

**Are the Current Legal Provisions Concerning Education in
Situations of Non-International Armed Conflict Effective in
Practice? An Examination of International Human Rights
Law and International Humanitarian Law**

By

Siobhan Smith

LL.B (Hons) Lancaster University 2012

LL.M Lancaster University 2013

*A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
(Ph.D) IN THE LAW SCHOOL, LANCASTER UNIVERSITY, UK*

(September 2019)

© Siobhan Smith

DECLARATIONS

I confirm that the thesis is my own work, that it has not been submitted in substantially the same form for the award of a higher degree elsewhere. To the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference has been made.

I confirm that the thesis does not exceed the permitted word count.

ACKNOWLEDGEMENTS AND DEDICATION

I would first like to express my sincere appreciation to my supervisors, Dr Amanda Cahill-Ripley, Professor James Sweeney, and Dr Jackson Maogoto. I am grateful for your invaluable and insightful feedback, support, and patience.

Thank you to the Economic and Social Research Council for the generous scholarship for this research, without which this thesis would not have been possible. I am equally thankful for the additional funding for an internship at the Global Coalition to Protect Education from Attack in 2016, during which I was fortunate to be able to act as a contributing researcher and writer for ‘Education Under Attack: 2018’. I am grateful to the Global Coalition to Protect Education from Attack for allowing me to undertake this internship, during which I developed a better understanding of the global issue of deliberate and direct attacks against education.

Similarly, I am also grateful to the British Institute of International and Comparative Law, to Kristen Hausler for guiding me in co-authoring the second edition to ‘Protecting Education in Insecurity and Armed Conflict’, and to Jean-Pierre Gauci for his Ph.D proofreading generosity.

I am particularly grateful to my wonderful family, and to the friends who made the PhD bearable. Finally, I am most thankful to my partner, Dr Barış Alhan, for his unwavering belief in me, for his encouragement, and his support throughout the PhD process.

ABSTRACT

This thesis examines three ways in which education is deliberately and directly attacked during situations of armed conflict: firstly, situations where students, educational personnel, and educational institutions are physically attacked; secondly, where education institutions are used for military purposes; and thirdly, where children are recruited for military purposes, including recruitment from within schools and along school routes. Deliberate and direct attacks against education during situations of non-international armed conflict are a long-standing problem. Given the importance of education for the individual and society as a whole, this is an issue in need of addressing. There is, at the time of writing, however, no analysis as to the adequacy of IHRL in providing for the right to education, and of IHL in protecting education, in the context of deliberate and direct attacks during non-international armed conflicts, in both theory and practice. I examine the phenomenon of deliberate and direct attacks in Colombia and the DRC. The methodology is therefore socio-legal in nature. The findings of this thesis are that gaps and ambiguities exist in the manner in which international human rights law provides for the right to education, and in which international humanitarian law protects education. While there is some scope for international human rights law to fill the gaps in international humanitarian law, and vice versa, when the regimes are applied simultaneously in practice to the issue of deliberate and direct attacks, gaps and ambiguities nonetheless remain. There is scope for the law to be developed in this regard.

LIST OF ABBREVIATIONS

ADF	Allied Democratic Forces
AUC	Autodefensas Unidas de Colombia
CDE	Convention against Discrimination in Education
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
COALICO	Coalición Contra La Vinculación de Niños, Niñas y Jóvenes al Conflicto Armado en Colombia/Coalition Against Involvement of Children and Youth in Armed Conflict
CPR	Civil and Political Rights
DRC	Democratic Republic of Congo
ELN	Ejército de Liberación Nacional
ESCR	Economic, Social and Cultural Rights
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo
FARDC	Forces Armées de la République Démocratique du Congo
FDLR	Democratic Forces for the Liberation of Rwanda
GCPEA	Global Coalition to Protect Education from Attack
IAC	International Armed Conflict
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
LRA	Lords Resistance Army

M23	Mouvement du 23 mars
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NIAC	Non-International Armed Conflicts
NSAG	Non-State Armed Group
M23	Mouvement du 23 mars
SACC	South African Constitutional Court
UN	United Nations
UDHR	Universal Declaration of Human Rights
UPDF	Uganda People's Defence Force

CONTENTS

DECLARATIONS	2
ACKNOWLEDGMENTS AND DEDICATION	3
ABSTRACT	4
LIST OF ABBREVIATIONS	5

INTRODUCTION

Central Research Question	13
Rationale	14
The Continued Application of the Right to Education for All during Situations of Non-International Armed Conflict	15
Restrictions on the applicability of IHRL during Armed Conflicts	19
<i>Reservations</i>	19
<i>Derogations and Limitations</i>	20
<i>Extra-territorial Obligations</i>	22
<i>Obligations of Non-State Armed Groups</i>	23
The Benefits of Ensuring the Realisation of the Right to Education for All during Situations of Non-International Armed Conflict	24
Contributions to Knowledge	30
Methodology	35
Black Letter Law Approach	36
Socio-Legal Approach	37
Comparative Case Study Approach	38
Chapter Overview	39

CHAPTER ONE

The Realisation of the Right to Education during Non-International Armed

Conflicts: International Human Rights Law

1.1.	Introduction	43
1.2.	Sources of International Human Rights Law Relevant to the Right to Education	44
1.3.	The Normative Content of the Right to Education	47
1.3.1.	The Prohibition of Discrimination	47
1.3.2.	The aims and objectives of education	49
1.3.3.	The Right to Receive an Education: The Levels of Education	51
1.3.3.1.	Primary education	53
1.3.3.2.	Secondary education	57
1.3.3.3.	Higher Education	58
1.3.3.4.	Fundamental Education	61
1.3.3.5.	The ‘4-A framework’	62
1.3.4.	A system of schools, a fellowship system and teaching staff conditions	66
1.3.5.	The Freedom to Choose and Establish Schools	69
1.4.	Obligations Provided for within Article 2(1) of the International Covenant on Economic, Social and Cultural Rights	70
1.4.1.	The Obligation to Take Steps ‘with a View to Achieving Progressively the Full Realisation’ of the Right to Education	71
1.4.2.	The Obligation to Use the Maximum Available Resources	73
1.4.3.	The obligation to take steps by ‘all appropriate means’	79
1.4.4.	Obligation of International Assistance and Co-operation	81

1.5.	Obligations Provided for within General Comments 3 and 13 of the Committee on Economic, Social and Cultural Rights	87
1.5.1.	Minimum Core Obligations	87
1.5.1.1.	Defining the minimum core obligations approach	88
1.5.1.2.	Minimum Core Obligations and their Relationship to Immediate Obligations	93
1.5.2.	Tripartite obligations – the obligations to respect, protect and fulfil	103
1.5.2.1.	Respect	103
1.5.2.2.	Protect	104
1.5.2.3.	Fulfil	105
1.5.2.4.	The relationship between the Tripartite Typology and the 4-A Framework	107
1.6.	The Protection of Children from Military Recruitment and Use	108
1.7.	Conclusion	111

CHAPTER TWO

The Protection of Education during a Non-International Armed Conflict:

International Humanitarian Law

2.1.	Introduction	112
2.2.	Sources of International Humanitarian Law	113
2.2.1.	Treaty Law	113
2.2.2.	Customary Law	115
2.3.	The Classification of Conflicts and the threshold for the	

applicability of IHL	118
2.3.1. Classifying a non-international armed conflict	120
2.4. The Lower Level of Regulation of Non-international Armed Conflicts	129
2.4.1. The Erosion of the International/Non-International Dichotomy	131
2.4.2. The Unification of International Humanitarian Law	133
2.5. Rules relevant to the explicit protection of education during a non-international armed conflict	137
2.6. Rules relevant to the protection of education from deliberate and direct attacks during a non-international armed conflict	142
2.6.1. The Principles of Humanity, Military Necessity, and Proportionality	142
2.6.2. The Principle of Distinction	145
2.6.2.1. Protection of Civilians and Civilian Populations	146
2.6.2.1.1. Members of Non-state Armed Groups with a ‘Continuous Combat Function’	153
2.6.2.1.2. Civilians who Engage in ‘Sporadic Acts of Violence’ and a Revolving Door of Protection	155
2.6.2.1.3. Direct Participation in hostilities	157
2.6.2.1.4. Child Soldiers	162
2.6.2.2. The protection of civilian objects	165
2.6.3. The Prohibition on the Use of Human Shields and precautions against the effects of attacks	169
2.6.4. Precautions in attack	171
2.7. Conclusion	174

CHAPTER THREE

The Relationship between International Human Rights Law and International Humanitarian Law

3.1.	Introduction	175
3.2.	Complementary approach	176
3.3.	Humanisation Approach	180
3.4.	<i>Lex Specialis Derogate Legi Generali</i> Approach	182
3.4.1.	Displacement Approach	183
3.4.2.	Event-specific and Reverse Event-specific Displacement Approaches	185
3.4.3.	Specificity Approach	187
3.4.4.	Active Hostilities/Security Operations Approach	192
3.5.	Unified Approach	197
3.6.	Conclusion	201

CHAPTER FOUR

Case studies: Deliberate and Direct Attacks Against Education in Colombia and the Democratic Republic of Congo

4.1.	Introduction	202
4.2.	Methodology	203
4.2.1.	The Sample	203
4.2.2.	Analysing Documented Direct and Deliberate Attacks against Education	206
4.2.3.	A Comparative Approach	210
4.3.	Colombia	212

4.3.1.	The Context	212
4.3.2.	Attacks against Educational Institutions in Colombia	218
4.3.3.	Attacks on Students and Educational Personnel in Colombia	228
4.3.4.	The Military Recruitment and Use of Children	237
4.4.	The Democratic Republic of Congo	242
4.4.1.	The Context	242
4.4.2.	Attacks on Educational Institutions	251
4.4.3.	Attacks on Students and Educational Personnel	258
4.4.4.	The Military Recruitment and Use of Children	259
4.5.	Conclusion	262

CONCLUSION

5.1.	Are the Current Legal Provisions Concerning Education within International Human Rights Law and International Humanitarian Law Effective?	263
5.2.	Recommendations	270
5.3.	Scope for Further Research	271

<u>BIBLIOGRAPHY</u>	272
----------------------------	-----

Introduction

Central research question

This thesis examines the phenomenon of deliberate and direct attacks against education during non-international armed conflicts.¹ Specifically, it focuses on three situations in which deliberate and direct attacks against education occur: firstly, physical attacks against educational institutions, students, and educational personnel; secondly, the military use of educational institutions; thirdly, the military recruitment and use of children.² The central research question of this thesis is whether, in respect of these types of deliberate and direct attacks, international human rights law adequately provides for the right to education,³ and whether international humanitarian law adequately protects education.⁴ In order to shed light on the efficacy of the law in practice, I examine deliberate and direct attacks against education in the context of NIAC in Colombia and the Democratic Republic of Congo.⁵

This thesis is written for two purposes. Firstly, this thesis is written to provide guidance to those responsible for implementing the law ‘on the ground’ as to how

¹ Hereinafter NIAC.

² ‘Attack’, for the purposes of international humanitarian law, is defined as ‘an act of violence... whether in offence or in defence’: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 Jun. 1977, 1125 U.N.T.S. 3, entered into force 7 Dec 1978, Art 49(1-2), hereinafter Additional Protocol I. The examination of physical attacks against educational institutions, staff and students conforms to the notion of being ‘attacked’ in international humanitarian law, however, the military use of educational institutions or the military recruitment and use of children will not amount to an ‘attack’ within the meaning of Additional Protocol I: Peter Rowe, ‘Chapter 10: The Application of International Humanitarian Law to Attacks on Education in Armed Conflict’ in UNESCO, *Protecting Education from Attack: A State-of-the-Art Review* (UNESCO 2010), 180. However, one of the three key texts in this field refers to an attack on education as ‘an act against education, students and education staff, and educational institutions... education-related violations are those acts which attack and undermine the conditions necessary for education’: British Institute of International and Comparative Law, *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook* (British Institute of International and Comparative Law 2012), 5-6, hereinafter BIICL Handbook. While the military use of educational institutions and the military recruitment and use of children does not fall within the legal definition of an ‘attack’ within international humanitarian law, this thesis adopts the wider interpretation of attack as contained within the BIICL Handbook, as such deliberate and direct acts result in individuals being deprived of their right to education and are therefore attacks against education within the meaning of international human rights law.

³ Hereinafter IHRL

⁴ Hereinafter IHL

⁵ Hereinafter DRC; I explain the choice of case studies in the methodology section of Chapter 4.

IHRL and IHL, as they currently stand, should be applied in practice simultaneously. Secondly, this thesis is written to provide guidance to policy makers at the international, regional, and national levels as to how IHRL and IHL can be improved in order to better facilitate the realisation of the right to education in situations of NIAC.

NIAC can, of course, significantly impact the realisation of the right to education in many ways. However, due to the focus on deliberate and direct attacks against education in NIAC, this thesis does not examine issues such as indiscriminate attacks against education, or disproportionate incidental loss of life and injury to students and educational personnel, or disproportionate damage to schools. Also, this thesis does not look at issues such as access to education in NIAC more broadly, so for example, it does not look at access in refugee camps. Additionally, while regional instruments are of importance to the protection of education, this thesis only examines the adequacy of the law that is of universal application. Finally, this thesis concentrates on the adequacy of the norms of IHRL and IHL, and does not examine the adequacy of the accountability mechanisms in international law, though it is recognised that adequate accountability mechanisms are important for the effective realisation of the right to education in practice.⁶

Rationale

NIAC not only negatively impacts the realisation of the right to education but also many other rights, so why then is education deserving of increased protection? This question is addressed, firstly, from a legal perspective, as everyone has a right to

⁶ For a discussion of the adequacy of the accountability mechanisms in international law, see the BIICL Handbook (n2); see also Shaheed Fatima QC, *Protecting Children in Armed Conflict* (Hart Publishing 2018), hereinafter *Protecting Children*.

education within IHRL that remains applicable in a NIAC.⁷ This question is addressed, secondly, from the perspective of the particular benefits to the individual and society.

The Continued Application of the Right to Education for All during Situations of Non-International Armed Conflict

Education is deserving of increased protection in a NIAC in the face of deliberate and direct attacks, as all States have committed to realising the right to education for everyone, and such attacks impact the realisation of this right. The Convention on the Rights of the Child, which provides for the right to education for all, has been almost universally ratified, with the exception of the United States of America.⁸ The United States of America is, however, a party to the International Convention on the Elimination of All Forms of Racial Discrimination, which also recognises the right of all to education.⁹ As such, each State has committed to ensuring the right to education by ratifying at least one of the major IHRL instruments.

Significantly, the right of every person to education remains applicable even if a situation of armed conflict exists, whether an international armed conflict or NIAC.¹⁰ The ‘traditional approach’ to the question of the applicability of IHRL in armed conflicts is that IHRL applies only in peacetime, while IHL applies only in wartime.¹¹

⁷ For a discussion of the right of all to education as contained within the International Covenant on Economic, Social and Cultural Rights, see Chapter 1.

⁸ Convention on the Rights of the Child, 1989; For the ratification status of this instrument, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-11&chapter=4&lang=en (Last accessed 30/09/2019)

⁹ International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Arts 5 and 7; For the ratification status of this instrument, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-2&chapter=4&clang=en (Last accessed 30/09/2019)

¹⁰ Hereinafter IAC

¹¹ Gill refers to the view that IHRL does not apply during an armed conflict as the ‘traditional approach’, while Heintze refers to this as both the ‘traditional approach’ and the ‘separation theory’, and Hathaway and others describe this as ‘the displacement model’: Oona A Hathaway and others, ‘Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law’ (2012) 96 Minnesota Law Review 1883, 1894-1895; Terry D Gill, ‘Chapter 9: Some Thoughts on the Relationship Between International Humanitarian Law and

Now, however, it is well accepted that IHRL applies in armed conflicts,¹² and while it is also traditionally argued that the two regimes developed separately, this proposition is also increasingly challenged.¹³

While the focus of the question as to the applicability of IHRL in armed conflicts has previously been on civil and political rights,¹⁴ with economic, social and cultural rights being largely absent from the debate,¹⁵ many scholars also argue that both CPR and ESCR are applicable in armed conflicts alongside IHL.¹⁶ This is important as the

International Human Rights Law – A Plea For Mutual Respect and a Common-sense Approach’ (2013) 12 *The Yearbook of International Humanitarian Law* 251, 255; Hans-Joachim Heintze, ‘Theories on the Relationship between International Humanitarian Law and Human Rights Law’ in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013), 54-62.

¹² Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002), 193; Christopher Greenwood, ‘Scope of Application of Humanitarian Law’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd Ed, Oxford University Press 2008), 74; Cordula Droeger, ‘Elective Affinities? Human Rights and Humanitarian Law’ (2008) 90 *International Review of the Red Cross* 501, 501-502; Sandesh Sivakumaran, ‘Re-envisaging the International Law of Internal Armed Conflict’ (2011) 22(1) *The European Journal of International Law* 219, 234; Katharine Fortin, ‘Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948 to 1968’ (2012) 94 *International Review of the Red Cross* 1433, 1434; Vera Gowlland-Debbas and Gloria Gaggioli, ‘The Relationship between International Human Rights and Humanitarian Law: An Overview’ in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013), 79; Jean d’Aspremont and Elodie Tranchez, ‘The Quest for a Non-Conflictual Existence of International Human Rights Law and Humanitarian Law: Which Role for the *Lex Specialis* Principle?’ in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013), 223; Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health-Related Issues in Non-International Armed Conflicts* (Martinus Nijhoff Publishers 2013), 20; William Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors* (T.M.C. Asser Press 2014), 326, 376; Jordan J Paust, ‘Human Rights on the Battlefield’ (2015) 47 *The George Washington International Law Review* 509, 511; Daragh Murray and others (eds), *Practitioners’ Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016), paras 1.02, 1.05; Chandra Lekha Sriram, Olga Martin-Ortega, and Johanna Herman, *War, Conflict and Human Rights: Theory and Practice* (3rd ed, Routledge 2018), 54

¹³ Fortin, (n12), 1433,1434; Boyd van Dijk, ‘Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions’ (2018) 112 *The American Journal of International Law* 553, 553

¹⁴ Hereinafter CPR

¹⁵ Noam Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87 *International Review of the Red Cross* 737, 751; Cordula Droeger, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40(2) *Israel Law Review* 310, 342; Elizabeth Mottershaw, ‘Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law’ (2008) 12(3) *The International Journal of Human Rights* 449, 449, 451-452; Ian Scobbie, ‘Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflicts’ (2010) 14(3) *Journal of Conflict and Security Law* 449, 454; Giacca, *Economic, Social and Cultural Rights in Armed Conflict* (Oxford University Press 2014), 82-84; Hereinafter ESCR

¹⁶ Lubell, (n15), 751; Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press 2006), 120; Robert Kolb and Richard Hyde, *An Introduction to the International Law*

right to education is considered an ESCR, due to it being provided for within the International Covenant on Economic, Social and Cultural Rights.¹⁷ It is clear that within the scholarly debate there has been a move towards the continued applicability of CPR and ESCR in situations of both IAC and NIAC, and this is also affirmed in numerous authoritative international sources. This was first affirmed in 1968, when the United Nations adopted General Assembly Resolution 2444 (XXIII), entitled ‘Respect for Human Rights in Armed Conflict’.¹⁸ Following the adoption of Resolution XXIII, the continued applicability of ESCR, including the right to education specifically, was affirmed in sources of IHL,¹⁹ IHRL,²⁰ and by the International Court of Justice.²¹

of Armed Conflicts (Hart Publishing 2008), 270; BIICL Handbook (n2), 35, 47; Mary E O’Connell, ‘Historical Development and Legal Basis’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd ed, Oxford University Press 2013), 13; Gerd Oberleitner, ‘Humanitarian Law as a Source of Human Rights Law’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013), 291; hereinafter CPR and ESCR respectively.

¹⁷ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, *entered into force* 3 January 1976, hereinafter ICESCR

¹⁸ United Nations General Assembly, *Respect for Human Rights in Armed Conflicts*, 19 December 1968, A/RES/2444; Notably, ‘human rights’ are referred to as opposed to CPR, and ‘armed conflict’ is referred to as opposed to IAC, indicating that it was recognised that both CPR and ESCR applied in both IAC and NIAC.

¹⁹ See Additional Protocol I, Art 72; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, *entered into force* 7 Dec 1978, Preamble, hereinafter Additional Protocol II; ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987), para 4371; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC 2016), para 39 and ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (2nd edn, ICRC 2017); which refer to the applicability of IHRL alongside IHL in IAC and NIAC without distinguishing between CPR and ESCR.

²⁰ See Convention on the Rights of the Child, 20 November 1989, *entered into force* 2 September 1990, Art 38, hereinafter CRC; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, U.N. Doc. A/54/49, *entered into force* 12 February 2002, hereinafter OPCRC, which are IHRL instruments that regulate the protection of children in IAC and NIAC alongside IHL; See also the United Nations Human Rights Council, hereinafter HRC, and its Universal Periodic Review, the function of which is to review the fulfilment by each State of its human rights obligations. The HRC stated that ‘given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law’, again without distinguishing between CPR and ESCR or IAC and NIAC, United Nations Human Rights Council, *Institution-Building of the United Nations Human Rights Council*, 18 June 2007, A/HRC/RES/5/1. On this see also, Lijiang Zhu, ‘International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council an Empirical Survey’ (2014) *Journal of International Humanitarian Legal Studies* 186, 186-187, 211-212; See United Nations Human Rights Committee, *General Comment No. 29: States of*

Specifically in respect of the right to education, Vernor Munoz, the UN Special Rapporteur on the Right to Education, states that ‘emergency situations should not...entail suspension of domestic and international obligations to guarantee the human rights of those affected’.²² The following UN Special Rapporteur on the Right to Education, Kishore Singh, provides that ‘emergencies do not relieve states from their obligation to take all appropriate measures to ensure the realization of the right to

Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, paras 3 and 16; United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add. 13, para 11; United Nations Human Rights Committee, *General Comment No. 36: on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, 30 October 2018, CCPR/C/GC/36, paras 2, 23, 29, 64, 67, 6, and Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing (art. 11.1 of the Covenant: Forced Evictions)*, 20 May. 1997, E/1998/22, at [5] (General Comment 7); Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12)*, 11 Aug. 2000, E/C.12/2000/4, at [10, 34] (General Comment 14); Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 Jan. 2003, E/C.12/2002/11, at [21] (General Comment 15); Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security (art. 9)*, 4 Feb. 2008, E/C.12/GC/19, at [27, 50] (General Comment 19); Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel* 31 August 2001, E/C.12/1/Add.69, at [12]; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, 26 June 2003, E/C.12/1/Add.90, at [31]; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of the Congo*, December 2009, E/C.12/COD/CO/416, at [6]; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, 7 June 2010, E/C.12/COL/CO/5, at [7]; United Nations General Assembly, *Report of Four Special Rapporteurs on their Mission to Lebanon and Israel*, 2 October 2006, A/HRC/2/7, at [15], which clearly affirm the applicability of both CPR and ESCR in IAC and NIAC.

²¹ See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, International Court of Justice, 8 July 1996, at [25] (Nuclear Weapons Opinion), which, on the issue of the right to life, a CPR, provides that the ICCPR applied in armed conflict; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, International Court of Justice, 9 July 2004, at [106, 134] (Wall Opinion), which goes further by stating that the construction of the wall impeded ‘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 and in the United Nations Convention on the Rights of the Child’ (emphasis added); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Rep. 2005 (Dec. 19), at [216-217] (DRC v Uganda), which held that the CRC and the OPCRC, instruments which protect children and education from deliberate and direct attack in IAC and NIAC, had been violated; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* I.C.J. Rep. 2008 (Oct. 15), at [112], which held that that the Convention on the Elimination of Racial Discrimination, an instrument which protects the right to education, applied ‘even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law’, hereinafter ICJ

²² United Nations General Assembly, *Report of the Special Rapporteur on the Right to Education, Vernor Munoz: Right to Education in Emergency Situations*, 20 May 2008, A/HRC/8/10, at [10] (Education in Emergency Situations)

education for all persons in their territories'.²³ These are the clearest authoritative statements as to the right to education applying in both IAC and NIAC.

Restrictions on the applicability of IHRL during Armed Conflicts

While it is now clearly accepted that ESCR, including the right to education, remains applicable during a NIAC, there are, however, situations in which the application of both CPR and ESCR may be restricted in armed conflict situations. An IHRL treaty that has been ratified and is in force may apply only partially where a valid reservation, derogation, or limitation has been made to the treaty, where a State is acting extraterritorially, and where the perpetrator is a non-State actor, such as a non-State armed group.²⁴

Reservations

Reservations can be made to CPR and ESCR, and can also be made to IHL treaties, and reservations to IHRL instruments can apply in peacetime as well as during a conflict. Therefore, this is not a restriction specific to ESCR. Article 2(1)(d) of the Vienna Convention on the Law of Treaties states that 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.²⁵

²³ United Nations General Assembly, *Interim Report of the Special Rapporteur on the Right to Education, Kishore Singh: The Right to Education*, 5 August 2011, A/66/269, at [67] (Report of Kishore Singh)

²⁴ Hereinafter NSAG

²⁵ Vienna Convention on the Law of Treaties, 23 May. 1969, 1155 UNTS 331 (1969), entered into force 27 Jan. 1980, Art 2(1)(d), hereinafter VCLT

Article 19 of the VCLT provides that a State may only make a reservation to a treaty, firstly, where the treaty permits this, and secondly, where it is compatible with the object and purpose of the treaty.²⁶ Therefore, a State should not be permitted to make a reservation in respect of minimum core obligations, simply put, the essential elements of a right.²⁷ If the State were permitted to make a reservation in respect of the minimum core of the right to education, during peacetime or NIAC, this would undoubtedly cause the right to lose its *raison d'être*. In the case studies of this thesis, there are no relevant reservations made by Colombia and the DRC to the treaties that regulate the issue of deliberate and direct attacks in a NIAC. While the question of reservations is important to this issue beyond the context of the two States examined, it is not necessary to discuss this in further detail for the purposes of this thesis.

