conflict

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.¹⁹³ 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 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 non-discrimination provisions of IHRL.

¹⁹⁰ Art.30 of the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in 1990 (General Assembly Resolution 45/158), available at: www2.ohchr.org/english/law/cmwu.htm.

¹⁹¹ Art.12(4) of the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

¹⁹² Arts 43(1)(a) and 45(1)(a) and (b) of the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

¹⁹³ Art.75 Additional Protocol I, Part II Fourth Geneva Convention. ICRC CIHL Study, Rule 88, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88.

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 international armed conflicts is structured in a way that establishes a special regime of protection based on nationality.¹⁹⁴ 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”,¹⁹⁵ in other words, ‘enemy nationals’. This group of civilians is referred to in the Fourth Geneva Convention as ‘protected persons’.¹⁹⁶

It is unsurprising that IHL provides a detailed regulation of the treatment of ‘enemy nationals’ in international armed conflict, 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.¹⁹⁷ However, the conditions and treatment of such internees is strictly regulated by Part III and subject to safeguards to ensure that they are treated 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 Conflict

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 non-international armed conflicts, both apply without adverse distinction to all persons not taking an active part in hostilities (a concept discussed in more detail below).¹⁹⁸ However, in non-international armed conflicts there is no ‘protected persons regime’ or differentiation in protection based on nationality.¹⁹⁹

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:

¹⁹⁴ This is known as the ‘protected person regime’.

¹⁹⁵ Art.4 Fourth Geneva Convention. 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: J Pictet (ed.) *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1952–1960) Vol.4, 47.

¹⁹⁶ Unlike the Geneva Conventions, Additional Protocol I, applicable in international armed conflicts, does not establish a regime of protection based on nationality.

¹⁹⁷ Art.42 Fourth Geneva Convention.

¹⁹⁸ See Common Art.3, and Art 2(1) Additional Protocol II.

¹⁹⁹ This is because international armed conflicts 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 non-international armed conflicts.

- 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.²⁰⁰

The principle of distinction, and the protection it affords, applies across both international and non-international armed conflicts.²⁰¹ It is also part of customary international law.²⁰² 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.

The Principle of Distinction in International Armed Conflict

In order to apply the principle of distinction and the protection that it affords in international armed conflict, it is first necessary to understand who is a ‘civilian’ and who is a ‘combatant’.²⁰³ Although the principle of distinction applies in both international and non-international armed conflicts,²⁰⁴ the concept of ‘combatants’, and the rule of ‘combatant’s immunity’, apply only in international armed conflict. In non-international armed conflict, 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.²⁰⁵

A combatant is anyone who is a member of the regular armed forces of a State,²⁰⁶ (other than chaplains and medical personnel);²⁰⁷ or a member of an organized, non-State armed group that meets the following ‘combatant criteria’:

²⁰⁰ Arts 48 and 51 Additional Protocol I; Art.13(2) Additional Protocol II; ICRC CIHL Study, Rule 1, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1; Rule 7, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule7.

²⁰¹ ICRC CIHL Study, Rule 1, (see fn.798 above); Rule 7 (see fn.798 above).

²⁰² *Ibid.*

²⁰³ C Pilloud (ed.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), 1911.

²⁰⁴ ICRC CIHL Study, Rule ; ICRC CIHL Study, Rule 7, (see fn.798 above).

²⁰⁵ See also ICRC CIHL Study Rule 5, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule5.

²⁰⁶ As defined by Art.43 Additional Protocol I; ICRC CIHL Study, Rule 3 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3.

²⁰⁷ Art.4A(1) and (3) Third Geneva Convention; ICRC CIHL Study, Rule 3 (see fn.804 above).

- that the group belongs to²⁰⁸ (or is under command responsible to)²⁰⁹ a State party to the conflict;²¹⁰ and
- that the group be subject to an internal disciplinary system and be capable of implementing and respecting IHL.²¹¹

Combatants are also under an obligation to distinguish themselves from the civilian population.²¹²

The definition of combatant also includes those persons who are part of a spontaneous civilian uprising, also known as ‘*levée en masse*’.²¹³

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 POWs status upon capture;²¹⁴
- the right to participate in hostilities and to be free from criminal prosecution as a result of that participation (combatant immunity).²¹⁵

In case of doubt, a person is presumed to be a civilian.²¹⁶ This very important rule is designed

²⁰⁸ This is the terminology of Art.4A of the Third Geneva Convention.

²⁰⁹ This is the terminology of Art.43 Additional Protocol I.

²¹⁰ 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 Y Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (CUP, 2004), 39–40; K Del Mar “The Requirement of ‘Belonging’ under International Humanitarian Law” (2010) 21 (1) *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 international armed conflict, see D Akande “Clearing the Fog of War? The ICRC’S Interpretive Guidance on Direct Participation in Hostilities”, (2010) *International and Comparative Law Quarterly* 59, 185. For discussion of the classification of groups that “belong to a State” but do not meet the “combatant” criteria in international armed conflict, see N Melzer, *ICRC Interpretive Guidance on Direct Participation in Hostilities*, (ICRC, 2009) (The concept of civilian), 20; and D Akande, *ibid.*, 183–186.

²¹¹ Art.4A(2) Third Geneva Convention; Art.1 Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907; Art.43 Additional Protocol I; ICRC CIHL Study, Rule 4, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule4.

²¹² Art.4A(2) Third Geneva Convention; Art.44(3) Additional Protocol I; ICRC CIHL Study, Rule 4 (see fn.809 above). 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, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule106.

²¹³ Art.2 Hague Regulations 1907; Art.4A(6) Third Geneva Convention.

²¹⁴ Art.45 Additional Protocol I. ICRC CIHL Study Rule 3 (see fn.804 above). See also Third Geneva Convention for the rights of POWs

²¹⁵ Art.45 Additional Protocol I. ICRC CIHL Study, Rule 3, (see fn.804 above).

²¹⁶ Contained in Art.50(1) Additional Protocol I; ICRC CIHL Study, Rule 6, (see fn.809 above)

to prevent parties to a conflict from “shooting first and asking questions later”.²¹⁷ 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.²¹⁸

The presence of combatants in the civilian population does not deprive the population of its civilian character.²¹⁹ 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.²²⁰

The Principle of Distinction in Non-international Armed Conflict

While the principle of distinction is a fundamental principle of IHL,²²¹ the IHL of non-international armed conflict does not use the concept of ‘combatant’.²²² Instead, in non-international armed conflict, the protection derived from the principle of distinction is based on conduct rather than status. This means that those persons who do not take part in hostilities are protected from direct attack and the effects of hostilities²²³ and that those persons who take a direct part in hostilities may be subject to attack.²²⁴ The issue of direct participation in hostilities is discussed in further detail below.

The protection afforded in both international and non-international armed conflict to civilians, including students and education staff, who do not take part in hostilities is very similar. However, unlike the law of international armed conflict, 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 organized non-State armed group in a non-international armed conflict.²²⁵

²¹⁷ C Pilloud, above n.203, para.2030.

²¹⁸ Declarations of Understanding of several NATO forces when ratifying Additional Protocol I cited by Stefan Oeter in D Fleck (ed.), *The Handbook of International Humanitarian Law* 2nd edn (Oxford: OUP, 2009), 185. See for example BR-Drs 64/90 of 2 February 2009, 132 (Germany), 125 (Belgium), 127 (Italy), 129 (Netherlands), 130 (Spain).

²¹⁹ Contained in Art.50(1) Additional Protocol I; ICRC CIHL Study, Rule 6.

²²⁰ C Pilloud, above n.203, para.1922.

²²¹ ICRC CIHL Study, Rule 1; ICRC CIHL Study, Rule 7, (see fn.798 above).

²²² This is because, politically, States parties to the IHL treaties have been reluctant to recognize members of non-State armed groups, often fighting against a State in a non-international armed conflict, as combatants and, therefore, entitled to combatant immunity. For discussion of this, see H-P Gasser, “Protection of the Civilian Population” in D Fleck, above n.218, D Fleck, “The Law of Non-International Armed Conflicts” in D Fleck, *ibid*.

²²³ Art.13(1) and (2) Additional Protocol II; Common Art.3 Geneva Conventions.

²²⁴ Art.13(3) Additional Protocol II.

²²⁵ The situation is different if the non-State armed group is participating in an international armed conflict: see the discussion of combatant status and “combatant criteria” above.

The ICRC, in its interpretive guidance on the notion of direct participation in hostilities²²⁶ (discussed in more detail below), seeks to clarify that those taking direct part in hostilities, in non-international armed conflict, can further be divided into:

- those civilians who engage in ‘sporadic acts of violence’;²²⁷ and
- those persons who are members of a non-State armed group and have a “continuous combat function”.²²⁸

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.²²⁹ Where students and education staff engage in hostilities in non-international armed conflicts, 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.

Special Protection of Children

Parties to an international armed conflict are under a special obligation to respect children and protect them from all forms of indecent assault.²³⁰ In non-international armed conflict parties are required to provide children with the care and aid they require.²³¹ This protection also forms part of customary international law.²³²

The special IHL protection of children in international and non-international armed conflicts is characterized by the following features:

- It applies to all children, regardless of nationality (including an ‘enemy nationals’),²³³ in the territory of a party to an international armed conflict or the State on which a non-international armed conflict is taking place.

²²⁶ N Melzer, above n.210.

²²⁷ *Ibid.*, 70.

²²⁸ *Ibid.*, 72.

²²⁹ *Ibid.*, 70.

²³⁰ Art.77 Additional Protocol I.

²³¹ Art.4(3) Additional Protocol II.

²³² ICRC CIHL Study, Rule 135, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule135.

²³³ For further discussion on the protected persons regime in international armed conflict, see above.

- 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.²³⁴

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.²³⁵

Special provisions of IHL protecting children also apply in situations of internment²³⁶ or detention,²³⁷ evacuation,²³⁷ displacement²³⁹ or separation from families,²⁴⁰ during belligerent occupation,²⁴¹ and non-international armed conflict.²⁴² Further, IHL specifies that in distribution of humanitarian aid priority must be given to children.²⁴³

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 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.²⁴⁴ 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.²⁴⁵

²³⁴ See Chapter 3.

²³⁵ Art.77 Additional Protocol I.

²³⁶ Arts 81, 82, 85, 89, 91, 94, 119, 127 and 132 Fourth Geneva Convention.

²³⁷ Art.76 Fourth Geneva Convention; Art.77 Additional Protocol I.

²³⁸ Art 49 Fourth Geneva Convention; Art.78 Additional Protocol I; Art.4(3)(e) Additional Protocol II.

²³⁹ Art.38 Fourth Geneva Convention; Art.74 (reunion of families) Additional Protocol I

²⁴⁰ Arts 24, 25, 26 Fourth Geneva Convention; Art.4(3)(b) Additional Protocol II.

²⁴¹ Art.50 Fourth Geneva Convention.

²⁴² Art.4 Additional Protocol II.

²⁴³ Art.70 Additional Protocol I.

²⁴⁴ For discussion of these circumstances, see Chapter 2.

²⁴⁵ For discussion of the relationship between IHRL and the IHL of non-international armed conflict see L Moir, *The Law of Internal Armed Conflict* (CUP, 2002), 219–220.

Special Protection of Women

Female students and education staff benefit from special protection under IHL.²⁴⁶ This protection forms part of customary international law.²⁴⁷ Any attack on the honour of women, including rape, enforced prostitution or any form of indecent assault is prohibited by IHL.²⁴⁸ Wilful violation of this protection which causes great suffering or serious injury to body or health is a grave breach of IHL.²⁴⁹ The use of sexual violence is prohibited regardless of the gender of the victim. This prohibition is discussed in further detail, below.

Pregnant women, nursing women and mothers of young children benefit from particular protection.²⁵⁰ They are to be afforded respect and preferential treatment in the following circumstances: evacuation;²⁵¹ when being transported;²⁵² in consignment and distribution of medical supplies, food, clothing and other humanitarian aid;²⁵³ in detention and internment;²⁵⁴ and during belligerent occupation.²⁵⁵

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 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.²⁵⁶

Special Protection of the Sick and Wounded (including Persons with Disability)

IHL provides special protection to the sick and wounded in both international and non-international armed conflict.²⁵⁷ This forms part of customary international law,²⁵⁸ and includes the protection of persons with disabilities in need of medical attention.²⁵⁹ Thus, where students and education staff are sick, wounded or in need of medical attention, whether or not this is the

²⁴⁶ 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.

²⁴⁷ ICRC CIHL Study, Rule 134, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule134.

²⁴⁸ Art.27(2) Fourth Geneva Convention; Art.76(1) Additional Protocol I.

²⁴⁹ Art.147 Fourth Geneva Convention. Note, however, that this is not limited to the special protection of women.

²⁵⁰ Art.16 Fourth Geneva Convention.

²⁵¹ Art.17 Fourth Geneva Convention.

²⁵² Arts 21 and 22 Fourth Geneva Convention.

²⁵³ Art.23 Fourth Geneva Convention; Art.70 Additional Protocol I.

²⁵⁴ Arts 82, 85, 89, 91, 132 Fourth Geneva Convention; Art.76 Additional Protocol I.

²⁵⁵ Art.50 Fourth Geneva Convention.

²⁵⁶ For discussion of these circumstances, see Chapter 2.

²⁵⁷ See, for example, the Second Geneva Convention; Art.8 Additional Protocol I; Art.7 Additional Protocol II.

²⁵⁸ ICRC CIHL Study, Rule 110, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule110.

²⁵⁹ Art.8 Additional Protocol I. ICRC CIHL Study, Rule 138, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule138. It is not clear, however, the extent to which persons with disabilities not in need of medical attention benefit from special protection.

result of a disability, they benefit from this special protection. Further, medical personnel,²⁶⁰ who may also be teachers in teaching hospitals or stationed in educational facilities, benefit from special status under IHL.²⁶¹

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 minimize the effect on them of hostilities,²⁶² and to treat them without discrimination.²⁶³ This protection applies in both international and non-international armed conflict.²⁶⁴

Unlike IHRL,²⁶⁵ IHL does not make specific reference to people with disabilities outside the general provisions protecting the ‘sick and wounded’.²⁶⁶ 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.

Anti-discrimination in IHL

IHL focuses predominantly on the physical protection of vulnerable groups 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 aims to mitigate the consequences of armed conflict on the civilian population and, therefore, focuses only on these effects and not broader issues.

Despite the absence of express rules dealing with anti-discrimination in IHL, 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

²⁶⁰ Note, religious personnel benefit from similar protection see for example ICRC CIHL Study, Rule 27, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule27.

²⁶¹ Art.27 Hague Regulations; Art.19 First Geneva Convention; Art.18 Fourth Geneva Convention; Art.21 Additional Protocol I; Art.11 Additional Protocol II; ICRC CIHL Study, Rule 25, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule25.

²⁶² Arts 16 and 17 Fourth Geneva Convention.

²⁶³ Art.12(2) First Geneva Convention; Art.12 (2) Second Geneva Convention, Art.10(2) Additional Protocol I and Art.7 Additional Protocol II. For further discussion regarding this protection, see D Fleck, above n.218, in particular ch.6, 329–332.

²⁶⁴ ICRC CIHL Study, Rule 110, www.icrc.org/customary-ihl/eng/docs/v1_rul_rule110. See also Art.7 Additional Protocol II.

²⁶⁵ 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.

²⁶⁶ Although some provisions of IHL are broad enough to require the needs of children with disability to be taken into account: Art.77 Additional Protocol I and Art.4(3) Additional Protocol II. See the discussion of these provisions in Chapters 3 and 4, above.

conflicts²⁶⁷ 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 IHL²⁶⁸ and ICL.

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 international and non-international armed conflict.²⁶⁹ 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.²⁷⁰ 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.²⁷¹ 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.²⁷²

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 Case*, was that ‘arbitrarily’ deprivation of life, under Article 4 of the ICCPR ought to be determined in accordance with the rules of IHL.²⁷³

²⁶⁷ Subject to the issues of derogations and extra-territorial application outlined in Chapter 2.

²⁶⁸ 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 L Doswald-Beck, above n.16.

²⁶⁹ ICRC CIHL Study, Rule 6, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6.

²⁷⁰ Art.49, para.1 Additional Protocol I. “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*).

²⁷¹ Art.49, para.2 Additional Protocol I.

²⁷² S Oeter, “Methods and Means of Combat”, in D Fleck, above n.218, 176.

²⁷³ See Chapter 2 for further discussion.

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.²⁷⁴

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.²⁷⁵

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 non-international armed conflict, and it also forms part of customary international law.²⁷⁶ 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.²⁷⁷

Except for the very rare case of participation in a *levée en masse*,²⁷⁸ 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*.²⁷⁹ 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’.²⁸⁰

²⁷⁴ *Khatsiyeva and Others v Russia* (2008) App No 5108/02 (ECtHR, 17 January 2008); *Jose Alexis Fuentes Guerrero et al v Colombia* (2009) IACoMHR, Case 11.519, 13 April 1999.

²⁷⁵ *Ibid.*

²⁷⁶ ICRC CIHL Study, Rule 6, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6; *Prosecutor v Strugar (Trial Judgment)*, IT-01-42-T (ICTY) (31 January 2005), para.20.

²⁷⁷ ICRC Interpretive on DPIH, 43–44. See also *The Prosecutor v Jean Paul Akayesu* (ICTR-96-4-T) (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.

²⁷⁸ This concept describing a spontaneous civilian uprising is discussed above in relation to the definition of combatant in international armed conflict: Art.2 Hague Regulations 1907; Art.4A(6) Third Geneva Convention.

²⁷⁹ Art.45 Additional Protocol I. See also C Pilloud, above n.203, para.1944.

²⁸⁰ This is the immunity that combatants have from criminal prosecution for participation in an international armed conflict. For discussion of this immunity, see above.

Direct Participation in Hostilities

The Geneva Conventions and Additional Protocols do not contain a definition of ‘direct participation in hostilities’.²⁸¹ 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”.²⁸² 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.²⁸³

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.²⁸⁴

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”;²⁸⁵ *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”;²⁸⁶ *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”.²⁸⁷

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.

²⁸¹ 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; *The Prosecutor v Jean Paul Akayesu* (ICTR-96-4-T) (2 September 1998), 629.

²⁸² C Pilloud, above n.203, para.1944. This was confirmed by the ICTY in *Prosecutor v Strugar*, (Appeal Judgment) IT-01-42-A, (ICTY), 17 July 2008.

²⁸³ Members of the armed forces, and other ‘combatants’ in international armed conflicts may be targeted at all times (unless they are *hors de combat*).

²⁸⁴ There are critical comments on this Guide: see, for example, Schmitt, “The Interpretive guidance on the Notion of direct Participation in Hostilities: A critical analysis”, May 5 2010, *Harvard National Security Journal* Vol.1, 6–44.

²⁸⁵ ICRC Interpretive on DPIH, 46.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

The following examples²⁸⁸ 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;²⁸⁹
- delivering ammunition to the front line;²⁹⁰
- 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;²⁹¹
- participation in a military operation that results in harm to an adversary.²⁹² 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;²⁹³
- teaching material that constitutes propaganda to students in educational facilities;²⁹⁴
- publication of material by academics that constitutes propaganda;²⁹⁵
- 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;²⁹⁶
- undertaking construction or repair of a school which may be used for a military purpose;²⁹⁷
- providing supplies or services (such as training material, textbooks, electricity, fuel, finances and financial services) to a party to a conflict;²⁹⁸

²⁸⁸ Please note, these examples are demonstrative only and ought not to be relied on in all circumstances.

²⁸⁹ ICRC Interpretive on DPIH, 54.

²⁹⁰ *Ibid.*, 56.

²⁹¹ *Ibid.*, 53.

²⁹² *Ibid.*, 54–55.

²⁹³ *Ibid.*, 53.

²⁹⁴ 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.

²⁹⁵ See *Ibid.*

²⁹⁶ ICRC Interpretive on DPIH, 51.

²⁹⁷ 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.

²⁹⁸ ICRC Interpretive on DPIH, 53.

- 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.²⁹⁹

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.³⁰⁰

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”.³⁰¹ 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
- while they are being deployed to, or returning from, the location of the specific hostile act.³⁰²

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”.³⁰³

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

²⁹⁹ *Ibid.*, 51.

³⁰⁰ 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.

³⁰¹ ICRC Interpretive on DPIH, 70.

³⁰² *Ibid.*, 65–67.

³⁰³ *Ibid.*, 70. An alternative approach to the ICRC’s ‘revolving door’ approach is the concept of ‘continuous direct participation’ supported by Schmitt. See Schmitt, above n.284, 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.

loses civilian protection because of their membership to a non-State armed group.³⁰⁴ 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.³⁰⁵ 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”.³⁰⁶ This is known as the ‘functional membership’ approach.³⁰⁷

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.³⁰⁸ 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.³⁰⁹ 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,³¹⁰ 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 is the subject of the ICC’s first judgment in the *Lubanga Case*.

³⁰⁴ In a non-international armed conflict, 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 international armed conflict; D Akande, above n.210, 186.

³⁰⁵ The idea of DPIH is designed to apply to sporadic acts of violence: ICRC Interpretive on DPIH, 72.

³⁰⁶ *Ibid.*, 72.

³⁰⁷ *Ibid.*; N Meltzer, above n.210, 350.

³⁰⁸ See, for example, the practice in Afghanistan, Pakistan, Thailand and Columbia, noted in the Global Coalition Study on Field-based Programmatic Measures to Protect Education from Attack (2010), 10–13

³⁰⁹ ICRC Interpretive Guidance on DPIH, 61;

³¹⁰ Examples given by ICRC Interpretive Guidance on DPIH, 61.

The recruitment of children under 15 as soldiers in armed forces or in armed groups, is prohibited by IHL treaty law³¹¹ and customary international law³¹² applicable in both international and non-international armed conflict.