Derogations and Limitations

The International Covenant on Civil and Political Rights contains a clause allowing the State to derogate from certain rights.²⁸ Conversely, the ICESCR does not contain a derogation clause; instead it permits limitations to its rights.²⁹ In respect of derogations, Article 4 of the ICCPR provides that:

‘In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the 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

²⁶ Ibid, Art 19

²⁷ See Chapter 1 for a discussion of minimum core obligations.

²⁸ International Covenant on Civil and Political Rights, Art 4, hereinafter ICCPR

²⁹ Mottershaw (n15), 451-452; Amrei Müller, ‘Limitations to and Derogations from Economic, Social and Economic Rights’ (2009) 9(4) Human Rights Law Review 557, 558; Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011), 467

international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.³⁰

Article 4 of the ICESCR sets out the meaning of ‘limitations’, providing that States may subject ESCR ‘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’.³¹ It has also been correctly argued that limitations must not affect the minimum core of ESCR, since this would go against the nature of the right.³² As such, in a NIAC, while a State may be permitted to make a limitation to the right to education, this is not permissible in respect of elements of the right that form part of the minimum core.

In respect of the derogability of ESCR, on the one hand, it is argued that as there is no derogation clause in the ICESCR, parties will continue to be bound by it in situations of armed conflict.³³ Conversely, the CESCR, in the limited guidance they have provided, has stated that minimum core obligations also cannot be subject to derogation.³⁴ It is therefore arguable that non-core rights within the ICESCR can be derogated from,³⁵ and there ‘seems to be some agreement on the derogability of ESCR such as the right to strike, rights related to trade unions and the right to work in exceptional situations’.³⁶ Alston and Quinn argue also that in a sufficiently grave

³⁰ ICCPR, Art 4; Note that Article 4(2) of the ICCPR prohibits derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18.

³¹ ICESCR, Art 4

³² Giacca (n15), 82; Müller, ‘Limitations’ (n29), 575; For a detailed discussion of the concept of ‘minimum core’, see Chapter 1.

³³ Murray, *Guide*, (n12), at [1.1.40]; See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 9 July 2004, paras. 102–12

³⁴ General Comment 14, at [47]; General Comment 15, at [40]; For a detailed discussion of the minimum core obligations see Chapter One

³⁵ Müller, ‘Limitations’ (n29), 575; BIICL Handbook (n2), 22

³⁶ Giacca (n15), 84

situation, the absence of a derogation clause should not be interpreted as foreclosing the possibility of derogation.³⁷

There is, therefore, a lack of clarity as to the derogability of ESCR and the right to education. Though even if it is possible to derogate from ESCR, it is clear that the minimum core of ESCR remains non-derogable, so the restriction on the applicability of ESCR is only partial. However, no relevant derogations or limitations have been made by Colombia and the DRC. While derogations and limitations are important issues in respect of the protection of education more widely, the precise nature and scope of these principles will not be examined further as this is not necessary for the purposes of this thesis.

Extra-territorial obligations

The extraterritorial application of IHRL has now been clearly established.³⁸ The case law of the ICJ supports the position that IHRL obligations extend extraterritorially to situations in which the State exercises ‘effective control’ over a territory.³⁹ The question of extraterritorial applicability is relevant during IAC and in cases of occupation, where a State is likely to be operating outside of its own borders.⁴⁰ As such, a State will not be bound by IHRL where it does not exercise effective control over territory, though a State that has effective control will be bound to protect IHRL, including the right to education. The case studies of this thesis concern NIAC, as such the issue of extraterritorial obligations is not relevant. As such, the complex issue of extraterritorial IHRL obligations will not be discussed further,

³⁷ Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156

³⁸ John Cerone, ‘Jurisdiction and Power: the Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context’ (2007) 40(2) *Israel Law Review* 396, 418

³⁹ Noam Lubell, ‘Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the debate’ (2007) 40(2) *Israel Law Review* 648, 652

⁴⁰ Lubell, ‘Challenges in Applying’ (n15), 739

though it is important to note that the issue is important for the wider protection of education in armed conflict situations.

Obligations of Non-State Armed Groups

It is often argued that IHL binds all parties to a conflict, including NSAG.⁴¹ However, the question as to whether IHRL binds non-State actors is far more controversial,⁴² as there is disagreement as to whether NSAG may be bound by IHRL.⁴³ NSAG may have a significant impact on the enjoyment of human rights, including the right to education, which implies that they should have obligations, but this is countered with the argument that it is the States responsibility to regulate the conduct of these actors.⁴⁴ The significant threat that NSAG pose to CPR and ESCR ‘is particularly so where a State has lost control over part of its territory’.⁴⁵ Yet, there is a growing consensus to suggest that NSAG can hold IHRL obligations,⁴⁶ particularly where they have control over territory.⁴⁷ In situations where the State has no power to enforce its IHRL obligations as a result of a NSAG’s control over territory, if NSAG have no IHRL obligations this results in a legal vacuum where individuals are left

⁴¹ Moir (n12), 194; Laura M Olson, ‘Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict’ (2009) 40(3) *Case Western Reserve Journal of International Law* 437; Sivakumaran, ‘Re-envisaging’ (n12), 248; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups: Studies in International Law* (Hart Publishing 2016), 10-12, 59, 82; Protecting Children (n6), at [2.14.1]

⁴² Droegge, ‘The Interplay’ (n15), 336; Droegge, ‘Elective Affinities?’ (n12), 521

⁴³ Sivakumaran, ‘Re-envisaging’ (n12), 242-243; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017), 15

⁴⁴ Sigrun I. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia: Oxford, 2006), 63-64

⁴⁵ Tatyana Eatwell, *State Responsibility for Human Rights Violations Committed in the State’s Territory by Armed Non-State Actors* (Geneva Academy of International Humanitarian Law and Human Rights 2018), 7; As to the ability of NSAG to have a significant impact of the enjoyment of rights, see also, Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law* (Oxford University Press 2018), 1-4

⁴⁶ Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford University Press: Oxford, 2010), 127

⁴⁷ Nigel S Rodley, ‘Can Armed Opposition Groups Violate Human Rights?’ in Kathleen E. Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century* (Springer 1993), 297-313; Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Oxford University Press 2002), 52; Fortin, *The Accountability* (n43), 385-386

without effective legal protection.⁴⁸ By allowing a vacuum to exist, international law's effectiveness is undermined, as it fails to respond to the realities of international life.⁴⁹ Murray argues that 'it does not seem reasonable that affected individuals should be denied the protections of international human rights law solely because the entity to whose authority they are subject is not a state'.⁵⁰

Not only does it remain unclear whether NSAG have IHRL obligations, especially when such groups do not have territorial control, another significant concern is whether NSAG have the capacity to comply with the rules of IHRL, as some have significant capabilities and some do not.⁵¹ It is often argued that non-State actors are unlikely to have the capacity to uphold certain rights.⁵² The question as to whether and to what extent NSAG must apply IHRL is, therefore, left unresolved.⁵³ In the case studies of this thesis, due to the difficulties in determining whether the NSAG in question have territorial control and the capacity to realise the right to education, the focus is on the obligations of the States of Colombia and the DRC, as the primary IHRL obligations holders. As I only analyse the obligations of States within the case studies of this thesis, it is not necessary, and beyond the scope of this thesis, to examine in any more detail the obligations of NSAG.

The Benefits of Ensuring the Realisation of the Right to Education for All during Situations of Non-International Armed Conflict

As well as education being a legal right for all that States are required to realise during situations of NIAC, there are other significant and persuasive reasons for ensuring increased protection of education in NIAC. Arguably, one of the most

⁴⁸ Murray (n41), 9-10; Fortin, *The Accountability* (n43), 375

⁴⁹ Ibid, (n41), 10

⁵⁰ Ibid, 157, 159; See also, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 534; Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 *Human Rights Quarterly* 60, 61

⁵¹ Sivakumaran, 'Re-envisaging' (n12), 253, 256

⁵² Moir (n12), 194

⁵³ Murray, *Guide*, (n12), 3

compelling reasons to protect education during NIAC is that education can be both the cause of conflict or the solution to conflict.⁵⁴ On the one hand, education itself can play a contributory role in the outbreak of armed conflict, for example, tension and violence between groups may increase where curricula, language policies or teaching methods are biased against, or insensitive towards, minority groups.⁵⁵ An unequal and inadequate system of education can motivate a rebel group to fight against the State. Alternatively individuals may have few opportunities or the means to support themselves because of a lack of education, so resort to participating in a conflict to support themselves instead.⁵⁶

This could result in a vicious cycle whereby a lack of, or unequal distribution of, educational opportunities contributes to the outbreak of conflict, while the conflict further restricts educational opportunities, which in turn intensifies the conflict. The conflicts in Sudan and Sierra Leone have been directly linked to issues such as a lack of, or unequal access to, education, to exclusionary content of the curriculum, and to the failure of education resulting in employment after graduation.⁵⁷ It is important to realise equitable and quality education in peacetime in order to minimise the risk of NIAC, but to also ensure such education during a NIAC to avoid enflaming the conflict. Education is intimately intertwined with, and plays a vital role in, the

⁵⁴ UNICEF, *The Two Faces of Education in Ethnic Conflict: Towards a Peacebuilding Education for Children* (UNICEF 2000), vii; Shelley Deane, 'Syria's Lost Generation: Refugee Education Provision and Societal Security in an Ongoing Conflict Emergency' (2016) 47 *IDS Bulletin* 35, 35

⁵⁵ Global Education Cluster, *Booklet 6: Education for Building Peace, Protecting Education in Countries Affected by Conflict Series* (Global Education Cluster 2012), 4

⁵⁶ Kendra E Dupuy, 'Education in Peace Agreements, 1989–2005' (2008) 26 *Conflict Resolution Quarterly* 149, 150; see also Clayton L Thyne, 'ABC's, 123's, and the Golden Rule: The Pacifying Effect of Education on Civil War, 1980-1999' (2006) 50 *International Studies Quarterly* 733, 738; Paul Collier, 'Doing Well out of War: An Economic Perspective' in Mats Berdal and David M Malone (eds), *Greed and Grievance: Economic Agendas in Civil Wars* (Lynne Rienner 2000)

⁵⁷ Dupuy, (n56), 149, 150; See also, Thyne, (n56), 733; Nicholas Sambanis, 'Using Case Studies to Expand Economic Models of Civil War' (2004) 2 *Perspectives on Politics* 259

building of peace in conflict-affected societies,⁵⁸ as does human rights education and an understanding of IHL.⁵⁹ Education is essential for peace and tolerance,⁶⁰ to sustainable development and stability within and among countries.⁶¹ Education can contribute to peace where the equal right of all groups to education is respected, and where the education promotes values such as mutual respect, understanding, and conflict resolution.⁶² As such, it is equally important to realise education during NIAC to bring an end to the conflict.

Human rights are indivisible in that each right is inherent to the dignity of every person and each right has equal status and no hierarchy among other rights, similarly human rights are interdependent and interrelated as the realisation of one right often depends, wholly or in part, on the realisation of others.⁶³ However, education, in particular, is an enabling right, in that it empowers access to other human rights,⁶⁴ as many CPR and ESCR can only be ‘exercised in a meaningful way after a minimum level of education has been achieved’.⁶⁵ The ICESCR itself provides that education should ‘strengthen the respect for human rights and fundamental freedoms’.⁶⁶ Education has, therefore, been described as a ‘key to unlock other human rights’, such as the rights to health, or freedom of expression and of association,⁶⁷ or the right to

⁵⁸ Dupuy, (n56), 149, 150; Save the Children, *Education for Peace: Building Peace and Transforming Armed Conflict Through Education Systems* (2008), 2, available at https://toolkit.ineesite.org/resources/ineecms/uploads/1050/Education_for_Peace_Building_Peace.pdf

⁵⁹ Global Education Cluster, (n55), 7

⁶⁰ Incheon Declaration, <https://unesdoc.unesco.org/ark:/48223/pf0000245656>, at [5]

⁶¹ The Dakar Framework for Action, Education for All: Meeting our Collective Commitments, at <https://unesdoc.unesco.org/ark:/48223/pf0000121147>, at [6]

⁶² Global Education Cluster, (n55), 3, 4, 5

⁶³ UNICEF/UNESCO, ‘A Human Rights-Based Approach to Educational for All’ (*UNICEF*, 2007) <www.unicef.org/publications/index_42104.html>, 10

⁶⁴ See generally, *Ibid*, Chapter 2; Incheon Declaration, <https://unesdoc.unesco.org/ark:/48223/pf0000245656>, at [5]

⁶⁵ Manfred Nowak, ‘The Right to Education’ in Asbjørn Eide and others, *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001)

⁶⁶ Nowak, (n65); See also, ICESCR, Art 13(1), which is discussed in greater detail in Chapter 1

⁶⁷ Katarina Tomasevski, *Education Denied: Costs and Remedies* (Zed Books 2003), 32

work and the right to an adequate standard of living.⁶⁸ Education can also contribute to increasing people's income and combatting poverty.⁶⁹ The failure to realise the right to education is, therefore a great impediment for the future of any child,⁷⁰ or adult and society. Education also facilitates human rights education, and such knowledge 'is a prerequisite for individuals and groups so that they can reasonably expect and demand respect for their rights and freedoms'.⁷¹ Therefore, in a NIAC, the continuity of education is especially important, as all rights are at risk of violation, and individuals educated on their rights will be better equipped to expect and demand respect for all of their rights, including the right to education itself. As such, States should endeavour to protect each right, while taking into account that protecting the right to education is particularly vital for the realisation of other rights.

Education is also considered crucial for democratic societies in general',⁷² and is also considered enabling in the sense that it empowers meaningful participation in society,⁷³ promotes 'the rule of law and a culture of lawfulness', and 'provides an important protective function by strengthening learners' abilities to face and overcome difficult life situations'.⁷⁴ In fact, children and their families living on the ground in conflict situations have recognised education as a key concern and as a humanitarian

⁶⁸ BIICL Handbook (n2), 132

⁶⁹ UNICEF, 'Rebuilding Hope in Afghanistan' (*UNICEF*, November 2003) <<https://www.unicef.org/publications/files/e0973unicef.pdf>>, 2; ICRC, (n76), 4; See also UNESCO, 'Education Counts: Towards the Millennium Development Goals' (*UNESCO*, 2011) <<http://unesdoc.unesco.org/images/0019/001902/190214e.pdf>>, 7: 'One extra year of schooling increases an individual's earnings by up to 10%': International Commission on Financing Global Education Opportunity, 'The Learning Generation: Investing in Education for a Changing World' (*International Commission on Financing Global Education Opportunity*, 2016) <http://report.educationcommission.org/wp-content/uploads/2016/09/Learning_Generation_Full_Report.pdf>, 99

⁷⁰ BIICL Handbook (n2), 132

⁷¹ Gudmundur Alfredsson, 'The Right to Human Rights Education' in Asbjørn Eide and others, *Economic, Social and Cultural Rights: A Textbook* (2nd ed, Martinus Nijhoff 2001), 273

⁷² BIICL Handbook (n2), 66; See Klaus D. Beiter, *The Protection of Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Koninklijke Brill NV 2006), 3

⁷³ See generally, *UNICEF*, 2007, Chapter 2

⁷⁴ UNESCO, 'Strengthening the Rule of Law through Education: A Guide for Policymakers' (*UNESCO*, 2019) <<https://unesdoc.unesco.org/ark:/48223/pf0000366771>>, 2

need.⁷⁵ Protecting education is seen as important for those living in such situations because it can also provide a sense of normality in an otherwise hostile and frightening environment.⁷⁶ Yet, in order to fulfil these functions, it is important that children not only have access to schools during armed conflict, but also a high quality of learning, as ‘being in school isn’t the same thing as learning’.⁷⁷

Significantly, particularly in protracted conflict situations, conflict can deprive an entire generation of children of a good-quality education,⁷⁸ resulting in ‘generations of uneducated adults who are destined for a life of poverty in countries with little chance of economic growth, political stability or security’.⁷⁹ For example, Rohingya children,⁸⁰ and Syrian children have been referred to as a ‘lost generation’ as a result of missed educational opportunities due to armed conflict and the impact this will have on their future.⁸¹ Similarly, the conflict in Yemen has disrupted the education of

⁷⁵ ICRC, ‘Framework for Access to Education’ (ICRC, July 2017)

<www.icrc.org/en/document/framework-access-education>, 4; Save the Children, ‘What do Children Want in Times of Emergency and Crisis? They Want an Education’ (Save the Children, June 2015) <www.savethechildren.org/content/dam/global/reports/education-and-child-protection/what-children-want.pdf>, 1, 11, and 16

⁷⁶ ICRC, July 2017, 4

⁷⁷ The World Bank ‘The Education Crisis: Being in School is Not the Same as Learning’ (*The World Bank*, January 2019) <www.worldbank.org/en/news/immersive-story/2019/01/22/pass-or-fail-how-can-the-world-do-its-homework>

⁷⁸ Save the Children, *Attacks on Education: The Impact of Conflict and Grave Violations on Children’s Futures* (Save the Children, 2013), 7,

http://www.protectingeducation.org/sites/default/files/documents/grave_violations.pdf

⁷⁹ Save the Children, ‘The Future is Now: Education for Children in Countries Affected by Conflict’ (Save the Children, 2010),

⁸⁰ UNICEF, ‘Investment in Education Desperately Needed to Avert “Lost Generation” of Rohingya children – UNICEF: One Year After Mass Exodus from Myanmar, the Futures of More than 500,000 Refugee Children in Bangladesh are in the Balance’ (UNICEF, August 2018)

⁸¹ UNICEF and others, ‘Syria Crisis: Education Interrupted – Global Action to Rescue the Schooling of a Generation’ (UNICEF and others, 2013), 3,

http://www.protectingeducation.org/sites/default/files/documents/education_interrupted.pdf; UNICEF, ‘Syria’s Children: A Lost Generation?’ (UNICEF, March 2013), 2, 4; Save the Children, *Futures Under Threat: The Impact of the Education Crisis on Syria’s Children* (Save the Children, 2014), 3, 4, 6, 16, 34

http://www.protectingeducation.org/sites/default/files/documents/save_the_children_futures_under_threat.pdf Save the Children, ‘Education under Attack in Syria’ (Save the Children, 2015), 5; American Institute for Research, CFBT Education Trust, Save the Children, ‘The Cost of War: Calculating the Impact of the Collapse of Syria’s Education System on Syria’s Future’ (American Institute for Research, CFBT Education Trust, Save the Children, 2015), 1,

http://www.protectingeducation.org/sites/default/files/documents/the_cost_of_war.pdf; Deane, (n54), 35; see also, the No Lost Generation Initiative, initiated in 2013 by UN agencies, NGO’S and

millions of children, putting their development and future at risk,⁸² and Yemeni children have also been referred to as a ‘lost generation’.⁸³

Few matters are ‘more compelling than the desire to protect children from armed conflict’.⁸⁴ Children have always been affected by armed conflict, yet there has been a drastic increase in the impact of armed conflict on entire communities, with children being caught up in, and targeted by, violence.⁸⁵ This thesis looks at the killing and injuring of child students, attacks on primary and secondary schools, and the military recruitment of children. However, educational initiatives typically focus almost exclusively on the provision of primary and secondary education in conflict contexts, while higher education is rarely considered.⁸⁶ The failure to protect higher education will also result in ‘losing a future generation of scientists, engineers, physicians, teachers and leaders’.⁸⁷ Higher education should also be protected because it helps build human capital and growth, and helps mitigate the risk and effects of conflict.⁸⁸ Where generations of children and adults miss out on their right to education, the peacebuilding function of education is lost, as are the above-mentioned additional benefits to the individual and society, as such, it is essential to ensure the education of both children and adults during NIAC. As such, this thesis also examines the protection of education for adults during NIAC.

governments in order to tackle the education crisis in Syria, Lebanon, Jordan, Turkey, Iraq, and Egypt, at <https://www.nolostgeneration.org/page/about-nlg>

⁸² Save the Children, ‘Futures on the Line: Yemen’s Children Missing an Education’ (Save The Children, 2016), 1, http://www.protectingeducation.org/sites/default/files/documents/20160523_yemen_education_brief_final_designed_version.pdf

⁸³ War Child, ‘Yemeni Children are Becoming a Lost Generation’ (War Child, May 2019), <https://www.warchild.org.uk/whats-happening/news/yemen-children-lost-generation>

⁸⁴ Protecting Children (n6), at [1.15]

⁸⁵ Ibid, at [1.20]

⁸⁶ Deane, (n54), 45-47

⁸⁷ Declan Butler, ‘Lost Generation Looms as Refugees Miss University: Educational Void Risks Hampering Reconstruction in Middle East’ (Nature, September 2015) at <https://www.nature.com/news/lost-generation-looms-as-refugees-miss-university-1.18403>

⁸⁸ Deane, (n54), 45-47

Contribution to knowledge

There are three key texts that examine the protection of education in situations of armed conflict. One of these texts is a study by the British Institute of International and Comparative Law, '*Protecting Education in Insecurity and Armed Conflict: An International Law Handbook*'.⁸⁹ The BIICL Handbook develops an analysis of the protection of education during situations of insecurity and armed conflict within IHRL, IHL and international criminal law, and provides guidance as to how these regimes intersect.⁹⁰ However, there are three main differences between this thesis and the BIICL Handbook, emphasising the originality of, and the need for, this research.

Firstly, and most significantly, the BIICL Handbook constitutes an excellent starting point from which to work, but it is aimed at presenting clarity rather than identifying problems. The BIICL Handbook was written with the intent to inform legal and non-legal practitioners as to how international law currently applies,⁹¹ so it is logical that areas of uncertainty and controversy, or areas where gaps in protection exist, are not examined with depth. The purpose of this thesis, on the other hand, is to assess what the law currently is so as to better understand its shortcomings and gaps when applied in practice, in order to determine how the law can be developed to better ensure the realisation of the right to education during armed conflicts. In contrast to the BIICL Handbook, this thesis actively highlights and focuses on areas of debate.

Secondly, the methodology used in the BIICL Handbook is black letter law, as it focuses on analysing treaties and other international and regional instruments, customary international law, case law and academic literature.⁹² The BIICL Handbook does not apply the law in practice. Conversely, this thesis is socio-legal in nature,

⁸⁹ BIICL Handbook (n2)

⁹⁰ Ibid, 2

⁹¹ Ibid, 2-3

⁹² Ibid, 2

examining the effectiveness of IHRL and IHL in practice within the context of comparative case studies.

Thirdly, this thesis is more focused than that of the BIICL Handbook. This thesis does not look at a broad spectrum of education-related violations during armed conflict and insecurity, rather it examines the particular issue of deliberate and direct attacks against education during NIAC. It is worth noting that the BIICL Handbook is also broader as it covers the protection of education within international criminal law. Instead, this thesis focuses on an in-depth analysis of IHRL and IHL, permitting a more detailed and thorough analysis.

The second key text is the recently published '*Protecting Children in Armed Conflict*', which examines whether the norms of IHRL, IHL, and ICL, and the regimes respective accountability mechanisms adequately and efficiently protect children during situations of armed conflict in respect of the 'six grave violations' identified by the UN Special Representative for Children in Armed Conflict.⁹³ *Protecting Children*, therefore, does what the BIICL Handbook does not, namely it focuses on examining the adequacy of international law. It argues that numerous existing substantive protections relevant to the protection of children in conflict are vague and ambiguous and could be clarified,⁹⁴ and that some substantive protections are under-developed and could be strengthened, or are lacking altogether and could be created.⁹⁵ However, this thesis differs significantly from, and supplements the knowledge in, *Protecting Children*. It does this ultimately by highlighting the relevant ambiguities and gaps identified in *Protecting Children*, and providing additional commentary on them; at times this thesis agrees with the recommendations made, and at other times it makes alternative recommendations. Significantly, this thesis also provides additional

⁹³ *Protecting Children* (n6), at [1.11]

⁹⁴ *Ibid*, at [1.7, 1.12.1, 2.69 9.8, 9.49]

⁹⁵ *Ibid*, at [1.7, 1.12.2, 2.69, 9.8, 9.49]

commentary on the adequacy of IHRL and IHL in their protection of education in NIAC, above and beyond that contained in Protecting Children.

Like the BIICL Handbook, Protecting Children in AC adopts a blackletter methodology and does not examine the law in practice. Most importantly, this thesis applies the law simultaneously in practice in order to test the ambiguities and gaps identified in Protecting Children, as well as in Chapter 1, 2 and 3 of this thesis. This thesis also supplements the knowledge in Protecting Children, as it examines the relationship between IHRL and IHL in far greater depth. In Protecting Children, it was stated that it would not be helpful to embark on an analysis as to whether *lex specialis* or some other mechanism best protects children in respect of the regulation of the relationship between the two regimes. This is because the text uses the lack of clarity as to the relationship to support its key recommendation that the IHRL and IHL rules relating to the protection of children be consolidated into one body of law.⁹⁶ Conversely, Chapter 3 of this thesis is dedicated to the examination of the various approaches to the relationship between IHRL and IHL, with the purpose of determining which approach best protects education while balancing the purposes of IHRL and IHL. While a unified body of law might be an approach that is developed going forward, it is important to determine how to best regulate the relationship until such an approach is possible. Chapter 4 explores the relationship between the two bodies further, as it examines whether the ambiguities and gaps in IHRL can be filled by the simultaneous application of IHL, and vice versa.