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.³¹³ As already mentioned, IHRL contains similar provisions but sets the age limit at 18 years.³¹⁴ Additional Protocol II, applicable in non-international armed conflict, also prohibits the participation in hostilities of children below the age of 15.³¹⁵

Although IHL does not strictly prohibit the recruitment of children between the ages of 15 and 18, as many IHRL instruments do,³¹⁶ Article 77(2) of Additional Protocol I requires that when children over the age of 15 are recruited into hostilities, priority should be given to the older children.³¹⁷

In *Lubanga* 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.³¹⁸ 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 organized armed group connected to a party in an international armed conflict, or who are directly or actively participate in hostilities³¹⁹ (whether members of a non-state armed group or not), in either an international or non-international armed conflict, lose their protection against direct attack.

However, although children are not protected from direct attack while they participate in hostilities, IHL does recognize the special vulnerability of children in the hands of the enemy and

³¹¹ Art.77(2) Additional Protocol I; Art.4(3) Additional Protocol II; Art.38 CRC.

³¹² ICRC CIHL Study, Rule 136, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule136; Rule 137, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule137.

³¹³ Art.77 Additional Protocol I.

³¹⁴ See Optional Protocol to the CRC; ACRWC; ILO Convention on the Worst Forms of Child Labour.

³¹⁵ Art.4(3)(c) Additional Protocol II.

³¹⁶ For example, see Optional Protocol to the CRC; ACRWC; ILO Convention on the Worst Forms of Child Labour.

³¹⁷ A similar provision is contained in Art.38 CRC.

³¹⁸ 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*”, at www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/.

³¹⁹ Under IHL. The position is different under ICL. See discussion of the *Lubanga Case* in the ICL section of this Chapter.

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 international armed conflict are entitled to POW status upon capture.³²⁰ Detaining parties must take into consideration the age of any POWs when implementing the Third Geneva Convention (setting out the protection of POWs).³²¹
- Those children that are not combatants in international armed conflict, or who are not members of the armed forces in non-international armed conflict, 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.³²²
- 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.³²³ 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.³²⁴

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 humanity³²⁵ 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.

³²⁰ In accordance with the Third Geneva Convention.

³²¹ Art.16 Third Geneva Convention.

³²² Art.77(3)–(4) Additional Protocol I.

³²³ Contained in Art.94 Fourth Geneva Convention.

³²⁴ Art.68 Fourth Geneva Convention; Art.77(5) Additional Protocol I; Arts 4–6 Additional Protocol II.

³²⁵ Discussed in detail in relation to prohibited forms of attack by the ICJ, in *Nuclear Weapons Advisory Opinion*, paras 78–87.

Attacks Intended to Spread Terror among the Civilian Population³²⁶

Article 51 of Additional Protocol I and Article 13(2) of Additional Protocol II prohibit attacks, and threats of attacks,³²⁷ *solely* intended to spread terror among the civilian population.³²⁸ This prohibition also forms part of the customary international law.³²⁹

Attacks prohibited by this rule include those which are designed to intimidate or coerce the civilian population into acting in a particular way.³³⁰ This could include attacking female-only civilian educational institutions and facilities,³³¹ or female students and education staff on the way to educational institutions,³³² 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 terrorize or demoralize them.³³³

Similarly, parties to an international armed conflict 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).³³⁴ The ICRC Customary International Humanitarian Law Study concludes that the concept of reprisals (lawful or not) is not known to the law of non-international armed conflict.³³⁵ 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.

³²⁶ S Oeter, “Methods and Means of Combat” in D Fleck, above n.272, 159.

³²⁷ C Pilloud, above n.203, 1940.

³²⁸ 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: Y Dinstein, above n.210, 116.

³²⁹ ICRC CIHL Study, Rule 2, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule2.

³³⁰ S Oeter gives the example of Serb attacks on civilian objects during the conflict in the FRY designed to intimidate the local population into expelling ethnic minorities from the area: S Oeter, “Methods and Means of Combat” in D Fleck, above n.272, 194.

³³¹ For example, the attacks on girls’ schools in Northern Pakistan: EFA Global Monitoring Report, *The Hidden Crisis: Armed Conflict and Education* (UNESCO, 2011); the poisoning of water supplies for girls’ schools in Kunduz Province, Afghanistan: EFA Report 2011, 143.

³³² For example, the suicide bombings of female students and teachers on the way to schools in Afghanistan, outlined in UNAMA, 2010 and EFA Report 2011, 143.

³³³ See the examples listed in ICRC CIHL Study, Rule 2, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule2. See also ICTY Jurisprudence: *Prosecutor v Djukić*, Judgment, Case No IT-96-20-PT, Trial Chamber (24 April 1996), *Prosecutor v Martić*, IT-95-11 (1995), *Prosecutor v Karadžić and Mladić*, Judgment, Case No IT-95-18, Trial Chamber (1995).

³³⁴ Art.33 Fourth Geneva Convention; Art 51 Additional Protocol I.

³³⁵ ICRC CIHL Study, Rule 148, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule148.

Sexual Violence

The use of sexual violence in armed conflict is prohibited, expressly and implicitly, by numerous provisions of IHL that apply in both international³³⁶ and non-international armed conflict.³³⁷ This prohibition forms part of the customary international law.³³⁸ Women and children benefit from special protection against sexual and indecent assault.³³⁹ In addition, the use of sexual violence against men and boys in armed conflict is also a serious issue.³⁴⁰ The prohibition of sexual violence is non-discriminatory and applies equally to men, women, boys and girls.³⁴¹

The prohibition on sexual violence includes rape, indecent assault, forced prostitution, sexual slavery, forced pregnancy and enforced sterilization.³⁴² It can, in conjunction with other factors in armed conflict, amount to an act of genocide or torture.³⁴³ The prohibition has been found to protect persons in civilian internment. Such situations of prolonged detention have been recognized as taking away the capacity of a victim to consent to any sexual activity.³⁴⁴

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.³⁴⁵

Prohibition on Torture and Inhumane Treatment

IHL expressly prohibits the use of torture and other inhumane treatment at all times.³⁴⁶ This prohibition applies across nationality and without adverse distinction. In addition, specific provisions

³³⁶ Art.27(2) Fourth Geneva Convention; Arts 75(2)(b), 76(1), 77(1) Additional Protocol I.

³³⁷ Common Art.3(1); Art.4(2)(e) Additional Protocol II.

³³⁸ ICRC CIHL Study, Rule 93, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule93.

³³⁹ Children: Art.77 Additional Protocol I. Women: Art.27 Additional Protocol I.

³⁴⁰ See the enlightening discussion by S Sivakumaran, “Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict” (2010) Vol.92 No 877 *International Review of the Red Cross*, 259.

³⁴¹ Except for forced pregnancy. See, for example, the ICC Statute prohibition on rape: Art.8(2)(b)(xxii) and Art.8(2)(e)(vi). C Pilloud (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), para.3049.

³⁴² ICRC CIHL Study, Rule 93 (see fn.936 above).

³⁴³ See *The Prosecutor v Jean Paul Akayesu* (ICTR-96-4-T) (2 September 1998) ICTR Trial Chamber Judgment; *Prosecutor v Musema* (ICTR-96-13); and *Prosecutor v Delalic, Mucic, Delic and Lando* (“*Celebici Camp*” Case) No IT-69-21-T, (1998) (torture).

³⁴⁴ For example, see *Prosecutor v Furundzija* Judgment, Case No IT-95-17/1-A, Trial Chamber (10 December 1998).

³⁴⁵ See EFA Global Monitoring Report, 132, 144–145 for examples of the use of sexual violence in conflict.

³⁴⁶ Art.75 Additional Protocol I. Common Art.3; ICRC CIHL Study, Rule 90, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule90.

protect those persons in POW detention³⁴⁷ and civilian internment.³⁴⁸ ICL prohibits the use of torture and inhumane treatment on similar grounds.³⁴⁹

While there is significant convergence between IHL and IHRL on the issue of torture and inhuman and degrading treatment,³⁵⁰ 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.³⁵¹ However, this prohibition is only applicable in circumstances related to hostilities.³⁵² The prohibition of corporal punishment protects those “affected by a situation” of international armed conflict³⁵³ who are in the power of a party to the conflict. IHL prohibits corporal punishment, for example, where 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 international armed conflict internment of civilians is permissible only when it is absolutely necessary for imperative reasons of security;³⁵⁴ and as a criminal penalty.³⁵⁵ In all cases, decisions regarding internment must be subject to a procedure and subject to review by an independent body.³⁵⁶ The conditions of internment are regulated by the Fourth Geneva Convention,³⁵⁷ which provides that, at a minimum, all internees must be treated humanely.³⁵⁸

In non-international armed conflict, arbitrary arrest and detention are prohibited in all circumstances.³⁵⁹

³⁴⁷ Arts 13 and 14 Third Geneva Convention.

³⁴⁸ Art.100 Fourth Geneva Convention.

³⁴⁹ See discussion in the next section.

³⁵⁰ However, not total convergence, as is discussed further in S Sivakumaran, “Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals” 18 (2005) *Leiden Journal of International Law* 541.

³⁵¹ This is also a rule of customary international law: ICRC CIHL Study, Rule 91, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule91.

³⁵² See Chapter 2.

³⁵³ Art.75(1) Additional Protocol I.

³⁵⁴ Arts 41–43 and 78 (relating to belligerent occupation) of Fourth Geneva Convention.

³⁵⁵ Art.68 Fourth Geneva Convention.

³⁵⁶ Arts 43 and 78 Fourth Geneva Convention.

³⁵⁷ See Arts 79–141 Fourth Geneva Convention.

³⁵⁸ Art.100 Fourth Geneva Convention.

³⁵⁹ Art.5(1) Additional Protocol II; ICRC CIHL Study, Rule 99, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99.

Other Prohibited Forms of Attack

IHL also contains prohibitions on the following forms of attack in both international and non-international armed conflict, many of which overlap with prohibitions against similar conduct under IHRL:

- the taking of hostages;³⁶⁰
- the use of slavery or forced labour;³⁶¹ and
- forced displacement of civilian populations for reasons other than imperative military necessity.³⁶²

Attacks on Freedom of Thought or Conscience

IHL does not contain an express right to freedom of thought or conscience similar to IHRL.³⁶³ IHL also does not prohibit the dissemination of propaganda *per se*.³⁶⁴ 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.³⁶⁵ Occupying powers must, if possible, ensure that children in occupied territories are educated by persons of their own nationality, language and religion.³⁶⁶ Similar provisions exist for all civilian internees³⁶⁷ in international armed conflict and for children in non-international armed conflict.³⁶⁸ 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.³⁶⁹ 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.

³⁶⁰ Arts 34 and 147 Fourth Geneva Convention.; Art.75(2)(c) Additional Protocol II; Common Art.3; ICRC CIHL Study, Rule 96, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule96.

³⁶¹ See Lieber Code, Art 6 Nuremberg Charter; Art 4 Additional Protocol II; Rule 94 (slavery) ICRC CIHL Study available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule94; Rule 95 (forced labour) ICRC CIHL Study available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule95.

³⁶² This must also be temporary and subject to a right to return once the military necessity no longer exists: Art 49 and 147 Fourth Geneva Convention; Art 51(7), 78(1) and 85(4)(a) Additional Protocol I; Art 4(3)(2) and 17 Additional Protocol II and ICRC CIHL Rule 129 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule129 and Rule 132 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule132.

³⁶³ For discussion of this issue under IHRL, see above.

³⁶⁴ S Oeter, “Methods and Means of Combat”, in D Fleck above n.272, 231.

³⁶⁵ Art.24 Fourth Geneva Convention.

³⁶⁶ Art.50 Fourth Geneva Convention.

³⁶⁷ Art.94 Fourth Geneva Convention.

³⁶⁸ Art.4(3)(a) Additional Protocol II.

³⁶⁹ S Oeter, above n.272, 232.

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.*³⁷⁰ In other words, attacks of a nature “to strike military objectives and civilians or civilian objects without distinction”.³⁷¹ This rule means “the rights of parties to a conflict to choose means and methods of warfare are not unlimited”³⁷² 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:³⁷³

- 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;
- 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 law³⁷⁴ 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;³⁷⁵
- to ‘carpet’ bomb or drop random bombs on a region from the land, sea, or air;³⁷⁶
- to fire imprecise missiles against military objectives located near, or in between, civilian objects;³⁷⁷ and
- to use starvation of civilians as a method of warfare.³⁷⁸

³⁷⁰ Art.51 Additional Protocol I.

³⁷¹ Art.51(4) Additional Protocol I.

³⁷² Art.35 Additional Protocol I; Art 22 Hague Regulations.

³⁷³ Art.51(4) Additional Protocol I. See also Aldrich, “The Laws of War on Land” [2000] Vol.94, *American Journal of International Law* 42, 51.

³⁷⁴ ICRC CIHL Study, Rule 11, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule11.

³⁷⁵ Listed in Y Dinstein, above n.210, 118.

³⁷⁶ Art.49(3) Additional Protocol I; Listed in Y Dinstein, *ibid.*, 118.

³⁷⁷ *Ibid.*, 118.

³⁷⁸ Art.54 (1) and (2) Additional Protocol I; Art.14 Additional Protocol II; ICRC CIHL Study, Rule 53, available at www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter17_rule53. However, in international armed conflict 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

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*.³⁷⁹

Weapons such as land mines³⁸⁰ and cluster munitions³⁸¹ 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.

Parties must never use weapons that cause superfluous injury or unnecessary suffering.³⁸² 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.³⁸³ It requires consideration of both physical injury and psychological suffering.³⁸⁴

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,³⁸⁵ including biological weapons,³⁸⁶ chemical weapons³⁸⁷ and dum-dum bullets (which expand in the human body).³⁸⁸

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 non-international armed conflict.

³⁷⁹ ICJ *Nuclear Weapons Case* Advisory Opinion (1996) ICJ Reports, para.257. ICRC CIHL Study, Rule 71, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule71.

³⁸⁰ Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction 1997, 36 ILM 1507.

³⁸¹ Convention on cluster munitions 2008.

³⁸² ICJ *Nuclear Weapons Case*, above n.379, para.257, Art.35 Additional Protocol I; ICRC CIHL Study, Rule 70, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70.

³⁸³ ICJ *Nuclear Weapons Case*, *ibid.*, para.257. This principle must not be confused with that of lethality. Lethal weapons are not prohibited by IHL.

³⁸⁴ Y Dinstein, above n.210, 59.

³⁸⁵ F Kalshoven and L Zegveld, *Constraints on the Waging of War: Introduction to International Humanitarian Law* 4th edn (CUP, 2011), 36.

³⁸⁶ ICRC CIHL Study, Rule 73, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule73.

³⁸⁷ ICRC CIHL Study, Rule 74, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule74.

³⁸⁸ ICRC CIHL Study Rule 77 www.icrc.org/customary-ihl/eng/docs/v1_rul_rule77. See also the prohibition on exploding bullets: Rule 78 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule78. 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.

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).³⁸⁹ This rule is the culmination of the two previous rules on indiscriminate weapons and those that cause unnecessary suffering.³⁹⁰ It incorporates a prohibition on weapons, such as biological weapons, that might spread disease across borders into neutral States,³⁹¹ and weapons that cause widespread, long-term and severe damage to the natural environment.³⁹²

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 law³⁹³ and places the following obligations on parties to the conflict when launching an attack against a military objective:³⁹⁴

- to exercise *constant care* to spare the civilian population and civilian objects;³⁹⁵
- to *verify* that the objects which are to be the subject of an attack are military and not civilian;³⁹⁶
- to choose means and methods of attack which *minimize civilian* loss of life or damage;³⁹⁷
- to *cancel or suspend an attack* if it becomes clear that the attack is against a civilian or civilian object or is disproportionate;³⁹⁸
- to *minimize casualties* and to refrain from excessive attacks; and³⁹⁹
- to issue an *advance warning* of attacks that may affect the civilian population where circumstances permit.⁴⁰⁰

³⁸⁹ ICJ, *Nuclear Weapons Advisory Case*, above n.379, paras 261–262.

³⁹⁰ ICJ, *Nuclear Weapons Advisory Case*, *ibid.*, paras 261–262, Y Dinstein, above n.210, 57.

³⁹¹ Y Dinstein, *ibid.*, 57.

³⁹² Prohibited by Art.35 Additional Protocol I. ICRC CIHL Study, Rule 45, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule45.

³⁹³ ICRC CIHL Study, Rule 15, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule15. See also Rules 16–24.

³⁹⁴ Art.57 Additional Protocol I.

³⁹⁵ Art.57(1) Additional Protocol I; ICRC CIHL Study, Rule 19, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule19.

³⁹⁶ Art.57(2)(a)(i) Additional Protocol I; ICRC CIHL Study, Rule 16, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule16.

³⁹⁷ ICRC CIHL Study, Rule 7, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule17.

³⁹⁸ Art.57(2)(b) Additional Protocol I. ICRC CIHL Study, Rule 19, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule19.

³⁹⁹ Art 57(2)(a)(ii) and Art 57(2)(a)(iii) Additional Protocol I; ICRC CIHL Study Rule 11 www.icrc.org/customary-ihl/eng/docs/v1_rul_rule11 and Rule 14 www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14.

⁴⁰⁰ Art 57(2)(c) Additional Protocol I. ICRC CIHL Study Rule 20 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule20.

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.⁴⁰¹ 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,⁴⁰² state that the use of indiscriminate violence⁴⁰³ and weapons⁴⁰⁴ 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

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;⁴⁰⁵
- the obligation to issue an advance warning to allow for evacuation;⁴⁰⁶ and
- the obligation to exercise constant care not to endanger civilians during the planning and execution of an attack.⁴⁰⁷

Each of these rules is crucial to ensuring the safety and well-being of students and education staff in armed conflicts.

⁴⁰¹ Art 57(2)(a)(iii) Additional Protocol I; ICRC CIHL Study Rule 20, *ibid*.

⁴⁰² This is typical of ECHR Cases: 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* 741–767.

⁴⁰³ See, for example, *Ergi v Turkey* (1998) 32 EHRR 388, para.79; IACommHR *Jose Alexis Fuentes Guerrero et al v Colombia*, Case 11.519, 13 April 1999, paras 29–43.

⁴⁰⁴ *Isayeva, Yusupova and Bazayeva v Russia* ECtHR Judgment, 24 February 2005, paras 195–199; *Khamzayev and Others v Russia* (3 May 2011) (ECtHR) para.253; IACommHR, *Juan Carlos Abella v Argentina* (La Tablada case) Case 11.137, 18 Nov 1997, OEA/Ser.L/V/II 98, paras 186 and 187.

⁴⁰⁵ *Khatsiyeva and Others v Russia* App No 5108/02 (ECtHR, 17 January 2008), para.136; *Khamzayev and Others v Russia*, above n.404, para.183.

⁴⁰⁶ *Khatsiyeva and Others v Russia*, *ibid.*, para.184; *Kerimova and Others v Russia* App Nos 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05, para.252.

⁴⁰⁷ *Khamzayev and Others v Russia*, above n.404, para.250.

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 hostilities⁴⁰⁸ and the prohibition on the use of indiscriminate means and methods of warfare.⁴⁰⁹

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.

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.⁴¹⁰ 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 education staff (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.⁴¹¹ ICL prohibits the wilful killing or murder of those

⁴⁰⁸ See, for example, Art.8(b)(i), (xvii), (xviii), (xix) and (e)(i) Rome Statute.

⁴⁰⁹ See, for example, Art.8(b)(xx) and (xix); 8(e)(xii), (xiv) and (xv) Rome Statute.

⁴¹⁰ See, for example, Art.28 of the Rome Statute; Art.6 Convention Against Enforced Disappearances.

⁴¹¹ Art.50 First Geneva Convention; Art.51 Second Geneva Convention; Art 130 Third Geneva Convention; Art.147 Fourth Geneva Convention; Art.11(4) Additional Protocol I.

not taking a direct part in hostilities,⁴¹² as well as the launching of attacks targeted at these persons.⁴¹³ 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 recognizes this principle, through the war crime of causing excessive incidental damage to civilians.⁴¹⁴

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,⁴¹⁵ shipwrecked,⁴¹⁶ POWs,⁴¹⁷ or civilians on the territory of an enemy or subject to occupation.⁴¹⁸ 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.⁴¹⁹

A further requirement of all war crimes is that the prohibited conduct took place in the context of, and was associated with, an international or non-international armed conflict. The perpetrator must also be aware of factual circumstances that established the existence of an armed conflict.⁴²⁰

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,⁴²¹ intentionally directing attacks against the civilian population (or those not taking a direct part in hostilities),⁴²² 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.⁴²³

⁴¹² Art.8(2)(a)(i) and (c)(i) Rome Statute; Art.2(a) ICTY Statute; Art.4(a) ICTR Statute.

⁴¹³ Art.8(2)(b)(i) and (8)(2)(e)(i) Rome Statute.

⁴¹⁴ Art.8(2)(b)(iv) Rome Statute.

⁴¹⁵ Falling into the categories established in Art.13 First Geneva Convention.

⁴¹⁶ Falling into the categories established in Art.13 Second Geneva Convention.

⁴¹⁷ Art.4A Third Geneva Convention.

⁴¹⁸ Art.4 Fourth Geneva Convention. 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 (including *Tadić* ICTY Appeals Chamber (2 October 1995), para.166) and academic analysis suggests it now refers to allegiance rather than nationality of the civilian: R Cryer, H Friman, D Robinson and E Wilmshurst, above n.418, 287–288.

⁴¹⁹ 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."

⁴²⁰ See generally, ICC's Elements of Crimes.

⁴²¹ Art.8(2)(a)(i) Rome Statute (wilful killing in international armed conflict) and Art.8(2)(c)(i) (murder) in non-international armed conflict.

⁴²² Art.8(2)(b)(i) Rome Statute in the case of international armed conflict and Art.8(2)(e)(i) in non-international armed conflict.

⁴²³ Art.8(2)(b)(iv) Rome Statute.

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 international armed conflict are essentially the same as the crime of ‘murder’ in non-international armed conflict.⁴²⁴
- For the offence of *intentionally directing attacks against the civilian population in either international or non-international armed conflict*, 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.⁴²⁵
- 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.⁴²⁶ Although the Rome Statue lists this crime only in relation to international armed conflict, 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 non-international armed conflict.⁴²⁷

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

⁴²⁴ See Judgment in *Prosecutor v Delalic, Mucic, Delic and Lando* (“*Celebici Camp*” Case) No IT-69-21-T, (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: para.423.