While there is naturally some overlap between Protecting Children and this thesis, the focus of this thesis fundamentally differs. The six grave violations examined in Protecting Children are: the killing and ill treatment of children; the military

⁹⁶ Ibid, at [2.86]

recruitment and use of children; sexual violence against children; child abduction; the denial of humanitarian assistance; and attacks against schools and hospitals.⁹⁷ This thesis examines the adequacy of IHRL and IHL only in respect of the killing and ill treatment of children, the military recruitment and use of children, and attacks against schools and hospitals. Also, this thesis does not look at a broad spectrum of child-related violations, rather it looks specifically at the issue of deliberate and direct attacks against education in a NIAC for both adults and children.

As to the killing and ill-treatment of children examined generally in *Protecting Children*, this thesis analyses this issue only in respect of the systematic targeting of children when they are going to or from school, and while they are at school, but also in respect of such attacks against education personnel in all levels of education, and attacks against adult students. As such, while *Protecting Children* focuses on a range of rights and protections provided for within the Convention on the Rights of the Child, this thesis focuses on the protection of the right to education as contained in the ICESCR, which provides for the right to education for adults as well as children, as such, much of the analysis on IHRL within *Protecting Children*, was not relevant for this thesis. Additionally, unlike *Protecting Children*, I do not examine the manner in which attacks against education affect other rights, such as the right to life, as this is beyond the scope of this thesis.

Similarly, in respect of the grave violation regarding the military recruitment and use of children, again the focus in this thesis is on the realisation of the right to education. In respect of attacks against schools and hospitals, attacks against hospitals are examined only to the extent that it is necessary to underline the different level of protection between educational institutions and hospitals in IHL. As such, the focus is

⁹⁷ Ibid, at [1.11]

once more on the right to education. This thesis is also narrower as it does not look at the regime of ICL and accountability mechanisms, or the law applicable in IAC. Such issues are beyond the scope of this thesis, and it allows for a more detailed analysis of IHRL and IHL in respect of the issue of deliberate and direct attacks in a NIAC.

The BIICL Handbook states that ‘there has been very little examination of the different areas of international law and their intersection on issues concerning education-related violations during insecurity and armed conflict’.⁹⁸ This thesis is essential due to the need for further research examining how IHRL and IHL intersect specifically on the issue of deliberate and direct attacks against education during armed conflict situations. Moreover, the problem is global, as attacks against education occur in Africa, the Americas, Asia, Europe, and the Middle East.⁹⁹ Attacks are also longstanding and on-going issues. The third of the three key texts is the ‘Education under Attack’ series. UNESCO first examined incidences of attacks against education in their report ‘Education under Attack’, which highlights the occurrence of such attacks globally between 1999 to 2007.¹⁰⁰ UNESCO repeated this study for the period of 2007 to 2010.¹⁰¹ The Global Coalition to Protect Education from Attack replicated ‘Education under Attack’ for the period 2010 to 2013,¹⁰² and most recently for the period 2013 and 2017.¹⁰³ These reports offer a ‘global overview providing a more detailed picture of the scale, nature, motives and impact of attacks on education and the variety of responses that are being, or could be, made’.¹⁰⁴ These reports discuss attacks against education in order to highlight the occurrence of attacks

⁹⁸ BIICL Handbook (n2), 2

⁹⁹ Human Rights Watch, ‘Protecting Schools from Military Use: Law, Policy, and Military Doctrine’ (Human Rights Watch May 2019), 1

¹⁰⁰ United Nations Educational Scientific and Cultural Organization, *Education under Attack: 2007* (UNESCO 2007)

¹⁰¹ United Nations Educational Scientific and Cultural Organization, *Education under Attack: 2010* (UNESCO 2010)

¹⁰² Global Coalition to Protect Education from Attack, *Education under Attack: 2014* (GCPEA 2014)

¹⁰³ Global Coalition to Protect Education from Attack, *Education under Attack: 2018* (GCPEA 2018)

¹⁰⁴ GCPEA, *Education under Attack: 2014* (n102), 5

against education around the globe, without an analysis of, or the application of, the applicable legal framework.

There are also numerous texts relevant to the relationship between IHRL and IHL,¹⁰⁵ though none examine the relationship specifically in the context of deliberate and direct attacks against education in a NIAC in practice. Of particular importance for the purposes of this thesis is ‘Practitioners Guide to Human Rights in Armed Conflict’,¹⁰⁶ as I identify the approach developed within this text as the most suitable approach to regulating the relationship between IHRL and IHL. However, this thesis supplements this text as it expands upon the proposed approach in the context of deliberate and direct attacks against education, and tests the approach in the case studies.

Therefore, my thesis is original because at the time of writing, no other text examines the effectiveness of IHRL in providing for the right to education, and of IHL in protecting education, when applied simultaneously, in both *theory* and *practice* in relation to the issue of deliberate and direct attacks during NIAC. This research is essential not only as is it original, but also because it demonstrates how education can be better protected during situations of NIAC, and as highlighted above, education is worthy of increased protection.

Methodology

This thesis adopts a mixed-methods methodology. Macro research relates to large-scale systems of social relations, whereas micro research is concerned with analysing more local forms of social organisation.¹⁰⁷ Chapters 1 to 3 of this thesis are macro in the sense that they are a large-scale examination of IHRL and IHL. Chapter 4 is micro

¹⁰⁵ See Chapter 3 on the relationship between IHRL and IHL.

¹⁰⁶ Murray, Guide,(n12)

¹⁰⁷ Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in Practice* (3rd edn, Routledge 2007), 188

as it examines more locally, in the form of two case studies, the effectiveness of IHRL and IHL in practice. The overall thesis is socio-legal in the sense that it examines law in practice. The macro part of the thesis is, however, largely black letter in its close analysis of IHRL and IHL. The case studies, in the micro part of thesis, are both socio-legal and comparative.¹⁰⁸

Black Letter Law Approach

A black letter law approach can be defined as research aimed at providing a detailed commentary of the content of the law.¹⁰⁹ A black letter approach will criticise the law and call for reform, but this is ‘limited in nature and scope to the exposure of ambiguities and gaps within existing law’.¹¹⁰ Traditional forms of black letter research focus on using primary legal sources, particularly cases and statutes, and this is seen as sufficient.¹¹¹ Salter and Mason refer to a black letter approach as ‘law in books’.¹¹² The macro section of my thesis is largely black letter in the sense that primary and secondary sources are sufficient in facilitating the analysis of the content of, and the relationship between, IHRL and IHL, and I subject IHRL and IHL to a detailed analysis in order to uncover ambiguities and gaps.

A criticism of the black letter approach is that it is often too descriptive,¹¹³ ‘without taking the context of the law sufficiently into account’.¹¹⁴ The black letter

¹⁰⁸ See Chapter 4 for an in depth analysis of the methodology for the case studies, including a description of how the case studies were chosen.

¹⁰⁹ Ian Dobinson and Francis Johns, ‘Qualitative Research Methods’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007), 18-19; Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman 2007), 50; Terry Hutchinson, ‘Doctrinal Research: Researching the Jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013), 9

¹¹⁰ Salter and Mason (n109), 45, 99-100

¹¹¹ Douglas W Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163, 178; Fons Coomans, Fred Grunfeld and Menno T. Kamminga (eds), *Methods of Human Rights Research* (Intersentia 2009), 47

¹¹² Salter and Mason (n109), 89, 118

¹¹³ *Ibid*, 49; Mark van Hoecke, ‘Legal Doctrine: Which method(s) for what kind of discipline?’ in Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011), 3

¹¹⁴ Hoecke (n113), 3

law approach studies legal rules, principles and cases in a manner which views the law as operating in a ‘social, economic and political vacuum’.¹¹⁵ In adopting a black letter approach, one must ‘interpret disputes in a strictly legalistic manner’, which ‘requires students to rigorously exclude supposedly external factors, such as policy, ideological and moral issues’.¹¹⁶ The macro part of this thesis is not examined in a non-contextual vacuum, as social, economical, political, policy, ideological or moral issues are taken into account where relevant when applying the legal standards to the particular context of the case studies.

Socio-legal Approach

The definition of the socio-legal approach is contentious.¹¹⁷ Salter and Mason argue that it is difficult to provide a ‘single and fixed definition of the essence of socio-legal studies’.¹¹⁸ The concept is hard to define because of the wide range of scholarship carried out under the name socio-legal, and more frequently, the term ‘socio-legal’ has been used broadly.¹¹⁹ This is reflected in the definition provided by the Socio-Legal Studies Association, which states authoritatively that ‘socio-legal studies embraces disciplines and subjects concerned with law as a social institution, with the social effects of law, legal processes, institutions and services and with the influence of social, political and economic factors on the law and legal institutions’.¹²⁰ It is also provided that ‘socio-legal research is diverse, covering a range of theoretical perspectives and a wide variety of empirical research and methodologies’.¹²¹

¹¹⁵ Coomans, Grunfeld and Kamminga (n111), 46

¹¹⁶ Salter and Mason (n109), 45

¹¹⁷ Fiona Cownie and Anthony Bradney, ‘Socio-legal Studies: A Challenge to the Doctrinal Approach’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013), 35

¹¹⁸ Salter and Mason (n109), 121

¹¹⁹ Cownie and Bradney (n117), 35

¹²⁰ Socio-Legal Studies Association, ‘Statement of Principles of Ethical Research’ (2009) at [1.2.1], at http://www.slsa.ac.uk/images/slsdownloads/ethicalstatement/slsa%20ethics%20statement%20_final%5B1%5D.pdf (Last accessed on 14/12/2017)

¹²¹ *Ibid*, at [1.2.2]

Socio-legal studies can be seen as research that investigates and assesses ‘the practical impact of law in action’, and as addressing the gap between ‘law in books’ and ‘law in action’.¹²² A socio-legal approach allows one to go beyond merely providing critique of IHRL and IHL, by testing the efficacy of the law in practice. Salter and Mason argue that any thesis that wishes to address its topic in a fulsome way must address both the ‘law in books’ and ‘law in action’ dimensions.¹²³ This thesis examines ‘law in books’ in the macro part, and ‘law in action’ in the micro part, addressing more thoroughly the adequacy of IHRL and IHL.

Unlike a black-letter approach, those ‘adopting a sociolegal approach must be prepared to use a far wider range of sources’, gathering data wherever appropriate to the problem using whatever method is most suitable.¹²⁴ Socio-legal research ‘reinstates the centrality of social scientific approaches, using both qualitative and quantitative research methods, to investigate the impact of law in action’.¹²⁵ The micro part of this thesis examines a broad range of sources, such as UN reports, the reports of human rights monitoring bodies, and the reports of reputable NGO’s that document attacks against education in both a quantitative and qualitative manner. Testing efficacy requires the analysis of such information.

Comparative Case Study Approach

Gaining access to research subjects in order to conduct interviews or questionnaires can be difficult, and if the researcher wants to spend some time observing the subjects then the difficulties are likely to be greater.¹²⁶ An ethnography study was not feasible here in light of the conflict situations within Colombia and the

¹²² Salter and Mason (n109), 125, 30

¹²³ Ibid, 125, 30

¹²⁴ Ibid, 129-130

¹²⁵ Ibid, 119

¹²⁶ Mandy Burton, ‘Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013), 59

DRC, largely due to safety issues for both observers and participants. It was also not possible due to constraints on time and finances. For the same reasons, interviews were not an option.

A case study investigates specific research questions in the context of human activity embedded in the real world, and can examine an individual case or multiple cases.¹²⁷ I have adopted a case study methodology, examining Colombia and the DRC. These countries have been chosen because the issue of deliberate and direct attacks are longstanding in these States, and they provide a best-case scenario in respect of having ratified the relevant treaties, therefore it will be quite telling if these States are not realising the right to education in practice.¹²⁸

A benefit of a case study approach is that it investigates something that already exists, and is not an artificially generated situation.¹²⁹ This is a particular benefit for this thesis, as drawing upon actual situations will enable a more realistic examination of the effectiveness of IHRL and IHL in practice. Given the necessarily limited number of case studies undertaken, I have been careful not to extrapolate too far. However, in Chapter 4 we shall see that it is possible to draw conclusions towards my working hypothesis that gaps and inconsistencies exist.

Chapter overview

As the right to education remains applicable in situations of NIAC, Chapter One proceeds to examine, firstly, the normative content of the right to education in the context of NIAC, with a focus on the ICESCR.¹³⁰ Chapter One then discusses the IHRL obligations of States Parties to the ICESCR during NIAC. Chapter One discusses the various obligations explicitly provided for within Article 2(1) of the

¹²⁷ Bill Gillham, *Case Study Research Methods* (Continuum International Publishing Group 2010), 1

¹²⁸ Full detail on the methodology for the case studies is provided in Chapter 4.

¹²⁹ Martyn Denscombe, *The Good Research Guide: For Small Scale Research Projects* (5th edn, Open University Press 2014), 54

¹³⁰ ICESCR

ICESCR, and then considers the obligations not explicitly set out within the ICESCR, but which are provided for within *General Comment No. 3: The Right Nature of State Parties Obligations (Art. 2, Para 1, of the Covenant)*,¹³¹ and *General Comment No. 13, The Right to Education*,¹³² of the Committee on Economic, Social and Cultural Rights.¹³³ The purpose of this chapter is to determine whether there are gaps or ambiguities in the manner in which IHRL provides for the right to education in the context of deliberate and direct attacks during NIAC. I argue that education is inadequately provided for within IHRL, as while the normative content of the right to education is generally clear, the same cannot be said of the obligations of States.

Chapter Two examines the protection of education within IHL. The chapter begins with a brief analysis of the various sources of IHL. Following on from this, the classification of conflicts and the issues surrounding the lower level of regulation of NIAC are discussed. Chapter Two then outlines the IHL provisions that explicitly protect education, with an emphasis on the fact that there are few such provisions, none of which are directly relevant to the issue of deliberate and direct attacks. The main focus of the chapter is then on the more important IHL provisions that implicitly protect education from deliberate and direct attacks. Namely these provisions relate to the principles of humanity, military necessity, proportionality, distinction, and precautions in attack. The purpose of this chapter is similarly to determine whether there are gaps or ambiguities in the protection that IHL affords to education in the context of deliberate and direct attacks during NIAC. I argue that the protection of education within IHL is inadequate, as a result of areas of uncertainty and gaps in protection.

¹³¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of State Parties' Obligations (Art. 2, Para 1, of the Covenant)*, 14 Dec. 1990, E/1991/23 (General Comment 3)

¹³² Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The Right to Education (Art. 13 of the Covenant)*, 8 Dec. 1999, E/C.12/1999/10 (General Comment 13)

¹³³ Hereinafter CESCR

Chapter Three proceeds to assess the manner in which IHRL and IHL apply simultaneously. Various approaches to the relationship between IHRL and IHL are explored, namely the ‘complementarity approach’, ‘humanisation approach’, ‘*lex specialis* approach’, ‘active hostilities/security operations approach’, and the ‘unified approach’. These approaches are examined with a view to determining, firstly, whether there are multiple feasible approaches to describing the relationship between IHRL and IHL, and, secondly, which approach most appropriately protects education during armed conflict situations. I argue that there is more than one current feasible approach to the relationship between IHRL and IHL, namely the *lex specialis* and active hostilities/security operations approach, and that while the unified approach, while not presently relevant, is a potential feasible approach in the future. I further argue that the active hostilities/security operations approach most adequately regulates the relationship between IHRL and IHL.

Chapter Four starts by outlining the methodology chosen specifically for the comparative case studies. Next, I first outline the context of the conflict in Colombia, I then identify the patterns and trends in respect of deliberate and direct attacks against education, and I apply IHRL and IHL simultaneously to specific incidents of each type of attack. Following this, I do the same for the DRC. This is done with a view to establishing whether IHRL has been violated and IHL breached. The main purpose of Chapter Four is to determine whether inconsistencies and ambiguities exist when IHRL and IHL are applied simultaneously, to show whether any remaining gaps and ambiguities exist. I argue that gaps and ambiguities remain.

The Conclusion of this thesis begins by summarising the arguments referred to in the preceding chapters. It answers the main research question of this thesis, namely whether the right to education is effectively provided for within IHRL and whether

IHL effectively protects education from deliberate and direct attacks during NIAC, arguing that education is in fact inadequately provided for. As such, I provide recommendations as to how the law can be developed to better protect education in practice, and identify areas for further research.

Chapter One: The Realisation of the Right to Education during Non-International Armed Conflicts: International Human Rights Law

1.1. Introduction

As IHRL remains applicable during armed conflicts,¹³⁴ it is necessary to examine the nature and scope of the right to education during a NIAC, and the corresponding obligations of States. This is considered with a view to determining whether the right to education is adequately provided for within IHRL. This is important, because if there are gaps or ambiguities in the provision for education within IHRL, this will impact the realisation of the right to education during a NIAC in practice. There has, at the time of writing, been little discussion as to the adequacy of IHRL in providing for the right to education specifically during a NIAC in respect of the issue of deliberate and direct attacks. As such, this chapter focuses on the adequacy of the nature and scope of the right to education and its corresponding obligations in respect of attacks against educational institutions, students and educational staff, the military use of educational institutions and the military recruitment and use of children.

This chapter begins with an overview of the relevant sources of IHRL, followed by an examination of the normative content of the right to education, focusing on Article 13 and 14 of the ICESCR. Following this, I analyse the obligations of States in respect of all ESCR, including the right to education, as provided for within Article 2(1) of the ICESCR.¹³⁵ Next, I examine the obligations that are not explicitly provided for within Article 2(1) of the ICESCR, but which have been developed following the adoption of the ICESCR, namely, minimum core obligations, and the tripartite obligations to respect, protect, and fulfil. I finally set out the manner in which IHRL

¹³⁴ See the introduction for a detailed discussion of the applicability of IHRL during armed conflicts.

¹³⁵ ICESCR, Art 2(1)

regulates the issue of child soldiers. While the military recruitment and use of children may violate the right to education, this is also explicitly prohibited, not within the ICESCR, but within the CRC and its Optional Protocol on the Involvement of Children in Armed Conflict.¹³⁶ I argue that IHRL insufficiently provides for education during situations of NIAC, as gaps and ambiguities exist within the IHRL framework, particularly in respect of determining the obligations of States. I test these ambiguities and gaps further in my case studies.

1.2. Sources of International Human Rights Law Relevant to the Right to Education

Unlike IHL,¹³⁷ ‘because of the difficulty in determining the content of customary human rights law’ the emphasis in this chapter will be on treaty law obligations.¹³⁸ While numerous IHRL instruments expressly protect the right to education for specific groups of vulnerable people,¹³⁹ the ICESCR protects the right for everyone. Also, Article 13 of the ICESCR is the most comprehensive binding provision dealing with the right to education,¹⁴⁰ for this reason, it is often thought of as the most important provision for the right to education.¹⁴¹ The focus of this chapter, therefore, is on the right to education as provided for within Articles 13 and 14 of the ICESCR.¹⁴² While the discussion within this chapter is centred on the ICESCR, other

¹³⁶ Hereinafter OPCRC

¹³⁷ For a further discussion on the customary nature of IHL, see Chapter 2. There is scope for further research into customary IHRL relevant to the realisation of the right to education in a NIAC, but due to the complexity of the topic, it is outside the scope of this thesis.

¹³⁸ Murray, *Guide*, (n12), at [1.1.81]

¹³⁹ For example, the Convention on the Rights of the Child, hereinafter CRC, provides in Article 1 that the Convention applies to ‘every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier’. The ICESCR also applies to individuals above this age, providing for the right to education for a broader range of individuals. A further example is Convention on the Elimination of All Forms of Discrimination against Women, hereinafter CEDAW, which only applies to females, while the ICESCR applies to males and females.

¹⁴⁰ General Comment 13, at [2]; Fons Coomans, ‘Clarifying the core elements of the right to education’ (1995) 18 SIM Special 11-25, 13

¹⁴¹ Beiter, (n72), 94

¹⁴² ICESCR, Art 13

IHRL instruments are examined where they occasionally add to the understanding of the right to education within the ICESCR.

The normative content of Article 13 and 14, as well as the obligations of States, will be analysed in light of the General Comments produced by the CESCR relevant to the right to education. *General Comment 11: Plans of Action for Primary Education (Art. 14)* addresses the obligation to produce a plan of action aimed at securing compulsory and free primary education in accordance with Article 14 of the ICESCR.¹⁴³ *General Comment No. 13: The Right to Education (Article 13 of the Covenant)* analyses the normative content of the right to education under Article 13 of the ICESCR, and the corresponding obligations.¹⁴⁴ General Comment 11 and General Comment 13 are complementary and should be read together.¹⁴⁵ The obligations of States will also be assessed in light of *General Comment No. 3: The Nature of States Parties' Obligations (Art 2, Para 1 of the Covenant)*, which provides additional guidance on the obligations of States in respect of all ESCR, including the right to education in the context of Article 2(1) of the ICESCR.¹⁴⁶ The minimum core obligations approach was also developed following the adoption of the ICESCR by the CESCR,¹⁴⁷ who incorporated the concept into its General Comment 3,¹⁴⁸ and

¹⁴³ Committee on Economic, Social and Cultural Rights, *General Comment 11: Plans of Action for Primary Education (Art 14)* 10 May 1999, E/C.12/1999/4. (General Comment 11)

¹⁴⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Article 13 of the Covenant)* 8 Dec 1999, E/C.12/1999/10, at [3]

¹⁴⁵ General Comment 13, at [2]

¹⁴⁶ Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations (Art 2, Para 1 of the Covenant)*, 14 Dec. 1990, E/1991/23. (General Comment 3)

¹⁴⁷ Gerald L Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863, 1878; Murray Wesson, 'Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284, 299-300, 308; Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *The Yale Journal of International Law* 113, 115; Inga Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing 2014), 117

¹⁴⁸ General Comment 3

elaborated upon it within General Comment 13 in respect of the right to education.¹⁴⁹ The CESCR also incorporated the tripartite typology of obligations into General Comment 13 in respect of education.¹⁵⁰

General Comments serve an important function in international law, and while they are not legally binding they carry considerable legal weight.¹⁵¹ Through their General Comments, the CESCR aims to define and clarify ICESCR provisions in order to assist States in fulfilling their obligations under the Covenant, and whenever necessary the CESCR is permitted to revise and update its General Comments.¹⁵² However, the CESCR fails to update their General Comments frequently, and the quality of clarification provided by the CESCR is questionable.¹⁵³ As such, General Comments 11 and 13 are used in this chapter as a starting point for determining the nature and scope of the right to education and the corresponding obligations in the context of deliberate and direct attacks during a NIAC. However, their accuracy is also assessed.

Clarification on State obligations can also be found within the Limburg Principles,¹⁵⁴ as well as the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.¹⁵⁵ While the Limburg Principles deal mainly with establishing obligations and they briefly discuss violations, the Maastricht Guidelines mainly focus

¹⁴⁹ General Comment 13

¹⁵⁰ Ibid, at [46-47]

¹⁵¹ Beiter (n72), 365; For further discussion of the significance of soft law, see Alan Boyle, 'Soft Law in International Law Making' in Malcolm D Evans, *International Law* (5th edn, Oxford University Press 2018)

¹⁵² Committee on Economic, Social and Cultural Rights, *Report on the Thirtieth and Thirty-First Sessions*, 2004, E/2004/22, at [51-52]

¹⁵³ Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge 2013), 128

¹⁵⁴ See Chapter 1 for further discussion of the Limburg Principles

¹⁵⁵ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) 20 Human Rights Quarterly 691 (Maastricht Guidelines)

on violations.¹⁵⁶ Also, the former instrument only provides interpretations of the obligations contained within Article 2(1) of the ICESCR, whereas the Maastricht Guidelines also discusses minimum core obligations and the tripartite obligations, evidencing a growing consensus towards the acceptance of these obligations within the international community.

1.3. The Normative Content of the Right to Education

1.3.1. The Prohibition of Discrimination

Article 13(1) of the ICESCR recognises ‘the right of everyone to education’,¹⁵⁷ making it clear that everyone has the right not to be discriminated against in education. Article 13(1) must be considered alongside Article 2(2) of the ICESCR, which states 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’.¹⁵⁸ The term ‘other status’ is broad and all encompassing, to ensure that education and other ESCR are delivered without distinction of any kind.

All the main IHRL treaties have similar provisions for the right to education and the prohibition of discrimination.¹⁵⁹ However, other instruments expressly prohibit discrimination on additional grounds, such as ‘economic condition’,¹⁶⁰ ‘ethnic origin’,¹⁶¹ and ‘disability’.¹⁶² Yet, this is not a true gap in IHRL, as such

¹⁵⁶ Limburg Principles, Section B; Maastricht Guidelines, at [6-15]

¹⁵⁷ ICESCR, Art 13(1)

¹⁵⁸ Ibid, Art 2(2)

¹⁵⁹ Universal Declaration of Human Rights, 10 December 1948, UNGA Res 217 A(III), Arts 2, 26(1) (UDHR); UNESCO Convention against Discrimination in Education, Preamble, Art 1 (CDE); CEDAW, Art 10; CRC, Art 2(1), 28(1)

¹⁶⁰ CDE, Art 1(1)

¹⁶¹ CRC, Art 2(1); International Convention on the Elimination of All Forms of Racial Discrimination 1965, Art 1(1), 5(c)(v), (7); International Labour Organisation Convention Concerning Indigenous and Tribal Peoples 1989, No 169, Arts 1(1), 26-31; United Nations Declaration on the Rights of Indigenous Peoples, 2007, Art 14(2)

¹⁶² CRC, Art 2(1); Convention on the Rights of Persons with Disabilities 2006, 24(2)

discrimination is also clearly prohibited implicitly within the ICESCR as a result of the inclusivity of the term ‘other status’. While the ICESCR is weak in that it does not offer explicit protection to individuals discriminated against on these additional grounds, other IHRL instruments nonetheless assist in informing the understanding of *who* can be discriminated against under the term ‘other status’, mitigating this weakness.

Other IHRL instruments can also inform the understanding of *how* individuals can be discriminated against in education for the purposes of the ICESCR. The most useful instrument in this regard is the Convention against Discrimination in Education, as its entire focus is, naturally, on the prevention of discrimination in education. The ICESCR does not provide in as much detail as the CDE what will or will not amount to discrimination within education.¹⁶³ For example, the ICESCR provides, in Article 13(2)(a), that it would be discriminatory if primary education were not made compulsory and free to all. However, the CDE goes further to state that not only would it be discriminatory if primary education was not available to all, but also if, despite being available, the conditions relating to the quality of education differed.¹⁶⁴ The CDE assists in making clear that during a NIAC, as well as during peacetime or an IAC, the State, to be in accordance with the ICESCR, must ensure that education is provided to all and is of an adequate standard.

Article 10 of the Convention on the Elimination of all forms of Discrimination Against Women is also useful as it expands on the prohibition of discrimination on the grounds of sex, by setting out specific steps to be taken to ensure gender equality within education. For example, Article 10(b) provides that females should have ‘access the same curricula, the same examinations, teaching staff with qualifications

¹⁶³ CDE, Arts 1-5

¹⁶⁴ CDE, Art 4(b)

of the same standard and school premises and equipment of the same quality'.¹⁶⁵ While these specific steps are not expressly provided for within the ICESCR, the ICESCR does explicitly prohibit discrimination on the grounds of sex, and CEDAW can be utilised to inform the understanding of the prohibition against discrimination within the ICESCR on the grounds of sex, both during peacetime and in the context of a NIAC. It is explicitly clear under both the ICESCR and CEDAW that it would amount to discrimination if the State were to fail to provide an education to females during a NIAC. Yet, CEDAW also assists in making clear that the State would violate the prohibition against discrimination if they were to, for example, teach maths and science to boys but not girls.

A particular strength of the prohibition against discrimination is that the ICESCR, when considered alongside other IHRL instruments, sets out clearly the obligations of States. Another strength of the principle of non-discrimination is that it forms part of the minimum core of the right to education,¹⁶⁶ and minimum core obligations cannot be subject to reservations, derogations or limitations.¹⁶⁷ A NIAC could, therefore, never be used to justify the alteration of the States obligations in respect of non-discrimination. Where a NIAC results in discriminatory practices in respect of education, the State would be violating its IHRL obligations.

1.3.2. The aims and objectives of education

Article 26(2) of the Universal Declaration of Human Rights provides that education should: fully develop the human personality, strengthen respect for human rights and fundamental freedoms, promote tolerance, understanding and friendship

¹⁶⁵ Convention on the Elimination of all forms of Discrimination Against Women, Art 10(b), hereinafter CEDAW

¹⁶⁶ The minimum core of the right to education is discussed in more detail in the second part of this chapter pertaining to obligations.

¹⁶⁷ See the Introduction for a discussion of reservations, derogations and limitations and their relationship to minimum core obligations.

among all nations, racial or religious groups, and further the activities of the United Nations for the maintenance of peace.¹⁶⁸ Article 13(1) of the ICESCR reiterates these aims and objectives of education,¹⁶⁹ and adds three additional aims: education should also be directed to the ‘human personality's sense of dignity’, it should ‘enable all persons to participate effectively in a free society’, and it should ‘promote understanding among all ethnic groups’.¹⁷⁰ The CESCR points out in General Comment 13 that these aims and objectives apply to all levels of education, ‘whether private or public, formal or non-formal’.¹⁷¹

Beiter argues that while the above-mentioned aims of education remain topical, new developments in the sphere of educational aims are not reflected in Article 13 and the provision is therefore out-dated.¹⁷² The CESCR itself recognises that since the adoption of the ICESCR other international instruments ‘have further elaborated the objectives to which education should be directed’.¹⁷³ For example, the CRC provides that the education of the child should not only develop the human personality, but also the child's ‘talents and mental and physical abilities to their fullest potential’.¹⁷⁴ The CRC also provides that education should develop ‘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’ and ‘the development of respect for the natural environment’.¹⁷⁵ While the ICESCR does not exhaustively state the

¹⁶⁸ Universal Declaration of Human Rights, Art 26(2); Hereinafter UDHR

¹⁶⁹ ICESCR, Art 13(1)

¹⁷⁰ General Comment 13, at [4]

¹⁷¹ *Ibid*, at [4]

¹⁷² Beiter (n72), 467

¹⁷³ General Comment 13, at [5]

¹⁷⁴ CRC, Art 29(1)(a)

¹⁷⁵ *Ibid*, Art 29(1)(c) and (e); See also the aims of education stated within the World Declaration on Education for All, Art 1; Vienna Declaration and Programme of Action (1993), Part I at [33], Part II at [80]; Plan of Action for the United Nations Decade for Human Rights Education (1995-2004), at [2]; CERD, Art 7; CEDAW) Art 10(c)

aims and objectives of education, this weakness is overcome by looking at the full range of applicable IHRL instruments that inform any assessment of whether education complies with the required aims and objectives.

A State would not be permitted to make a reservation, derogation or limitation to the right to education in respect of the aims and objectives of education, due to the nature of this as a minimum core obligation.¹⁷⁶ A reservation of this nature would certainly go against the object and purpose of the ICESCR, and it would nonetheless be difficult to argue that such derogation was required by the exigencies of the situation, or that a limitation was necessary for the general welfare in a democratic society. It would also be nonsensical for a State to want to restrict the right to education in such a way. If education is afforded in a manner that reinforces the above aims and objectives, the peace-building function of education is activated, while the failure to ensure that education conforms to these aims may conversely contribute to the start of a NIAC, or enflame it further.¹⁷⁷ It is, therefore, vital to ensure that education is provided in accordance with the above-mentioned aims and objectives of education during a NIAC.

1.3.3. The Right to Receive an Education: The Levels of Education

Article 13(2) of the ICESCR refers to primary, secondary, higher and fundamental levels of education.¹⁷⁸ It is crucial to analyse the nature and scope of each level of education, as each level carries with it different obligations. A preliminary issue, however, is what ‘school’ means. Protecting Children argues that as there are no

¹⁷⁶ See below for a discussion of the minimum core obligations of the right to education.

¹⁷⁷ See the introduction for a further discussion of the peacebuilding effect of education during a NIAC.

¹⁷⁸ ICESCR, Art 13(2); See UNESCO, *International Standard Classification of Education: ISCED 2011*. While ISCED is not a binding instrument, it contains useful guidance as to who each level of education should apply to, and what the educational content should be, internationally, see also UNESCO, ‘Frequently Asked Questions about Education Statistics’ at <http://uis.unesco.org/en/questions-and-answers-about-isced-2011> (Last accessed on 29/08/2017)

specific definitions for schools in the relevant treaties, there is a lack of clarity as to what is meant by ‘school’, which leads to debate as to whether certain facilities are protected at all.¹⁷⁹ They acknowledge that the lack of a definition is probably because of the difficulties in capturing the numerous relevant permutations which may need to be taken into account,¹⁸⁰ and adopt the working definition contained in the Special Representative for Children in Armed Conflict’s ‘Guidance Note on Security Council Resolution 1998: Protect Schools + Hospitals’, as it does not appear to have led to any dissent or disagreement.¹⁸¹ This guidance defines ‘schools’ as:

all learning sites and education facilities, as determined by the local context, including both formal and informal, secular and religious, providing early childhood, primary and secondary education, as well as vocational training to children. “Schools” include all school-related spaces, structures, infrastructure and grounds attached to them, such as water, sanitation and hygiene facilities, which are recognizable and known to the community as such, but may or may not be marked by visible boundaries or signage.¹⁸²

This thesis similarly adopts this definition, though with the inclusion of all learning sites and education facilities related to higher and fundamental education.

¹⁷⁹ Protecting Children (n6), at [7.8]

¹⁸⁰ Ibid, at [7.8.2]

¹⁸¹ Ibid at [7.8.3]

¹⁸² Special Representative for Children in Armed Conflict’s, ‘Guidance Note on Security Council Resolution 1998: Protect Schools + Hospitals’, (May 2014), <<https://childrenandarmedconflict.un.org/publications/AttacksonSchoolsHospitals.pdf>>

1.3.3.1. Primary education

Article 13(2)(a) of the ICESCR provides that primary education must be compulsory and available free to all.¹⁸³ States should ensure that primary education remains compulsory and free even during a NIAC. The provision of primary education for all is also a minimum core obligation, and States cannot subject the right to primary education to a reservation, derogation or limitation in a NIAC.¹⁸⁴ In this sense, primary education benefits from additional protection than the other levels of education, which are weak in that the State could subject them to a reservation, derogation or limitation in a NIAC, where this practice is not discriminatory and where such a restriction is necessary, as the other levels do not form part of the minimum core. Nonetheless, where no such reservation, derogation or limitation has been made, the State remains bound to realise the right of all to all levels of education in a NIAC, and must provide this education for free if possible, and free on a progressive basis where necessary. As with primary education, free education in respect of all levels is especially important during a NIAC, when parents may be more likely to be unable to afford to send their children to school. States should refrain from excessive restrictions to their applicability, given the benefits of education for the individual and society, particularly in respect of its peacebuilding function.

The CESCR elaborated upon the requirement to make primary education compulsory within General Comment 11, stating 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’.¹⁸⁵ Compulsory education is essential as it is an important means of protecting children from their parents and from economic

¹⁸³ ICESCR, Art 13(2)(a)

¹⁸⁴ See below for a detailed discussion of the minimum core obligations of the right to education.

¹⁸⁵ General Comment 13, at [6]

exploitation.¹⁸⁶ Children are especially vulnerable to economic exploitation in a NIAC. For example, parents struggling financially as a result of the conflict might choose to send their child to work in hazardous conditions, instead of sending them to school, if primary education was not compulsory. Primary education also has a protective function in respect of the military recruitment of children, as a child who is not compelled to go to primary school may choose to enlist in armed groups instead. A NSAG may also be less likely to recruit children, voluntarily or forcibly, if a culture of sending all children to primary school exists as opposed to a culture where primary school is optional. States should therefore enact laws that make primary education compulsory, and ensure that enough schools are available so that all children of primary school age can attend primary school,¹⁸⁷ whether or not a NIAC exists.

Also, parents must not prevent their children from receiving an education where this is available and made compulsory. While this may restrict the right of parents to freely decide on their children's education, this is justified by the principle of the best interests of the child and also the best interests of society.¹⁸⁸ A parent may understandably not want to send their child to school in a NIAC if there are concerns for their safety where students or schools are being deliberate and directly targeted, or where children are being recruited from schools. While in such contexts it may be reasonable for the parent not to send their child to school, the State should endeavour to provide an education to such children in a manner that is safe, such as by facilitating home-schooling by the parents, or providing national education through the radio or television instead, and it is in this context that a parent should ensure the continuity of their child's compulsory education.

¹⁸⁶ Nowak, (n65), 262

¹⁸⁷ Beiter (n72), 511-512

¹⁸⁸ Ibid, 511-512

Education can only fairly be made compulsory if it is also made free.¹⁸⁹ Making parents responsible for funding education broadens the gap between those who can go to school and those who cannot.¹⁹⁰ This is especially true in a NIAC, when financial resources are likely to be scarcer. States must, therefore, individually and collectively fund education.¹⁹¹ According to the CESCR in General Comment 11, the nature of the requirement for free primary education is unequivocal, and:

Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization...Indirect costs, such as compulsory levies on parents...or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis.¹⁹²

'Free' has also been interpreted by the CESCR as meaning 'free tuition, free admission, no fees for exams and free textbooks'.¹⁹³ Indirect costs for primary education could include expenses for meals at school, school transport, medical expenses or boarding fees, which may undermine the right to free primary education.¹⁹⁴ For example, providing a free meal for primary school children during a NIAC may be the difference between families sending their child to school or not,

¹⁸⁹ Ibid, 96-97

¹⁹⁰ Tomasevski, (n67), 53

¹⁹¹ Ibid, 53

¹⁹² *General Comment 11*, at [7]

¹⁹³ Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Third Periodic Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Nepal*, 2011, E/C.12/NPL/3, at [286]

¹⁹⁴ Fons Coomans, 'In Search of the Core Content of the Right to Education' in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002), 228

particularly if this would be the only meal the child receives that day. States should, therefore, clearly interpret ‘free’ primary education broadly, as this would be more effective for the realisation of the right to education and human dignity,¹⁹⁵ including in the context of a NIAC.

The urgent nature of the duty to make primary education free and compulsory is underpinned in Article 14 of the ICESCR,¹⁹⁶ which requires States to adopt a plan of action for the introduction of compulsory and free primary education if this has not yet been achieved. The CESCR, in General Comment 11, states that financial difficulties cannot relieve States of their obligation to adopt a plan of action, which must be aimed at the progressive implementation of the right to free and compulsory primary education for boys and girls.¹⁹⁷ The available resources of a State are likely to be impacted by the existence of a NIAC. However, regardless of the level of resources available during a NIAC, States without free and compulsory primary education for all should adopt a plan of action for its realisation. In creating this plan, States should seek to ensure that resources are, firstly, prioritised towards ensuring that there are enough schools of a sufficient quality for all primary school aged children. Resources should then be prioritised towards ensuring direct costs of education are covered, followed by indirect costs, so that primary education can be made compulsory. IHRL, therefore, clearly sets out the obligation to make primary education free and compulsory, including in a NIAC.

¹⁹⁵ Mansuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009), 379

¹⁹⁶ Beiter (n72), 99

¹⁹⁷ *General Comment 11*, at [3, 6-10]; See below for a more detailed discussion of the principle of progressive realisation and the issue of a States available resources in respect of the realisation of the right to education during a NIAC.

1.3.3.2. Secondary education

Article 13(2)(b) of the ICESCR states that ‘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’.¹⁹⁸ In General Comment 13 it is stated that ‘generally available’ means ‘firstly, that secondary education is not dependent on a student's apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all’.¹⁹⁹ As with primary education, the State is not able to decide to whom they will provide a secondary education, and the quality of secondary education should again be of an equal standard. The CESCR interpret ‘accessible to all’ as meaning that educational institutions must be physically and economically accessible to everyone, without discrimination.²⁰⁰ The State would not be able to subject their obligation to provide secondary education in this non-discriminatory manner to a reservation, derogation or limitation in a NIAC, because as discussed above, this forms part of the States minimum core obligations.

However, while the obligations of States in respect of secondary education are clear, the obligations are not as far-reaching and strong as those relating to primary education, as there is no legal obligation to make secondary education compulsory within the ICESCR, despite the importance of this level of education for the individual and society, in peacetime and NIAC. The CESCR, in General Comment 13, also provides that secondary education ‘includes completion of basic education and consolidation of the foundations for life-long learning and human development. It

¹⁹⁸ ICESCR, Art 13(2)(b)

¹⁹⁹ General Comment 13, at [13]

²⁰⁰ General Comment 13, at [6(c)]

prepares students for vocational and higher educational opportunities'.²⁰¹ While primary education is essential for the individual and society and is the stepping-stone into secondary education, secondary education is similarly necessary as it solidifies an individual's ability to become a valuable member of society, and it paves their way into vocational work and higher education. As such, it is in the long-term interest of the State for it to ensure the realisation of the right to secondary education in a NIAC.

The CESCRC further recognises that secondary education, in its different forms, 'demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings' and encourages 'alternative educational programmes which parallel regular secondary school systems'.²⁰² As with primary education, in responding to the needs of secondary students in a NIAC the State must take into account the educational needs of those affected by the conflict. Alternative educational programmes for secondary education are of great importance during a NIAC, for example, where a school is destroyed and no other building is available, the State could ensure the continuity of secondary education by providing classes via radio or television broadcast.

1.3.3.3. Higher education

According to Article 13(2)(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'.²⁰³ As with primary and secondary education, where not already achieved, the State should work towards making higher education free, especially during a NIAC when resources may be scarcer for the individual, prioritising primary education first, then secondary education. However,

²⁰¹ Ibid, at [12]

²⁰² Ibid, at [12]

²⁰³ ICESCR, Art 13(2)(c)

the CESCR points out that ‘while article 13(2)(c) is formulated on the same lines as article 13(2)(b), there are three differences between the two provisions’.²⁰⁴ The first difference is that Article 13(2)(c) does not mention higher education ‘in its different forms’, and secondly, no specific reference to technical and vocational training is made.²⁰⁵ However, as with primary and secondary education, the CESCR also states that:

If higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning; in practice, therefore, both secondary and higher education have to be available “in different forms” [and] technical and vocational education...forms an integral component of all levels of education, including higher education.²⁰⁶

While the ICESCR does not explicitly state this, it is nonetheless clear that all levels of education must be flexible enough to adapt to various situations, such as a NIAC. The CESCR references distance learning as one way in which higher education can respond to the needs of students, however, in a NIAC, the State could realise the right to education through distance learning in respect of all levels of education, where it is not possible to physically attend educational institutions.

Thirdly, the ‘most significant difference’ is that higher education does not need to be ‘available’ to all like primary and secondary education, but ‘accessible’ instead ‘on

²⁰⁴ General Comment 13, at [18]

²⁰⁵ Ibid, at [18]

²⁰⁶ Ibid, at [18]

the basis of capacity'.²⁰⁷ As to the meaning of the term 'accessible', in General Comment 13 it is provided that reference should be made to the above guidance provided by the CESCR in relation to this term in respect of secondary education.²⁰⁸ The CESCR also elaborates on the principle of 'capacity', stating that 'the "capacity" of individuals should be assessed by reference to all their relevant expertise and experience'.²⁰⁹ The concept of 'capacity' is both qualitative and quantitative in character. It is qualitative in the sense that it refers to the intellectual ability of students, and quantitative as it permits the restriction of the number of students who can gain entry to specific fields of study within higher education.²¹⁰

The 'capacity' criterion is problematic in the context of a NIAC, as this concept evidences the importance of fully realising the right to primary and secondary education for all in a NIAC. If primary and secondary education is not realised for those affected by the conflict, or the quality of this level of education is inferior, it is likely that such individuals will lack the capacity to attend higher education later on, even if the conflict has since ended. While higher education is not compulsory, and rightfully so, it is essential that all individuals, no matter their background, have the opportunity to develop the capacity to access to this level of education. For those whose academic achievement in primary and secondary education was impacted by a NIAC, States should ensure that higher education facilities are mindful of the impact of the conflict on an individual when assessing the capacity criterion, as an individual may be capable but this is not reflected in their grades.

As well as realising the right to primary and secondary education in a NIAC, States should also take steps to ensure that higher education is realised at the time of

²⁰⁷ Ibid, at [18-19]

²⁰⁸ Ibid, at [20]

²⁰⁹ Ibid, at [19]

²¹⁰ Beiter (n72), 524

the conflict. If States do not take steps to realise the right to higher education for all in a NIAC, this is of detriment to the whole of society, as those who would otherwise have been capable of becoming doctors, lawyers, teachers, and so on, will be prevented from doing so. This is a particular problem in a protracted NIAC, and especially where higher education is frequently subjected to deliberate and direct attack.

1.3.3.4. Fundamental education

It is stated within Article 13(2)(d) of the ICESCR that ‘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’.²¹¹ According to the CESCR in General Comment 13, the content of fundamental education must resemble that of primary education, and ‘is not limited by age or gender; it extends to children, youth and adults, including older persons...curricula and delivery systems must be devised which are suitable for students of all ages’.²¹² The recognition of the right to fundamental education within the ICESCR highlights the importance of primary education. Fundamental education is of particular importance during a NIAC, when many may not have received a primary education.

A gap in the ICESCR is that Article 13(2) of the ICESCR, unlike Article 26(1) of the UDHR, does not require that fundamental education be free, nor provides for the progressive introduction of free fundamental education.²¹³ Beiter argues that States should, however, strive to achieve free fundamental education, as free fundamental education would be the most effective instrument in ensuring accessibility to this level

²¹¹ ICESCR, Art 13(2)(d)

²¹² General Comment 13, at [22-24]

²¹³ UDHR, Art 26(1)

of education.²¹⁴ Making fundamental education free would be particularly effective during a NIAC, as those who did not receive a primary education because of the conflict may be of even greater financial need.

What is not clear is whether, in light of the importance of primary education, the realisation of free fundamental education should be prioritised over other levels of education. The fact that, unlike primary education, fundamental education is not compulsory and should simply be encouraged or intensified suggests that it is given less weight, and that secondary and higher education be prioritised accordingly. This appears to be the appropriate balance. Where a NIAC results in the failure to realise the right to primary education, I propose that the State should be considered to have an increased legal burden to provide fundamental education on a free basis, as the futures of many will be impacted as a result of circumstances most likely out of their control. Though whether States have such an increased burden is unclear.

1.3.3.5. The ‘4-A framework’

It is stated within General Comment 13 that all levels of education ‘should exhibit the following interrelated and essential features’: availability, accessibility, acceptability and adaptability.²¹⁵ Coomans argues that ‘the 4-A scheme is a useful device to analyse the content of the right to receive an education and the obligations of state parties resulting from it as well as to measure the level of realization’.²¹⁶ The 4-A framework is also ‘a useful tool to understand the various facets that this right entails

²¹⁴ Beiter (n72), 529-530

²¹⁵ General Comment 13, at [6]

²¹⁶ Fons Coomans, ‘Education and Work’ in Daniel Moeckli and others, *International Human Rights Law* (2nd ed, Oxford University Press 2014), 242

in practice'.²¹⁷ It is particularly useful in the context of deliberate and direct attacks in a NIAC.

The term 'availability' is defined in General Comment 13 as meaning that there should be a sufficient quantity of functioning educational institutions and programs within the jurisdiction of the State party. As a minimum, what is required is 'buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on'.²¹⁸ In more developed States, facilities such as a library, computer facilities and information technology may also be required.²¹⁹ Protecting Children argues that the 'concept of sufficient facilities' in the CRC appears primarily focused on the construction of, and investment in, additional facilities, but it is unclear what, if any, scope there is for an obligation to repair and maintain schools attacked during armed conflict.²²⁰

In the context of the ICESCR, however, the obligation to make education available, this concept being necessarily broad to apply in both peacetime and IAC and NIAC, makes clear that States would have to repair and maintain schools attacked where such attacks affected the availability of education. This interpretation further clarifies that deliberate and direct attacks directed at facilities such as a library would also infringe upon the availability of the right to education in the context of a NIAC. Protecting Children, does, however, correctly argue that one way of clarifying and developing the existing IHRL framework would be a General Comment by the CESCR or the CRC Committee, perhaps jointly, that specifically addresses the issue of attacks against educational institutions and facilities and the obligation to repair and

²¹⁷ BIICL Handbook (n2), 73

²¹⁸ General Comment 13, at [6(a)]

²¹⁹ Ibid, at [6(a)]

²²⁰ Ibid, at [7.72, 7.122]

maintain those that have been attacked.²²¹ Explicit acknowledgement of this protection would, naturally, be stronger than the currently implicit protection.

According to the CESCR, the term ‘accessibility’ has three overlapping dimensions: education should not only be accessible to everyone without discrimination, it should also be physically and economically accessible. Physical accessibility requires that education must be within safe physical reach, either at a reasonably convenient geographic location or via modern technology.²²² So not only must there be a sufficient quantity of schools and facilities that are fit for their purpose during a NIAC, but these should be within reasonable and safe reach. Where they are not safely accessible due to the NIAC, alternative means of delivery should be adopted. Naturally, the physical accessibility of education is likely to be particularly challenging during periods of NIAC,²²³ especially when deliberate and direct attacks against, schools, students and teachers occur, so education delivered through modern technology will be of increased importance.

Economic accessibility, on the other hand, refers to affordability, subject to the differing obligations in relation to the cost of primary, secondary, higher and fundamental education.²²⁴ Individuals affected by a NIAC may find themselves in situations of extreme poverty, so costs of education may have a large impact on whether they attend school.²²⁵ Primary education should, as stated above, be made free and compulsory, and secondary, higher, and fundamental education should be made free progressively, to ensure that those affected by a NIAC continue to receive an education and that the benefits of education to the individual and society are not lost.

²²¹ Ibid, at [7.123, 9.12.9]

²²² Ibid, at [6(b)]

²²³ BIICL Handbook (n2), 75

²²⁴ General Comment 13, at [6(b)]

²²⁵ BIICL Handbook (n2), 75

The CESCR states that acceptability means that the form and substance of education, including curricula and teaching methods, should be relevant, culturally appropriate and of good quality, and subject to the educational aims and objectives discussed above, and such minimum educational standards as may be approved by the State.²²⁶ Whether an education is of good quality is an incredibly subjective issue, but what is clear is that States should strive to continuously improve the standard of the education delivered, including during a NIAC. States should ensure a high standard of quality in education, as failing to do so can contribute to the outbreak of a NIAC or increase tensions, particularly if this is discriminatory in nature. Culturally inappropriate education can have a similar effect, while culturally appropriate education that conforms to the educational aims and objectives under the ICESCR can prevent conflict occurring or assist in the peacebuilding process.²²⁷ For example, propaganda for a NIAC through educational material would never be acceptable, as this would not be relevant but also because this would likely intensify a conflict and violate the peacebuilding aims and objectives of education.²²⁸ Whether an education is relevant, culturally appropriate and of good quality should be reviewed on a regular basis, and States should strive to continuously improve their standards.²²⁹ The failure to review the cultural appropriateness of the education system, particularly in the context of an armed conflict and the issue of deliberate and direct attacks, would violate IHRL.

The CESCR defines adaptability as meaning that education must ‘be flexible so it can adapt to the needs of changing societies and communities and respond to the

²²⁶ General Comment 13, at [6(c)]

²²⁷ See the Introduction for a discussion of the conflict preventing and peacebuilding functions of education.