⁴²⁵ See *Prosecutor v Stanislav Galic* (ICTY Case No IT-98-29-T). 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 *The Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, Case No ICC-01/04-01/07, 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* (Case No ICC-02/04-01/05).

⁴²⁶ 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.

⁴²⁷ See discussion of this in R Cryer, H Friman, D Robinson and E Wilmshurst, above n.418, 298.

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.⁴²⁸

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.⁴²⁹

4.3.2 Protection from Torture and Other Inhuman and Degrading Treatment

As already mentioned, the use or threat of torture against students and education staff in situations of insecurity and armed conflict is a serious education-related violation. Torture under international criminal law has been defined similarly under IHRL⁴³⁰ and IHL.⁴³¹ 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.⁴³² 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.

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*.⁴³³ 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.

⁴²⁸ *The Prosecutor v Jean Paul Akayesu (ICTR-96-4-T)* (2 Sept 1998) ICTR Trial Chamber Judgment, para.590. Proof of these two elements are required for every offence charged as a crime against humanity: *Prosecutor v Krstic*, Trial Chamber Judgment, IT-98-33-A (19 April 2004) (ICTY) para.485.

⁴²⁹ See the Trial Chamber Judgment in the case of *Prosecutor v Kupreskic et al.* (Trial Judgment), IT-95-16-T, (ICTY), 14 January 2000. Another ICTY Trial Chamber, in the case of *Prosecutor v Kunarac and Others*, Case Nos IT-96-23 & IT-96-23/1, Trial Chamber, (22 Feb 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.

⁴³⁰ In general see A Zahar, “Torture”, in A Cassese (ed.) *The Oxford Companion to International Criminal Justice* (OUP, 2009), 537–538.

⁴³¹ See discussion of this in *Prosecutor v Kunarac and Others*, Case Nos. IT-96-23 & IT-96-23/1, Trial Chamber, (Feb. 22, 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: S Sivakumaran, above n.350, 541.

⁴³² *Prosecutor v Delalic, Mucic, Delic and Lando* (“*Celebici Camp*” Case) No IT-69-21-T, (1998).

⁴³³ *Ibid.*, para.454.

Sexual assault can also be considered as torture *per se*, in that rape by definition results in severe pain or suffering for the victim.⁴³⁴ 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.⁴³⁵ 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.⁴³⁶ Further, the CAT sets out a number of prohibited purposes. This list is not, however, exhaustive.⁴³⁷

Torture and Inhuman 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 inhuman treatment under Article 8(2)(a)(ii) relating to offences committed in an international armed conflict, 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 non-international armed conflict. 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.

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

⁴³⁴ 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 Furundzija*, Judgment, Case No IT-95-17/1-A (10 December 1998) in which the victim was threatened with mutilation on interrogation. See also *Prosecutor v Brdanin*, Trial Chamber II, IT-99-36-T (1 September 2004) in which the Trial Chamber stated at para.485 that rape necessarily amounts to torture.

⁴³⁵ 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.

⁴³⁶ *Prosecutor v Delalic, Mucic, Delic and Lando* (“*Celebici Camp*” Case) No IT-69-21-T, (1998), para.442.

⁴³⁷ See *Prosecutor v Mrksic*, Trial Judgment, Case No 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 Naletilic and Martinovic*, Trial Chamber Judgment, Case No IT-98-34-T (31 March 2003), para.299.

- 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.⁴³⁸

Note also that the ‘torture’ element of the war crime of violence to life and person in non-international armed conflicts is identical to the offence in an international armed conflict.⁴³⁹

There is no requirement to prove a specific purpose where the charge is one of inhuman treatment. Inhuman 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.”⁴⁴⁰ However, even for the offence of inhuman treatment as a war crime, a requisite level of seriousness is necessary.⁴⁴¹ 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.⁴⁴²

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 crime.⁴⁴³ The case

⁴³⁸ See the ICC’s Elements of Crimes, 15. Also see *Prosecutor v Brdjanin*, (Decision on Motion for Acquittal Pursuant to Rule 98bis), Case No IT-99-36 (28 November 2003), and *Prosecutor v Milan Martić*, Trial Judgment, Case No IT-95-11-T (12 June 2007).

⁴³⁹ 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).

⁴⁴⁰ *Prosecutor v Mucic et al*, Trial Judgment, Case No IT-96-21-T (16 November 1998), Trial Chamber Judgment 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* (Series A, No 241-A, Application No 12850/87) (1993) 15 EHRR 1, 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 (1995) ECHR 55, the Court found that inhumane treatment had been committed where an individual was beaten whilst in custody and his wife threatened (para.537).

⁴⁴¹ See the case of *Prosecutor v Krnojelac*, Case No IT-97-25 (2005), 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.

⁴⁴² See *Prosecutor v Milan Martić*, Case No IT-95-11-T Trial Chamber Judgment, (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.

⁴⁴³ See, for example, Art.2(b) ICTY Statute, relating to breaches of the Geneva Conventions; Art.4(a) of the Statute of the ICTR and Art.3(a) of the Statute of the SCSL, both of which pertain to non-international armed conflict.

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.⁴⁴⁴

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”.⁴⁴⁵

‘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);⁴⁴⁶ 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.⁴⁴⁷ In the context of crimes against humanity, as with war crimes, torture has been

⁴⁴⁴ See, for example: *Prosecutor v Ljube Boskoski & Johan Tarculovski*, Case No IT-04-82-T (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, Ivan Cermak, Mladen Markac*, Trial Judgment, Case No 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 Krnojelac*, Trial Judgment, Case No IT-97-25-T (ICTY) (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.

⁴⁴⁵ Art.7(2)(e) of the Rome Statute.

⁴⁴⁶ Footnote above, Elements of Crimes states at 12, “It is understood that ‘character’ refers to the nature and gravity of the act.”

⁴⁴⁷ See for example Art.5(f) and (e) (where it is perpetrated in connection with an armed conflict). ICTY Statute; Art.3(f) and (i) ICTR Statute.

held to include rape,⁴⁴⁸ as well as severe beatings, electrocutions, threats of death, the witnessing of killings, and sexual assaults in order to extract confessions.⁴⁴⁹ 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”.⁴⁵⁰

4.3.3 Protection from Sexual Violence

The term ‘sexual violence’ in international criminal law encompasses a broad range of offences relating to non-consensual acts of a sexual nature capable of being categorized 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,⁴⁵¹ although until recently it was not defined under ICL.⁴⁵² 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,⁴⁵³ that

⁴⁴⁸ 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 Kumarac, Kovac & Vukovic*, ICTY Case Nos IT-96-23-T & IT-96-23/1-T (22 February 2001).

⁴⁴⁹ See para.524 of the Trial Chamber in the case of *Prosecutor v Brdanin*, Case No IT-99-36.

⁴⁵⁰ See para.131 of the Trial Chamber Judgment in the case of *Prosecutor v Krnojelac*, Trial Judgment, Case No IT-97-25-T (15 March 2002). 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, Ivan Cermak, Mladen Markac*, Trial Judgment, Case No 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).

⁴⁵¹ *Prosecutor v Brima et al*, Case No SCSL-04-16-T Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, Special Court for Sierra Leone, 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 ICC Statute as war crimes and crimes against humanity, namely, ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation’ and other similar forms of violence”.

⁴⁵² A Cassese *International Criminal Law*, 2nd edn (OUP, 2008), 112. See *Akayesu* (ICTR), para.597, that rape “is a physical invasion of a sexual nature, committed under circumstances which are coercive”.

⁴⁵³ 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.⁴⁵⁴

Other discrete crimes under international criminal law 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”.⁴⁵⁵

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.⁴⁵⁶ The offences of sexual violence apply equally to international as well as non-international armed conflicts.⁴⁵⁷

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 characterize crimes against humanity, as discussed above.⁴⁵⁸

⁴⁵⁴ 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 Cassese, 2008, 112, see above citing; *Prosecutor v Furundzija*, Judgment, Case No IT-95-17/1-A (10 December 1998); and *Prosecutor v Kunarac and others*, above n.448.

⁴⁵⁵ Art.8(2)(b)(xxii) and Art.2(e)(iv) Rome Statute.

⁴⁵⁶ For examples of cases involving sexual violence charged as a war crime, see *Prosecutor v Kunarac et al*, above n.448 (multiple rapes had been personally committed by all three defendants); *Prosecutor v Tharcisse Renzaho*, Case No ICTR—97-31-T (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*, Case No ICC-01/04-01/07 (the defendants are accused of the commission of rape as a war crime; as commanders of the two military factions they were responsible for an attack on a village in which rapes took place); *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, Case No ICC-01/04-01/07 (the defendants are accused 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).

⁴⁵⁷ 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”.

⁴⁵⁸ For examples of cases involving sexual violence charged as a crime against humanity, see *Prosecutor v Kunarac et al*, above n.448; *Prosecutor v Jean-Pierre Bemba Gombo* (an ongoing case in which it is alleged that the accused knowingly and intentionally participated in a series of rapes of civilian men,

Sexual Violence as Torture

It is now clear that rape can be characterized 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.⁴⁵⁹ 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.⁴⁶⁰ 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.”⁴⁶¹

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 15⁴⁶² as a war crime.⁴⁶³ The Rome

women and children conducted as part of a widespread and systematic attack directed against the civilian population with the intention of terrorizing the population); *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, Case No ICC-01/04-01/07 (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.

⁴⁵⁹ *Prosecutor v Furundzija*, ICTY IT-95-17/1, Trial Chamber judgment, 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 Brdanin*, Case No IT-99-36, para.485 of the Trial Chamber judgment.

⁴⁶⁰ *Prosecutor v Brdanin*, Case No IT-99-36T (1 September 2004), para.485.

⁴⁶¹ *The Prosecutor v Jean Paul Akayesu (ICTR-96-4-T)* (2 September 1998) ICTR Trial Chamber Judgment para.597

⁴⁶² 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 criminalize recruitment under that age in domestic law.

⁴⁶³ The first international decision on child soldiers was taken by the SCSL in *Prosecutor v Sam Hinga Norman*. Case No SCSL-2004-14-AR72(E) Judgment of 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 Brima, Kamara and Kanu* SCSL-04-16-T, Judgment 21 June 2007 (child soldiers employed on the front line but also in logistical operations and as

Statute criminalizes the recruiting (whether through conscription or enlistment) or use of children to participate actively in either international or non-international armed conflicts.⁴⁶⁴ 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.⁴⁶⁵ The first judgment issued⁴⁶⁶ by the ICC Trial Chamber found Thomas Lubanga Dyilo guilty of conscripting, enlisting and using children actively to participate in armed conflict.⁴⁶⁷

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.⁴⁶⁸ The court held that ‘active participation’ also includes a “myriad of roles that support the combatants”,⁴⁶⁹ 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.⁴⁷⁰ Further, the court did not address whether or not sexual slavery constituted ‘active participation’.⁴⁷¹ 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-

bodyguards and human shields) and *Prosecutor v Sesay, Kallon and Gbao* SCSL-04-15-T, Judgment 2 March 2009. See also *Prosecutor v Charles Taylor*, SCSL-03-01-T, Judgment of 26 April 2012 (Count 9).

⁴⁶⁴ Art.8(2)(b)(xxvi) for international armed conflicts, Art.8(2)(e)(vii) for non-international armed conflicts.

⁴⁶⁵ 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* (Rome, Italy: Xpress srl 2002, 73–74).

⁴⁶⁶ Note that the ICC is currently still hearing the case of *Prosecutor v Katanga and Chui*, ICC-01/04-01/07 in which the defendants are accused under Art.8 (2) Rome Statute of using children to participate actively in hostilities in an international and non-international armed conflict. It is contended that the accused ordered, controlled and oversaw the training of children and their use in armed hostilities.

⁴⁶⁷ *Prosecutor v Thomas Lubanga Dyilo*, International Criminal Court, ICC-01/04-01/06.

⁴⁶⁸ *Lubanga, ibid.*, para.628. *Rutaganda*, ICTR-96-3-T Judgment of 6 December 1999 para.100.

⁴⁶⁹ *Lubanga, ibid.*, para.628.

⁴⁷⁰ *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 N Urban, above n.318

⁴⁷¹ *Lubanga, above n.467*, paras 629–631.

related violation of international law. Serious, widespread and systemic discrimination against students and education 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 education 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,⁴⁷² there appears to be some consensus that the acts underlying persecution must be sufficiently serious, in practice of comparable gravity to other acts criminalized under customary international law.⁴⁷³ 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.”⁴⁷⁴

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,⁴⁷⁵ such as “acts of a physical, economic or judicial nature that violate an individual’s right to the equal enjoyment of his basic rights”.⁴⁷⁶ 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.⁴⁷⁷

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

⁴⁷² *Prosecutor v Kordic and Cerkez*, Trial Chamber Judgment, Case No IT-95-14/2 (26 February 2001) para.192.

⁴⁷³ *Prosecutor v Krnojelac*, Appeal Chamber Judgment, Case No IT-97-25-A (17 September 2003) para.199.

⁴⁷⁴ *The Media Case: Prosecutor v Nahimana, Barayagwiza and Ngeze*, ICTR Trial Chamber (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 emphasize 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).

⁴⁷⁵ *Prosecutor v Kordic and Cerkez*, Trial Chamber judgment, para.192. See also *Prosecutor v Kupreskic et al*, Trial Chamber judgment, para.581.

⁴⁷⁶ *Prosecutor v Tadić*, Trial Chamber judgment, para.710.

⁴⁷⁷ 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.

human shields; wanton destruction and plunder; the destruction or damage of religious or educational buildings;⁴⁷⁸ deliberate and organized detention and killing of particular groups of victims;⁴⁷⁹ and hate speech broadcast on the radio at the time that attacks were being launched against particular groups of victims.⁴⁸⁰

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.⁴⁸¹ The Statute of the SCSL added ethnic grounds to this list.⁴⁸² 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 recognized as impermissible under international law”.⁴⁸³ 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.⁴⁸⁴

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.⁴⁸⁵

Special Protection Against Deportation or Forcible Transfer

Deportation or forcible transfer of people, including students and education staff, is a serious education-related violation. Such conduct disrupts education and undermines the conditions necessary for the provision of education to students. ICL recognizes 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.⁴⁸⁶ The crimes may be characterized 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

⁴⁷⁸ *Prosecutor v Kordic and Cerkez*, Trial Chamber judgment, paras 19, 195, 203–205 and 207.

⁴⁷⁹ *Prosecutor v Kupreskic et al*, Trial Chamber judgment, paras 630–631; also see *Office of the Co-Prosecutor v Duch*, Trial Chamber judgment.

⁴⁸⁰ *The Media Case*, above n.474.

⁴⁸¹ Nuremberg Charter (Art.6(c) IMT Charter), Art.5(h) ICTY Statute, and Art.3(h) ICTR Statute. The Tokyo Charter omitted religious grounds.

⁴⁸² Art.2(h) SCSL Statute.

⁴⁸³ Art.7(1)(h) Rome Statute.

⁴⁸⁴ *Prosecutor v Kordic and Cerkez*, Trial Chamber Judgment, Case No IT-95-14/2 paras 211–220 and Appeals Chamber judgment, paras 110–112. See also *Prosecutor v Blaskic*, Trial Chamber judgment, paras 235, 244 and 260 and Appeals Chamber judgment, paras 164–166.

⁴⁸⁵ 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).

⁴⁸⁶ *Prosecutor v Krstic*, Trial Chamber judgment, IT-98-33-A (19 April 2004) (ICTY) para.521.

two concepts as the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”.⁴⁸⁷

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.⁴⁸⁸ 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.⁴⁸⁹ 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.⁴⁹⁰ Note that evacuation is permitted under the Geneva Conventions where the security of the population or imperative military reasons require it,⁴⁹¹ provided those evacuated are returned to their homes as soon as hostilities in the area have ceased.⁴⁹²

The prosecution must also prove that the accused has the specific intent that the persons in question are removed from an area.⁴⁹³ 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.⁴⁹⁴ The involvement of an NGO in assisting the transfer does not of itself render an otherwise unlawful transfer lawful.⁴⁹⁵ 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.⁴⁹⁶

⁴⁸⁷ HRC General Comment 29, para.13 (d). See also *Prosecutor v Krnojelac*, Trial Chamber Judgment, Case No IT-97-25-T (ICTY) (15 March 2002) para.474 and *Prosecutor v Stakic*, Trial Chamber Judgment, Case No IT-97-24-T (31 July 2003) para.672.

⁴⁸⁸ *Prosecutor v Naletilic and Martinovic*, Trial Chamber Judgment, Case No 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: *Stakic* Appeal Chamber judgment, para.282.

⁴⁸⁹ *Prosecutor v Vidoje Blagojevic & Dragan Jokic* IT-02-60-T (2007), para.596. See also *Prosecutor v Naletilic and Martinovic* Trial Chamber Judgment, Case No IT-98-34-T (31 March 2003) para.519.

⁴⁹⁰ *Prosecutor v Ante Gotovina, Ivan Cermak, Mladen Markac* IT-06-90-T (2011), para.1739.

⁴⁹¹ Art.49 Fourth Geneva Convention, Art.17 Protocol II

⁴⁹² Art.49 Fourth Geneva Convention.

⁴⁹³ *Prosecutor v Naletilic and Martinovic*, Trial Chamber Judgment, Case No IT-98-34-T (31 March 2003), para.520. Note that the Appeals Chamber in *Prosecutor v Stakic*, Appeal Judgment, Case No IT-97-24-A (ICTY) (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.

⁴⁹⁴ *Prosecutor v Stakic*, Trial Chamber judgment, Case No IT-97-24-T (31 July 2003), para.687.

⁴⁹⁵ *Ibid.*, para.286.

⁴⁹⁶ *Prosecutor v Kordic*, Appeals Chamber Judgment, Case No 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”.

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 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.

As explained in this chapter, IHRL and IHL contain relevant provisions which protect students and education staff as individuals. ICL criminalizes 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”.⁴⁹⁷ 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.⁴⁹⁸ 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 non-international or international armed conflict, 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 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.

⁴⁹⁷ Art.2 ICCPR. See also CESCR General Comment 20 (2009).

⁴⁹⁸ For more on derogations, see Chapter 2.

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.⁴⁹⁹ 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 international or non-international armed conflict. However, the recruitment of children under the age of 15 is 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

⁴⁹⁹ Art.75 Additional Protocol I, Part II Fourth Geneva Convention. ICRC CIHL Study, Rule 88, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88.

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 18.⁵⁰⁰ Further, the ICC in *Lubanga* 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.

⁵⁰⁰ For example, Optional Protocol to the; 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. 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”.¹

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 international human rights law is to protect and promote the rights of individuals, its provisions do not directly protect buildings per se, 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.

As IHL applies 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

¹ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/66/256, 3 August 2011, para.38.

when it might become a military object, and lose 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,

[S]tates 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.²

As already mentioned, the CESCR noted that “education in all its forms and at all levels” shall be available as well physically accessible.³ 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 technology⁴

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 realized at the time a State enters into a treaty which

² Art.3 CRC.

³ See Chapter 3. CESCR General Comment 13, para.6.

⁴ CESCR General Comment 13, para.6.

protects this right, it must take all possible measures to fully realize 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.⁵ 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.⁶ 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 International Human Rights Law 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 avoid 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”.⁷

In *World Organisation Against Torture, Lawyers’ Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v Zaire*, the African Commission on Human and Peoples’ Rights 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.⁸ 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.

⁵ See also UNESCO, *Protecting Educational from Attack: A State-of-the-Art Review* (UNESCO, 2010), 165, 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.

⁶ See Vernor Muñoz Villalobos, *Report submitted by the Special Rapporteur on the right to education* E/CN.4/2005/50, 17 December 2004, para.119, where he noted that “security in schools forms part of the human right to education”.

⁷ Progress report of the Special Rapporteur on the right to education (2000), para.32, available at: <http://www.unhcr.org/refworld/topic,4565c2252f,4565c25f3d1,3b00f4290,0,UNCHR,THEMREPORT,html>.

⁸ 25/89, 47/90, 56/91, 100/93 *World Organisation Against Torture, Lawyers’ Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v Zaire*, 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,⁹ 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, the Convention against Discrimination in Education 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”.¹⁰

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.¹¹ This is now reflected in Principle 23 of the Guiding Principles on Internal Displacement.¹²

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.¹³ With regard to reports submitted by States Parties to the Optional Protocol to the CRC

⁹ *Cyprus v Turkey* (2001) ECtHR Application No 25781/94.

¹⁰ Art.5(3) CDE.

¹¹ 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), available at: www.unhcr.org/refworld/docid/3d4f95e11.html.

¹² See Chapter 4.1.

¹³ See *Concluding Observations of the Committee on the Rights of the Child: Burundi*, 10/16/2000, CRC/C/15/Add.133, paras 64–65; *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, CRC/C/ETH/CO/3, 1 November 2006, paras 27–28; *Concluding observations of the Committee on the Rights of the Child: Israel* 10/09/2002, 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, second and*

on the Involvement of Children in Armed Conflict, the Committee called for an immediate cessation of school occupation by armed forces,¹⁴ and for the reparation of the damage to school infrastructure due to military occupation.¹⁵

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.¹⁶

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.¹⁷ 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.¹⁸ The restrictions imposed by the blockade

third periodic reports of States parties due in 2005, Republic of Moldova, CRC/C/MDA/3, 10 July 2008, 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, (HRW, 2011), 46.

¹⁴ 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, CRC/C/OPAC/COL/CO/1 (11 June 2010), para.39.*

¹⁵ *Ibid.*, para 25.

¹⁶ Committee on the Rights of the Child, 49th Session, 15 September–3 October 2008, Day of General Discussion on “The Right of the Child to Educational in Emergency Situations”, Recommendations, 19 September 2008, para.35.

¹⁷ 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”.