²²⁸ BIICL Handbook (n2), 76

²²⁹ BIICL Handbook (n2), 76

needs of students within their diverse social and cultural settings'.²³⁰ Where deliberate and direct attacks against education result in the deprivation of the right to education, States must ensure they respond to the educational needs of society in a NIAC by providing education in a manner that is flexible enough to meet the needs of all individuals who would not otherwise receive an education. Such measures include the rapid resuming of educational activities, the reintegration of children in alternative schools after school closures, or education about conflict resolution, disaster risk reduction, and civic education.²³¹

1.3.4. A system of schools, a fellowship system and teaching staff conditions

Article 13(2)(e) clearly instructs States to do three things: actively pursue the development of a system of schools at all levels; establish an adequate fellowship system; and continuously improve the material conditions of teaching staff.²³² The obligation to actively pursue the development of a system of schools at all levels is clearly interpreted by the CESCR as meaning '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'.²³³ This additional reference to the requirement to prioritise primary education reinforces its importance to the individual and society in peacetime and NIAC. A developmental strategy for all levels of education, however, reinforces the importance of protecting all levels of education during a NIAC. Such a developmental strategy will also be more important in a NIAC, when the realisation of the right to education will be more difficult, especially in the context of deliberate and direct attacks that disrupt the development of education. The CESCR defines the term

²³⁰ General Comment 13, at [6(d)]

²³¹ BIICL Handbook (n2), 77

²³² ICESCR, Art 13(2)(e)

²³³ General Comment 13, at [25]

‘actively pursue’ as meaning ‘that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour’.²³⁴ As such, even in a NIAC, this should attract priority.

General Comment 13 states that the requirement for the establishment of a fellowship system ‘should enhance equality of educational access for individuals from disadvantaged groups’.²³⁵ Where free education has not been achieved in a State, a fellowship system would be particularly beneficial to those groups disadvantaged educationally by a NIAC. A fellowship system would ensure that those who would not otherwise be able to afford to obtain an education, because of the impact of a NIAC on their financial resources, have their right to education realised. Despite the importance of a fellowship system to the realisation of the right to education, in both peacetime and during an IAC or NIAC, a potential gap in protection is that the term ‘fellowship’ remains undefined in both Article 13(2)(e) of ICESCR and general Comment 13. Beiter provides that ‘fellowship’ should be defined as meaning financial assistance for individual students in order to help with direct and indirect costs of education in the case of need, which can be in the form of either bursaries or low interest loans.²³⁶

The lack of explicitness as to the meaning of fellowship allows for flexibility as to its interpretation, so States are free to interpret it as covering direct and indirect costs. The risk is that States interpret this strictly as covering direct costs, meaning that individuals affected by deliberate and direct attacks in a NIAC are still unable to afford the realisation of their right to education. This flexibility is, however,

²³⁴ Ibid, at [25]

²³⁵ Ibid, at [26]

²³⁶ Beiter (n72), 532

necessary, as the State may only be able to financially provide for direct costs, especially in a NIAC, when the States own resources are likely to be impacted.

Low interest loans are unsuitable in the context of primary education where it is made compulsory, as it should simultaneously be made free. If secondary education is compulsory in a State, it should also be made free and low interest loans would similarly be unsuitable. Where secondary education is not compulsory and fees are charged, low interest loans may be acceptable, but such loans are still more suitable for higher education considering secondary education is necessary to ensure that individuals are capable of attending higher education. Low interest loans are also less appropriate in conflict settings where civilians would otherwise have had access to education at no cost, or without having accrued debt. However, if necessary, low interest loans should be utilised as a last resort, where it is not possible to provide free education to all, or where bursaries are not possible, whether in peacetime or in an IAC or NIAC.

It is acknowledged in General Comment 13 that unacceptably low levels of material conditions and teaching staff are major obstacles to the full realization of students' right to education'.²³⁷ This is a greater obstacle during a NIAC when deliberate and direct attacks against educational institutions cause damage to buildings, facilities and teaching materials, and where such attacks against teachers cause them to flee or work in conditions not conducive to a quality education. The requirement to continuously improve conditions aims to protect teachers and serves especially to emphasise the fact that favourable material conditions will enhance the quality of the enjoyment of the right to education.²³⁸ Continuously improving

²³⁷ General Comment 13, at [27]

²³⁸ Beiter (n72), 533

conditions is likely to be more difficult during a NIAC where deliberate and direct attacks against educational institutions, teachers and students occur, where conditions will instead deteriorate. Nonetheless, States should clearly strive, in accordance with the ICESCR, to ensure the best possible conditions during a NIAC in order to fully realise the right to education.

1.3.5. The Freedom to Choose and Establish Schools

Article 13(3) of the ICESCR identifies two aspects of parental freedom; the ‘freedom 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 the ‘freedom to ensure the religious and moral education of their children in conformity with their own convictions’.²³⁹ In a NIAC, realising these parental freedoms can be instrumental in the peacebuilding process where the conflict is aggravated by factors such as interference with choice of schools, or religious or moral beliefs.

Article 13(4) also refers to ‘the liberty of individuals and bodies to establish and direct educational institutions’, providing that the institutions conform to the aims and objectives of education, and to any minimum standards as laid down by the State.²⁴⁰ It has frequently been held that there exists no requirement for States to assist, financially or otherwise, in the establishment and operation of such institutions, they must simply refrain from interfering with the liberty of individuals to establish educational institutions,²⁴¹ and to choose to send their children to such schools. Interfering is, however, allowed to the extent of ensuring that the aims and objectives of education, and the standards proscribed by the ICESCR, are met. In the context of a

²³⁹ ICESCR, Art 13(3)

²⁴⁰ Ibid, Art 13(4)

²⁴¹ Beiter (n72), 146

NIAC, it is especially important for a State to refrain from interfering with the establishment of private schools where such schools are able to fulfil the realisation of the right to a quality education when the State itself cannot realise this right for those students whose education is affected by the conflict.

1.4. Obligations Provided for within Article 2(1) of the International Covenant on Economic, Social and Cultural Rights

Article 2(1) is described as the linchpin of the ICESCR, as it describes the obligations incumbent upon States in relation to realising all of the rights enumerated within the Covenant, being of critical importance to its substance and implementation.²⁴² Article 2(1) is, therefore, central to the understanding of the legal obligations imposed upon States in respect of ESCR,²⁴³ and in respect of the right to education in the context of deliberate and direct attacks during a NIAC. However, while it is argued that Article 2(1) ‘lays down clear human rights legal obligations for States parties’,²⁴⁴ it is conversely argued to be an ‘enormous obstacle’ to the implementation of ESCR,²⁴⁵ as its interpretations have been controversial and much debated.²⁴⁶ It is essential to determine whether Article 2(1) is in fact clear in setting out the obligations of States. If there are ambiguities or gaps, it will not be possible to conclude that the right to education is provided for in a NIAC effectively within IHR.

Article 2(1) of the ICESCR provides that States must:

²⁴² Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A perspective on its Development* (Clarendon Press 1995), 106

²⁴³ Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003), 312

²⁴⁴ Manisuli Ssenyonjo, ‘Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law’ (2011) 15(6) *The International Journal of Human Rights* 969, 971

²⁴⁵ Sepúlveda (n243), 312; Hereinafter ESCR

²⁴⁶ Amanda Cahill-Ripley, *The Human Right to Water and its Application in the Occupied Palestinian Territories* (Routledge 2011), 55

[T]ake 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.²⁴⁷

Each of these obligations are now examined in turn, though while the obligations are discussed separately, one should bear in mind that they are intertwined and should be viewed as an organic whole.²⁴⁸ These obligations should also be read in conjunction with Article 13 of the ICESCR, as Article 2(1) describes how States should implement the specific steps identified above.

1.4.1. The Obligation to Take Steps ‘with a View to Achieving Progressively the Full Realisation’ of the Right to Education

General Comment 3 states that progressive realisation:

[S]hould not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective...to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus

²⁴⁷ ICESCR, Art 2(1)

²⁴⁸ Sepúlveda (n243), 313

imposes an obligation to move as expeditiously and effectively as possible towards that goal'.²⁴⁹

In the context of the right to education, the CESCR reiterates within General Comment 13 that the term 'progressive realisation' is to be taken as meaning that States have a 'specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of article 13'.²⁵⁰ It is similarly pointed out within the Limburg Principles that States must realise ESCR as expeditiously as possible, and that 'under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant',²⁵¹ including in respect of the right to education. The term is, therefore, inextricably linked to the phrases 'full realization' and 'maximum of its available resources'.²⁵²

As such, the term 'progressive realisation' is clear, and imposes well-defined, albeit broad, obligations. States should immediately start working towards achieving, as quickly as possible, the full realisation of the right to education, in line with their maximum available resources. While progress towards the full realisation of education may be impacted as a result of a NIAC, particularly where deliberate and direct attacks against education occur, the obligation to progressively realise the right to education as expeditiously as possible nonetheless continues. However, while the meaning of progressive realisation is clear, there are practical difficulties in

²⁴⁹ General Comment 3, at [9]

²⁵⁰ General Comment 13, at [43-45]

²⁵¹ Limburg Principles, at [21]

²⁵² Alston and Quinn (n37), 172

determining whether a State has complied with its obligation to realise an ESCR progressively.

It is often argued that compliance with the principle of progressive realisation is difficult to measure.²⁵³ Measuring progressive realisation requires knowledge as to the resources and means available to a State, which, as will be shown below, are difficult to assess in scholarly research, as this ‘involves the gathering of data which is often not available, is complex to assess and is often inexact’.²⁵⁴ Progressive realisation also requires long-term measurement over a considerable period of time’.²⁵⁵ As such, the case studies in this thesis do not attempt to assess progressive realisation in light of available resources and means. While progressive realisation is difficult to assess in the context of scholarly research, such information would, however, be available to the State, enabling them to act in accordance with the principle of progressive realisation, and to courts tasked with determining whether they have in fact done so. I discuss the concepts of maximum available resources and means and international obligations for cooperation and assistance to demonstrate the difficulties surround assessing compliance with progressive realisation.

1.4.2. The Obligation to Use the Maximum Available Resources

As indicated, Article 2(1) of the ICESCR qualifies the principle of progressive realisation with the simultaneous obligation to take steps ‘to the maximum of available resources’.²⁵⁶ The term ‘maximum available resources’, however, has never

²⁵³ Audrey R Chapman, ‘A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996) 18(1) *Human Rights Quarterly* 23, 23, 31, 33; Eitan Felner, ‘Closing the Escape Hatch: A Toolkit to Monitor the Progressive Realization of Economic, Social and Cultural Rights’ (2009) 3 *Journal on Human Rights Practice* 402, 407

²⁵⁴ Cahill-Ripley, (n246), 141

²⁵⁵ *Ibid*, 141

²⁵⁶ ICESCR, Art 2(1)

been clearly defined and remains vague',²⁵⁷ and the term is often argued to be problematic.²⁵⁸ Two difficulties in measuring whether a State is in compliance with the obligation to use their maximum available resources are, firstly, determining which resources count, and secondly, determining whether these resources were used to the 'maximum'.²⁵⁹ These two issues cause difficulty in determining whether the State has complied with their obligation to progressively realise ESCR, including the right to education in a NIAC.

In relation to the first difficulty, there has been a focus on prioritising available financial resources, and 'such a focus may have resulted in perceived or real lack of financial resources being used as an excuse for not doing what is possible'.²⁶⁰ It is, therefore, argued that 'resources' should not be interpreted as being limited to only financial resources.²⁶¹ It is essential to look at the actual resources of the State rather than to budgetary expenditures.²⁶² Robertson argues that 'while other types of resources might be identified, it appears that financial, natural, human, technological, and informational resources are the most important resources in achieving ICESCR Rights'.²⁶³ There, therefore, appears to be consensus for a broad interpretation of resources, which would be beneficial to the State who will be more fairly assessed on compliance, and to the individual who has their ESCR better realised. This is especially relevant in a NIAC, when financial resources may be necessarily re-diverted to military expenditure, as the State should look to the whole range of their

²⁵⁷ Sigrun Skogly, 'The Requirement of Using the "Maximum of Available Resources" for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 Human Rights Law Review 393, 396, 398

²⁵⁸ Robert E Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realising Economic, Social and Cultural Rights' (1994) 16 Human Rights Quarterly, 694; Chapman, (n253), 31

²⁵⁹ Ssenyonjo, *Economic* (n195), 62

²⁶⁰ Skogly, 'The Requirement' (n257), 401, 420

²⁶¹ Robertson, (n258), 693, 695

²⁶² *Ibid*, 698

²⁶³ *Ibid*, 697

resources to realise ESCR, including the right to education in the face of deliberate and direct attacks.

In relation to the second difficulty, the question of whether resources are used to the ‘maximum’ is complex. As to the meaning of the term ‘maximum’, Skogly suggests that a qualitative approach, in the sense of efficient utilisation, be taken in addition to a quantitative one, as ‘by focusing on the development of the quality of the resources or the means of implementation, much can be achieved without necessarily requiring a significant increase in funding’.²⁶⁴ While the availability of resources is one of the major obstacles to fully realising ESCR,²⁶⁵ resource distribution is also a key issue.²⁶⁶ Non-compliance with ESCR can often be attributed to political will rather than a matter of actual resource scarcity.²⁶⁷ Skogly argues that it is essential to look at both the resources that are used, and the way in which they are used.²⁶⁸ In order to ensure the realisation of the right to education in a NIAC, measuring State compliance with the ‘maximum’ element of this obligation, therefore, requires one to consider both the resources used, the total amount of resources available, and the way in which they are allocated.

Robertson adds that State compliance should be measured based on resource utilisation, by comparing similarly developed States expenditure on ESCR and on other reasonable expenditures.²⁶⁹ While this approach could serve as a very useful framework for determining whether resources have been distributed adequately, it is necessary to take into account the different contextual situations within each State. The fact that the CESCR consider such information on a country-by-country basis is

²⁶⁴ Skogly, ‘The Requirement’ (n257), 404-405, 414

²⁶⁵ Beiter (n72), 382-383

²⁶⁶ Ssenyonjo, ‘Reflections’ (n244), 980

²⁶⁷ Ibid, 976-977; Craven (n242), 106

²⁶⁸ Skogly, ‘The Requirement’ (n257), 404

²⁶⁹ Robertson (n258), 703

significant in this respect.²⁷⁰ The CESCR stated that, where a State uses resource constraints as an explanation for the taking of no steps, or retrogressive steps, they would consider this in light of objective criteria, which includes: the country's level of development; the severity of the alleged breach and whether it concerns a minimum core obligation; the country's current economic situation; the existence of other serious claims on the State party's limited resources such as natural disasters or internal armed conflict; whether the State party had sought to identify low-cost options; and finally whether the State party had sought cooperation and assistance or rejected offers of resources.²⁷¹ Therefore, a NIAC is a significant consideration that the CESCR will take into account in determining whether ESCR, including the right to education, was violated. The question as to whether States have 'appropriately' allocated the maximum of their available resources to ESCR is, however, subjective and complex, being more difficult during a NIAC.

Beiter argues that where a State spends a disproportionate amount on its military compared to insignificant amounts on ESCR, this could point to non-compliance.²⁷² The CESCR have in fact expressed concern about disproportionate military spending in Concluding Observations.²⁷³ The State would have to justify the amount of resources spent on its military where the right to education is unrealised or where retrogression occurs. Maximum available resources would need to be examined from the perspective of whether the diversion of spending from education to the military was necessary in the circumstances, and should bear in mind the importance of

²⁷⁰ CESCR: Statement, at [10]

²⁷¹ Ibid, at [10]

²⁷² Beiter (n72), 386; Ssenyonjo, 'Reflections' (n244), 981

²⁷³ CESCR, *Concluding Observations: Philippines*, (1995) UN Doc. E/C.12/1995/7, at [21]; CESCR, *Concluding Observations: Senegal*, (2001) UN Doc. E/C.12/1/Add62, at [23]; CESCR, *Concluding Observations: DRC*, at [16]; United Nations Committee on the Rights of the Child, *Concluding observations: Democratic Republic of Congo: Consideration of reports submitted by States parties under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, CRC/C/OPAC/COD/CO/1, 7 March 2012, at [18] (CRC Concluding Observations DRC 2012)

education for peace when determining whether military spending is proportionate or not. In the context of deliberate and direct attacks, redirecting funding to the military may be necessary to protect schools and children, though it should be taken into account when conducting military operations that military presence in or near school increases the likelihood of attacks on schools or against students.²⁷⁴

It is further provided in General Comment 3 that ‘any deliberately retrogressive measures would require the most careful consideration and would need to be fully justified in the context of the full use of the maximum available resources’.²⁷⁵ Nolan, Lusiani, and Courtis argue that it is clear that Article 2(1) encompasses ‘an understanding that progressive realisation may be limited by the ‘realities’ faced by States, such as a diminution of resources available to them’, and appears ‘to contemplate that retrogressive measures may be justifiable in some circumstances’.²⁷⁶ Article 2(1), therefore, is broad enough to allow the State flexibility when faced with the realities of a NIAC, and the likely reduction in available resources. In the context of education, the CESCR, in General Comment 13, reiterates that:

If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are 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 State party's maximum available resources.²⁷⁷

²⁷⁴ See the case studies in this thesis for evidence of military presence causing increased attacks against education.

²⁷⁵ General Comment 3, at [9]

²⁷⁶ Nolan A, Lusiani N J and Courtis C, ‘Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social rights’ in Nolan A (Ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge university Press 2014), 124

²⁷⁷ General Comment 13, at [43-45]

However, the CESCR also provides that there exists ‘a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education’.²⁷⁸ As such, the State cannot justify retrogressive measures simply by referring to resource scarcity, rather it must show, having the burden of proving this, why the measures ‘were necessary for the protection of the totality of the rights provided for in the Covenant’.²⁷⁹ In the contexts of deliberate and direct attacks against education, retrogression would only be justifiable, therefore, if this was necessary, and if the State was taking all steps to mitigate such attacks in line with their available resources.

Significant to the issue of retrogressive measures, Ssenyonjo argues that States must also address all factors that would adversely affect the availability of resources.²⁸⁰ A NIAC, as already repeatedly pointed out, would affect the availability of resources, financial or otherwise, which may result in retrogression. The State must take steps to address a NIAC that adversely affects its available resources and inability to realise ESCR, including the right to education. As discussed, ensuring the realisation of education is simultaneously an effective way of addressing a NIAC.²⁸¹ The CESCR has stated that:

In its assessment of whether a State party has taken reasonable steps to the maximum of its available resources to achieve progressively the realization of the

²⁷⁸ Ibid, at [43-45]

²⁷⁹ Nolan, Lusiani and Curtis (n276), 134

²⁸⁰ Ssenyonjo, *Economic* (n195), 62-63

²⁸¹ See introduction.

provisions of the Covenant, the Committee places great importance on transparent and participative decision-making processes at the national level.²⁸²

The State should, therefore, act, and be encouraged to act, as far as practicably possible, in a transparent manner in respect of their resources and steps taken towards the progressive realisation of ESCR, including the right to education. This would permit the discerning of whether States are unable rather than unwilling to comply with their obligations, including in a NIAC.

1.4.3. The obligation to take steps by ‘all appropriate means’

Article 2(1) of the ICESCR also obligates States to take steps ‘by all appropriate means’ to fully realise ESCR, ‘including particularly the adoption of legislative measures’.²⁸³ The ICESCR does not provide for the mandatory adoption of legislature,²⁸⁴ however, the CESCR states that the implementation of ‘legislation is highly desirable and in some cases may even be indispensable’.²⁸⁵ It is also stated within the Limburg Principles that ‘article 2(1) would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant’.²⁸⁶ States should, therefore, ensure that domestic legislation is enacted that protects education against deliberate and direct attacks.

Nonetheless, legislative measures alone will not be sufficient to realise the rights contained in the ICESCR.²⁸⁷ The phrase ‘all appropriate means’ reflects this, as it is

²⁸² CESCR: Statement, at [11]

²⁸³ ICESCR, Art 2(1)

²⁸⁴ Alston and Quinn (n37), 167; Beiter (n72), 393; Ssenyonjo, *Economic* (n195), 54

²⁸⁵ General Comment 3, at [3]

²⁸⁶ Limburg Principles, at [18]; See also Alston and Quinn (n37), 167; Beiter (n72), 393; Ssenyonjo, *Economic* (n195), 54

²⁸⁷ Limburg Principles, at [18]; Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights on Context: Law, Politics and Morals* (Oxford University Press 2013), 286

purposefully broad and flexible.²⁸⁸ In addition to legislation, other appropriate means include judicial remedies, ‘administrative, financial, educational and social measures’.²⁸⁹ The inclusion of the word ‘all’ in ‘all appropriate means’ indicates that States must utilise an array of appropriate means available to them to ensure the realisation of the right to education in a NIAC. The utilisation of several methods is a good indicator of the political will of the State in realising education in the face of attacks against education.

Similar to the obligation to use the maximum of available resources, States also have a margin of discretion as to which ‘appropriate means’ to pursue, but this discretion is not absolute.²⁹⁰ Craven argues that ‘it is natural that the approach of each state will vary according to the circumstances in which it finds itself’.²⁹¹ However, within the Limburg Principles, it is stated that while the ‘appropriateness of the means to be applied...shall be determined by that State’ this ‘shall be subject to review by the [CESCR]’.²⁹² The CESCR are of the same opinion, as it is provided in General Comment 3 that:

The phrase “by all appropriate means” must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the “appropriateness” of the means chosen will not always be self-evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to

²⁸⁸ Ssenyonjo, *Economic* (n195), 56

²⁸⁹ General Comment 3, at [5, 7]; Limburg Principles, at [17]

²⁹⁰ Maastricht Guidelines, at [8]; Beiter (n72), 391-392

²⁹¹ Craven (n242), 115

²⁹² Limburg Principles, at [20]

be the most “appropriate” under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.²⁹³

Therefore, the CESCR has the residual power to assess appropriateness.²⁹⁴ States, therefore, have a duty to explain to the CESCR why the means taken, in accordance with their discretion, to combat deliberate and direct attacks against education were the most appropriate. However, it can still be determined by the CESCR that they have failed to fulfil their obligation under Article 2(1) to use all appropriate means. As such, as with the determination of whether the maximum available resources were used, the determination of whether all appropriate means have been used is similarly subjective, complicated and dependant on information from the State as to what means were available and how they have been allocated in light of the NIAC.

1.4.4. Obligation of International Assistance and Co-operation

Craven argues that although there is agreement that the full realisation of ESCR is to some extent contingent on the provision of international assistance, ‘the nature, scope and obligatory nature of such assistance is still unclear’.²⁹⁵ Article 2(1) of the ICESCR provides that States have an obligation to take steps not only individually, but also ‘through international assistance and co-operation’.²⁹⁶ The Limburg Principles similarly state that international assistance and co-operation ‘must be

²⁹³ General Comment 3, at [4]

²⁹⁴ Craven (n242), 116

²⁹⁵ Craven (n242), 145

²⁹⁶ ICESCR, Art 2(1)

directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized'.²⁹⁷

The realisation of the right to education is regarded as requiring substantial resources, and where the right to education cannot be realised, States are obliged to seek assistance and cooperation.²⁹⁸ The key question is not whether a State has an obligation to seek assistance and cooperation, but rather whether States have an obligation to provide assistance and co-operation,²⁹⁹ as this issue has not yet been settled.³⁰⁰ It is provided in General Comment 3 that international cooperation 'for the realization of economic, social and cultural rights is an obligation of all States', particularly those States which are in a position to assist other States.³⁰¹ However, Saul, Kinley and Mowbray argue that the CESCR 'avoids any direct attribution of responsibility or duty' and therefore 'the assertion that there are well established principles of international law that oblige states to so cooperate is simply incorrect'.³⁰²

The CESCR reaffirms the notion that the States have an obligation to provide international co-operation and assistance in respect of education in General Comment 13.³⁰³ General Comment 11 also provides that 'where a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist'.³⁰⁴ Most developed States generally provide assistance to developing States, yet some have denied the existence of a legally binding obligation to do so.³⁰⁵ General Comments 3, 11 and 13

²⁹⁷ Limburg Principles, at [30-31]

²⁹⁸ Beiter (n72), 91, 379

²⁹⁹ Ibid, 379-380

³⁰⁰ Skogly, *Beyond National Borders* (n44), 17

³⁰¹ General Comment 3, at [14]

³⁰² Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014), 138-139

³⁰³ General Comment 13, at [56]

³⁰⁴ *General Comment 11*, at [9]

³⁰⁵ Ssenyonjo, 'Reflections' (n244), 983

each make reference to the word ‘obligation’, however, it is not clear whether this is an obligation of a legal or moral character.

During the drafting of the Optional Protocol to the ICESCR, the United Kingdom, the Czech Republic, Canada, France and Portugal argued that international cooperation and assistance was an important moral obligation, but not a legal one.³⁰⁶ The result of this is that the Optional Protocol refers in Article 14(1) to the ‘need for technical advice or assistance’ and in Article 14(3) and 14(4) to establishing a trust fund with a view to ‘providing expert and technical assistance to States Parties’.³⁰⁷ Ssenyonjo argues that while Article 14 is a weak provision, it is significant that the Optional Protocol does not exclude other forms of assistance and cooperation, which could consist of:

[T]he conclusion of international agreements, the provision of human resources, enabling access to literature, the development of collaborative research agendas that enable researchers in developed states to address issues affecting developing states, educational and academic scholarships and exchanges, direct investment and joint venture programmes in the creation of various projects relating to various aspects of ESC rights’.³⁰⁸

Skogly argues that the uncertainty as to the legality of the obligation does not render the concept of international assistance and cooperation worthless, rather it is of utmost

³⁰⁶ Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2005, E/CN.4/2005/52, at [76]

³⁰⁷ Optional Protocol to the ICESCR (2008), Art 14

³⁰⁸ Ssenyonjo, ‘Reflections’ (n244), 984

importance for the implementation and fulfilment of human rights.³⁰⁹ For example, where a State is unable to fulfil the right to education in the context of deliberate and direct attacks, international co-operation and assistance may be instrumental in realising the right to education.