¹⁸ Report of the United Nations Fact-Finding Mission on the Gaza Conflict: Human Rights in Palestine and Other Occupied Arab Territories, A/HRC/12/48, 25 September 2009.

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.¹⁹ 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,²⁰ as well as the general closure of schools during hostilities which disrupted the programme of study.²¹

The African Commission considered the impact of sanctions and embargos imposed on Burundi by neighbouring States, following the overthrow of the democratically elected leader.²² 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.²³ 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”.²⁴ 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 knowl-

¹⁹ *Ibid.*, para.1269.

²⁰ *Ibid.*, para.1271.

²¹ *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.

²² 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.

²³ 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. Available at www.ohchr.org/EN/Issues/Education/SREducation/Pages/AnnualReports.aspx. 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.”

²⁴ HRCouncil, *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.

edge. However, in order to have access to the internet, educational facilities must also have electricity and the necessary information technology 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”.²⁵

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.²⁶ In most circumstances, it is better for persons with disabilities to be educated within the general educational system,²⁷ 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.²⁸ 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 livable for students with disabilities.²⁹ 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.

²⁵ See Art.20 which states this has to be prohibited by law.

²⁶ Arts 9 and 24 of the CRPD. See also Chapter 4.

²⁷ CESCR, General Comment No 5. See also the *General Comment No 9 on the rights of children with disabilities* (2006). Available at www2.ohchr.org/english/bodies/cescr/comments.htm.

²⁸ Art.9 CRPD; see also Art.3 Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, UNGA Res 1608 of 7 June 1999.

²⁹ Art.19 CRPD.

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 ICECSR. The right to property is protected in many regional treaties.³⁰

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,³¹ including both individual and collective ownership.³² 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,³³ 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”.³⁴ 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”.³⁵ Sanitation facilities must be

³⁰ Arts 13 and 14 ACHPR (see also Art.21); Art.21 IACHR; Art.1 of Protocol I to the ECHR on the right to peaceful enjoyment of possessions.

³¹ Art.16 CEDAW.

³² Art.5(v) CEDAW.

³³ Art.12 ICESCR; Art.5(e)(iv) CERD; Arts 11(1)(f) and 12 CEDAW; Art.24 CRC; Art.11 of the revised European Social Charter; Art.16 ACHPR; Art.10 Additional Protocol to the IACHR in the Area of Economic, Social and Cultural Rights of 1988.

³⁴ CESCR, General Comment 14, *The right to the highest attainable standard of health (article 12 of the ICCPR)*, E/C.12/2000/4, 11 August 2000, para.11. Available at www2.ohchr.org/english/bodies/cescr/comments.htm.

³⁵ 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*, CRC/GC/2003/4, 1 July 2003, para.17. See also Office of the United Nations High Commissioner for Human Rights, WHO, *The Right to Health*, Factsheet

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.³⁶

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.³⁷ 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”.³⁸

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”.³⁹ This means that States must take measures to prevent accidents within educational facilities.⁴⁰

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.⁴¹ It is not only the establishment of educational

No 31, 1. Regarding the right to health including a right to education on health, see also Art.11(3) of the revised ESC; Art.10(2)(e) of the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights of 1988; and Art.10(h) CEDAW.

³⁶ See UN-Water, “Sanitation contributes to dignity and social development”, factsheet No 3 (2009), 1. Available at www.unwater.org/downloads/media/sanitation/iys/FactsheetNo.3_EN_2009.pdf. See also Interim report of the Special Rapporteur on the right to education, A/66/269, 5 August 2011, para.79.

³⁷ CESCR General Comment 14, paras 4 and 11.

³⁸ *Yakye Axa Indigenous Community v Paraguay* (Judgment of 17 June 2005), para.166.

³⁹ Art.12(2)(b) ICESCR.

⁴⁰ CESCR General Comment 14, para.15.

⁴¹ See in general CESCR General Comment 3.

facilities but also their maintenance, including the upkeep of piped water, which bears significant costs.⁴²

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.⁴³ 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 international and non-international armed conflicts as part of customary international law.⁴⁴ 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 are civilian and military objects. The word ‘object’ is used by the

⁴² Preliminary report of the Special Rapporteur on the right to education, E/CN.4/1999/49, para.52. Available at: www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/6a76ced2c8c9efc780256738003abbc8?Opendocument.

⁴³ Arts 48 and 51(2) Additional Protocol I; Art.13(2) Additional Protocol II; Rule 1 Customary IHL Database (ICRC), available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1; Rule 7 Customary IHL Database (ICRC), available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule7.

⁴⁴ *Tadić*, paras 97–98; Rule 7 Customary IHL Database (ICRC), available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule7.

Geneva Conventions and Additional Protocols to mean something that is visible and tangible.⁴⁵ This includes buildings, vehicles, and infrastructure such as roads, bridges and school grounds. In an international armed conflict 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.⁴⁶ Typical civilian objects include:

- school buildings;
- school grounds;
- university buildings;
- public transportation or personal transportation; and
- houses and other private property.

Typical civilian objects can become military objects.⁴⁷ 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*.⁴⁸

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:⁴⁹

- 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,⁵⁰ for a military

⁴⁵ C Pilloud (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), para.2008.

⁴⁶ Art.52(1) Additional Protocol I; ICRC CIHL Study, Rule 9, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule9.

⁴⁷ ICRC CIHL Rule 10 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule10.

⁴⁸ Art.52(2) Additional Protocol I; ICRC CIHL Study, Rule 8, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8.

⁴⁹ C Pilloud, above n.45, para.2020.

⁵⁰ This future use is what is meant by ‘purpose’: C Pilloud, *ibid.*, para.2022.

purpose, and make an effective contribution to military action.⁵¹ Similarly, objects which make an effective contribution to military action by virtue of their location may become military objects.⁵²

The word ‘effective’ may be considered to be a limitation on the definition of military object.⁵³ It requires that an object be of more than some indirect use to the military before it may be targeted.⁵⁴

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”⁵⁵ and not merely “hypothetical and speculative”.⁵⁶ This definition of ‘military object’ is customary international law⁵⁷ and binding on all parties to a conflict across both international and non-international armed conflict.

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 recognize ‘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.⁵⁸ There is some dispute, however, about the extent to which the potential military use of civilian infrastructure may render it a lawful target

⁵¹ For consideration on the issue of ‘purpose’, see the Eritrea Ethiopia Claims Commission, Partial Award on *Western Front, Aerial Bombardment and Related Claims*, 19 December 2005, (2006) ILM 45, 396, paras 106–121.

⁵² Art.52 Additional Protocol I. C Pilloud (fn.1147 above), para.2021.

⁵³ P 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 C Byron, “International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage” in (2010) 13 *Yearbook of International Humanitarian Law* 175, 180.

⁵⁴ This issue is disputed by the United States Government who employs a broader approach to the definition of military object: C Byron, *ibid.*, 183.

⁵⁵ C Pilloud, above n.45, para.1976.

⁵⁶ *Ibid.*

⁵⁷ Eritrea Ethiopia Claims Commission, above n.51, 396; Rule 8, ICRC CIHL database, www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8.

⁵⁸ 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.

under this test,⁵⁹ 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.⁶⁰ 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.⁶¹ Distance learning is, therefore, dependent on civilian infrastructure, 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*.⁶² This rule is designed to prevent parties to a conflict from “shooting first and asking questions later”.⁶³ The presumption in favour of civilian status (and therefore protection from attack) operates where:⁶⁴

- an educational facility appears to be used for a military purpose but:
 - 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”.⁶⁵ This is assessed from the point of view of a soldier on the ground or of a military commander controlling an attack.

⁵⁹ For the view that bridges and other logistical infrastructure are military objectives in a conflict, see the discussion in *ibid*. See also Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP, 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 M Bothe, “The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY” (2001) 12 *EJIL* 531.

⁶⁰ The Global Coalition to Protect Educational from Attack, *Study on Field-based Programmatic Measures to Protect Educational from Attack* (GCPEFA, 2011), 17.

⁶¹ *Ibid*.

⁶² Contained in Art.52(3) Additional Protocol I; ICRC CIHL Study, Rule 10, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule10.

⁶³ C Pilloud, above n.45, 2030.

⁶⁴ As outlined by S Oeter, “Methods and Means of Combat” in D Fleck (ed.) *The Handbook of International Humanitarian Law* 2nd edn (OUP, 2009), 188.

⁶⁵ *Ibid*.

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.⁶⁶

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,⁶⁷ safety zones,⁶⁸ installations containing dangerous forces,⁶⁹ the natural environment,⁷⁰ and installations and vehicles used in peace-keeping missions.⁷¹ Each of these objects is subject to a special, more restrictive, protective regime.

Distinction in Non-international Armed Conflict

Neither Common Article 3 of the Geneva Conventions nor Additional Protocol II (which regulate non-international armed conflicts) sets out the concepts of civilian or military objects. However, the jurisprudence of the ICTY⁷² 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 non-international armed conflict.⁷³ The ICRC Study concludes that State practice supports the application of these concepts to non-international armed conflict and also sets out a number of other treaties applicable to non-international armed conflict which also use these concepts.⁷⁴

Therefore, although not mentioned in the text of Common Article 3 nor Additional Protocol II, the concepts of civilian and military object apply to non-international armed conflict as part of customary international law.⁷⁵ So parties to a non-international armed conflict must at all times

⁶⁶ Declarations of Understanding of several NATO forces when ratifying Additional Protocol I cited *ibid.*, 185. See for example BR-Drs 64/90 of 2 February 2009, 132 (Germany), 125 (Belgium), 127 (Italy), 129 (Netherlands), 130 (Spain).

⁶⁷ Art.19 GC I; Art.23 GC II; Art.18 GCIV; Art.8(e) Additional Protocol I; ICRC CIHL Study, Rule 28, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule28.

⁶⁸ See for example ICRC CIHL Study, Rule 35, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule35.

⁶⁹ See for example ICRC CIHL Study, Rule 42, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule42.

⁷⁰ See for example ICRC CIHL Study, Rule 45, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule45.

⁷¹ See for example ICRC CIHL Study, Rule 33, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule33.

⁷² *Tadić*, paras 97–98.

⁷³ ICRC CIHL Study Rule 7, available at: www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule7.

⁷⁴ See for example Art.3(7) Amended Protocol II to the Convention on Certain Conventional Weapons; Art 2(1) Protocol III to the Convention on Certain Conventional Weapons; Art 6(a) Second Protocol to the Hague Convention for the Protection of Cultural Property among others.

⁷⁵ ICRC CIHL Study, Rule 7, available at: www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule7. A proposition also supported by D Fleck “The Law of Non-International Armed

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.⁷⁶ 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 international armed conflicts. Although Additional Protocol II (applying to non-international armed conflict) 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 international and non-international armed conflict.⁷⁷

Definition of ‘Attack’

An attack is ‘any act of violence’ against an adversary, whether in offence or in defence.⁷⁸ 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.⁷⁹ 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”.⁸⁰ 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.

Conflicts” in D Fleck (ed.) *The Handbook of International Humanitarian Law* 2nd edn (Oxford: OUP, 2009), 628–629.

⁷⁶ See EFA Global Monitoring Report, 144. HRW, *Schools as Battlegrounds* (HRW, 2011) available at www.hrw.org/world-report-2011/schools-battlegrounds.

⁷⁷ ICRC CIHL Study, Rule 7, ICRC Customary IHL Database, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule7.

⁷⁸ Art.49, para.1 Additional Protocol I.

⁷⁹ Art.49, para.2 Additional Protocol I.

⁸⁰ S Oeter, “Methods and Means of Combat”, in D Fleck, above n.64, 176.

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.

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.⁸¹ 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 applies to both international and non-international armed conflict.⁸² 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 international and non-international armed conflict and under occupation.⁸³ This rule protects not only private property but also property belonging to the community or the State.⁸⁴ 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.⁸⁵ 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

⁸¹ Seizure and confiscation should be distinguished from “requisitioning”, which is permitted in some circumstances outlined in Arts 55 and 57 Fourth Geneva Convention. Note additional provisions applying to the personal property of prisoners of war outlined in Arts 119 and 130 Third Geneva Convention. Discussion of these provisions is beyond the scope of this Handbook.

⁸² ICRC CIHL Study, Rule 50, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule50. See also J Bing Bing, “Protected Property” and Its Protection in *International Humanitarian Law*, (2002) 15 (1) *Leiden Journal of International Law* 131, 133.

⁸³ Arts 28 and 47 Hague Regulations; Art.33 Fourth Geneva Convention; Art.4(2)(g) Additional Protocol II.

⁸⁴ J Pictet (ed.) *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1952–1960) Vol.4, 226–227.

⁸⁵ ICRC CIHL Study, Rule 52, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule52.

than is public property.⁸⁶ This rule forms part of customary international law.⁸⁷ Any educational facility, whether part of a public or private educational institution, is treated as if it is private property.⁸⁸

This means that educational facilities in occupied territory benefit from the following protection:

- they may not be confiscated;⁸⁹
- they may not be seized, destroyed, or wilfully damaged;⁹⁰
- 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.⁹¹

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 international armed conflict⁹² and in relation to particular objects (including education facilities) in non-international armed

⁸⁶ An occupying force may take possession of cash, funds, movable objects, stores and supplies if those objects are publically owned: Art.52 Hage Regulations. Public buildings and immovable public property must be safeguarded and administered by the occupying power in accordance with the rules of "usufruct": Art.55 Hague Regulations. However, it is probable that destruction of public buildings may be permitted on the grounds of military necessity: Art.53 Fourth Geneva Convention.

⁸⁷ ICRC CIHL Study, Rule 51, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule51.

⁸⁸ Art.56 Hague Regulations.

⁸⁹ Art.46 Hague Regulations. 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: Art.52 Hague Regulations. This prohibition on confiscation is subject to rules relating to communication equipment, transport and munitions, outlined in Art.53 Hague Regulations.

⁹⁰ It is not clear whether this rule is subject to military necessity or not: J Bing Bing, "Protected Property" and its Protection in *International Humanitarian Law*, (2002) 15 (1) *Leiden Journal of International Law* 131, 145. ICRC CIHL Study says it is subject to military necessity: See ICRC CIHL Study, Rule 51, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule51.

⁹¹ It is noted that legal proceedings is not the same as criminal proceedings and it may refer only to compensation proceedings. J Bing Bing, above n.90, 145; and Art.3 Hague Regulations.

⁹² See for example Art.2(b)(ii), (ix), (xiii), and (xxiv) of the Rome Statute.

conflicts.⁹³ 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.⁹⁴

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 protection across IHRL,⁹⁵ IHL⁹⁶ and ICL,⁹⁷ resulting in strong, non-derogable protection for educational faculties 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 fluid⁹⁸ 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.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ Similar calls for action have been made by the Committee on

⁹³ See for example Art.2(e)(ii), (iii), (iv), and (xii) of the Rome Statute.

⁹⁴ See discussion of IHRL, above.

⁹⁵ See discussion above. Also see the ECtHR cases: *Akdivar and others v Turkey*, ECtHR Judgment, 30 August 1996, para.88; *Selcuk and Asker v Turkey*, ECtHR Judgment, 24 April 1998, para.86; *Biligin v Turkey*, ECtHR Judgment, 16 November 2000, para.108.

⁹⁶ See for example Art.23 Hague Regulations, Art.50 First Geneva Convention, Art.51 Second Geneva Convention, Art.147 Fourth Geneva Convention, Art.46 Hague Regulations (applying to occupation). See also discussion above.

⁹⁷ See for example Art.8(b)(xiii) and Art.8(e)(xii) protecting property of an enemy in international and non-international armed conflicts respectively. See also discussion above.

⁹⁸ 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.

⁹⁹ See discussion of military objects, above.

¹⁰⁰ To the best knowledge of the authors, at the time of printing, no such IHRL cases existed.

¹⁰¹ Statement by the President of the Security Council, 6114th meeting of the Security Council, 29 April 2009, S/PRST/2009/9.

the Rights of the Child.¹⁰² 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 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”.¹⁰³ Crucially, this definition contains the limitation that ‘military operations’ must be those actions of armed forces that are ‘related to hostilities’.¹⁰⁴ 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 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.¹⁰⁵

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’.¹⁰⁶ 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

¹⁰² For example, see the CRC’s Concluding Observations: Colombia, UN Doc CRC/C/OPAC/COL/CO/1 (2010) paras 39–40, available at www2.ohchr.org/english/bodies/crc/docs/CRC.C.OPAC.COL.CO.1.doc; and the CRC’s Concluding Observations: Sri Lanka, UN Doc CRC/C/OPAC/LKA/CO/1 (2010), paras 24–25 available at www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-OPAC-LKA-CO-1.doc.

¹⁰³ C Pilloud, above n.45, para.1875.

¹⁰⁴ *Ibid.*

¹⁰⁵ 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.

¹⁰⁶ However, this term is also ambiguous and is in need of clarification.

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,¹⁰⁷ 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.

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.¹⁰⁸ 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.¹⁰⁹ 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*.¹¹⁰ Provisions of the Geneva Conventions and Additional Protocols contain both express and implied references to military necessity.¹¹¹

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

¹⁰⁷ Art.52 Additional Protocol I.

¹⁰⁸ Art.52(2) Additional Protocol I; ICRC CIHL Study, Rule 10, available at www.icrc.org/customary-ihl/leng/docs/v1_rul_rule10.

¹⁰⁹ American Military Tribunal in the 1948 *Hostage Case* (part of the “Subsequent Proceedings” at Nuremberg), 1253.

¹¹⁰ N Hayashi, “Requirements of Military Necessity in International Humanitarian Law and International Criminal Law” (2010) Vol.28 *Boston University International Law Journal* 39.

¹¹¹ 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.

- 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.¹¹²

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.¹¹³

Similarly, parties to a conflict can *never* use or occupy an educational facility for any of the following reasons:

- where such use is intended to terrorize the civilian population;¹¹⁴
- where the use is intended to cause destruction of the facility and disrupt educational activity;¹¹⁵
- where the use is for a political or ideological, rather than *military*, purpose;¹¹⁶
- to demonstrate military strength;¹¹⁷
- to intimidate the political leadership of an adversary;¹¹⁸ or
- to use the civilian character of the facility to shield the military occupants (human shields).¹¹⁹

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.¹²⁰ This

¹¹² Y Dinstein, “Military Necessity” in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition, www.mpepil.com.

¹¹³ See also, for example, Art.58(a) Additional Protocol 1 on the obligation to the maximum extent feasible not to locate military objects in densely populated areas; ICRC CIHL Study, Rule 23, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule23.

¹¹⁴ 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.

¹¹⁵ 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.

¹¹⁶ See S Oeter, “Methods and Means of Combat” in D Fleck, above n.64, 180.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ See below for discussion of this. See also Art.28 Fourth Geneva Convention, Art.51(7) Additional Protocol I.

¹²⁰ As set out in Art.52(2) Additional Protocol I; ICRC CIHL Study, Rule 10, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule10.

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 neutralize 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 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.¹²¹ This means that the object may be attacked, regardless of the presence of civilians,¹²² 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 international and non-international armed conflict.¹²³ 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;¹²⁴

¹²¹ As previously outlined, this criteria are also part of customary international law applicable in both international and non-international armed conflict: ICRC CIHL Study Rule 10 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule10.

¹²² D Fleck (ed.) *The Handbook of International Humanitarian Law*, 2nd edn (Oxford: OUP, 2009), 187

¹²³ See ICRC CIHL Study, Rule 22, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule22, Rule 23, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule23, and Rule 24, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule24.

¹²⁴ See also ICRC CIHL Study Rule 24 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule24.

- 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 precautions¹²⁵ 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.¹²⁶

Importantly, the use of ‘human shields’ is strictly prohibited by IHL.¹²⁷ 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 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.¹²⁸

¹²⁵ To the maximum extent feasible.

¹²⁶ Art.58(2) Additional Protocol and Art.13(1) Additional Protocol I; and ICRC CIHL Study, Rule 22, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule22.

¹²⁷ Art.28 Fourth Geneva Convention; Art.51(7) Additional Protocol I.

¹²⁸ United Nations Economic and Social Council Committee on Economic, Social and Cultural Rights *Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment 13 (8 December 1999) UN Doc E/C.12/1999/10. Available at www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?OpenDocument.

IHL prohibits the attacking of objects indispensable to the survival of the civilian population with the intent to deprive the population of their supply.¹²⁹ This includes food, clothing and water installations. This means that water facilities that supply educational facilities may not be attacked by an enemy.¹³⁰ Further, IHL contains a general prohibition on starvation of the civilian population as a method of warfare,¹³¹ 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.¹³² Further, occupying powers must ensure that those civilians within their territory have their basic needs met.¹³³ 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 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.

¹²⁹ Art.54(2) Additional Protocol I; Art.14 Additional Protocol II; ICRC CIHL Study, Rule 53, available at www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter17_rule53. As noted above, this prohibition is not absolute in the case of international armed conflict 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.

¹³⁰ In so far as the supply belongs to the enemy. In international armed conflict attacks may be permissible where the attack occurred in friendly territory and on the grounds of imperative military necessity: Art.54(3) and (5) Additional Protocol I; Art.14 Additional Protocol II; ICRC CIHL Study, Rule 53, (fn.1227 above).

¹³¹ See Art.54(1) Additional Protocol I; Art 14 Additional Protocol II; ICRC CIHL Study Rule 53 (fn.1226 above). This prohibition is absolute in the case of non-international armed conflict.

¹³² Art.70 Additional Protocol I; ICRC CIHL Study Rule 55 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55.

¹³³ American Military Tribunal in the 1948 *Hostage Case* (part of the “Subsequent Proceedings” at Nuremberg), 1253.

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.¹³⁴ 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*.¹³⁵ Provisions of the Geneva Conventions and Additional Protocols contain both express and implied references to military necessity.¹³⁶

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).):

- 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.¹³⁷

The only legitimate military purpose recognized by IHL is the weakening of an enemy’s military forces.¹³⁸ 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.¹³⁹ 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

Proportionality¹⁴⁰ 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.¹⁴¹ This principle is part of customary international law.¹⁴²

¹³⁴ N Hayashi, above n.110, 39.