Article 26(3) of the CRC elaborates on the principle of international cooperation in relation to the right to education, providing that:

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.³¹⁰

States should therefore take into account the needs of States who are unable to realise the right to education due to deliberate and direct attacks during a NIAC, particularly developing States. While States may not be legally obligated to provide such co-operation or assistance, it should be given where possible.

Whether States in a position to assist and co-operate have a legal obligation to do so where assistance and co-operation is sought remains unclear. Even if it is accepted that a legal obligation to provide assistance and cooperation exists, the scope of this obligation is unclear. The State should at the very least be considered bound by a legal obligation to provide co-operation and assistance where this is free, such as sharing

³⁰⁹ Skogly, *Beyond National Borders* (n44), 17-18

³¹⁰ CRC, Art 28

information and ideas. In the context of deliberate and direct attacks, this could include sharing military or political information to combat NSAG. However, it has been argued that ‘although there is clearly an obligation to cooperate internationally, it is not clear whether this means that wealthy States Parties are obliged to provide aid to assist in the realization of the rights in other countries’.³¹¹ It is also unclear from the wording of Article 2(1) how much a State would actually have to give to be in accordance with their legal obligations.

While international assistance should not be merely financial, the level of financial aid to be provided by developed countries was established in 1970 via a General Assembly Resolution, whereby developed countries formally pledged to ‘exert its best efforts to reach a minimum net amount of 0.7 percent of its gross national product’ to assist developing countries.³¹² This target has been affirmed in various instruments, most notably in the Monterrey Consensus,³¹³ the FAO voluntary guidelines³¹⁴ and the Doha Declaration.³¹⁵ Despite this pledge, the levels of aid provided remain insufficient and developed countries have mostly failed to meet the above target.³¹⁶ Yet it remains questionable whether the CESCR can find developed States to be in violation of Article 2(1) for failing to devote 0.7% of their GDP to international assistance.³¹⁷

It is set out in the Limburg Principles that:

³¹¹ Matthew Craven, ‘The International Covenant on Economic, Social and Cultural Rights’ in Raija Hanski and Markku Suksi, *An Introduction to the International Protection of Human Rights: A Textbook* (2nd ed, Abo Akademi University 1999), 108

³¹² United Nations General Assembly Resolution 2626 (XXV) 1970, at [43]

³¹³ Final Outcome of the International Conference on Financing for Development, adopted on 22 March 2002 in Monterrey, Mexico, A/CONF/198/3.

³¹⁴ FAO, ‘Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security’ (2003), 36 at <ftp://ftp.fao.org/docrep/fao/meeting/009/y9825e/y9825e.pdf> (Last visited 10 April 2013)

³¹⁵ United Nations, Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus 2008, A/CONF.212/L.1/Rev.1*, at [43]

³¹⁶ UN report A/HRC/10/5, at [7]

³¹⁷ Ssenyonjo, ‘Reflections’ (n244), 985

‘irrespective of differences in their political, economic and social systems, States shall co-operate with one another to promote international social, economic and cultural progress, in particular the economic growth of developing countries, free from discrimination based on such differences’.³¹⁸

As such, if a State provides assistance and cooperation to another State that is unable to realise the right to education, they must do so on an indiscriminate basis. Nor should states attach conditions to the aid that they provide where this would result in the violation of IHRL.³¹⁹ For example, in relation to the right to education States should not provide aid for the rebuilding of educational institutions following targeted attacks, with an attached condition as to the curriculum that would lead to the discrimination of certain groups.

States giving aid also have a responsibility to refrain from withdrawing aid until they have first given the recipient State reasonable notice, so they have the opportunity to make alternative arrangements.³²⁰ De Schutter argues that unjustified regressions of the amount of aid that developed countries provide should be treated as a violation of a State’s obligations under international law.³²¹ Again, if a State has withdrawn aid for education without reasonable notice, it is unclear whether this would amount to a violation of the ICESCR, especially where adequate justification for doing so is provided.

³¹⁸ Limburg Principles, at [30-31]

³¹⁹ Ssenyonjo, ‘Reflections’ (n244), 985

³²⁰ Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, Addendum: Missions to the World Bank and the International Monetary Fund in Washington, D.C.’ (2006) at [29]

³²¹ Olivier De Schutter, ‘The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food: Moving from Charity to Obligation’ (2009) A/HRC/10/5, at [6, 8-9]

1.5. Obligations Provided for within General Comments 3 and 13 of the Committee on Economic, Social and Cultural Rights

It is important to examine the nature and scope of minimum core obligations and tripartite obligations to respect, protect and fulfil, to determine whether they improve the protection of education during NIAC. If there are, conversely, ambiguities or gaps in the manner in which they regulate the right to education, this may pose an obstacle to the realisation of the right to education during NIAC when deliberate and direct attacks occur.

1.5.1. Minimum Core Obligations

It is important to discuss the concept of minimum core obligations because they are of particular relevance during NIAC, as the CESCR has stipulated that they are non-derogable, and it is also argued that they cannot be subject to reservations or limitations.³²² As such, minimum core obligations are capable of ensuring basic protection to the right to education during NIAC where a State attempts to restrict the rights applicability. However, minimum core obligations are ‘one of the more difficult and controversial concepts in economic, social and cultural rights’.³²³

On the one hand, the concept of minimum core obligations is argued to be ‘crucial in the implementation of economic and social rights’,³²⁴ and useful as it defines criteria by which to determine clear violations of ESCR.³²⁵ In particular, it is argued to allow ‘for a clearer formulation of the concept of progressive realisation, by ensuring

³²² See Introduction for a discussion of reservations, derogations and limitations in respect of minimum core obligations.

³²³ Sage Russell, ‘Introduction: Minimum State Obligations - International Dimensions’ in Danie Brand and Sage Russell (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002), 14

³²⁴ Cahill-Ripley, (n246), 56

³²⁵ Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Intersentia 1999), 148.

that the state has a starting-point from which to work'.³²⁶ On the other hand, there have been various calls for the minimum core concept to be abandoned.³²⁷ However, Young argues that before we completely embrace or abandon the minimum core concept, we must formulate a clearer analysis of its interpretation, it being necessary to disentangle the inconsistencies and controversies that have accompanied the concept.³²⁸ It is important, therefore, to determine whether the minimum core obligations approach is a concept that is clear and useful for determining violations of the right to education in a NIAC, or whether it should in fact be abandoned.

1.5.1.1. Defining the minimum core obligations approach

General Comment 3 states that:

[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party... if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.³²⁹

Minimum core obligations are referred to as 'the nature or essence of a right...the essential element or elements without which a right loses its substantive significance'.³³⁰ The problem is that the minimum core is open to disagreement, and

³²⁶ Wesson (n147), 284, 299-300; Tara J Melish, 'Rethinking the 'Less as More' Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (2006) 39 *New York University Journal of International Law and Politics* 171, 206; Young, (n147), 151-152

³²⁷ Karin Lehmann, 'In Defense of the Constitutional Court: Litigating Socio-economic Rights and the Myth of the Minimum Core' (2006) 22 *American University International Law Review* 163, 165, 182, 197; Melish (n326), 206; Young (n147), 165

³²⁸ Young (n147), 116

³²⁹ General Comment 3, at [10]

³³⁰ Russell, 'Introduction' (n323), 15; Audrey Chapman and Sage Russell, 'Introduction' in Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002), 9; BIICL Handbook (n2), 78; Young (n147), 126; Rolf Kunnemann, 'The Right to Adequate Food: Violations Related to its Minimum Core Content' in Danie Brand and

‘the minimum core will look different to an advocate of human flourishing in comparison with an advocate of basic survival’.³³¹ One can look to where consensus has been reached on a rights nucleus.³³² The importance of consensus is its relationship to the principles of State consent and sovereignty, and the ensuring of the validity of a minimum core concept universally.³³³ Yet it is not unclear whose consensus counts, nor whether unanimous or majority consensus is required.³³⁴ Dixon argues that the minimum core should derive from a survey of State practices conducted by the CESCR.³³⁵ Following General Comment 3, the CESCR has in fact fleshed out the minimum core of most ESCR in its General Comments, and if the CESCR ‘deviates too far from consensus, the Committee (and the General Comments it issues) likewise loses legal authority’.³³⁶

However, the identification of the minimum core by the CESCR has been criticised as not having met with success,³³⁷ and as being far from coherent.³³⁸ As such, it is important to take the CESCR determination of the core content of the right to education as a starting point, and to determine whether the CESCR has correctly identified its core content. Nonetheless, the failure of the CESCR to ‘articulate a coherent, stable, and determinate vision of minimum core duties...should not be taken to signal the death knoll for the concept of minimum core obligations’.³³⁹ Going forward the CESCR can update its analysis of the minimum core of ESCR, and should ensure that in doing so it adopts a coherent approach with a transparent methodology

Sage Russell (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002), 82

³³¹ Young (n147), 127-133, 138

³³² Ibid, 140

³³³ Ibid, 144-155

³³⁴ Ibid, 147-149

³³⁵ Rosalind Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited’ (2007) 5 *International Journal of Constitutional Law* 391, 415-416

³³⁶ Young (n147), 143-144

³³⁷ Sepúlveda (n243), 367

³³⁸ Young (n147), 154

³³⁹ John Tobin, *The Right to Health in International Law* (Oxford University Press 2012), 244

as to how they determined that core by consensus. As it may be possible for the State to derogate from or limit the applicability of non-core aspects of the right to education during a NIAC, it is important that the CESCR ensures that in identifying the core this genuinely reflects the ‘raison d’être’ of the right to education. This would ensure that education can be meaningfully realised in the face of aggressive derogation or limitation practices.

Another important critique is that by prioritising the core, we neglect the non-core elements of a right.³⁴⁰ This is because the minimum core creates ‘a “floor” below which conditions should not be permitted to fall’,³⁴¹ but this floor may become a ‘ceiling,’ whereby States reach their minimum core obligations and do nothing more to fully implement the right.³⁴² The concept is therefore argued to pose ‘a danger that the remainder of a right is subsequently considered unimportant and therefore may well be denied’.³⁴³ This is, however, not a real weakness.

We must recall the limited purpose of the approach.³⁴⁴ Chapman and Russell argue that:

The purpose of minimum core obligations is not to provide States with a loophole that allows them to avoid their obligations. Rather it is to accommodate the reality that many ESCR require resources that are simply not available in many countries and that States must still realize rights fully upon meeting their minimum core obligations.³⁴⁵

³⁴⁰ Olivier De Schutter, ‘Introduction,’ in Olivier De Schutter (ed) *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2013), xxxi

³⁴¹ Chapman and Russell, ‘Introduction’ (n330), 9

³⁴² Russell, ‘Introduction’ (n323), 14; Chapman and Russell, ‘Introduction’ (n330), 9

³⁴³ Brigit Toebes, ‘The Right to Health’ in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds), *Economic, Social and Cultural Rights: A textbook* (2nd ed, Martinus Nijhoff 2001), 176

³⁴⁴ De Schutter, ‘Introduction’, (n340), xxxi

³⁴⁵ Chapman and Russell, ‘Introduction’ (n330), 10

The principle of progressive realization, therefore, makes clear that the concept does not allow States to simply comply with the minimum core and do nothing more, once the minimum core is realised States must endeavor to realise the non-core elements of ESCR. What is required is that ‘states should strive to realize the full spectrum of rights’ in accordance with their obligation to take steps progressively.³⁴⁶ The minimum core should therefore be seen as an expanding floor from which States should endeavor to move upwards,³⁴⁷ and as a springboard for further action.³⁴⁸

The question becomes one of timing with the ultimate goal of full implementation, and while recognising that all components of a right are equal, tackling the most essential elements of a right first is prioritised.³⁴⁹ The minimum core obligations concept helps direct resources to where they are most urgent, thereby defining priorities for domestic efforts towards the full realisation of ESCR.³⁵⁰ The benefit of the obligations approach is, therefore, that it enables a more realistic and informed strategy for the realisation of ESCR.³⁵¹ Particularly where a State has limited resources due to a NIAC, and important budgetary decisions have to be made in respect of military expenditure versus expenditure on the right to education, minimum core obligations will serve an important function in assisting a State in allocating its resources.

Another critique of the minimum core obligations approach is that it directs attention to the performance of developing States,³⁵² whom are more likely to be struggling to meet the basic components of a right. However, in this respect, minimum

³⁴⁶ Toebe (n343), 176

³⁴⁷ Coomans, ‘Search of the Core Content’, (n194), 180

³⁴⁸ Geraldine Van Bueren, ‘Alleviating Poverty Through the Constitutional Court’ (1999) 15 South African Journal on Human Rights 52, 59

³⁴⁹ Russell, ‘Introduction’ (n323), 15

³⁵⁰ De Schutter, ‘Introduction’ (n340), xxix; Wesson (n147), 299-300

³⁵¹ Young (n147), 151-152

³⁵² Craven (n311), 152

core obligations are also a useful concept at the international level.³⁵³ In the context of international co-operation and assistance, attention on developing States can be beneficial. As the core reflects the most essential elements of a right, States struggling to meet the core of the right to education can be afforded the assistance required to meet their obligations.

In this regard, the practicalities of prioritising resources to core needs have to be considered. Wesson argues that one approach is that resources allocated to ‘non-core needs should be redistributed to satisfy core entitlements as a matter of absolute priority’.³⁵⁴ However, he argues that such an approach is unrealistic, unconscionable and has the potential to be counterproductive, instead a more nuanced approach is needed that allows for the most effective allocation of scarce resources that balances short-term and long-term aims.³⁵⁵ Another approach is that there should be no redistribution of resources from non-core to core needs, rather, as additional resources become available ‘these should be devoted to core needs, while existing services are simply maintained without being expanded’.³⁵⁶ However, such an interpretation would deprive the minimum core of its *raison d’etre*.³⁵⁷ A third interpretation is a balance whereby certain allocations could be compromised to satisfy core needs, while others are maintained. A benefit is that ‘the minimum core would not result in inappropriate services being terminated...nor would it be deprived of its teeth’.³⁵⁸ Wesson adds that ‘this would simply be a bridge too far’, as courts are ill-suited to determine the appropriate balance between short and long-term aims, and an approach requiring

³⁵³ Danie Brand, ‘The Minimum Core Content of the Right to Food In Context: A Response to Rolf Kunnemann’ in Danie Brand and Sage Russell (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002), 106

³⁵⁴ Wesson (n147), 303-304

³⁵⁵ Ibid, 303-304

³⁵⁶ Ibid, 303-304

³⁵⁷ Ibid, 304

³⁵⁸ Ibid, 304

courts to consider non-core allocations as violations if core needs are not addressed is unworkable and inflexible.³⁵⁹

However, there is a fourth approach to the issue of resource allocation. Lehmann argues that ‘in determining whether a particular expenditure that does not involve the fulfillment of a right is reasonable, account must be taken of the fact that it is a non-rights expenditure’.³⁶⁰ There should, therefore, be a more robust analysis of budget and expenditure,³⁶¹ and emphasis should not be placed on the redistribution of resources from the non-core to the core. Instead, in determining whether the State has effectively allocated its resources to the core and non-core elements of the right to education during NIAC, emphasis should be on redistributing resources from non-rights to the core as far as possible, and where essential from the non-core to the core.

1.5.1.2. Minimum Core Obligations and their Relationship to Immediate Obligations

The CESCR stated in the context of ESCR and the right to education specifically that the ICESCR, as well as providing for progressively realisable obligations and acknowledging constraints due to the limits of available resources, also imposes on States ‘obligations which are of immediate effect’.³⁶² A State will be considered to violate an immediately realisable obligation where non-compliance has occurred, and will not be able to justify non-compliance on the basis of resource constraints. Immediately realisable obligations, therefore, refer to negative obligations which do not require resources to realise. Progressively realisable obligations, conversely, are

³⁵⁹ Ibid, 305, 308

³⁶⁰ Lehmann (n327), 185, 195, 197

³⁶¹ Lillian Chenwi, ‘Unpacking “Progressive Realisation”, its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance’ (2013) 39 *De Jure* 742, 769

³⁶² General Comment 3, at [1]; General Comment 13, at [43]

positive obligations that can be realised over time in light of resources available, as discussed above.

It is often argued that minimum core obligations are not subject to the principle of progressive realisation and must be implemented immediately, irrespective of the availability of resources.³⁶³ On the one hand, the Maastricht Guidelines provide expressly that minimum core ‘obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties... resource scarcity does not relieve States of certain minimum obligations’.³⁶⁴ On the other hand, the Limburg Principles, while not explicitly referring to the concept of minimum core obligations, provides that ‘States Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all’, and that a State will be in violation of the ICESCR if ‘it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet’.³⁶⁵ The reference to the phrase ‘wilfully fails to meet’ is significant, as this infers that one should examine whether a State was unwilling rather than unable to comply with international minimum standards, namely minimum core obligations, having regard to resource scarcity and the principle of progressive realisation. Unfortunately, Russell argues that this contradiction has not been fully grappled with, nor resolved.³⁶⁶

Significantly, De Schutter argues that the Maastricht Guidelines interpretation of minimum core obligations is not an accurate reading of the CESCR position.³⁶⁷

³⁶³ Philip Alston, ‘Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights’ (1987) 9 Human Rights Quarterly 332, 353; Robertson, (n258), 701; Arambulo, (n325), 148; Chapman and Russell, (n330), 14; Chapman, (n363), 37, 47; Coomans, (n194), 178; Cahill-Ripley, (n246), 56-57; Ssenyonjo, ‘*Reflections*’, (n244), 969, 978

³⁶⁴ Cees Flinterman, ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1997) 15 Netherlands Quarterly of Human Rights 691, at [9-10]

³⁶⁵ *Limburg Principles*, at [25, 72]

³⁶⁶ Russell, ‘Introduction’ (n323), 17

³⁶⁷ De Schutter, ‘Introduction,’ (n340), xxvii

Russell argues that the position that minimum core obligations are immediately enforceable is ‘hopelessly incompatible in practice’.³⁶⁸ As minimum core obligations are not limited to cost free negative obligations but also positive obligations, in reality meeting minimum core obligations immediately may be a challenge for States and they may have to be realised progressively.³⁶⁹ It would be illogical to accuse a State of violating a right that it could not have possibly met.³⁷⁰ This may be particularly unfair in the context of a NIAC, when it may be more financially or practically difficult to comply with minimum core obligations that are positive in nature. For example, rebuilding primary schools destroyed by NSAG requires resources that the State may simply not have, and where such resources are available, rebuilding requires time, holding a State to be in violation where rebuilding does not happen immediately would be unjust, but the impossibility of the situation would be for the State to prove.

Complicating the debate as to the immediate or progressive nature of minimum core obligations further is the fact that the CESCR has interpreted this inconsistently. In the first formulation of the minimum core obligations concept by the CESCR, the CESCR recognised that it would be unfair to make minimum core obligations immediately enforceable, irrespective of resource constraints:

Any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned...In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum

³⁶⁸ Young, (n147), 115

³⁶⁹ Russell, (n323), 16; Chapman and Russell, (n330), 10; Coomans, (n216), 247-248

³⁷⁰ Kunnemann, (n330), 91

obligations.³⁷¹

In line with the resources, available resources can be taken into account, and the State has the burden of proving that all efforts have been made to meet the minimum standards set out in the minimum core obligations, including by the adoption of low-cost programmes.³⁷²

De Schutter argues that the CESCR felt compelled to state that even in relation to minimum core obligations, the lack of resources cannot be dismissed.³⁷³ In respect of the right to education, the CESCR is silent in General Comments 11 and 13 as to the progressive or immediate nature of minimum core obligations. However, in *General Comment 12: The Right to Adequate Food (Art. 11)*, it is provided that ‘the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations’.³⁷⁴ This is in line with the wording of General Comment 3, and with the understanding that minimum core obligations can be progressively realised in line with resource constraints.

On the other hand, in *General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, it is provided that States ‘cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations.’³⁷⁵ This was reiterated in *General Comment 15: The Right to Water (Arts. 11 and 12 of the*

³⁷¹ General Comment 3, at [11]

³⁷² Sir Nigel Rodley, ‘International Human Rights Law’ in Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018), 783

³⁷³ De Schutter, ‘Introduction’ (n340), xxvii

³⁷⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art 11)*, 12 May.1999, E/C.12/1999/5, at [17]. (General Comment 12)

³⁷⁵ General Comment 14, at [47]

International Covenant on Economic, Social and Cultural Rights).³⁷⁶ It is clear that the CESCR alters their interpretation of minimum core obligations in accordance with the idea that States cannot justify non-compliance in light of resource scarcity as a result of the immediate nature of minimum core obligations. *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he or she is the Author (Article 15, paragraph 1 (c), of the Covenant)*, goes further by explicitly stating that minimum core obligations ‘are of immediate effect’.³⁷⁷ Significantly, however, *General Comment 19: The Right to Social Security (Art. 9)* reverts back to the wording of General Comment 3, and the idea that minimum core obligations are in fact realisable progressively in light of resource constraints.³⁷⁸

The inconsistent approach of the CESCR risks undermining the minimum core obligations approach, despite its importance to the right to education during situations of NIAC, as well as other ESCR, due to the inability to restrict their application. This risk is highlighted by the fact that there have been calls to abandon the approach due to the confusion that surrounds it. Going forward, the CESCR should endeavor to update their General Comments and put forward an approach that is consistent.

I further submit that the view that minimum core obligations are either solely immediate or solely progressive is wrong on the basis that minimum core obligations may correspond to either immediately or progressively realisable elements of a right. This can be evidenced clearly when the minimum core obligations and immediate

³⁷⁶ General Comment 15, at [40]

³⁷⁷ Committee on Economic, Social and Cultural Rights, *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he or she is the Author (article 15, paragraph 1 (c), of the Covenant)* 12 Jan. 2006, E/C.12/GC/17, at [25, 39] (General Comment 17)

³⁷⁸ General Comment 19, at [60]

obligations of the right to education, as identified by the CESCR, are compared.³⁷⁹ Article 13 of the ICESCR lists several specific steps that must be complied with in order for the right to education to be fully realised.³⁸⁰ In General Comment 13, the CESCR identifies five of those steps as amounting to the minimum core: ‘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 ensure the provision of primary education for all on a free and compulsory basis; ‘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’.³⁸¹ The CESCR also identifies various immediate obligations, but these do not necessarily correspond with those elements of the right to education that form the minimum core.

In General Comment 13, the CESCR reiterates that the principle of non-discrimination is an immediate obligation that is subject to neither progressive realisation nor the availability of resources.³⁸² The CESCR, therefore, considers the principle of non-discrimination to be both a minimum core obligation and an immediate obligation. Conversely, the CESCR does not identify the minimum core obligation to ensure that education conforms to the objectives set out in Article 13(1) of the ICESCR as an immediate obligation. Ensuring that education conforms to the objectives set out in Article 13(1) would require resources and time to implement, for example to amend educational curricula, or to train educational staff, and therefore, is progressively realisable.

³⁷⁹ There is scope for further research into the immediate and progressive nature of minimum core components of other ESCR. However, for the purpose of this thesis, it is sufficient to show that at least in respect of education, the argument that all minimum core obligations are immediate is deeply flawed.

³⁸⁰ ICESCR, Art 13

³⁸¹ General Comment 13, at [57]

³⁸² Ibid, at [43]

The minimum core obligation to provide free and compulsory primary education to all is also specified to be of an immediate nature within General Comment 13.³⁸³ As with the principle of non-discrimination, there is a direct overlap between what the CESCR considers to be a minimum core obligation and an immediate obligation. However, as Beiter points out, the nature of a State's obligation with respect to primary education is overstated within General Comment 13, as Article 14 of the ICESCR provides for its progressive realisation.³⁸⁴ Therefore, it is clear that the CESCR are incorrect when stating that the minimum core obligation to provide free and compulsory education is an immediate obligation.

The CESCR, does however, provide that the adoption of a plan for the progressive realisation of the right to education is immediate in nature, stating in General Comment 11 that:

A State party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available. If the obligation could be avoided in this way, there would be no justification for the unique requirement contained in article 14 which applies, almost by definition, to situations characterized by inadequate financial resources.’³⁸⁵

In relation to the minimum core obligation ‘to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education’, it is provided in General Comment 13 that a State party has an immediate obligation to take steps to realise all levels of education for all those within its jurisdiction, and that ‘at a minimum, the State party is required to adopt and

³⁸³ Ibid, at [51]

³⁸⁴ Beiter, (n72), 390; See ICESCR, Art 14

³⁸⁵ *General Comment 11*, at [9]

implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant'.³⁸⁶ While the CESCR does not provide so explicitly, as with the creation of a plan for primary education being immediately realisable, it is clear that the minimum core obligation to have a plan for the realisation of the other levels of education is also immediately realisable. Transparent plans of action are required, with benchmarks tied to specific timeframes, in order to measure progress and ensure that policy commitments do not simply remain noble sentiments on paper.³⁸⁷ Plans for all levels of education will be particularly important for the realisation of education in situations of NIAC, where deliberate and direct attacks against education occur, being reviewed more regularly to allow for the nuances of the conflict and nature of attacks.

In relation to the minimum core obligation to ensure free choice of education without interference from the State or third parties, the CESCR does not identify this requirement as an immediate obligation. Coomans argues that the freedom dimension of the right to education requires a policy of non-interference and implies negative obligations.³⁸⁸ Significantly, 'refraining from interfering with the enjoyment of a right does not seem to be contingent upon resource-availability or require progressive realization'.³⁸⁹ Therefore, while the CESCR has failed to elaborate on the immediately realisable nature of this minimum core obligation, it is clear that this is implementable immediately.