¹³⁵ 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.

¹³⁶ Art.52(2) of Additional Protocol I.

¹³⁷ Y Dinstein, above n.112.

¹³⁸ This is a long-standing maxim of IHL. See generally E 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.

¹³⁹ Art.52(2) Additional Protocol I; C Pilloud, above n.45, para.2028.

¹⁴⁰ Proportionality under IHL is different to the concept of proportionality under IHRL.

¹⁴¹ HP Gasser, “Protection of the Civilian Population”, in D Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edn (Oxford: OUP, 2009), 248; Y Dinstein, above n.59, 119.

¹⁴² ICRC CIHL Study, Rule 14, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14.

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”.¹⁴³ 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.¹⁴⁴ Whether or not an attack is excessive is to be assessed on its particular circumstances.¹⁴⁵ There is no mathematical formula for determining this.¹⁴⁶

The principle of proportionality is inherent in the principle of humanity, central to all of the rules of IHL.¹⁴⁷ 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 I¹⁴⁸ and it forms part of the customary international law.¹⁴⁹

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 military one is distinct from whether or not it may legally be attacked in accordance with the requirement of proportionality.¹⁵⁰

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.¹⁵¹ 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.

¹⁴³ Dissenting Opinion of Judge Higgins in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, para.587.

¹⁴⁴ Art.57(2) Additional Protocol I.

¹⁴⁵ See, for example, the *Nuclear Weapons Advisory Opinion*, above n.143.

¹⁴⁶ N Melzer, *Targeted Killing in International Law*, (OUP, 2008), 362. This makes it very difficult to assess.

¹⁴⁷ See ICRC CIHL Study, Rule 14, (see fn.1239 above).

¹⁴⁸ Including Art 51(5)(b) and 57 Additional Protocol I.

¹⁴⁹ Art 23(1) GCIII Art 28 GCIV Art 51(5)(b) and 57(2)(a)(iii) Additional Protocol I and Y Dinstein (see fn.1237 above), 120. ICRC CIHL Study, Rule 14, (see fn.1239 above).

¹⁵⁰ Y Dinstein, above n.59, 120.

¹⁵¹ Art.28 Fourth Geneva Convention; Art.51(7) Additional Protocol I; ICRC CIHL Study, Rule 97, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule97.

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.¹⁵² Further, parties, were required to spare such buildings, as far as possible, from the effects of bombardment from the land, air and sea.¹⁵³ 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.¹⁵⁴ Nevertheless, it is clear that the Hague Regulations, and other early IHL texts,¹⁵⁵ 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.

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.¹⁵⁶

Cultural Property

Educational facilities are not, in themselves, protected as cultural property.¹⁵⁷ 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.¹⁵⁸ Parties to the Convention must respect cultural property whether it is on their own or an enemy’s territory and in both international and non-international armed conflict.¹⁵⁹

¹⁵² Art.56 Hague Regulations.

¹⁵³ Art.27 Hague Regulations and Art.5 Hague Convention IX.

¹⁵⁴ GR 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.

¹⁵⁵ Including the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact) (15 April 1935).

¹⁵⁶ For the argument that educational facilities ought to benefit from such special protection, see GR Bart, above n.154.

¹⁵⁷ See Art.1 Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954).

¹⁵⁸ Arts 6, 16 and 17 Hague Convention on Cultural Property.

¹⁵⁹ Art.4 Hague Convention on Cultural Property.

‘Cultural property’ refers to any movable or immovable objects of great importance to the cultural heritage of all people.¹⁶⁰ 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.¹⁶¹ This list could include many educational facilities with buildings of historical or religious 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.¹⁶² 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.¹⁶³ 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)¹⁶⁴ or directly attacking it.¹⁶⁵ 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

¹⁶⁰ Art.1 Hague Convention on Cultural Property. This is a vague and potentially broad definition.

¹⁶¹ Art.53 Protocol 1 to the Hague Convention on Cultural Property. See also ICRC CIHL Study, Rule 40, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule40 and Rule 39 available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule39.

¹⁶² Special protection also exists; however, this regime has not been implemented with any success and will, therefore, not be considered here.

¹⁶³ Art.4 Hague Convention on Cultural Property.

¹⁶⁴ Art.4 Hague Convention on Cultural Property, Operation of Art.53 Additional Protocol I and Art.16 Additional Protocol II. ICRC CIHL Study, Rule 39, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule39.

¹⁶⁵ 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, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule38.

there is no feasible alternative for obtaining a similar military advantage.¹⁶⁶ 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”¹⁶⁷ and administered by UNESCO.¹⁶⁸ Parties that have control over listed cultural property are prohibited from using the property for a military purpose, without exception.¹⁶⁹ 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”.¹⁷⁰

Medical Facilities

Where an educational facility is also a ‘medical unit’, it benefits from special protection under IHL.¹⁷¹ Medical units may be fixed or mobile¹⁷² and need not be permanent, and must be marked with a red cross or equivalent symbol.¹⁷³ The term ‘medical unit’ includes the following objects, whether or not they are military or civilian:¹⁷⁴

- 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 facilities at universities.

Medical units must be respected and protected at all times in both international and non-international armed conflict.¹⁷⁵ This forms part of customary international law.¹⁷⁶ They cannot

¹⁶⁶ Arts 52 and 53 Additional Protocol I; Art.16 Additional Protocol II, Art.4(1) and (2) Cultural Property Convention; Art.6 Optional Protocol to Hague Convention on Cultural Property.

¹⁶⁷ Art.12 Optional Protocol 2 to the Hague Convention on Cultural Property, ICRC Factsheet. Criteria for listing are outlined in Art.10 of the Optional Protocol.

¹⁶⁸ At www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/armed-conflict-and-heritage/enhanced-protection/. There was no educational facility on the list at the time of writing.

¹⁶⁹ Art.12 Optional Protocol 2 to the Hague Convention on Cultural Property.

¹⁷⁰ ICRC Fact Sheet, Art.13 Optional Protocol 2 to the Hague Convention on Cultural Property.

¹⁷¹ See for example ICRC CIHL Study, Rule 28, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule28.

¹⁷² Art.8(e) Additional Protocol I.

¹⁷³ Arts 38 and 42 First Geneva Convention.

¹⁷⁴ Art.8(e) Additional Protocol I.

¹⁷⁵ Art.17(1) Hague Regulations; Art.19(1) First Geneva Convention; Art.18 Fourth Geneva Convention; Art.12(1) and 21 Additional Protocol I; Art.11(1) Additional Protocol II;

¹⁷⁶ ICRC CIHL Study, Rule 28, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule28.

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.¹⁷⁷ Protection of medical units is lost only in limited circumstances.¹⁷⁸

5.2.12 Special Protection of Education 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 neutralized zones for the civilian population. Article 14 provides that parties¹⁷⁹ 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 neutralized zones for the protection of civilians by agreement between the parties to a conflict. Both safety zones and neutralized zones should not be subject to military attack.¹⁸⁰

Article 60 of Additional Protocol I sets out provisions for parties to a conflict to agree to declare tracts of land ‘demilitarized’, or ‘outside’ the area of conflict, so that they cannot not be subject to military operations.¹⁸¹ ‘Military operations’ means “all movements and activities related to hostilities, carried out by armed forces”.¹⁸² This is different to the use of safety or neutralized zones which are areas of refuge surrounded by hostilities.¹⁸³

The IHL of non-international armed conflict does not mention safety, neutralized or demilitarized zones. However “nothing prevents parties to such an internal conflict from establishing zones or localities through special agreements”.¹⁸⁴ In any event, the ICRC has declared that Articles 14, 15 and 60 are part of customary international law applicable in international and

¹⁷⁷ Art.19(2) First Geneva Convention; Art.18(5) Fourth Geneva Convention; Art.12(4) Additional Protocol I.

¹⁷⁸ They are used outside their humanitarian function to undertake acts harmful to the enemy, Warning must be given: Art.21 First Geneva Convention; Art.19 Fourth Geneva Convention; Art.13(1) Additional Protocol I; Art.11(2) Additional Protocol II.

¹⁷⁹ 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.

¹⁸⁰ ICRC CIHL Study, Rule 35, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule35. UN General Assembly Resolution 2675 (XXV) (1970). In practice, however, the use of safety zones has proved to have a limited success, especially in non-international armed conflicts. 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 K Landgren, “Safety Zones and International Protection: A Dark Grey Area” (1995) 7 *Int Journal of Refugee Law* 3, 436.

¹⁸¹ H-P Gasser, “Protection of the Civilian Population”, in D Fleck, above n.141, 255.

¹⁸² C Pilloud, above n.45, para.2304.

¹⁸³ H-P Gasser, “Protection of the Civilian Population”, in D Fleck, above n.141, 255.

¹⁸⁴ *Ibid.*

non-international armed conflict.¹⁸⁵

The use of neutralized or demilitarized 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.¹⁸⁶ 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 demilitarized 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.¹⁸⁷ However, neutralized zones established under IHL have been used by parties to a conflict to protect particular objects during hostilities. For example, Argentina and Britain agreed to the establishment of a neutralized zone around the Anglican Cathedral in Port Stanley on the Falkland Islands.¹⁸⁸

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.

¹⁸⁵ ICRC CIHL Study, Rule 35, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule35; Rule 36, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule36.

¹⁸⁶ See discussion by K Landgren, above n.180, 436.

¹⁸⁷ However, in the Nepalese programme “Schools as Zones of Peace”, parties to a conflict agreed to depoliticize 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, resourcecentre.savethechildren.se/content/library/documents/case-study-promoting-schools-zones-peace-szop-campaign-nepal; and UNICEF www.unicef.org/infobycountry/nepal_62457.html.

¹⁸⁸ See S Oeter, “Methods and Means of Combat”, in D Fleck, above n.64, 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.

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 international criminal law. 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 criminalizes acts of “intentionally directing attacks against buildings dedicated to ... education ... provided they are not military objectives”.¹⁸⁹

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.

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.¹⁹⁰

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;¹⁹¹ and the offence of directing attacks against civilian objects as a war crime.¹⁹²

¹⁸⁹ Art.8(2)(e)(iv) of the Rome Statute criminalizes this conduct in non-international armed conflicts. Also see Law of the Iraqi High Tribunal 2005, Section 4, Art.13: War Crimes Art.13(b)(10).

¹⁹⁰ See the ICC’s Elements of Crimes.

¹⁹¹ Art.2(d) ICTY Statute, Art.6 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, and Art.8(2)(a)(iv) Rome Statute. 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.

¹⁹² Art.8 (2)(b)(ii) Rome Statute.

The war crime of destruction and appropriation of property requires the prosecution to prove (in addition to the elements for war crimes in an international or non-international armed conflict):

- 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.¹⁹³

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.¹⁹⁴ It is for the prosecution to prove to the required standard that the educational facility was not being used for military purposes. No offence is committed if the perpetrator did not intend that civilian property should be the object of attack.¹⁹⁵

If the prosecution fails to prove a sufficient nexus between the attack on the educational facility and an international or non-international armed conflict, 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,¹⁹⁶ 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,¹⁹⁷ and there are also a number of ongoing ICTY cases involving charges of destruction or wilful damage to insti-

¹⁹³ See the ICC's Elements of Crimes.

¹⁹⁴ See for example *Prosecutor v Milan Martić*, Judgment, Case No 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.

¹⁹⁵ See for example Art.8(2)(b)(ii) Rome Statute.

¹⁹⁶ Arts 8(2)(b)(ix) and 2(e)(iv) Rome Statute.

¹⁹⁷ *Prosecutor v Miodrag Jokic*, Sentencing Judgment, Case No IT-01-42/1-S (18 March 2004) (accused sentenced to 7 years' imprisonment following a guilty plea for his involvement in this attack), and *Prosecutor v Pavle Strugar*, Judgment, Case No IT-01-42-T (ICTY) (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).

tutions dedicated to education.¹⁹⁸ Similarly, the Court of Bosnia and Herzegovina¹⁹⁹ has dealt with war crimes cases involving attacks on educational facilities,²⁰⁰ as has the War Crimes Chamber of the District Court of Belgrade.²⁰¹

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 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*,²⁰² 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”.²⁰³ 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 asso-

¹⁹⁸ *Prosecutor v Jadranko Prlic and 5 others*, Case No IT-04-74 (ICTY) (case still in Pre-Trial); *Prosecutor v Goran Hadzic*, Case No IT-04-75-PT ICTY (case still in pre-trial); *Prosecutor v Vojislav Seselj*, Case No IT-03-67 (closing arguments); *Prosecutor v Zdravko Tolimir* (“Srebrenica”), Case No IT-05-88/2 (the accused is currently on trial).

¹⁹⁹ A State court, with jurisdiction over international crimes as well as domestic offences. See the website of the court in English, at www.sudbih.gov.ba.

²⁰⁰ *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 Ljubicic*, indictment 26 September 2000). 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).

²⁰¹ 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 Strugar, Jokic and Kovacevic*, Case No IT-01-42-PT (28 May 2003)) but his case was referred to the Serbian authorities under ICTY Rule 11*bis*. 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.

²⁰² 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”.

²⁰³ *Kordic and Cerkez* Trial Judgment, 26 February 2001, para.360.

ciated with the history and culture of a people”.²⁰⁴ 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.²⁰⁵

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.”²⁰⁶ 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.²⁰⁷

5.3.3 Attacking Educational Facilities as a Crime against Humanity

Additionally, the targeting of educational facilities may be characterized 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,²⁰⁸ the jurisprudence of the ICTY,²⁰⁹ and the 1991 International Law Commission Report,²¹⁰ in reaching a conclusion that the destruction of religious buildings is a clear case of persecution as a crime against humanity.²¹¹ 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.²¹² 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.²¹³

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

²⁰⁴ *Kordic and Cerkez* Appeals Judgment, 17 December 2004, para.91.

²⁰⁵ *Kordic and Cerkez* Appeals Judgment, *ibid.*, para.92.

²⁰⁶ *Prosecutor v Naletelic and Martinovic*, IT-98-34, 31 March 2003. See paras 604–605.

²⁰⁷ *Ibid.*, para.185 of the judgment stated that this would be a defence, although a different Trial Chamber in the same case disagreed.

²⁰⁸ Judgment of the IMT, 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.

²⁰⁹ *Blaskic* Trial Judgment, IT-95-14-T, 3 March 2000, para.227.

²¹⁰ 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”).

²¹¹ *Kordic and Cerkez* Trial Judgment, 26 February 2001, para.206.

²¹² *Ibid.*, para.207.

²¹³ *Kordic and Cerkez* Appeals Judgment, IT-95-14/2-A 17 December 2004, para.108.

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.²¹⁴ 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.²¹⁵

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

²¹⁴ 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 *The Prosecutor v Omar Hassan Ahmad Al Bashir: Public Redacted Version of the Prosecutor's Application Under Article 58*, ICC-02/05-157-AnxA July 14 2008).

²¹⁵ *Prosecutor v Vujadin Popovic et al.* (Srebrenica) 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 Simic* (Bosanski Samac) ICTY, IT-95-9/2 17 October 2002 (pleaded guilty—5 years for participating in torture of prisoners at a school); *Prosecutor v Dragan Zelenovic* (Foca), ICTY, IT-96-23/3 4 April 2007 (pleaded guilty, sentenced to 17 years for his part in torture and rape of women in schools); *Prosecutor v Stevan Todorovic* (Bosanski Samac), ICTY, IT-95-9/1 31 July 2001 (pleaded guilty to torture and beatings at schools, sentenced to 10 years); *Prosecutor v Dragan Obrenovic* (Srebrenica) ICTY, IT-02-60/2 10 December 2003 (pleaded guilty to persecutions as a crime against humanity, including assaulting and executing civilians at schools, sentenced to 17 years' imprisonment); *Prosecutor v Vidoje Blagojevic and Dragan Jokic*, ICTY, IT-02-60 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); ICTY, *Prosecutor v Radoslav Brdjanin* (Krajina) ICTY, IT-99-36 11 December 2002 (convicted, sentenced to 30 years for persecutions, torture, deportation, inhumane acts which took place inter alia at schools); *Prosecutor v Hadzihasanovic*, ICTY, IT-01-47 22 April 2008 (Enver Hadzihasanovic convicted for cruel treatment at a Zenica music school, sentenced to 3½ years); *Prosecutor v Ivica Rajic* (Stupni do) ICTY, IT-95-12 8 May 2006 (pleaded guilty, sentenced to 12 years for his role in beatings and detention of men in schools); *Prosecutor v Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic* (Foca) ICTY, IT-96-23 and 23/1 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 Trbic* (Srebrenica) ICTY, IT-05-88/1 21 October 2010 (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); *Prosecutor v Stevan Janovic and Dragan Stankovic* (Foca) ICTY, IT-96-23/2 (case transferred to Bosnia and convicted of rape and deportation as a crime against humanity, sentenced to 10 years).

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.

International Human Rights Law 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 non-international or international armed conflict 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.²¹⁶ 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 IHL²¹⁷ and ICL,²¹⁸ 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.²¹⁹

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.

²¹⁶ See, for example, Art.8(b)(xiii) and Art.8(e)(xii) protecting property of an enemy in international and non-international armed conflicts respectively.

²¹⁷ Art.52 Additional Protocol II.

²¹⁸ Art.8(2)(b)(ix) and (e)(iv), specific to educational facilities, Art.8(b)(xiii) and Art.8(e)(xii) Rome Statute, for protection of property more generally.

²¹⁹ Art.52 Additional Protocol I.

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.²²⁰ ICL sets out similar rules, prohibiting only intentional attacks or use of indiscriminate weapons.²²¹

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.

²²⁰ Which is different from the IHRL notion of proportionality. See discussion of the rules of military necessity and proportionality, above.

²²¹ See, for example, Arts 8(2)(a)(iv); (b)(ii) and (xx); and (e)(iv) and (xii) Rome Statute.

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.¹ Violation of the right to education, and of other related rights and protection affecting education, is a breach of an international obligation of a State, with resulting harm, as was set out in Chapters 4 and 5.

The consequence of these 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.² 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.

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 Law³ (Basic Principles on the Right to Remedy and Reparation):

¹ See for example Art.2(3) ICCPR under which States Parties need to provide remedies for any violation of an ICCPR provision.

² See M Jordans *et al*, “Systematic Review of Evidence and Treatment Approaches: Psychosocial and Mental Health Care for Children in War” 14 (2009) *Child and Adolescent Mental Health* 2.

³ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross*

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.⁴

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 obligation to respect, ensure respect for and implement IHRL and IHL.

As a result, States shall offer "available adequate, effective, prompt and appropriate remedies, including reparation".⁵ 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".⁶ 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.⁷

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.⁸

Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), available at: www2.ohchr.org/english/law/remedy.htm. 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.

⁴ Principle 11 Basic Principles on the Right to Remedy and Reparation. Although non-binding, these Basic Principles were adopted by a consensus resolution at the UN General Assembly and thus represent universally accepted standards.

⁵ Section I. 2 (c) Basic Principles on the Right to Remedy and Reparation.

⁶ Principle 18 Basic Principles on the Right to Remedy and Reparation. Note that the ILC Draft 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). Available at www.un.org/documents/ga/res/40/a40r034.htm. See also D Shelton, *Remedies in International Human Rights Law*, 2nd edn (OUP, 2005), 7–8. See also P de Greiff, *Handbook of Reparations* (OUP 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 Art.8 UDHR and its "effective remedies", questioning what this concept means.

⁷ HRC, General Comment No 31, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para.16.

⁸ Principle 12 Basic Principles on the Right to Remedy and Reparation.

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, being principally duties of cessation and non-repetition;⁹
- the creation of a duty to make full reparation.¹⁰

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 corollary’ of that act is the obligation to make reparation.¹¹ This obligation of reparation arises regardless of whether an international court or tribunal has jurisdiction and requires a State to make reparation. It is 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 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 international levels regarding reparation, the following analysis will examine whether an individual right to reparation has been recognized 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 International Court of Justice) 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.¹²

⁹ Art.30 of the ILC Draft Articles on State Responsibility.

¹⁰ Art.31 of the ILC Draft Articles on State Responsibility.

¹¹ ILC “Commentary to Articles on State Responsibility” in the *Yearbook of the International Law Commission* (2001) Vol. II, Part Two, 91.

¹² *Factory at Chorzów (Germany v Poland)*, Merits, 1928, PCIJ Series A, No 17, 47.

This definition has been applied subsequently on numerous occasions by the ICJ, human rights supervisory mechanisms and a multitude of international tribunals.¹³

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. 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.¹⁴ 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 violates a rule of IHL has an obligation to make reparation to an individual harmed irrespective of a court or tribunal having jurisdiction.¹⁵

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.¹⁶

¹³ ILC “Commentary to Articles on State Responsibility”, in the *Yearbook of the International Law Commission* (2001) Vol.II, Part Two, 91.

¹⁴ HRC General Comment 31, para.2.

¹⁵ F Kalshoven, “State Responsibility for Warlike Acts of the Armed Forces”, (1991) 40 *International and Comparative Law Quarterly* 827; C Greenwood, “International Humanitarian Law (Laws of War)”, in F Kalshoven (ed.), *The Centennial of the First International Peace Conference* (Kluwer, 2000), 250; and L 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.

¹⁶ 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 extra-territorial legislation, such as the United States’ Alien Tort Statute (28 USC § 1350). For further information regarding the Alien Tort Statute, see A Seibert-Fohr, “United States Alien Tort Statute” in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition, www.mpepil.com.

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 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.¹⁷ 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.¹⁸

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.¹⁹ In addition, a State which 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.²⁰

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,²¹ or specifically provide for a right to an effective remedy.²² 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

¹⁷ See, for example, the ECtHR case *P.F. and E.F. v United Kingdom* (2010) Admissibility, 23 November 2010, unreported, Application No 28326/09 ECtHR, 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.

¹⁸ See, for example, the practice set out in ICRC CIHL Study, Rule 150, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150.

¹⁹ 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.

²⁰ Consider the case *Leyla Zahir v Turkey* (ECtHR) (10 November 2005).