Compliance with the principle of progressive realisation is difficult to measure, hence the appeal of an immediately realisable minimum core. An immediately

³⁸⁶ General Comment 13, at [51]

³⁸⁷ Sandra Liebenberg, 'The Right to Social Security: Response from a South African Perspective' in Danie Brand and Sage Russell (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002), 157.

³⁸⁸ Coomans, 'Search of the Core Content' (n194), 162

³⁸⁹ Kevin Iles, 'Limiting Socio-economic Rights: Beyond the Internal Limitations Clause' (2004) 20 South African Journal on Human Rights 448, 459

realisable minimum core obligations approach would provide a greater level of protection to ESCR, including to education in a NIAC, yet interpreting the approach this way risks the approach not being taken seriously. This risk is higher considering minimum core obligations are not articulated within the ICESCR itself, but within the non-binding General Comments of the CESCR.

In practice, at the national level in South Africa, the minimum core obligations approach has been rejected on numerous occasions.³⁹⁰ For example, in the case of *Minister of Health v. Treatment Action Campaign*, the South African Constitutional Court rejected the minimum core obligations approach on the basis that ‘it is impossible to give everyone access even to a “core” service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights...on a progressive basis’.³⁹¹ The SACC interpreted minimum core obligations as immediate with the effect that the concept was considered unworkable, leading ultimately to its rejection.

Wesson argues that instead of rejecting the minimum core on the grounds that their immediate implementation is impossible, the SACC should have taken into account that the CESCR permits a State to justify its failure to meet the minimum core where it lacks resources, and as such they should have called upon the State to prove that it was unable to meet the minimum core.³⁹² Had the court interpreted the concept of minimum core obligations in the manner that some elements of a right are immediate and some are progressively realisable, the court may have found greater utility and purpose in the approach and utilised it in coming to its decision.

³⁹⁰ South Africa v. Grootboom (2001) (1) SA 46 (CC), at [30]; Minister of Health v. Treatment Action Campaign (2002) (5) SA 721 (CC), at [34-35] (TAC); Khosa v. Minister of Social Development (2004) (6) BCLR 569 (CC), at [40]; Mpumalanga Department of Education and Another v. Hoërskool Ermelo and Another (2010) (2) SA 415 (CC), at [52]; Governing Body of the Juma Masjid Primary School & Others v. Essay N.O. and Others (2011) (7) BCLR 651 (CC), at [37];

³⁹¹ TAC, at [35]; Hereinafter SACC.

³⁹² Wesson, (n147), 284, 299-300, 302

In accordance with the approach put forward in this thesis, the SACC should have examined first whether the issue concerns a minimum core obligation of an immediate nature, if so, this applies immediately irrespective of the availability of resources and the court could have found a violation. If the issue relates instead to a minimum core obligation that is progressive in nature, it is correct that a State may be able to justify non-compliance on the basis of a lack of resources. To justify this, the State must have utilised the maximum of its available resources at its disposal, have used all appropriate means, prioritising minimum core needs over non-rights expenditure and non-core needs in an appropriate manner, and seeking international assistance where necessary.

Young argues that another unanswered question is whether minimum core obligations are relative or universal, i.e. whether the obligations change to be State specific and dependent on resources, or whether minimum core obligations apply to all States in the same way.³⁹³ It is, however, frequently argued persuasively that there would be no point in having minimum core obligations if they were not universal.³⁹⁴ Not only would a minimum core obligations approach be more useful if applied universally, the CESCR clearly envisages its universal application. If it is accepted that minimum core obligations can be either immediate or progressive, the minimum core obligations approach can be applied to all States universally in a fair manner, regardless of their level of development and whether or not a NIAC exists, as such factors can be taken into account when determining progressively realisable minimum core components of ESCR, including the right to education.

³⁹³ Young (n147), 114-115; Lehmann (n327), 183

³⁹⁴ Geraldine Van Bueren, 'Of Floors and Ceilings: Minimum Obligations and Children' in Danie Brand and Sage Russell (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002), 184; Lehmann (n327), 184; Ssenyonjo, *Economic* (n195), 66

1.5.2. Tripartite obligations – the obligations to respect, protect and fulfil

The CESCR has applied the tripartite typology of obligations specifically to education in General Comment 13, stating that ‘the right to education, like all human rights, imposes three further types or levels of obligations on States parties: the obligations to respect, protect and fulfil, with the obligation to fulfil incorporating both an obligation to facilitate and an obligation to provide’.³⁹⁵ As stated within the Maastricht Guidelines, ‘failure to perform any one of these three obligations constitutes a violation’.³⁹⁶ While the concept of minimum core obligations is highly contentious, the tripartite typology is not. Cahill-Ripley argues that the acceptance of the tripartite framework is evidenced by its consistent use by the CESCR.³⁹⁷

The tripartite typology is important as it provides a clearer understanding of States obligations.³⁹⁸ As such, the typology is useful as it makes State compliance with the ICESCR comprehensible, realistic and feasible,³⁹⁹ and encourages the justiciability of ESCR.⁴⁰⁰ However, Ssenyonjo argues that the tripartite typology, despite being important, is an underexplored component of IHRL obligations.⁴⁰¹ It is, therefore, necessary to examine the tripartite obligations further.

1.5.2.1. Respect

In order to respect ESCR, States should not adopt laws, policies, programmes, administrative or other measures that would fail to conform to ESCR norms.⁴⁰² Governments are also ‘obliged to ensure that their organs, agents, and the structures of

³⁹⁵ General Comment 13, at [46-47]

³⁹⁶ Maastricht Guidelines, at [6]

³⁹⁷ Cahill-Ripley (n246), 58; See also General Comment 12, at [20]; General Comment 14, at [33]; General Comment 15, at [20]

³⁹⁸ Craven (n311), 110x; Mégret F, ‘Nature of Obligations’ in Moeckli D, Shah S and Sivakumaran S (eds), *International Human Rights Law* (2nd ed, Oxford University Press 2014), 103-104

³⁹⁹ Arambulo (n325), 129

⁴⁰⁰ De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd edn, Cambridge University Press 2019), 436

⁴⁰¹ Ssenyonjo, ‘Reflections’ (n244), 971

⁴⁰² Ssenyonjo, *Economic* (n195), 23

their law do not violate the human rights of those within their jurisdiction'.⁴⁰³ In relation to education, it is provided within General Comment 13 that 'the obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right'.⁴⁰⁴ To respect the right to education, States must not prevent children from attending school by closing education institutions, nor should they discriminate with respect to admission to public schools,⁴⁰⁵ whether in peacetime or a NIAC.

What the right to respect entails is inaction, in that States should not prevent access to the enjoyment of the right to education, and that any action that currently infringes such enjoyment should be halted immediately. As such, during a NIAC in the context of deliberate and direct attacks, it is clear that the State should ensure that they respect education by behaving in a manner that would not prevent children from attending school. For example, they should not destroy schools, or target students or teachers when conducting physical attacks, or recruit children for military purposes. Any such action should be halted immediately to ensure compliance with the obligation to respect.

1.5.2.2. Protect

Mégret argues that the obligation to protect is becoming ever more important, as it is 'much more akin to creating an environment in which rights are enjoyed'.⁴⁰⁶ Eide and Rosas similarly argue that the obligation to protect is the most important aspect of State obligations.⁴⁰⁷ This is a duty that specifically requires the State to prevent other individuals or groups from breaching the human rights of the individual'.⁴⁰⁸ According to the CESCR in General Comment 13, the obligation to protect requires

⁴⁰³ Murray, *Guide*, (n12), at [1.1.24]

⁴⁰⁴ General Comment 13, at [46-47]

⁴⁰⁵ Coomans, 'Education and Work' (n216), 247

⁴⁰⁶ Mégret (n398), 102

⁴⁰⁷ Asbjørn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in A Eide and others, *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001), 24

⁴⁰⁸ Murray, *Guide*, (n12), at [1.1.24]

States ‘to take measures that prevent third parties from interfering’ with the enjoyment of the right to education.⁴⁰⁹ ‘Third parties’, also referred to as non-state actors, include individuals, groups, corporations, other entities and agents acting under their authority.⁴¹⁰ Such actors could therefore include NSAG. The use of the word ‘prevent’ clearly indicates that where ‘an individual is at risk of having his/her rights violated, or where a situation exists which gives rise to such a risk, preventative measures must be taken, in order to ensure, to the fullest extent possible, that these risks do not materialize’.⁴¹¹

In the case of a NIAC where NSAG are involved, the obligation to protect is of particular importance. The obligation to protect clearly encompasses the requirement to protect an individuals’ enjoyment of the right to education from being violated by NSAG, who are often perpetrators of deliberate and direct attacks against education, as will be seen in the case studies of this thesis. However, the State would not be liable for every adverse interference of a person’s right to education by third parties such as NSAG, only for those interferences that could be traced to its shortcomings in protecting individuals.⁴¹² So where a State is adequately taking steps to combat deliberate and direct attacks against education, but these nonetheless occur, the State would not be considered in violation of their obligation to protect. This is, however, a subjective assessment, and whether the State is considered to be doing enough can vary depending on the decision maker.

1.5.2.3. Fulfil

The obligation to fulfil requires ‘the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain rights recognized in the

⁴⁰⁹ General Comment 13, at [47]

⁴¹⁰ General Comment 15, at [23]; Ssenyonjo, *Economic* (n195), 24

⁴¹¹ De Schutter, (n400), 436

⁴¹² Mégret (n398), 102

human rights instruments'.⁴¹³ According to the CESCR in General Comment 13, the 'facilitate' component of the obligation to fulfil 'requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education, such as, by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all'.⁴¹⁴ The obligation to facilitate requires States to manipulate the environment in a way that would enable individuals 'to realise their rights independently with the assistance of the state in creating the conditions that make this possible'.⁴¹⁵ During a NIAC, States should, therefore, avoid creating an environment where an individual cannot realise their own right to education, such as by attacking their school or university.

In relation to the obligation to provide, it is stated within General Comment 13 that States are obliged to provide 'a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal'.⁴¹⁶ General Comment 14 adds to this interpretation by providing that the obligation to fulfil should be seen as requiring that States adopt an extensive range of measures, such as legislative, administrative, budgetary and judicial, promotional and other measures to ensure the full realisation of human rights.⁴¹⁷ Where a NIAC prevents an individual from being able to realise their right to education, the State should, therefore, adopt a range of measures to ensure the realisation of this right, such as rebuilding a new school where no alternative is available.

Since the adoption of General Comment 13 and 14, the CESCR has interpreted the obligation to fulfil as being threefold: it includes the additional obligation to

⁴¹³ Murray, *Guide*, (n12), at [1.1.24]

⁴¹⁴ General Comment 13, at [46-47]

⁴¹⁵ Cahill-Ripley, (n246), 60

⁴¹⁶ General Comment 13, at [47]

⁴¹⁷ General Comment 14, at [33]

promote.⁴¹⁸ Ssenyonjo also argues that the obligation to promote would require States to take steps that would generally involve educating the public.⁴¹⁹ The inclusion of the obligation to promote in the latter interpretations of the CESCR could highlight a growing consensus that States also have an obligation to promote the fulfilment of ESCR. The addition of the obligation to promote is beneficial in the sense that it should heighten State compliance with ESCR if individuals are more aware of their entitlements, which would be particularly useful during a NIAC. For example, if the State destroys a school during a NIAC, and they purport to provide education through the radio, they should promote this widely so that individuals affected are aware of the alternative provision of their right to education. However, as the CESCR do not refer to the obligation to promote in respect of education, the protective function this offers could be lost where it is not recognised, due to a missed opportunity or due to strict interpretation, as being applicable.

1.5.2.4. The relationship between the Tripartite Typology and the 4-A Framework

The CESCR further provides that States are obligated to respect, protect and fulfil each of the ‘essential features’ of the right to education, stating that:

[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

⁴¹⁸ General Comment 15, at [25]; CESCR: Statement, at [7]

⁴¹⁹ Ssenyonjo, *Economic* (n195), 25

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.⁴²⁰

This is, however, only a partial analysis by the CESCR of the tripartite typology and the 4-A framework in the context of the right to education. The tripartite obligations are also of great significance to the realisation of education during a NIAC, as they significantly clarify the impact of deliberate and direct attacks on the availability, accessibility, acceptability and adaptability of education, and the States corresponding obligations. This is significant, in light of the criticism that the ‘exact contours of the concrete obligations remain tentative at best’,⁴²¹ and that a deficiency of IHRL is that it does not expressly address the context of armed conflict, since it applies in peacetime and during armed conflicts and relies upon broad and undefined concepts to understandably allow for flexibility.⁴²² It is, therefore, necessary to not only examine the tripartite obligations further in the context of deliberate and direct attacks against education, but also their relationship to the 4-A framework, in a NIAC.⁴²³

1.6. The Protection of Children from Military Recruitment and Use

The discussion above sets out how education itself is provided for within IHRL, and how IHRL operates to protect education in the context of the issue of deliberate

⁴²⁰ General Comment 13, at [50]

⁴²¹ Giacca, (n15), ESRC, 36 and 38

⁴²² Protecting Children (n6), at [7.71, 9.12.9]

⁴²³ In order to avoid significant repetition, the relationship between tripartite obligations and the 4-A framework is examined in greater detail in Chapter 4 of this thesis, in the context of the protection of education from deliberate and direct attacks during NIAC in Colombia and the DRC. This enables a fuller analysis of the relationship.

and direct attacks in a NIAC. While it could be argued that the military recruitment and use of children violates the right to education, and such practice is therefore implicitly prohibited, this practice is also explicitly prohibited within IHRL. This issue is not regulated within the ICESCR, however, considering this is an issue that relates to children, the matter is more appropriately regulated within the CRC and its Optional Protocol on the Involvement of Children in Armed Conflict.⁴²⁴

Article 38 of the CRC provides that the recruitment, and direct participation, of children under the age of fifteen into armed forces is prohibited, and that priority should be given to those who are oldest between the ages of fifteen and eighteen.⁴²⁵ However, the more recently adopted OPCRC, in Article 1, provides that States shall ‘take all feasible measures’ to ensure that those under the age of eighteen, rather than fifteen do not directly participate in hostilities.⁴²⁶ Article 2 also provides that States should ensure that those under the age of 18 are not compulsorily recruited into their armed forces.⁴²⁷ However, Article 3 of the OPCRC permits the voluntary recruitment of those under the age of eighteen.⁴²⁸ The OPCRC, nonetheless, clearly protects children to a greater extent than the CRC. Given this higher level of protection, it is significant to note that the OPCRC has been subject to wide ratification, having been ratified by 168 States,⁴²⁹ though it would benefit from wider ratification and those States that have not yet ratified it should do so.⁴³⁰ Protecting Children argues that the Special Representative for Children and Armed Conflict could assist in raising awareness and securing greater ratification.⁴³¹

⁴²⁴ Hereinafter OPCRC

⁴²⁵ CRC, Art 38

⁴²⁶ OPCRC, Art 1

⁴²⁷ OPCRC, Art 3

⁴²⁸ Ibid, Art 4

⁴²⁹ ICRC, ‘Treaties, States Parties, and Commentaries: Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000’

⁴³⁰ Protecting Children (n6), at [1.12.3, 4.116, 4.122]

⁴³¹ Ibid, at [1.12.3]

The OPCRC has been subject to further criticism. The ICRC has stated that although it ‘represents a clear improvement of existing international law...the text also contains evident weaknesses’.⁴³² Such weaknesses include: the failure to include an absolute obligation on States to prevent the involvement of children in hostilities, by requiring they only ‘take all feasible measures’; the above-mentioned possibility of voluntary recruitment into the State armed forces below the age of 18 years; and that while Article 4 refers to NSAG, this is framed as a moral, not a legal obligation.⁴³³

Article 4 provides that NSAG ‘should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years’, and places obligations on the State to prevent such recruitment and use.⁴³⁴ This is a highly important provision for the protection of children in NIAC because it explicitly places obligations on States to protect children from recruitment and use by NSAG. However, the OPCRC is criticised as imposing a double standard, in that the standard expected from NSAG under Article 4 is much higher than that expected of States, undermining the OPCRC. Protecting Children recommends that States should be encouraged to adopt the higher standard attributed to NSAG, and that international law could be developed by heightening the standards for States to match those for NSAG.⁴³⁵ If States are not willing to adopt such higher standards, NSAG should be encouraged to uphold the higher standard, but where the double standard would result in them disregarding IHL entirely, they should be encouraged to uphold, at least, the same standard as States.

⁴³² ICRC

⁴³³ Protecting Children (n6), at [1.65]

⁴³⁴ OPCRC, Art 4

⁴³⁵ Ibid, at [9.13.8]

1.7. Conclusion

The right to education is inadequately provided for within IHRL. While the nature and scope of the normative content of the right to education is generally clear, albeit broad, some aspects would benefit by being developed or clarified. In relation to the IHRL obligations of States, Article 2(1) of the ICESCR is weak, largely due to issues with progressive realisation. As to the obligations provided for within the General Comments of the CESCR, the biggest cause for concern in IHRL is the minimum core obligations approach. Minimum core obligations remain useful when understood, as advanced in this chapter, to correlate to content that is either immediate or progressive in nature depending on the element of the right in question, particularly in situations of NIAC. The tripartite obligations are less controversial, and also constitute useful tools for the realisation of education during a NIAC. While the CRC and the OPCRC more appropriately regulate the use of child soldiers, there are numerous inadequacies in the manner in which they do.

Chapter Two: The Protection of Education during a Non- International Armed Conflict: International Humanitarian Law

2.1 Introduction

The purpose of this chapter is to examine the nature and scope of the protection of education within IHL during situations of NIAC, and the corresponding obligations of States. This chapter examines IHL with a view to determining whether the protection afforded to education is adequate, or whether there are gaps and inconsistencies in the law that may lead to a lower level of protection of education during a NIAC in practice. There has, at the time of writing, been little discussion as to how education is protected during a NIAC in respect of the specific issue of deliberate and direct attacks against education. As such, this chapter focuses on the adequacy of the nature and scope of the protection of education in respect of attacks against educational institutions, students and educational staff, the military use of educational institutions and the military recruitment and use of children.

I begin with a brief analysis of the sources of IHL. Following this, I examine what constitutes an IAC or a NIAC, and the threshold for the application of IHL in both types of hostilities, with a focus on NIAC. I then examine the fact that different rules apply in an IAC and a NIAC, with fewer rules applying to NIAC.⁴³⁶ Next, I outline those IHL provisions that explicitly protect various aspects of education during situations of NIAC. Finally, I set out the IHL provisions corresponding to general principles of IHL that protect education in relation to the issue of deliberate and direct attacks during a NIAC: the principles of humanity, military necessity, proportionality, distinction, passive precautions and precautions in attack. I evaluate whether the IHL provisions that explicitly and implicitly protect education are sufficient in situations of

⁴³⁶ BIICL Handbook (n2), 32

NIAC, examining the strengths and weaknesses of such provisions. I argue that IHL insufficiently protects education during situations of NIAC, with such protection being worse in a NIAC than an IAC. I test the ambiguities and gaps identified in this chapter further in my case studies.

2.2 Sources of International Humanitarian Law

2.2.1 Treaty Law

The key instruments in contemporary IHL are the four Geneva Conventions,⁴³⁷ and the three Protocols Additional to the Geneva Conventions.⁴³⁸ The Geneva Conventions and their Additional Protocols are viewed as the most authoritative treaties governing IHL,⁴³⁹ and will be the focus of this chapter. Common Article 3 is contained identically within each of the four Geneva Conventions, and is important for the purposes of this thesis as it represents the first attempt to extend a minimum of humanitarian protection to a NIAC,⁴⁴⁰ and ‘marks the starting point of the positive body of law of NIAC’.⁴⁴¹ The adoption of the two Additional Protocols in 1977 is especially important for the protection of education during a NIAC, as they cemented

⁴³⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, *entered into force* 21 October 1950 (Geneva Convention I); Geneva Convention for the Amelioration of the Wounded Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, *entered into force* 21 October 1950 (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, *entered into force* 21 October 1950 (Geneva Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *entered into force* 21 October 1950 (Geneva Convention IV)

⁴³⁸ Additional Protocol I; Additional Protocol II; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005, *entered into force* 14 January 2007 ; Other IHL instruments include the Hague Conventions and their Regulations, of 1899 and 1907, treaties prohibiting the use of particular weapons, such as the 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, or the recently adopted Treaty on the Prohibition of Nuclear Weapons of 2017, 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.

⁴³⁹ Cahill-Ripley, (n246), 99

⁴⁴⁰ Green, *The Contemporary Law of armed Conflict* (3rd edn, Manchester University Press 2008), 54

⁴⁴¹Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar Publishing 2017), 24-34

the separation of IHL into the categories of IAC and NIAC.⁴⁴² Additional Protocol I applies to situations of IAC,⁴⁴³ and Additional Protocol II applies to situations of NIAC, and constitutes the first international instrument dedicated to the application of humanitarian principles during a NIAC.⁴⁴⁴ Additional Protocol II is therefore of great significance for the protection of education in a NIAC.

IHL treaties are among the most universally ratified. The Geneva Conventions have 196 State Parties, and thus have attained universal ratification.⁴⁴⁵ Additional Protocol I currently has 174 State Parties,⁴⁴⁶ and the latter has fewer, having only 168 State Parties.⁴⁴⁷ Although binding on a large number of states, the lower level of ratification of the Additional Protocols creates legal uncertainty, as the Protocols may be applicable to some parties of an armed conflict but not to others.⁴⁴⁸ Additional Protocol II is less widely ratified than Additional Protocol I, so such legal uncertainty is more likely in a NIAC. Of concern is that Common Article 3 would be the sole treaty-based provision directly regulating NIAC in situations where States have not ratified Additional Protocol II, and while customary IHL may also regulate a NIAC this source of law, as will be seen, can be problematic.⁴⁴⁹ Protecting Children argues that the Additional Protocols could benefit from further ratification, and that the

⁴⁴² Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Wilmschurst E, *International Law and the Classification of Conflicts* (Oxford University Press 2012), 34

⁴⁴³ Green (n440), 53

⁴⁴⁴ Ibid, 62

⁴⁴⁵ ICRC, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949' at <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument> (Last accessed 29th August 2019); ICRC, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949: Commentary of 2016' (ICRC, 2016), at [1]

⁴⁴⁶ Kolb and Hyde (n16), 53

⁴⁴⁷ ICRC, 'Treaties, States Parties and Commentaries: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977' at <https://ihl-databases.icrc.org/ihl/INTRO/470> (last accessed 30 May 2018)

⁴⁴⁸ ICRC, 'Treaties, States Parties and Commentaries: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977' at <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument> (last accessed 30 May 2018)

⁴⁴⁹ Kolb and Hyde (n16), 53

⁴⁴⁹ Protecting Children (n6), at [3.52.2]

Special Representative for Children and Armed Conflict could assist in raising awareness and securing greater ratification of such instruments.⁴⁵⁰ Nonetheless, where the additional protocols do apply, they ‘strengthen the protection of the defenceless to a considerable degree’.⁴⁵¹ This chapter examines the extent to which the Geneva Conventions and Additional Protocols strengthen the protection of education in respect of deliberate and direct attacks.

2.2.2 Customary Law

Also of relevance is customary IHL. Kolb and Hyde argue that customary international law is pivotal on three grounds: firstly, it ensures that those States that have not ratified the relevant IHL treaties are still bound by general rules that can be applied universally; secondly, customary international law fills in the gaps in protection where there is limited treaty regulation; thirdly, it acts as a guide to the interpretation of treaty rules.⁴⁵² While the determination of which rules of IHL amount to customary international law is complicated,⁴⁵³ guidance can be gained from the ICRC study on ‘Customary International Humanitarian Law’.⁴⁵⁴ However, Crawford argues that:

Despite the fact that the study is extensively researched, and makes some persuasive arguments, it should be kept in mind that it is an academic work, and

⁴⁵⁰ Ibid, at [1.12.3]

⁴⁵¹ Gasser, ‘Protection of the Civilian Population’ in Dieter Fleck, *The Handbook of International Humanitarian Law* (Oxford University Press 2009), 248

⁴⁵² Kolb and Hyde (n16), 58

⁴⁵³ Ibid, 58

⁴⁵⁴ ICRC, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge University Press 2005) (ICRC study)

not a declaration of the law to which states are bound. States may yet refute its findings, especially on some of the more controversial suggestions.⁴⁵⁵

It is stated in the ICRC study itself that ‘though it represents the truest possible reflection of reality, the study makes no claim to be the final word. It is not all-encompassing’.⁴⁵⁶ As such, the ICRC study constitutes an excellent starting point for determining which aspects of IHL are customary in nature.