²¹ Art.2 (3), ICCPR.

²² Art.8, UDHR; Art.25, ACHR; Art.13, ECHR. They do not provide for a "right to reparation" *per se*.

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.²³ However, once a violation of an ESCR is established, victims are entitled to adequate reparation in the same manner as victims of CPR.²⁴

The ECHR,²⁵ the ACHR²⁶ and the Optional Protocol to the African Charter establishing an African Court of Human Rights²⁷ 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’, 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 the merits.²⁸ All of these bodies consider the indication of such measures to be binding on the State to which they are directed.²⁹

The HRC, 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.³⁰ Alongside this practice, the HRC 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”.³¹ 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”.³² States Parties have not always complied with the HRC’s views.³³

²³ 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.

²⁴ See the Maastricht Guidelines, para.23.

²⁵ Art.41 of the ECHR 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”.

²⁶ Art.63 of the ACHR 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”.

²⁷ 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, entry into force 25 January 2004, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997). The ACtHR issued its first judgment in December 2009.

²⁸ See, for example, Art.5 Optional Protocol on ESCR.

²⁹ For example, for the HRC, such situations that fall under Rule 92 of the Rules of Procedure of the Human Rights Committee.

³⁰ See, for example, *Lantsova v Russia*, 26 March 2002, para.11, HRC Communication No 763/1997.

³¹ HRC General Comment 31, para.16.

³² *Ibid.*, para.15.

³³ See HJ Steiner, P Alston and R Goodman, *International Human Rights in Context: Law Politics and Morals*, 3rd edn (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.

Other global supervisory mechanisms have also adopted a broadly similar stance. For example, 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 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.³⁴

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 Committee on the Elimination of Racial Discrimination:

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.³⁵

In addition, Article 14 of the CAT provides that victims of torture must be able to 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

³⁴ 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, UN Doc CEDAW/C/GC/28, para.32. Available at www2.ohchr.org/english/bodies/cedaw/comments.htm.

³⁵ CERD General Recommendation No 26: Art 6 of the Convention 24/03/2000, Gen Rec No 26 (General Comments), para.2. Available at www2.ohchr.org/english/bodies/cerd/comments.htm.

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 39.³⁶

Finally, special procedures established by the HRC are also relevant to reparations within the IHRL framework. In particular, the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, created by the UN Human Rights Council in 2011, has the mandate to make recommendations for the protection of human rights in post-conflict situations, including on the issue of reparations.³⁷

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 international and non-international armed conflict.³⁸

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 international armed conflict, 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.³⁹

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

³⁶ CRC General Comment 5, para.24.

³⁷ Human Rights Council Eighteenth Session, *Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/18/L.22 adopted 29 September 2011 available at daccess-dds-ny.un.org/doc/RESOLUTION/LTD/G11/163/88/PDF/G1116388.pdf?OpenElement. [not found]

³⁸ ICRC CIHL Study, Rule 150, available at: www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter42_rule150.

³⁹ Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, entry into force 26 January 1910, 9 UKTS (1910).

for the obligation to make reparation to individuals for violations of IHL in international armed conflict.⁴⁰ There is a body of scholarly opinion in favour of its existence,⁴¹ as well as a number of judicial decisions.⁴² However, there are no examples of States affording reparations to individuals under Article 3 of the Hague Convention IV and Article 91 of Additional Protocol I.

The IHL of non-international armed conflict is more limited in its recognition of the right to remedy and reparations of victims than the law of international armed conflict. Neither Article 3 Common to the Geneva Conventions nor Additional Protocol II contain references to the right to remedy or reparation.

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 international and non-international armed conflict 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

⁴⁰ F Kalshoven, above n.15; C Greenwood, above n.15 and L Zegveld, "Remedies for Victims of Violations of International Humanitarian Law" (2003) 85 *International Review of the Red Cross* 498, 506.

⁴¹ E-C Gillard, "Reparation for Violations of International Humanitarian Law" (2003) 85 *International Review of the Red Cross* 536; R 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; A Randelzhofer, "The Legal Position of the Individual under Present International Law", in A Randelzhofer and C Tomuschat (eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (Martinus Nijhof 1999), 231; R Bank and E Schwager, "Is There a Substantive Right to Compensation for Individual Victims of Armed Conflict Against a State under International Law?" (2006) 49 *German Yearbook of International Law* 398; R Hofmann, "Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation Against States under International Law?" in P-M Dupuy et al. (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (N P Engel Verlag, 2006), 357; M Frulli, "When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The Markovich Case", in (2003) 1 *Journal of International Criminal Justice* 417; M Sassoli, "State Responsibility for Violations of International Humanitarian Law" (2002) 84 *International Review of the Red Cross* 419; L Zegveld, above n.40.

⁴² For example, *Ferrini v Federal Republic of Germany* (2004) Corte di Cassazione (Sezioni Unite), 11 March 2004, 87 *Rivista di diritto internazionale* 539. 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)* (2012) ICJ Judgment, 3 February 2012.

contained mechanisms for providing a general remedy or reparation for violations of its provisions.⁴³

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.⁴⁴

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.⁴⁵ 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.⁴⁶

6.2.1 International Human Rights Law Mechanisms

The IHRL discussed in Chapters 3, 4 and 5, and contained in international treaties, are binding legal obligations on 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

⁴³ Aside from limited access to restitution in the ICTY and ICTR, discussed below.

⁴⁴ Art.75 Rome Statute.

⁴⁵ Art.14 ICCPR.

⁴⁶ For example, the UN Human Rights Council 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 UN Human Rights Council.

domestic law, for example by limiting its justiciability, it is in breach of its obligations under international law.⁴⁷ This must be taken into account when considering claims based on IHRL. In addition, as set out in Chapter 2, it is necessary that a 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 do so. 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 be subject to undue delay.

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 rights matters. 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 recognized 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.⁴⁸
- CERD: The Committee on the Elimination of All Forms of Racial Discrimination may consider individual communications in relation to CERD regarding States parties that have made the necessary declaration under Article 14 of CERD.
- CRC: In December 2011, the UN General Assembly approved a third Optional Protocol to the CRC. This Protocol will enable individuals to submit complaints in relation to States parties to the Protocol regarding specific violations of their rights under the CRC and the first two Optional Protocols to the CRC. The Third Optional Protocol will enter into force

⁴⁷ According to Art 27 VCLT “[A] party may not invoke the provisions of its international law as justification for its failure to perform a treaty”.

⁴⁸ 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), available at www.hreoc.gov.au/sex_discrimination/publication/mechanisms/opcedaw.pdf.

once 10 States have ratified it.⁴⁹ At present, child rights protected under other treaties may be raised before the other treaty-monitoring committees with competence to consider individual complaints.

- CRPD: The Committee on the Rights of Persons with Disabilities may consider individual communications in relation to the Convention on the Rights of Persons with Disabilities 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 Human Rights Committee (HRC) 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 has given competence to the CESCR to receive and consider individual complaints (“communications ... by or on behalf of individuals or groups of individuals”) concerning States parties to the Protocol.⁵⁰ This Optional Protocol is not yet in force but likely to come into force shortly.⁵¹ This new mechanism is likely to play an essential role in the supervision of the ICESCR and thus in the protection of the right to education and other associated ESCR.

The UN treaty bodies have mostly dealt with education through the prohibition of non-discrimination. The Committee on the Elimination of All Forms of Racial Discrimination considered in *D. R. v Australia*⁵² 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 the CERD. In *Er v Denmark*,⁵³ it considered an allegation of discrimination on the basis of the practice of a school which excluded 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 (a form of education). The HRC, in *Waldman v Canada*, decided that Canada violated Article 26 ICCPR

⁴⁹ For further information on the Optional Protocol on a Communications Procedure, see the web page of the Office of the United Nations High Commissioner for Human Rights on the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure at www2.ohchr.org/english/bodies/hrcouncil/OEWG/index.htm; and the web page of the Office of the United Nations High Commissioner for Human Rights on the Committee of the Rights of the Child at www2.ohchr.org/english/bodies/crc/.

⁵⁰ Art.2 of the Optional Protocol to the ICESCR (GA resolution A/RES/63/117) of 10 December 2008, adopted by the Human Rights Council by its resolution 8/2 of 18 June 2008. In addition to communications, the OP-ICESCR also provides for inquiry procedures which allows the CESCR to investigate particular situations, as well as inter-States complaint mechanisms.

⁵¹ As of 23 November 2011, it has 39 signatories and 5 States Parties.

⁵² Communication No 42/2008.

⁵³ Communication No 40/2007.

by providing funding for the schools of one religious group and not another.⁵⁴ Again in relation to religion, the HRC decided that compulsory religious classes must be taught in an impartial manner and students must be able to exempt themselves from such a class.⁵⁵ The HRC has also stated that restrictions on religious expression in higher educational facilities which may restrict access to education violate Article 18 ICCPR.⁵⁶ The HRC also considered the right to education of non-nationals in a complaint by Iranian 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 HRC 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".⁵⁷ 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.⁵⁸

If a human rights treaty 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.⁵⁹ The level of compliance with the treaty bodies findings is variable.

There is also a complaint procedure, with no remedial element, before the UN Human Rights Council for "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances."⁶⁰ This applies to all Member States of the UN, irrespective of whether they are parties to any particular treaty, as the Human Rights Council is a UN body. The Human Rights Council 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 dialogue with the government. One mechanism, the Working Group on Arbitrary Detention, has a quasi-judicial procedure 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.

⁵⁴ Communication No 694/1996.

⁵⁵ *Unn et al v Norway* (1155/2003).

⁵⁶ See *Hudoyberganova v Uzbekistan* (931/2000) 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.

⁵⁷ *D and E, and their two children v Australia* (Communication No 1050/2002), para.64.

⁵⁸ See also *Omar Sharif Baban, on his own behalf and on behalf of his son, Bawan Heman Baban, v Australia* (Communication No 1014/2001).

⁵⁹ For further information on individual communications see the website of the Office of the United Nations High Commissioner for Human Rights at www2.ohchr.org/english/bodies/petitions/individual.htm.

⁶⁰ See General Assembly resolution 60/251 of 15 March 2006.

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. However, other systems, such as that under the Arab League,⁶¹ the Association of South East Asian Nations⁶² 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.

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 of Human and Peoples' Rights was only established in 2004 by means of the Optional Protocol to the ACHRP 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.⁶³

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,⁶⁴ and address situations of alleged rights violations through a communications procedure,⁶⁵ which can be initiated either by States parties to the Charter or by non-State entities.⁶⁶ For a communication

⁶¹ 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.

⁶² 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.

⁶³ 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 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.

⁶⁴ Art.46 ACHRP.

⁶⁵ Arts 47–59 ACHRP.

⁶⁶ 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 three months elapse and the situation has not been adequately addressed or resolved, either State may

to be considered by the Commission, the applicant State or party must have exhausted all domestic remedies, or such procedure must have been unduly prolonged.⁶⁷ In addition, every State party to the African Union is obliged to submit every two years a report to the African Commission⁶⁸ on the legislative or other measures taken with the view to giving effect to the rights set forth in the ACHPR.⁶⁹

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.⁷⁰ It may also make recommendations to the Assembly as it deems appropriate.⁷¹ 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 recognized by African States, African practice that conforms with regional and international law, as well as legal precedent and doctrine.⁷²

The ACHRP 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 recognized 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."⁷³

Over time the Commission has recommended that States which it views 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,⁷⁴ restitution⁷⁵ and compensation.⁷⁶

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.

⁶⁷ Arts 50 and 56(5) ACHRP.

⁶⁸ Art.45 (Part II of the ACHRP).

⁶⁹ Art.62 ACHRP.

⁷⁰ Art.52 ACHRP.

⁷¹ Art.53 ACHRP.

⁷² Arts 60–61 ACHRP.

⁷³ *Free Legal Assistance Group v Zaire, Communication No 25/89*, 4 *International Human Rights Reports* (1997) 89, para.39.

⁷⁴ See *Alhassan Abubakar v. Ghana* Communication No 103/93, 6 *IHRR* 832 (1999), 833.

⁷⁵ *Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v Nigeria* Communication No 60/91, 3 *IHRR* 132(1996), 133.

⁷⁶ *Union Inter Africaine 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 au Angola v Angola* Communication No 159/96, 6 *IHRR* 1139 (1999), 1141.

There have been two key communications regarding the right to education, brought before the Commission, involving complaints of many violations of human rights.⁷⁷

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.⁷⁸ The applicants alleged that the embargo violated, inter alia, the right to education under Article 17(1) by preventing the importation of school materials.⁷⁹ 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.⁸⁰ 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.⁸¹

In *Democratic Republic of Congo v Burundi, Rwanda and Uganda*,⁸² 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.⁸³

The Commission recommended that adequate reparations be paid.

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*,⁸⁴ the plaintiff, the NGO Registered Trustees of the Socio-Economic Rights

⁷⁷ See also *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995). 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).

⁷⁸ ACHPR *Association Pour la Sauvegarde de la Paix au Burundi/Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Decision taken at the 33rd Ordinary Session, Niamey, Niger, May 2003.

⁷⁹ *Ibid.*, para.3.

⁸⁰ *Ibid.*, para.24.

⁸¹ *Ibid.*, paras 75–79.

⁸² ACHPR *Communication 227/99—DRC/Burundi, Rwanda and Uganda* (2003); and *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19.

⁸³ *Ibid.*, para.88.

⁸⁴ *SERAP v Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010)

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 justiciable under the ACHPR and decided that all Nigerians are entitled to education as a human right.

*African Committee of Experts on the Rights and Welfare of the Child*⁸⁵

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.⁸⁶ 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.⁸⁷ To date, the Committee has received two communications, one of which has been finalized by the Committee. Both involve the right to education.

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*,⁸⁸ the complainants alleged numerous violations by the Kenyan Government,⁸⁹ 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”.⁹⁰ It also appointed a member of the Committee to follow up on the implementation of this decision.

⁸⁵ www.acerwc.org

⁸⁶ Art.43 ACRWC.

⁸⁷ In contrast to the CRC.

⁸⁸ *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* (22 March 2011). Decision: No.002/Com/2009.

See in particular paras 63–65.

⁸⁹ Art.6(2), (3) and (4) and Art.3 ACRWC.

⁹⁰ Para.69(4).

In *Hansungule, Acirokop and Mutangi v Uganda*,⁹¹ 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.⁹² 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 and General Comment of the UN Committee on Economic, Social and Cultural Rights.⁹³

Inter-American Human Rights System

Inter-American Commission on Human Rights

Established in 1959, the Inter-American Commission on Human Rights (IACCommHR) is an autonomous organ of the OAS,⁹⁴ 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 on the basis of its investigations and findings.⁹⁵ The IACCommHR may also mediate between the applicants and the respondent States to reach an amicable settlement.⁹⁶

Although the decisions of the Commission are not legally binding, in the event of non-compliance by a State with the IACCommHR'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 IACCommHR reason against this referral.⁹⁷ Generally, compliance with decisions of the IACCommHR is not as good as decisions of the IACtHR.⁹⁸

⁹¹ *Hansungule, Acirokop, and Mutangi v The Republic of Uganda* (2005) "Complainants' Communication" 13 June 2005.

⁹² *Ibid.*, para.77.

⁹³ Paras 77–98.

⁹⁴ Its mandate can be found in the OAS Charter, as amended by the 1967 Protocol of Buenos Aires: hrlibrary.ngo.ru/oasinstr/buenosaires.html, and ACHR as well as in the American Declaration of the Rights and Duties of Man.

⁹⁵ On the establishment of a right of private petition by the ACHR, see P Engstrom and A Hurrell, "Why the Human Rights Regime in the Americas Matters", in V Popovski and M 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.

⁹⁶ Art 48(1)(f).

⁹⁷ Rule 45 (as amended) of the IACHR's Rules of Procedure, available at: www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm.

⁹⁸ CM Cerna, "The Inter-American System For the Protection of Human Rights" (2004) *Florida Journal of International Law* 195, 202.

The IACommHR can decide whether to conduct state-specific monitoring and reporting.⁹⁹ 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.¹⁰⁰ 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,¹⁰¹ these on-site reports and comprehensive country reports were a useful way to clarify the situation.¹⁰²

Under Article 44 of the ACHR, 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 recognize 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.¹⁰³ Ten States have recognized this inter-State jurisdiction.¹⁰⁴ 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,¹⁰⁵ 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.¹⁰⁶

Inter-American Court on Human Rights

The Inter-American Court on Human Rights (IACtHR), which was also created under the ACHR,¹⁰⁷ has greater powers than the IACommHR to rule on violations of Convention rights, and to order, where appropriate, remedies and reparation.¹⁰⁸ Its decisions are legally

⁹⁹ 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.

¹⁰⁰ 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. T 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.

¹⁰¹ M Serrano, “The Human Rights Regime in the Americas: Theory and Reality”, in V Popovski, M Serrano and N Turner, above n.95, 16.

¹⁰² See, for example, the fallout of the 1979–80 report into the forced disappearances in Argentina to realize the impact that they had on shifting regional and international opinion and mobilizing the process of democratization: CM Cerna, above n.98, 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 F Gonzalez, “The Experience of the Inter-American Human Rights System” (2009–2010) *Victoria University Wellington Law Review* 103, 109.

¹⁰³ Art.45(1) ACHR.

¹⁰⁴ www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm.

¹⁰⁵ Art.46 ACHR.

¹⁰⁶ Art.46(2) ACHR.

¹⁰⁷ Ch.VIII ACHR.

¹⁰⁸ Art.63 ACHR.

binding.¹⁰⁹ 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.¹¹⁰

In addition to ratifying the Convention, it is also necessary for States to make a declaration recognizing the competence and jurisdiction of the IACtHR.¹¹¹ Twenty-two States have accepted the IACtHR's jurisdiction, more than double the number having recognized the competence of the IACtHR.¹¹² 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,¹¹³ complainants can now bring their case directly from the IACtHR (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.¹¹⁴ Moreover, 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 law¹¹⁵ 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”.¹¹⁶ 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 CPR, 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

¹⁰⁹ DJ Harris, “Regional Protection of Human Rights: The Inter-American Achievement”, in DJ Harris and S Livingstone (eds) *The Inter-American System of Human Rights* (Clarendon, 1998), 3.

¹¹⁰ Art 64 ACHR.

¹¹¹ Art 62 ACHR.

¹¹² www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm. This may evidence the wariness of States towards independent mechanisms allowing the right to individual petitions.

¹¹³ Art.61(1) ACHR.

¹¹⁴ *Pueblo Bello Massacre v Colombia*, Merits, Reparations and Costs, 31 January 2006, para.212, Inter-Am.Ct.H.R. Series C No 140; *19 Tradesmen v Colombia*, Merits, Reparations and Costs, 5 July 2004, para.187, Inter-Am.Ct.H.R. Series C. No 109; *Las Palmeras v Colombia*, Reparations and Costs, 26 November 2002, para.65, Inter-Am.Ct.H.R. Series C. No 96.

¹¹⁵ *Baldeón-García v Peru*, Merits, Reparations and Costs, 6 April 2006, para.175, Inter-Am.Ct.H.R. Series C. No 147; *Velásquez Rodríguez v Honduras*, Reparations and Costs, 21 July 1989, para.25, Inter-Am.Ct.H.R. Series C No 7.

¹¹⁶ *Ibid.*

sole provision of the Convention that refers to ESC rights,¹¹⁷ it has adopted what has been termed as an ‘integrated approach’ to rights.¹¹⁸ 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.¹¹⁹

In *Jehovah’s Witnesses v Argentina*,¹²⁰ 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.¹²¹ The 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*,¹²² a girl was expelled from a subsidized 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

¹¹⁷ L Sheaver, “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*.

¹¹⁸ M 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, at 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.”

¹¹⁹ JM 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.

¹²⁰ Case 2137.

¹²¹ Art.XII of the American Declaration on Human Rights.

¹²² Case 12.046: *Monica Carabantes Galleguillos v Chile* 12 March 2002, Report Number 33/02. Friendly Settlement, available at: www.cidh.oas.org/annualrep/2002eng/Chile12046.htm.

contains provisions on the rights of pregnant students or nursing mothers to have access to educational establishments”.¹²³

In the *Case of the Girls Yean and Bosico v Dominican Republic*,¹²⁴ 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.¹²⁵ While the application was pending, the IACommHR adopted precautionary (interim) measures to ensure that the two girls did not suffer irreparable harm.¹²⁶ 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.¹²⁷

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.¹²⁸ 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.¹²⁹ The right to education was viewed by the IACtHR as being the primary means through which “the vulnerability of children is gradually overcome”.¹³⁰

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.¹³¹ 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”,¹³² 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

¹²³ *Ibid.*, para.14.

¹²⁴ *Case of the Girls Yean and Bosico v Dominican Republic* (22 February 2001) Report No.28/01, Case 12.189.

¹²⁵ Judgment of IACtHR, para.185.

¹²⁶ 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.

¹²⁷ Judgment of IACtHR, para.27.

¹²⁸ *Advisory Opinion on the Juridical Condition and Human Rights of the Child* (Advisory Opinion OC-17/2002 of 28 August 2002).

¹²⁹ *Ibid.*, paras 80–86.

¹³⁰ *Ibid.*, para.88.

¹³¹ *Juvenile Re-education Institute v Paraguay* (Judgment of 2 September 2004).

¹³² *Ibid.*, para.172.

plan”.¹³³ 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.

European Mechanisms

The European Court of Human Rights (ECtHR) monitors compliance with the ECHR. In addition there is the European Social Charter, 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.

European Court of Human Rights

The ECHR established the European Court of Human Rights, 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.¹³⁴ 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.¹³⁵ The repeated references by the Court to the provision of compensation “where appropriate”¹³⁶ reflect its general position that Article 13 does not provide an independent right to a remedy.¹³⁷ However, the Court has consistently held that

¹³³ *Ibid.*, para.172.

¹³⁴ 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.

¹³⁵ See *Tanrikulu v Turkey*, Merits, Grand Chamber, 8 July 1999, para.117, 30 EHRR 950; *Aydin v Turkey*, Merits, Grand Chamber, 25 September 1997, para.103, 25 EHRR 251; *T.P. and K.M v United Kingdom*, Merits, Grand Chamber, 10 May 2001, para.110, 34 EHRR 42.

¹³⁶ *Ibid.*

¹³⁷ See *McCann v United Kingdom*, Merits, Grand Chamber, 5 September 1995, para.219, 21 EHRR 97. This case has been presented in Chapter 3. However, see also *Kelly et al v United Kingdom*, Merits, 4 May 2001, 37 EHRR 52.

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.¹³⁸

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.

Several cases concerning the interpretation of the right to education under Article 2 of Protocol 1 have come before the Court.¹³⁹ 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".¹⁴⁰ 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.¹⁴¹

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

¹³⁸ See, for example, *Akdivar et al v Turkey*, Just Satisfaction, Grand Chamber, 1 April 1998, para.47, unreported, Application No 21893/93; *Iatridis v Greece*, Just Satisfaction, Grand Chamber, 19 October 2000, para.32, unreported, Application No 31107/96. As a consequence, in contrast to the IACtHR, the ECtHR does not award forms of reparation such as rehabilitation. But *Cf Assanidze v Georgia, Merits, Grand Chamber*, 8 April 2004, at para.203, 39.

¹³⁹ See also *Kjeldsen, Busk Madsen and Pedersen v Denmark*, 4.1.4 above, and *Timishev v Russia*, discussed at 4.1.5 above.

¹⁴⁰ *Case Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium v Belgium*, (Merits) Application No 1474/62, Interpretation adopted by the Court, para.3.

¹⁴¹ *Ibid.*

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.

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 1.¹⁴² 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.¹⁴³ 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.¹⁴⁴

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.¹⁴⁵ 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.

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

¹⁴² *Cyprus v Turkey*, para.278.

¹⁴³ *Cyprus v Turkey*, para.43.

¹⁴³ *Cyprus v Turkey*, para.254.

¹⁴⁴ See the Open Society Institute, "The right to education and minority language", 2. www.soros.org/resources/articles_publications/articles/education-minority-language-20042501/edminlang.pdf.

¹⁴⁵ 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. See the Open Society Institute, "The right to education and minority language", 2. www.soros.org/resources/articles_publications/articles/education-minority-language-20042501/edminlang.pdf.

complaints for violations of the Charter.¹⁴⁶ It does not allow for individual complaints. Rather, 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,¹⁴⁷ in which the Committee affirmed that the Charter was to be interpreted in accordance with the Vienna Convention on the Law of Treaties 1969 and as a human rights instrument to complement the ECHR. The Committee documented the interaction between the two sets of rights and recognized 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.¹⁴⁸

One serious criticism of the European Committee of Social Rights is the fact that the Committee has no power to order remedies.¹⁴⁹ 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.¹⁵⁰ 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.

Court of Justice of the European Union

The Charter of Fundamental Rights applies to EU bodies and institutions and Member States

¹⁴⁶ 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.

¹⁴⁷ 12 (2005) IHRR 1153, 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.

¹⁴⁸ *International Federation of Human Rights Leagues (FIDH) v France* paras 27, 28 and 29. See also *International Commission of Jurists v Portugal*, *International Association Autism-Europe v France*, and *Mental Disability Advocacy Centre (MDAC) v Bulgaria*, all discussed at 4.1.5 above.

¹⁴⁹ See H 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, and 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.

¹⁵⁰ For example, a claim for compensation was made in Complaint No 9/2000 *Confederation française de l'Encadrement v France*, para.58. However, it has made requests to the Committee of Ministers to make a contribution to the costs of a successful complaint in Complaint No 15/2003 *European Roma Rights Centre v Greece*, although the Committee did not agree to these requests.

of the EU, solely in the context of their activities within the scope of EU law.¹⁵¹ Under the Charter, EU nationals cannot claim a right to education in their home State, but can do so if they move to another Member State.¹⁵²

The case law of the Court of Justice of the European Union (ECJ) on the right to education has generally concentrated on the right to equal access and non-discrimination.¹⁵³ 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,¹⁵⁴ 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,¹⁵⁵ including university education.¹⁵⁶

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 international and non-international armed conflict, 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 international armed conflict, 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 non-international armed conflict. 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

¹⁵¹ Charter of Fundamental Rights of the European Union, Art.51.

¹⁵² Commentary of the Charter of Fundamental Rights of the European Union, 144, available at: www.feantsa.org/files/housing_rights/Instruments_and_mechanisms_relating_to_the_right_to_housing/EU_network_commentary_eucharter.pdf.

¹⁵³ See, for example, ECJ Case 293/83, *Gravier v City of Liège* [1985] ECR 593 (judgment of 13 February 1985); ECJ Case 9/74, *Casagrande v Landeshauptstadt München* [1974] ECR 773 (judgment of 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, fra.europa.eu/fraWebsite/attachments/FRA-report-rights-child-conference2010_EN.pdf.

¹⁵⁴ Some assistance given by Member States to their nationals to undertake vocational training may fall outside the scope of EU law. ECJ Case 39/86, *Sylvie Lair v University of Hannover* [1988] ECR 3161 (judgment of 21 June 1988).

¹⁵⁵ ECJ Case 293/83, *Gravier v City of Liège* [1985] ECR 593 (judgment of 13 February 1985), para 30.

¹⁵⁶ ECJ Case 24/86, *Blaizot v University of Liège* [1988] ECR 379 (judgment of 2 February 1988).

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.¹⁵⁷

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 express remedy for victims of these violations.¹⁵⁸ 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 International Committee of the Red Cross (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.¹⁵⁹ Its position is recognized under the Geneva Conventions and its delegates receive special protection and benefit from particular rights assisting them to further the ICRC's mandate.¹⁶⁰ Although in non-international armed conflict the legal recognition and protection of the role of the ICRC is more limited in the text of the relevant treaties,¹⁶¹ the ICRC is still a vital mechanism for protecting the rights of victims of non-international armed conflict.

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.¹⁶² 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,¹⁶³ 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.¹⁶⁴ These

¹⁵⁷ For more information on these and other State based mechanisms, see T Pfanner "Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims" 874 (2009) 91 *International Review of the Red Cross*, 279.

¹⁵⁸ However, see the discussion of reparations under IHL.

¹⁵⁹ See the mission statement of the ICRC at www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm.

¹⁶⁰ See for example, Art.126 Third Geneva Convention; Art.143 Fourth Geneva Convention. Also, Art.9 First, Second and Third Geneva Conventions and Art.10 Fourth Geneva Convention.

¹⁶¹ For example, Common Art.3 recognizes 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 non-international armed conflicts, see M 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(1) *American University Law Review* 83–97.

¹⁶² For more information of the work of the ICRC, please see its website: www.icrc.org.

¹⁶³ In accordance with the ICRC's Assistance Policy, available at www.icrc.org/eng/assets/files/other/irrc_855_policy_ang.pdf.

¹⁶⁴ See the description of the ICRC's "protection and assistance activities" in T Pfanner, above n.157, 290–299.

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.¹⁶⁵ 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.

Special Agreements with Non-State Armed Groups

In situations of non-international armed conflict 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.¹⁶⁶ It is possible for these agreements or declarations to contain provisions relating to the making of reparations to individual victims of non-international armed conflict. There is some practice to suggest that non-State armed groups may agree to make such reparations,¹⁶⁷ 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 non-international armed conflict in the Philippines agreed to comply with IHRL and IHL during the conflict¹⁶⁸ and to provide justice, including compensation, to victims of violations.¹⁶⁹ Practice does not support the conclusion that non-State armed groups are liable for reparations for violations of IHL in non-international armed conflict outside of agreements or declarations setting out their consent for such liability.¹⁷⁰

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.

¹⁶⁵ L Zegveld, above n.40, 515.

¹⁶⁶ Common Art.3(2); As discussed in Chapter 2 of this Handbook.

¹⁶⁷ See discussion set out in ICRC CIHL Study, Rule 150, Associated Practice available at www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter42_rule150.

¹⁶⁸ 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.

¹⁶⁹ Art.2(3) of Part III 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.

¹⁷⁰ See for example the practice set out in ICRC CIHL Study. Rule 150 (see fn.1485 above).

6.2.3 International Criminal Law Mechanisms

In recent years, procedural mechanisms within the framework of the ICC have been established to develop principles relating to reparations for victims. 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. The ICC has not yet delivered a judgment on the issue of reparations¹⁷¹ and, as such, no general principles as to when the Court might order reparations can be determined.

The International Criminal Court Regime

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 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 and 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.

¹⁷¹ However, the forthcoming sentencing judgment of *Lubanga* may address this issue.

***Ad Hoc* and Mixed Tribunals Regimes**

The ICTY and ICTR do 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 have 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 must be made by the prosecution in each Tribunal, and cannot be made by the victim.¹⁷² As with reparations under the ICC regime, such claims can 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.¹⁷³

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.¹⁷⁴ 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.¹⁷⁵ 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.

Similarly, the Statute of the Lebanon Tribunal permits the Tribunal to identify victims who have suffered harm as the result of a crime prosecuted under its auspices and recognizes 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.¹⁷⁶ 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 is endowed with the power to apply ICL and prosecute individuals within the territory of the Former Yugoslavia since 1991,¹⁷⁷ and similarly

¹⁷² Rule 105 of *Rules of Procedure and Evidence* for both Tribunals.

¹⁷³ Rule 106 of *Rules of Procedure and Evidence* for both Tribunals.

¹⁷⁴ Rules 23, 100(2), 110(3) and 113(1) of the Internal Rules of Extraordinary Chambers in the Courts of Cambodia (Rev 2), as revised on 17 September 2010 (ECCC Internal Rules).

¹⁷⁵ L Zegveld, above n.40, 90.

¹⁷⁶ Art.25 Statute of Special Tribunal for Lebanon. 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.

¹⁷⁷ Security Council Resolution 808, 22 February 1993, para.1.

the ICTR is has jurisdiction to prosecute breaches of ICL committed within the State of Rwanda and those committed by Rwandan citizens in the territory of neighbouring States.¹⁷⁸

Similarly the mixed tribunals like those in Cambodia, Lebanon, East Timor and Sierra Leone apply international criminal law, 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.

6.2.4 Other Relevant Mechanisms for Reparation

International Court of Justice

Although the International Court of Justice (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.¹⁷⁹

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 authorized UN organs and specialized agencies refer to it.¹⁸⁰ 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.¹⁸¹ Advisory proceedings are essentially non-binding, however, an Advisory Opinion is an "authoritative statement of the applicable law".¹⁸²

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

¹⁷⁸ Security Council Resolution 995, 8 November 1994, para.1.

¹⁷⁹ See for example *Wall Advisory Opinion*; and *DRC v Congo*.

¹⁸⁰ Art.65 ICJ Statute.

¹⁸¹ Arts 59 and 60 ICJ Statute. 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."

¹⁸² R Higgins, "Human Rights in the International Court of Justice", *Leiden Journal of International Law*, 20 (2007), 745, 750,

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.¹⁸³

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 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,¹⁸⁴ including damage caused to an educational building, educational fixtures, desks, books and other educational materials as the result of a cluster bomb attack.¹⁸⁵ 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.¹⁸⁶

Some claims commissions recognize the right of individuals to receive a remedy but require that, procedurally, the claims be submitted by the government of the individual.¹⁸⁷ This procedural rule exists in order to facilitate the processing of mass claims relating to particular violations.¹⁸⁸ 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.

¹⁸³ See R 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.

¹⁸⁴ Eritrea-Ethiopia Claims Commission, Final Award, Ethiopia’s Damages Claims, available at www.pca-cpa.org/upload/files/ET%20Final%20Damages%20Award%20complete.pdf, para.378–379.

¹⁸⁵ *Ibid.*, paras 160–161.

¹⁸⁶ Eritrea-Ethiopia Claims Commission, Final Award, Eritrea’s Damages Claims available at www.pca-cpa.org/upload/files/ER%20Final%20Damages%20Award%20complete.pdf, para.196; 204–205.

¹⁸⁷ For example, the United Nations Compensation Commission (Iraq) and the Eritrea-Ethiopia Claims Commission: L Zegveld, above n.40, 521–523.

¹⁸⁸ It does not support a conclusion that individuals have no right to compensation: Zegveld, *ibid.*

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.¹⁸⁹

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).¹⁹⁰ 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;¹⁹¹ the Austrian Fund for Reconciliation, Peace and Cooperation;¹⁹² the Swiss Banks Settlement reached in connection with the *Holocaust Victims Assets* litigation in the United States;¹⁹³ 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.¹⁹⁴ However, discussion of these national programmes is outside the scope of this Handbook.

¹⁸⁹ *Ibid.*, 523.

¹⁹⁰ See generally, P de Greiff, above n.6.

¹⁹¹ See www.stiftung-evz.de/eng.

¹⁹² See www.reconciliationfund.at/index.php.

¹⁹³ *Re Holocaust Victims Assets*, Final Order and Judgment, 9 August 2000, 96 Civ 4849 (ERK) (MDG).

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.

¹⁹⁴ For example, the ICC Trust Fund for Victims solicits resources for redress from States, intergovernmental organizations 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.

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”.¹⁹⁵ As a result, States shall offer “available adequate, effective, prompt and appropriate remedies, including reparation”.¹⁹⁶ 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 ECtHR¹⁹⁷ 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 IAComHR. 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 recognized 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, although the systems for both the ICESCR and the CRC have not yet entered in 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.¹⁹⁸

¹⁹⁵ Principle 11 Basic Principles on the Right to Remedy and Reparation.

¹⁹⁶ Section I. 2 (c) of the Basic Principles on the Right to Remedy and Reparation.

¹⁹⁷ Art 34 ECHR.

¹⁹⁸ For further information on individual communications, see the website of the Office of the United Nations High Commissioner for Human Rights: www2.ohchr.org/english/bodies/petitions/individual.htm.

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 non-international armed conflict, 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 mechanisms of IHRL and ICL have an important role to play in assisting victims of international and non-international armed conflict

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.

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 (usually between States) or non-international (usually between a State and a non-State armed group). 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 realized 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 international and non-international armed conflict 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 international armed conflict 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 international armed conflict, 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 non-international armed conflict, 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, physical and basic education is protected as is moral and religious education.¹ In addition, each rule of IHL applies without adverse distinction, including on grounds of gender,² so any education provided under these provisions must apply equally to male and female students. Except for Article 4(3)(a) of Additional Protocol II,³ there is no clear requirement under IHL to ensure appropriate education for persons with disability. However, the Convention on the Rights of Persons with Disabilities contains provisions seeking to ensure the protection and safety of persons with disabilities that specifically apply during armed

¹ See discussion of this in Chapter 3 above, and also J Pictet (ed.) *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1952–1960) Vol.4, 187. Article 4(3)(a) Additional Protocol II expressly provides for this.

² Common Art.3, Article 75 Additional Protocol I, Part II Fourth Geneva Convention. ICRC CIHL, Rule 88, available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88.

³ See discussion of this issue in Chapter 3 above.

conflict.⁴ Further, under IHL, education should, wherever possible, be provided in a culturally sensitive way.⁵

In order for education to receive the full benefit of IHL protection, violations of IHL that adversely impact on education need to be recognized 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 and inclusion of the application of IHL on the provision of education in the training of national armed forces would drastically improve awareness of the impact of education-related violations of IHL.

So far, there are no ICL provisions or case law 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 recognize the effect of insecurity and armed conflict on education. Further, it emphasizes that many violations of ICL which impact on the protection of education need to be recognized 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.⁶ The full protective power of ICL has not yet been realized in relation to education.

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.

⁴ Art.11 Convention on Rights of Persons with Disabilities.

⁵ See, for example, Art.24 Fourth Geneva Convention (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.

⁶ See discussion of these issues in Chapter 3 above.

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.

Each of the three legal regimes contain rules protecting the lives of students and education staff. 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,⁷ 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 international or non-international armed conflict: 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,⁸ 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

⁷ 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.

⁸ See discussion in Chapter 4.

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 emphasize 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

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.⁹

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.¹⁰

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 international and non-international armed conflict is prohibited by all three legal regimes.¹¹ 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.¹²

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.¹³ 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

⁹ Art.32 CRC.

¹⁰ Art.3(a) of ILO Convention on the Worst Forms of Child Labour.

¹¹ 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: Art.77(2) Additional Protocol I; Art.4(3) Additional Protocol II; and the Rome Statute also sets the age at 15: Art.8(2)(b)(xxvi) and Art.8(2)(e)(vii).

¹² For example, the definition of 'active' under the Rome Statute was considered to be broader than the term 'direct' under IHL: *Lubanga Case*, para.627. Under IHL both terms are treated as synonymous. For further discussion of this issue see N Urban, "Direct and Active Participation in Hostilities: The Unintended Consequences of the ICC's decision in Lubanga", at www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/#comments.

¹³ Arts 2 and 10 CEDAW.

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.¹⁴ This means that, potentially, IHL can at least take into account (although it cannot seek to remedy) wider issues of social inequality in relation to, for example, the allocation of humanitarian aid,¹⁵ 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 Convention on the Rights of Persons with Disabilities 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 necessary 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 per se 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.

¹⁴ See Chapter 4 above.

¹⁵ Women receive priority in aid distribution of medical supplies if they are pregnant or nursing mothers (Art.23 Fourth Geneva Convention; Art.70 Additional Protocol I). 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.

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 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.

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 international armed conflict¹⁶ and in relation to particular objects (including education facilities) to non-international armed conflicts.¹⁷ 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.¹⁸ Under IHL the definition of military object is broad and fluid.¹⁹ 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.²⁰ 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.²¹ 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

¹⁶ See, for example, Art.2(b)(ii), (ix), (xiii) and (xxiv) Rome Statute.

¹⁷ See, for example, Art.2(e)(ii), (iii), (iv) and (xii) Rome Statute.

¹⁸ See discussion of the two-step test of military objective in Art.52 Additional Protocol I, in Chapter 5 above.

¹⁹ 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.

²⁰ See discussion of military object above, in Chapter 5.

²¹ For a detailed discussion of this issue, see Chapter 5.

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, 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 recognize 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.²²

As a result, States should offer “available adequate, effective, prompt and appropriate remedies, including reparation”.²³ Reparation may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

²² Principle 11 Basic Principles on the Right to Remedy and Reparation.

²³ Section I. 2 (c) Basic Principles on the Right to Remedy and Reparation.

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. For example, 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.²⁴ 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 international and non-international armed conflict, 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 recognized through the remedy provided by the relevant court or tribunal.²⁵ Second, where a violation of a rule of IHL also amounts to a violation of a

²⁴ This will be the subject of the sentencing decision in the *Lubanga Case*, due to be handed down after publication of this Handbook.

²⁵ For further discussion of relevant cases see Chapter 4 above in relation to the right to life and the principle of distinction under IHL.

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 express reference to IHL.²⁶ The use of IHRL mechanisms is especially useful for victims of education-related violations of IHL in non-international armed conflict, 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.

²⁶ 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.

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.

8

Appendix A: International and Regional Treaties and other Relevant Instruments

8.1 GENERAL INTERNATIONAL TREATIES AND INSTRUMENTS

1945

United Nations Charter, entered into force on 24 October 1945 and available at www.un.org/en/documents/charter/

1969

Vienna Convention on the Law of Treaties (VCLT), entered into force on 27 January 1980 and available at untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

2001

International Law Commission Draft Articles on Responsibility of States for Intentionally Wrongful Acts, available at untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

8.2 STATUTES OF INTERNATIONAL COURTS AND TRIBUNALS

1946

Statute of the International Court of Justice, entered into force on 24 October 1945 and available at www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

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 (ICTY Statute)—UN Security Council Resolution 827 adopted 25 May 1993, available at www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

1994

UN General Assembly Resolution Establishing the International Criminal Tribunal for Rwanda and attaching its Statute (ICTR Statute)—Resolution 955 adopted 8 November 1994, available at www.unicttr.org/Portals/0/English/Legal/Statute/2010.pdf

1998

Statute of the International Criminal Court (Rome Statute), entered into force on 1 July 2002, available at untreaty.un.org/cod/icc/statute/rome.htm

2002

Statute of the Special Court for Sierra Leone—pursuant to UN Security Council Resolution 1315, adopted 14 August 2000, available at www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3D&

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 (ECCC Law), available at www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf

2005

Law of the Iraqi High Tribunal

8.3 INTERNATIONAL HUMAN RIGHTS LAW

1921

International Labour Organisation Convention 14 Concerning the Application of the Weekly Rest in Industrial Undertakings—entered into force on 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

American Declaration on the Rights and Duties of Man, adopted 2 May 1948, available at www.unesco.org/most/rr4am1.htm

Charter of the Organization of American States (Pact of Bogota), entered into force on 13 December 1951, available at www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm

Universal Declaration of Human Rights—UN General Assembly Resolution 217A (III), adopted 10 December 1948, available at www.un.org/en/documents/udhr/

1950

European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 3 September 1953, available at www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf

1951

Convention relating to the Status of Refugees, entered into force on 22 April 1954, available at www2.ohchr.org/english/law/refugees.htm

1952

Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 18 May 1954, available at www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf

1954

Convention relating to the Status of Stateless Persons, entered into force 6 June 1960, available at www2.ohchr.org/english/law/stateless.htm

1957

International Labour Organisation Convention 106 Concerning Weekly Rest in Commerce and Offices—entered into force on 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, entered into force 22 May 1962, available at www.unesco.org/education/information/nfsunesco/pdf/DISCRI_E.PDF

1961

European Social Charter, entered into force 26 February 1965, available at conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CM=1&CL=ENG

1965

International Convention on the Elimination of All Forms of Racial Discrimination, entered into force 4 January 1969, available at www2.ohchr.org/english/law/cerd.htm

1966

International Covenant on Economic Social and Cultural Rights, entered into force 3 January 1976, available at www2.ohchr.org/english/law/cescr.htm

International Covenant on Civil and Political Rights, entered into force 23 March 1976, available at www2.ohchr.org/english/law/ccpr.htm

Optional Protocol I to the International Covenant on Civil and Political Rights, entered into force 23 March 1976, available at www2.ohchr.org/english/law/ccpr-one.htm

1969

American Convention on Human Rights, entered into force 18 July 1978, available at www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf

1970

International Labour Organisation Convention 132 Concerning Annual Holidays with Pay—entered into force on 30 June 1973 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312277:NO

1973

International Labour Organisation Convention 138 Concerning Minimum Age for Admission to Employment, entered into force 19 June 1976, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:3552079253152724::NO:12100:P12100_INSTRUMENT_ID:312283:NO

1979

Convention on the Elimination of All Forms of Discrimination against Women, entered into force 3 September 1981, available at www.un.org/womenwatch/daw/cedaw/text/econvention.htm

United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by UN General Assembly Resolution 34/169 on 17 December 1979, available at [www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)

International Convention Against the Taking of Hostages, entered into force 3 June 1983, available at treaties.un.org/doc/db/Terrorism/english-18-5.pdf

1981

African Charter of Human and Peoples' Rights (the Banjul Charter), entered into force 21 October 1986, available at www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf

International Labour Organisation Convention 155 Concerning Occupational Safety and Health and the Working Environment—entered into force on 11 August 1983 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312300:NO

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief—General Assembly Resolution 36/55 of 25 November 1981—available at <http://www2.ohchr.org/english/law/religion.htm>

1984

United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987, available at www2.ohchr.org/english/law/cat.htm

1985

Inter-American Convention to Prevent and Punish Torture, entered into force 28 February 1987, available at www.iadb.org/Research/legislacionindigena/pdocs/CONVENCIONTORURA.pdf

UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration), adopted 29 November 1985, available from www.un.org/documents/ga/res/40/a40r034.htm

International Labour Organisation Convention 161 Concerning Occupational Health Services—entered into force on 17 February 1988 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312306:NO

1988

Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol), entered into force 16 November 1999, available at www.oas.org/juridico/english/sigs/a-52.html

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, available at www.un.org/documents/ga/res/43/a43r173.htm

1989

United Nations Convention on the Rights of the Child, entered into force 2 September 1990, available at www2.ohchr.org/english/law/crc.htm

ILO Convention 169 on Indigenous and Tribal Peoples, entered into force 5 September 1991, available at <http://www2.ohchr.org/english/law/indigenous.htm>

1990

African Charter on the Rights and Welfare of the Child, entered into force 29 November 1999, available at www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/a.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf

Cairo Declaration on Human Rights in Islam, adopted 5 August 1990, available at www.oic-oci.org/english/article/human.htm

Vienna Declaration and Programme of Action, adopted 25 June 1993, available at [www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly Resolution 45/158 of 18 December 1990, available at www2.ohchr.org/english/law/cmw.htm

1993

Convention on the Rights of Persons with Disabilities—entered into force 3 May 2008 available at <http://www.un.org/disabilities/convention/conventionfull.shtml>

1994

Arab Charter on Human Rights, adopted 15 September 1994 (not in force), available at www1.umn.edu/humanrts/instreet/arabhrcharter.html

Arab Convention on Regulating the Status of Refugees in the Arab Countries adopted 1994 (not yet in force) available at <http://www.unhcr.org/refworld/docid/4dd5123f2.html>

1996

European Social Charter (Revised), available at conventions.coe.int/Treaty/en/Treaties/html/163.htm

1998

Protocol to European Social Charter Providing for a System on Collective Complaints, entered into force 1 July 1998, available at conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=158&CM=8&CL=ENG

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf>

1999

International Labour Organization Convention No 182 on the Worst Forms of Child Labour, entered into force 19 November 2000, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>

2000

Charter of Fundamental Rights of the European Union, entered into force 1 December 2009, available at www.europarl.europa.eu/charter/pdf/text_en.pdf

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol"), entered into force 25 November 2005, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, entered into force 12 February 2002, available at www2.ohchr.org/english/law/crc-conflict.htm

2001

Inter-American Democratic Charter, adopted 11 September 2001, available at www.oas.org/charter/docs/resolution1_en_p4.htm

2004

Covenant on the Rights of the Child in Islam, adopted June 2005, available at www.oicun.org/uploads/files/convention/Rights%20of%20the%20Child%20In%20Islam%20E.pdf

2005

UN General Assembly 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 (GA Resolution 60/147), adopted 16 December 2005, available at www2.ohchr.org/english/law/remedy.htm

2006

African Youth Charter, entered into force 8 August 2009, available at www.africa-union.org/root/ua/conferences/mai/hrst/charter%20english.pdf

International Labour Organisation Convention 187 Concerning the Promotional Framework for Occupational Safety and Health—entered into force on 20 February 2009 available at www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:106693681068150::NO:12100:P12100_INSTRUMENT_ID:312332:NO

International Convention for the Protection of All Persons from Enforced Disappearance—entered into force 23 December 2010 available at www2.ohchr.org/english/law/disappearance-convention.htm

2009

Convention for the Protection and Assistance of Internally Displaced Persons in Africa

(Kampala Convention)—not yet entered into force available at [au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_\(KAMPALA_CONVENTION\).pdf](http://au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_(KAMPALA_CONVENTION).pdf)

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 www.icrc.org/ihl.nsf/FULL/110?OpenDocument

1899

Hague Convention

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, entered into force 4 September 1900, available at www.icrc.org/ihl.nsf/FULL/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, entered into force 26 January 1910, available at www.icrc.org/ihl.nsf/FULL/195?OpenDocument

Hague Convention IX concerning Bombardment by Naval Forces in Time of War, entered into force 26 January 1910, available at www.icrc.org/ihl.nsf/FULL/220?OpenDocument

1935

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), entered into force 26 August 1935, available at www.icrc.org/ihl.nsf/FULL/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), entered into force 21 October 1950, available at www.icrc.org/ihl.nsf/FULL/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), entered into force 21 October 1950, available at www.icrc.org/ihl.nsf/FULL/370?OpenDocument

Geneva Convention relative to the Treatment of Prisoners of War 1949 (Geneva Convention III), entered into force 21 October 1950, available at www.icrc.org/ihl.nsf/FULL/375?OpenDocument

Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (Geneva Convention IV), entered into force 21 October 1950, available at www.icrc.org/ihl.nsf/FULL/380?OpenDocument

1954

Convention for the Protection of Cultural Property in the Event of Armed Conflict, entered into force 7 August 1956, available at www.icrc.org/ihl.nsf/FULL/400?OpenDocument

Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, entered into force 7 August 1956, available at www.icrc.org/ihl.nsf/FULL/410?OpenDocument

1977

Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), entered into force 7 December 1978, available at www.icrc.org/ihl.nsf/FULL/470?OpenDocument

Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), entered into force 7 December 1978, available at www.icrc.org/ihl.nsf/FULL/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, entered into force 2 December 1983, available at untreaty.un.org/cod/avl/pdf/ha/cprccc/cprccc_ph_e.pdf

1993

Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction—entered into force on 29 April 1997 available at <http://www.icrc.org/ihl.nsf/INTRO/553?OpenDocument>

1997

Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention), entered into force 1 March 1999, available at [www.unog.ch/80256EDD006B8954/\(httpAssets\)/8DF9CC31A4CA8B32C12571C7002E3F3E/\\$file/APLC+English.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/8DF9CC31A4CA8B32C12571C7002E3F3E/$file/APLC+English.pdf)

1999

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, entered into force 9 March 2004, available at www.icrc.org/ihl.nsf/INTRO/590?OpenDocument

2008

Convention on Cluster Munitions, entered into force 1 December 2010, available at www.clusterconvention.org/

2009

International Committee of the Red Cross Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, available at www.icrc.org/engl/assets/files/other/irrc-872-reports-documents.pdf

8.5 INTERNATIONAL CRIMINAL LAW

1945

Charter of the International Military Tribunal (Nuremberg Charter), available at *avalon.law.yale.edu/imt/imtconst.asp*

1948

Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), entered into force 12 January 1948, available at *www2.ohchr.org/english/law/genocide.htm*

8.6 LINKS TO TREATY RATIFICATION

Treaty	Ratification
United Nations Charter	<i>treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&lang=en</i>
Vienna Convention on the Law of Treaties (VCLT)	<i>treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en</i>
Statute of the International Court of Justice	<i>treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&lang=en</i>
Statute of the International Criminal Court (Rome Statute)	<i>treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en</i>
Charter of the International Military Tribunal (Nuremberg Charter)	<i>avalon.law.yale.edu/imt/imtconst.asp</i>
Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention)	<i>treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en</i>
Charter of the Organisation of American States (Pact of Bogota)	<i>www.oas.org/juridico/english/sigs/a-42.html</i>
European Convention for the Protection of Human Rights and Fundamental Freedoms	<i>conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG</i>
Convention relating to the Status of Refugees	<i>treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en</i>
Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms	<i>conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=009&CM=7&DF=25/04/2012&CL=ENG</i>

Convention relating to the Status of Stateless Persons	treaties.un.org/Pages/ViewDetailsII.aspx? &src=TREATY&mtdsg_no=V~3&chapter= 5&Temp=mtdsg2&lang=en
Convention against Discrimination in Education	portal.unesco.org/en/ev.php-URL_ID= 12949&URL_DO=DO_TOPIC&URL_ SECTION=201.html#STATE_PARTIES
European Social Charter	www.coe.int/t/dghl/monitoring/socialcharter/ presentation/SignaturesRatifications_en.pdf
International Convention on the Elimination of All Forms of Racial Discrimination	treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&mtdsg_no=IV-2&chapter=4& lang=en
International Covenant on Economic Social and Cultural Rights (ICESCR)	treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&mtdsg_no=IV-3&chapter=4& lang=en
International Covenant on Civil and Political Rights (ICCPR)	treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&mtdsg_no=IV-4&chapter=4& lang=en
Optional Protocol I to the International Covenant on Civil and Political Rights	treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&mtdsg_no=IV-5&chapter=4& lang=en
International Convention Against the Taking of Hostages	treaties.un.org/pages/ViewDetails.aspx?src= TREATY&mtdsg_no=XVIII-5&chapter=18& lang=en
International Labour Organization Convention 138 Concerning Minimum Age for Admission to Employment	webfusion.ilo.org/public/db/standards/normes/ appl/appl-byConv.cfm?hdroff=1&conv= C138&Lang=EN
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&mtdsg_no=IV-8&chapter=4& lang=en
African Charter of Human and Peoples' Rights (the Banjul Charter)	www.africa-union.org/root/au/Documents/ Treaties/List/African%20Charter%20on %20Human%20and%20Peoples%20Rights.pdf
United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&mtdsg_no=IV-9&chapter=4& lang=en
Inter-American Convention to Prevent and Punish Torture	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 (San Salvador Protocol)	www.oas.org/juridico/english/sigs/a-52.html

United Nations Convention on the Rights of the Child (CRC)	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	www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf
European Social Charter (Revised)	www.coe.int/t/dghl/monitoring/socialcharter/presentation/SignaturesRatifications_en.pdf
Protocol to European Social Charter Providing for a System on Collective Complaints	www.coe.int/t/dghl/monitoring/socialcharter/presentation/SignaturesRatifications_en.pdf
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf
International Labour Organisation Convention No 182 on the Worst Forms of Child Labour	webfusion.ilo.org/public/db/standards/normes/appl/appl-byConv.cfm?hdroff=1&conv=C182&Lang=EN
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)	www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en
Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)	www.africa-union.org/root/au/documents/treaties/list/Convention%20on%20IDPs%20-%20displaced.pdf
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	www.icrc.org/ihl.nsf/WebSign?ReadForm&id=150&ps=P
Hague Convention IX concerning Bombardment by Naval Forces in Time of War	www.icrc.org/ihl.nsf/WebSign?ReadForm&id=220&ps=P
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	www.icrc.org/ihl.nsf/WebSign?ReadForm&id=195&ps=P

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact)	www.icrc.org/ihl.nsf/WebSign?ReadForm&id=325&ps=P
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva Convention I)	www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949 (Geneva Convention II)	www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf
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)	www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf
Convention for the Protection of Cultural Property in the Event of Armed Conflict	www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf
Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict	www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf
Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I)	www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf
Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)	www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf
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	treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en
Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention)	treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-5&chapter=26&lang=en

Second Protocol to the Hague Convention
of 1954 for the Protection of Cultural
Property in the Event of Armed Conflict
Convention on Cluster Munitions

[www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf)
treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-6&chapter=26&lang=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 All Forms of Racial Discrimination

D.R. v Australia, No 42/2008

Er v Denmark, No 40/2007

Eritrea Ethiopia Claims Commission

Partial Award on Western Front, Aerial Bombardment and Related Claims, 19 December 2005, (2006) ILM 45: 396

Final Award, Eritrea's Damages Claims

Final Award, Ethiopia's Damages Claims

Extraordinary Chambers in the Courts of Cambodia

Closing Order, 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

D and E v Australia, No 1050/2002

Erkki Hartikainen v Finland, Communication No 40/1978, 9 April 1981

Herrera Rubio v Colombia, No 161/1983, UN Doc CCPR/C/OP/2 (2 November 1987)
 Hopu and Bessert v France, No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1 (29 December 1997)
 Hudoyberganova v Uzbekistan, No 931/2000
 Lantsova v Russia, No 763/1997, 26 March 2002
 Lopez Burgos v Uruguay, No 52/1979, 29 July 1981
 Omar Sharif Baban, on his own behalf and on behalf of his son, Bawan Heman Baban v Australia, No 1014/2001
 Pedro Pablo Camargo on behalf of the husband of Maria Fanny Suarez de Guerrero v Colombia, No R11/45, 9 April 1981
 Rawle Kennedy v Trinidad and Tobago (2000) 7 IHRR 315
 Unn et al. v Norway, No 1155/03
 Waldman v Canada Communication No 694/1996

International Court of Justice

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, ICJ Reports 2005
 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Preliminary Objections and Merits, Judgment, ICJ Reports 2002
 Barcelona Traction, Light and Power Company (Belgium v Spain), New Application, 1970 ICJ Reports 4
 Bosnia and Herzegovina v Serbia and Montenegro, Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide, Judgment of the ICJ, 26 February 2007
 Jurisdictional Immunities of the State (Germany v Italy), Application of 22 December 2008
 Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) (2012) ICJ Judgment, 3 February 2012
 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004
 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996
 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986
 United States Diplomatic and Consular Staff in Tehran (United States of America v Iran), Judgment, ICJ Reports 1980

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Prosecutor v Blagojevic and Jokic, ICTY, IT-02-60
 Prosecutor v Blaskic, (subpoena proceedings), Case No IT-95-14-AR108bis, Trial Chamber (18 July 1997)
 Prosecutor v Blaskic, Judgment, Case No IT-95-14-T, Trial Chamber, (3 March 2000)
 Prosecutor v Vidoje Blagojevic & Dragan Jokic IT-02-60-T (2007)

Prosecutor v Brdanin ('Krajina'), Case No IT-99-36-T, Trial Chamber (1 September 2004)
 Prosecutor v Brdanin ('Krajina'), Case No IT-99-36-A, Appeals Chamber (3 April 2007)
 Prosecutor v Brdjanin, (Decision on Motion for Acquittal Pursuant to Rule 98bis), Case No IT-99-36 (28 November 2003)
 Prosecutor v Ljube Boskoski & Johan Tarculovski Case No. IT-04-82-T (2008)
 Prosecutor v Delalic, Mucic and Delic ('the Celibici case'), Judgment, Case No IT-96-21-T, Trial Chamber II (16 November 1998)
 Prosecutor v Dukić, Judgment, Case No IT-96-20-PT, Trial Chamber (29 February 1996)
 Prosecutor v Furundzija, Judgment, Case No IT-95-17/1-A, Trial Chamber (10 December 1998)
 Prosecutor v Stanislav Galic (ICTY Case No IT-98-29-T)
 Prosecutor v Jean-Pierre Bemba Gombo
 Prosecutor v Ante Gotovina, Ivan Cermak, Mladen Markac, Trial Judgment, Case No IT-06-90-T (15 April 2011)
 Prosecutor v Hadzic, IT-04-75 ICTY
 Prosecutor v Goran Hadzic, Case No IT-04-75-PT ICTY
 Prosecutor v Hadzihasanovic, ICTY, IT-01-47-T, Trial Chamber (15 March 2006)
 Prosecutor v Hadzihasanovic, ICTY, IT-01-47-A, Appeals Chamber (22 April 2008)
 Prosecutor v Haradinaj, Judgment, Case No. IT-04-84-T, Trial Chamber (3 April 2008)
 Prosecutor v Janovic and Stankovic ('Foca') ICTY, IT-96-23/2 (8 December 2003) -
 Prosecutor v Jokic, Judgment, Case No IT-01-42/1, Trial Chamber (18 March 2004)
 Prosecutor v Miodrag Jokic, Sentencing Judgment, Case No IT-01-42/1-S (18 March 2004)
 Prosecutor v Karadačić and Mladić, Judgment, Case No IT-95-18, Trial Chamber, 27 June-8 July 1996
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 Prosecutor v Krnojelac, Judgment, Case No IT-97-25-T, Trial Chamber (15 March 2002)
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 Prosecutor v Kunarac, Judgment, Case No IT-96-23-T, Trial Chamber (22 February 2001)
 Prosecutor v Kunarac et al. IT-96-23 & 23/1 (2002)
 Prosecutor v Kunarac, Kovac & Vukovic, ICTY Case Nos IT-96-23-T & IT-96-23/1-T (22 February 2001)
 Prosecutor v Kupreskic et al. (Trial Judgment), IT-95-16-T, (ICTY), 14 January 2000
 Prosecutor v Ljubicic, Indictment (26 September 2000)
 Prosecutor v Martić, Judgment, Case No IT-95-11-T, Trial Chamber (12 June 2007)
 Prosecutor v Martić, Judgment, Case No IT-95-11-A, Appeals Chamber (8 October 2008)
 Prosecutor v Milorad Trbic ('Srebrenica') ICTY, IT-05-88/1
 Prosecutor v Mrksic, Trial Judgment, Case No IT-95-13/1-T (27 September 2007)
 Prosecutor v Mucic, Judgment, Case No IT-96-21-T, Trial Chamber (16 November 1998)

Prosecutor v Naletelic and Martinovic, Judgment, Case No IT-98-34-T, Trial Chamber (31 March 2003)

Prosecutor v Naletelic and Martinovic, Judgment, Case No IT-98-34-A, Appeals Chamber (3 May 2006)

Prosecutor v Obrenovic ('Srebrenica'), Judgment, Case No IT-02-60/2, Trial Chamber (10 December 2003)

Prosecutor v Popovic et al. ('Srebrenica'), Case No IT-05-88-T, Trial Chamber (26 September 2006)

Prosecutor v Prlic and 5 others, Case No IT-04-74-T (14 March 2012)

Prosecutor v Rajic ('Stupni do'), Case No IT-95-12-S, Trial Chamber (8 Mat 2006)

Prosecutor v Seselj, Case No IT-03-67-T (23 March 2012)

Prosecutor v Simic ('Bosanski Samac'), Case No IT-95-9/2, Trial Chamber (17 October 2002)

Prosecutor v Stakic, Appeal Judgment, Case No IT-97-24-A (ICTY) (22 March 2006)

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Prosecutor v Strugar, Jokic and Kovacevic, Case No IT-01-42-PT (7 June 2002)

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Prosecutor v Tolimir ('Srebrenica'), Case No IT-05-88/2

Prosecutor v Milorad Trbic ('Srebrenica') ICTY, IT-05-88/1 21 October 2010

Prosecutor v Zelenovic ('Foca'), Judgment, Case No IT-96-23/2, Trial Chamber (4 April 2007)

International Criminal Tribunal for Rwanda

Prosecutor v Akayesu, Judgment, Case No ICTR-96-4-T, Trial Chamber I (2 September 1998)

Prosecutor v Kalimanzira ICTR Trial Chamber (22 June 2009)

Prosecutor v Musema, Judgment, Case No ICTR-96-13-A, Trial Chamber (27 January 2000)

Prosecutor v Musema, Judgment, Case No ICTR-96-13-A, Appeals Chamber (16 November 2001)

Prosecutor v Nahimana, Barayagwize and Ngeze (Judgment) ICTR 99-52-T (3 December 2003)

Prosecutor v Tharcisse Renzaho, Case No ICTR—97-31-T (2009)

Prosecutor v Ruggiu ICTR Trial Chamber (1 June 2000)

Prosecutor v Rutaganda, ICTR-96-3-T Judgment of 6 December 1999

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Prosecutor v Brima et al, Case No SCSL-04-16-T Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, March 31, 2006

Prosecutor v Norman, (Decision on Preliminary Motion), Case No SCSL-2004-14-AR72(E), (31 May 2004)

Prosecutor v Sam Hinga Norman, Special Court for Sierra Leone SCSL-04-15-T (2004)

Prosecutor v Sesay, Kallon and Gbao, Trial Chamber, SCSL-04-15-T

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Prosecutor v Taylor (Decision on the immunity from prosecution), Appeals Chamber, No SCSL-2003-01-T, Judgment (31 May 2004) and (26 April 2012)

Prosecutor v Charles Taylor, SCSL-03-01-T. Judgment of 26 April 2012

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Lotus Case (France v Turkey) Permanent Court of International Justice, judgment of 7 September 1927, Series A No 10

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Alhassan Abubakar v Ghana Communication No 103/93

Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v Nigeria Communication No 60/91

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Association Pour la Sauvegarde de la Paix au Burundi/Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, Communication No 157/96, May 2003

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International Commission of Jurists v Portugal No 1/1998 657

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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 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.

There has been little examination of the how international human rights law, international humanitarian law, and international criminal law intersect on violations of the right to education and other relevant rights during insecurity and armed conflict. Such examination is essential for both the protection of education itself and for the benefits that derive from it. This Handbook considers the international legal protection of students and education staff, the protection of educational facilities, and introduces the mechanisms that can be used to obtain reparation for education-related violations.

“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 those who fail to do so to account.”

Sheikha Moza bint Nasser

Chair - Education Above All

UNESCO - Special Envoy Basic and Higher Education

“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

President – British Institute of International and Comparative Law

Former President - International Court of Justice

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