Though, as Bethlehem argues, while:

[T]he study is a remarkable endeavour and one that will greatly advance scholarship and debate, and ultimately compliance with, international humanitarian law...one should approach exercises of distilling customary international law...with caution.⁴⁵⁷

One reason for needing to utilise caution is that its methodology is frequently criticised.⁴⁵⁸ Yet, Scobbie argues that the methodology ‘is more stringent than some commentators have alleged’.⁴⁵⁹ In *Protecting Children*, it is argued that while some concerns have been expressed about the methodology of the ICRC study, numerous States and UN bodies have referred to it in support of particular rules being of

⁴⁵⁵ Emily Crawford, ‘Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts’ (2007) 20 *Leiden Journal of International Law* 441, 457

⁴⁵⁶ ICRC Study, xxiii

⁴⁵⁷ Daniel Bethlehem, ‘The Methodological Framework of the Study’ in Elizabeth Wilmshurst and Susan Breau, *Perspectives on the ICRC Study on Customary International Law* (Cambridge University Press 2007), 13

⁴⁵⁸ *Ibid.*, 4; John B Bellinger and William J Haynes, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’ (2007) 89 *International Review of the Red Cross* 443, 444; Crawford (n455), 457

⁴⁵⁹ Iain Scobbie, ‘The Approach to Customary International Law in the Study’ in Elizabeth Wilmshurst and Susan Breau, *Perspectives on the ICRC Study on Customary International Law* (Cambridge University Press 2007), 47

customary status, this being an implicit endorsement of the ICRC's methodology. Protecting Children itself refers to, and relies on, the rules of the ICRC study.⁴⁶⁰

A further reason for caution is that the ICRC study has been further criticised for over-simplifying rules that are complex and nuanced 'in a way that renders them overbroad or unconditional'.⁴⁶¹ Bellinger and Haynes argues that a general error of the ICRC study is 'the assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict, notwithstanding the fact that there is little evidence in support of those propositions'.⁴⁶² This Chapter identifies the relevant Rules of the ICRC study, but it does not embark on an analysis as to the accuracy of these rules as this is beyond the scope of the thesis, however the above criticisms should be borne in mind, in that the ICRC study is not viewed as an all-authoritative source on what rules of IHL are customary in nature.

The ICRC study sets out 161 rules of IHL as being customary in nature, of which only '17 are solely applicable in international armed conflicts, and only six are solely applicable in non-international armed conflicts'.⁴⁶³ The possible application of these customary rules to NIAC is significant because, as will be seen, there is more treaty law on IAC, accepted by a greater range of states, while for a NIAC, there is some treaty law, with more limited participation. Akande argues that though issues have been raised as to the methodology used in the ICRC study, there seems to be acknowledgement that customary international law now provides more elaborate rules for NIAC than Common Article 3 and Additional Protocol II.⁴⁶⁴ The ICRC study,

⁴⁶⁰ Ibid, at [2.59]

⁴⁶¹ Bellinger and Haynes (n458), 447

⁴⁶² Ibid, 448

⁴⁶³ Crawford (n455), 456-457

⁴⁶⁴ Akande (n442), 35, 36; See also Kolb and Hyde (n16), 19; Wilmshurst E, *International Law and the Classification of Conflicts* (Oxford University Press 2012), 3

therefore, has a significant contribution to make in identifying which rules, including those relevant to the protection of education from deliberate and direct attacks, are considered to have gained customary status in a NIAC.

A final point to make is that the International Law Commission is engaged in looking at wider issues of customary international law, and recently developed draft conclusions to assist in the determination of rules of customary international law.⁴⁶⁵ The customary law debate is also wider than IHL, and encompasses other areas of international law, including IHRL.

2.3 The Classification of Conflicts and the threshold for the applicability of IHL

IHL comes into play immediately upon the outbreak of hostilities that amount to an IAC or a NIAC.⁴⁶⁶ According to the International Criminal Tribunal for the former Yugoslavia, IHL continues to apply:

[B]eyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁴⁶⁷

An IAC will end when hostilities cease, and it ‘is not necessary for States to communicate this formally through a ceasefire or armistice agreement’.⁴⁶⁸ In order to determine whether IHL applies, it is, therefore, first necessary to establish if there is

⁴⁶⁵ ILC, *Identification of Customary International Law Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee* (2015) A/CN.4/L.869

⁴⁶⁶ Green (n440), 258-259

⁴⁶⁷ ICTY, *Prosecutor v. Dusko Tadic*, IT-94-1-A, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995), at [70]

⁴⁶⁸ Murray, *Guide*, (n12), at [2.05]

potentially an armed conflict, and then, if so, assess whether the situation is an IAC or NIAC.⁴⁶⁹

Classifying a situation as an armed conflict will determine that IHL applies to military activities, and classifying the conflict as an IAC or NIAC will determine which rules of IHL govern the conduct of armed forces.⁴⁷⁰ The distinctions between an IAC, NIAC, and belligerent occupation are, therefore, of significance as IHL has specific rules covering each situation,⁴⁷¹ and ‘the nature of the armed conflict is relevant to determining the relationship between’ IHRL and IHL.⁴⁷² It is, therefore, important to determine when such situations occur, which rules of IHL apply in such situations in respect of protecting education, and how each situation affects the relationship between IHL and IHRL.⁴⁷³

NIAC are, as will be demonstrated below, more poorly regulated than IAC, so important legal consequences follow from the characterisation of a conflict.⁴⁷⁴ For example, in respect of education, it will be shown that education is protected from deliberate and direct attacks to a lesser extent in a NIAC than an IAC. However, despite the significance of classifying a conflict as IAC or NIAC, making the distinction between them is often factually and politically difficult,⁴⁷⁵ and complicates the process of identifying the relevant applicable law given that different rules apply

⁴⁶⁹ Kolb and Hyde (n16), 74; Akande (n442), 32; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012), 155

⁴⁷⁰ Murray, *Guide*, (n12), at [2.01]

⁴⁷¹ Wilmshurst, (n464), 1-2; Ibid (n12), at [2.02]

⁴⁷² Ibid (n12), at [2.02]

⁴⁷³ This chapter will look at the distinctions between the three conflict situations and the rules of IHL applicable to the protection of education. Chapter 3 will examine the relationship between IHL and IHRL.

⁴⁷⁴ Crawford (n455), 445-446

⁴⁷⁵ Akande (n442), 56; Protecting Children (n6), at [2.74.1, 2.76, 2.78]

in each.⁴⁷⁶ As NIAC are, as will be seen, more poorly regulated than IAC, important legal consequences follow from the characterisation of a conflict.⁴⁷⁷

2.3.1 Classifying a non-international armed conflict

An IAC is more straightforward to classify than a NIAC. An IAC is defined in Article 2 common to all four Geneva Conventions as ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’.⁴⁷⁸ In the case of *Prosecutor v. Tadic* it was stated that an IAC ‘exists whenever there is a resort to armed force between states’.⁴⁷⁹ Similarly the ICRC argues that an IAC ‘occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation’.⁴⁸⁰ As such, it is clear that an IAC exists when armed force is resorted to between two or more States. As the existence of an IAC does not depend on the intensity of fighting, the number of casualties inflicted,⁴⁸¹ or the duration of the conflict, there is no minimum threshold for an IAC.⁴⁸² The position generally taken is that IHL applies to an IAC even where both parties deny that an armed conflict exists.⁴⁸³ A declaration of war is therefore not necessary, the existence of an IAC is simply a factual determination based on the conduct of States and their armed forces.⁴⁸⁴

Common Article 2 also provides that an IAC can constitute ‘cases of partial or total occupation of the territory of a High Contracting Party, even if the said

⁴⁷⁶ Protecting Children (n6), at [2.74.1, 2.76]

⁴⁷⁷ Crawford (n455), 445-446

⁴⁷⁸ Geneva Conventions 1949, Common Article 2

⁴⁷⁹ Tadic, (n467), at [70]

⁴⁸⁰ ICRC, ‘How is the Term Armed Conflict Defined in International Humanitarian Law: Opinion Paper’ (ICRC, 2008)

⁴⁸¹ Murray, *Guide*, (n12), at [2.04]

⁴⁸² Protecting Children (n6), at [2.77.1]

⁴⁸³ Akande (n442), 40

⁴⁸⁴ Murray, *Guide*, (n12), at [2.03]; Protecting Children (n6), at [2.77.1]; Tadic, (n467), at [70]

occupation meets with no armed resistance’.⁴⁸⁵ This again indicates a low threshold for the applicability of IHL to an IAC. The Geneva Conventions do not define ‘occupation’,⁴⁸⁶ however, Article 42 of the 1907 Hague Regulations provide that ‘territory is considered occupied when it is actually placed under the authority of the hostile army’.⁴⁸⁷ Akande argues that where the occupying power is engaged in hostilities with a NSAG within the territory it is occupying, the law relating to IAC is applicable.⁴⁸⁸ This is significant because more treaty law will apply to an IAC, potentially protecting education to a greater extent than if such a situation was considered to be a NIAC.

Article 1(4) of Additional Protocol I reiterates that an IAC applies in the situations outlined in Common Article 2 of the Geneva Conventions, and adds that an IAC can also be ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’.⁴⁸⁹ In practice Additional Protocol I has not been applied to these three situations due to difficulties surrounding their definition.⁴⁹⁰ The laws of NIAC may be inaccurately applied in these situations where the laws of an IAC should be, therefore, greater clarity is needed to ensure that education is protected properly in such conflicts.

Conversely, determining the existence of a NIAC has proven difficult,⁴⁹¹ as it is harder to define.⁴⁹² It is not easy to determine when a situation of violence within a State is to be classified as a NIAC, as there exists a debate as to the threshold of

⁴⁸⁵ Geneva Conventions 1949, Common Article 2

⁴⁸⁶ Akande (n442), 44

⁴⁸⁷ Hague Regulations 1907, Art 42

⁴⁸⁸ Akande (n442), 46

⁴⁸⁹ API, Art 1(4)

⁴⁹⁰ Akande (n442), 49

⁴⁹¹ Sivakumaran (n674), 155

⁴⁹² Protecting Children (n6), at [2.77.2]

violence that needs to be reached for IHL to apply.⁴⁹³ It is generally accepted that the threshold for the level of violence required to establish a NIAC is higher than that required to establish an IAC.⁴⁹⁴ However, while Common Article 2 of the Geneva Conventions and Article 1(4) of Additional Protocol I set out complementary definitions of an IAC, Common Article 3 to the Geneva Conventions and Article 1 of Additional Protocol II set out different thresholds for the category of a NIAC.⁴⁹⁵ These different thresholds mean that essentially two sets of rules are applicable in a NIAC: those rules contained in Common Article 3 and those contained in Additional Protocol II.⁴⁹⁶

A NIAC is defined in Common Article 3 as ‘an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’.⁴⁹⁷ The text of Common Article 3 does not elaborate further on how to define a NIAC, but where a situation is classified as a NIAC, Common Article 3 applies to all parties to the conflict and it prescribes basic rules to the conduct of these parties.⁴⁹⁸ Significantly, Common Article 3 was recognised as being of customary law status in the case of *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v US)*.⁴⁹⁹ The lack of a precise definition, and the resulting lack of clarity, has in practice allowed States to deny the existence of a NIAC,⁵⁰⁰ and prevent the application of Common Article 3.⁵⁰¹ Nonetheless, Sivakumaran argues that every

⁴⁹³ Wilmschurst, (464), 480; Akande (n442), 51

⁴⁹⁴ Murray, *Guide*, (n12), at [2.11]

⁴⁹⁵ BIICL Handbook (n2), 36

⁴⁹⁶ *Ibid*, 36

⁴⁹⁷ Geneva Conventions, Common Article 3

⁴⁹⁸ Murray, *Guide*, (n12), at [2.06]; Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, IT-94-1-A, 2 October 1995, para. 70; Tadić Judgment, ICTY, IT-94-1-T, 7 May 1997, paras 561–8; see also Prosecutor v. Limaj, Judgment, ICTY, IT-03-66-T, 30 November 2005, para. 84

⁴⁹⁹ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v US) (Merits)* 76 ILR 5, 179

⁵⁰⁰ ICRC, Conference of Government Experts and the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1971), 43

⁵⁰¹ Moir (n12), 34

attempt to define a NIAC was met with disagreement and a lack of consensus, so ambiguity within Common Article 3 was necessary.⁵⁰²

Alternatively, Additional Protocol II uses a more restrictive definition of NIAC.⁵⁰³

Article 1(1) of Additional Protocol II provides that a NIAC is one that takes place:

in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized 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.⁵⁰⁴

It is clear that Article 1(1) has a higher threshold of applicability than Common Article 3.⁵⁰⁵ Article 1(1) similarly refers to an undefined notion of a NIAC, but it adds additional criteria to be satisfied.⁵⁰⁶ Article 1(1) adds the prerequisite that armed force is between a State and a NSAG so does not apply to conflicts between NSAG, and that such NSAG operate under a responsible command and have territorial control.⁵⁰⁷ Sivakumaran correctly argues that the essential point of the requirement of territorial control is the ability to carry out sustained and concerted military operations, and not the quantum of territory controlled by the NSAG.⁵⁰⁸ Only partial territorial control is required, as no reference to the amount of territory is made in Article 1(1).

Article 1(2) of Additional Protocol II adds that the 'Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic

⁵⁰² Sivakumaran (n469), 161, 163

⁵⁰³ Protecting Children (n6), at [2.77.2]

⁵⁰⁴ Additional protocol II, Art 1(1)

⁵⁰⁵ Rowe, 'Chapter 10' (n2), 182

⁵⁰⁶ Sivakumaran (n469), 164

⁵⁰⁷ Ibid 184-185; Protecting Children (n6), at [2.77.2]

⁵⁰⁸ Ibid 187

acts of violence and other acts of a similar nature'.⁵⁰⁹ Green argues that the definition of an NIAC as contained within Additional Protocol II has a threshold that is so high that it would exclude most revolutions and rebellions.⁵¹⁰ This high threshold could mean that educational institutions, staff and students are left without the protections contained within Additional Protocol II during a NIAC. Protection in situations not meeting the threshold of Additional Protocol II would be limited to Common Article 3 where its lower threshold is met, customary IHL, IHRL and regional and domestic law.

However, the discrepancy between Common Article 3 and Additional Protocol II, and the resulting difficulty in determining whether the threshold of violence for a NIAC has been reached, has been mitigated by the ICTY. A customary law definition of a NIAC was developed in the case of *The Prosecutor v. Duško Tadic* that gives further guidance on the applicability of Common Article 3.⁵¹¹ In this case it was stated that a NIAC exists whenever there is 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.⁵¹² Therefore, in contrast to Additional Protocol II, this definition does not require that a Common Article 3 NIAC involve the State, rather it can be solely between NSAG. The ICTY also noted that this test 'focuses on two particular aspects of a conflict: the intensity of the conflict and the organization of parties' and that these two aspects differentiated a NIAC from internal tensions and disturbances.⁵¹³ However, it may be difficult to ascertain whether a NSAG has adequate levels of organisation and whether the violence in question is of sufficient intensity.⁵¹⁴ It is,

⁵⁰⁹ Additional Protocol II, Art 1(2)

⁵¹⁰ Green (n440), 83

⁵¹¹ BIICL Handbook (n2), 36

⁵¹² Tadic, (n467), at [70]

⁵¹³ IT-94-1-AR72, 2 Oct 1995, at [562]

⁵¹⁴ Protecting Children (n6), at [2.77.2]

however, significant to note that this definition differs from that set out in Additional Protocol II by not requiring that NSAG exercise a degree of territorial control,⁵¹⁵ which is also difficult to determine. The Additional Protocol also differs in that it refers to ‘sustained and concerted military operations’, and the Additional Protocol cannot be extra-territorial.⁵¹⁶

In light of these differences, the threshold for the applicability of Additional Protocol II remains higher than that of Common Article 3. For both Common Article 3 and Additional Protocol II to apply, the NIAC will need to meet the criteria of Additional Protocol II as well as those required for Common Article 3. Where the criteria for Common Article 3 is satisfied, but those for Additional Protocol II are not, only Common Article 3 will be applicable.⁵¹⁷ While two thresholds for a NIAC remain, the applicability of Common Article 3 is nonetheless substantially clarified by the customary definition and the gap between Common Article 3 and Additional Protocol II is lessened.

Sivakumaram argues that the customary definition encapsulates the core elements that are found in previous definitions in a neat and concise manner.⁵¹⁸ The term ‘protracted’ armed violence is included in the customary law definition in order to set it apart from situations of insecurity. In *Ramush Haradinaj*,⁵¹⁹ the ICTY held that the phrase ‘protracted armed violence’ refers to the intensity rather than duration of the violence.⁵²⁰ The ICTY also identified a number of factors as relevant to assessing the intensity of violence, including, but not limited to:

⁵¹⁵ BIICL Handbook (n2), 36-37

⁵¹⁶ Murray, *Guide*, (n12), at [2.17]

⁵¹⁷ *Ibid*, at [2.14]; Protecting Children (n6), at [2.77.2]

⁵¹⁸ Sivakumaran (n469), 164

⁵¹⁹ *Prosecutor v Ramush Haradinaj et al*, IT-04-84-T, 3 April 2008

⁵²⁰ *Ibid*, para 49

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 persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.⁵²¹

Other factors for reaching the intensity criteria could be ‘when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces’.⁵²² Sivakumaran argues that such factors for determining whether the intensity of the violence surpasses the threshold for a NIAC do not have to exist at the same time or exist at all.⁵²³

As to the requirement of a minimum level of organisation of the NSAG, the ICTY also identified a number of ‘indicative factors’, including but not limited to:

the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak

⁵²¹ Prosecutor v. Haradinaj, Judgment, Trial Chamber, ICTY, IT-04-84-T, 3 April 2008, para. 49

⁵²² Murray, *Guide*, (n12), at [2.09]; See also Prosecutor v. Limaj, Judgment, ICTY, IT-03- 66-T, 30 November 2005, paras. 135–170

⁵²³ Sivakumaran (n469), 168-169

with one voice and negotiate and conclude agreements such as cease-fire or peace accords.⁵²⁴

Other factors could include the ability to implement IHL, having uniforms, discrete roles and responsibilities of differing entities, having advanced modes of communication, and having external relations.⁵²⁵ The ICTY pointed out that ‘the requirements are not cumulative, but rather indicators of what constitutes an “organized armed group”’,⁵²⁶ so again all do not have to be met at the same time or at all.

The customary definition of a NIAC is supported by the ICRC,⁵²⁷ has been adopted by the Rome Statute,⁵²⁸ and is incorporated into the updated ICRC Commentaries on Common Article 3 of the Geneva Conventions.⁵²⁹ It is, therefore, clear that the customary definition of a NIAC is widely recognised as authoritative and has gathered traction, but ‘uncertainty continues to surround the identification of a NIAC [in the sense that] debate is now framed around the facts that aid identification of an armed conflict rather than the definition of an armed conflict itself’.⁵³⁰ The issue of determining whether a NIAC exists is thus a practical one as it depends on the availability of information as to the manner in which NSAG operate. The development of a customary definition of NIAC has, arguably, nonetheless significantly increased the level of protection available in NIAC.⁵³¹ As determining

⁵²⁴ *Prosecutor v Ramush Haradinaj et al*, para 60

⁵²⁵ Sivakumaran (n469), 170-171

⁵²⁶ Tadić, (n467), at [70]

⁵²⁷ ICRC, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’, Opinion Paper 5 (ICRC 2008)

⁵²⁸ Rome Statute, Art 8(2)(f), however, the term ‘violence’ is replaced with ‘conflict’.

⁵²⁹ ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (2nd edition, ICRC 2016), at para 414-444

⁵³⁰ Sivakumaran (n469), 156, 166

⁵³¹ BIICL Handbook (n2), 37

the existence of a NIAC is made easier, it is more difficult for States to refute the existence of a NIAC, and the protection within IHL can be applied to better regulate the protection of education on the ground.

It is also generally accepted that a NIAC can exist within one territory, across State borders, or exclusively extra-territorially.⁵³² For example, a State may be fighting a NSAG in its own territory, or in the territory of a neighbouring State or in a more distant State, without the involvement of the State in which the NSAG is operating. The applicability of the rules in a NIAC is particularly important for the protection of education from deliberate and direct attacks in situations in which the State is acting extra-territorially, as IHRL may not be applicable to the conduct of the State if it is acting without effective control.⁵³³ The State may also make a definitive statement that military action against a NSAG does not amount to a NIAC, in such situations Murray argues that the States armed forces should use IHRL as the sole framework governing their operations, subject to any relevant derogations.⁵³⁴ As IHRL applies in peacetime as well as during situations of conflict, IHRL continues to offer a level of protection to education in respect of deliberate and direct attacks where the threshold for a NIAC is not reached.

A further issue is that in reality armed conflicts do not always fit neatly into the two categories of armed conflict.⁵³⁵ A conflict can occur that is both international and non-international in character,⁵³⁶ or two or more conflicts with different classifications can exist in the same territory at the same time.⁵³⁷ A NIAC can also become an IAC where an external State intervenes on the part of a NSAG without the consent of the

⁵³² Murray, *Guide*, (n12), at [2.07]

⁵³³ See the introduction for a brief discussion of extra-territorial IHRL obligations.

⁵³⁴ Murray, *Guide*, (n12), at [2.12]

⁵³⁵ George H Aldrich, 'The Laws of War on Land' (2000) 94 *American Journal of International Law* 42, 62

⁵³⁶ Kolb and Hyde (n16), 79, 108

⁵³⁷ BIICL Handbook (n2), 40

State on whose territory the conflict is occurring,⁵³⁸ if the intervention creates conflict between the two States.⁵³⁹ However, if an external State intervenes to assist the territorial State fighting against a NSAG in a NIAC, the nature of the NIAC will not change, it remains a NIAC.⁵⁴⁰ Situations of mixed conflict can be difficult to categorise, and it may be unclear exactly what law applies,⁵⁴¹ particularly in situations where an external State intervenes on behalf of a NSAG, ‘the law remains opaque and opinions vary’ on the crucial question of when such assistance transforms a conflict from a NIAC to an IAC.⁵⁴² This may impact the protection of education, as where confusion exists as to whether the rules of an IAC or NIAC should be applied, the rule offering less protection may be applied incorrectly.⁵⁴³

2.4 The Lower Level of Regulation of Non-international Armed Conflicts

Different rules within IHL apply to an IAC and a NIAC, with IAC being regulated by the more rules and the most detailed IHL framework,⁵⁴⁴ and with fewer and less detailed rules applying to a NIAC.⁵⁴⁵ During the drafting of the Geneva Conventions, the ICRC recommended that the Geneva Conventions apply fully ‘in all cases of armed conflict which are not of an international character’.⁵⁴⁶ This suggestion was rejected and instead Common Article 3 was incorporated into the Geneva

⁵³⁸ Ibid, 40

⁵³⁹ Murray, *Guide*, (n12), at [2.22]

⁵⁴⁰ Ibid, at [2.19, 2.22];

⁵⁴¹ Crawford (n455), 442; Kolb and Hyde (n16), 79, 108; BIICL Handbook (n2), 40

⁵⁴² Murray, *Guide*, (n12), at [2.23]

⁵⁴³ As the case studies of this thesis do not relate to mixed armed conflicts but solely to NIAC, it is not necessary for the purposes of this thesis to give a further discussion on the issues surrounding mixed conflicts. This subject is, however, important for the wider protection of education, and there is scope for further research on this matter in respect of how mixed armed conflicts impact the protection of education from deliberate and direct attacks within IHL. For further discussion of the internationalisation of NIAC, see, Kubo Mačák, *Internationalized Armed Conflicts in International Law* (Oxford University Press 2018)

⁵⁴⁴ Protecting Children (n6), at [2.77.1]

⁵⁴⁵ J Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff 2005), 22; BIICL Handbook (n2), 32; Protecting Children (n6), at [2.77.2]

⁵⁴⁶ Jean Pictet, *Commentaries on the Geneva Conventions of 12 August 1949, Vol. III:*

Geneva Convention relative to the Treatment of Prisoners of War (International Committee of the Red Cross 1960), 31; Hereinafter ICRC

Conventions.⁵⁴⁷ As stated above, the adoption of Common Article 3 was significant as it extended the applicability of IHL to a NIAC for the first time. However, Geneva Convention I has 64 Articles, Geneva Convention II has 63 Articles, Geneva Convention III has 143 Articles, and Geneva Convention IV has 159 Articles, yet only Common Article 3 applies directly to NIAC in each Convention.⁵⁴⁸

Unfortunately, NIAC suffer from a lower level of regulation in both the Geneva Conventions and the Additional Protocols.⁵⁴⁹ Additional Protocol II remains the most comprehensive instrument that deals with the rules applicable in a NIAC,⁵⁵⁰ however Additional Protocol II contains only 28 Articles, while Additional Protocol I has 102. Therefore, while the rules applying to NIAC have clearly increased since 1949 with the adoption of Additional Protocol II, NIAC continue to be less densely regulated.⁵⁵¹ This has resulted in the argument that Common Article 3 and Additional Protocol II do not protect in a NIAC to the same extent that the Geneva Conventions and Additional Protocol I protect in an IAC.⁵⁵² Similarly, Akande argues that Additional Protocol II falls ‘far short in establishing a regime of international humanitarian law close to that established for international armed conflicts’.⁵⁵³

Further exacerbating this problem is that, as established above, Additional Protocol II has fewer Parties than Additional Protocol I. Essentially, there is more treaty law on IAC, accepted by a greater range of States, while for a NIAC, there is

⁵⁴⁷ Zamir, (441), 24-34

⁵⁴⁸ Green, ‘Fragmentation in Two Dimensions: The ICJ’s Flawed Approach to NonState Actors and International Legal Personality’ (2008) 9 Melbourne Journal of International Law 50, 54

⁵⁴⁹ Hans Gasser, *International Humanitarian Law: An Introduction* (Paul Haupt Publishers 1993), 21-22

⁵⁵⁰ James Summers, ‘Introduction’ in Caroline Harvey, James Summers and Nigel D White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014), 4

⁵⁵¹ Akande (n442), 65, 70, 107

⁵⁵² Sobhi Tawil, ‘International Humanitarian Law and Basic Education’ (2000) 82 International Review of the Red Cross 581, 581; Akande (n442), 5-57; Steven Haines, ‘The Nature of War and the Character of Contemporary Armed Conflict’, in Elizabeth Wilmshurst, *International Law and the Classification of Conflicts* (Oxford University Press 2012), 9

⁵⁵³ Akande (n442), 35

less treaty law, with more limited participation. It is, therefore, important to determine whether the lower level of regulation in a NIAC results in a lower level of protection of education in the context of deliberate and direct attacks than in an IAC. As such, the rules applicable to education in an IAC will also be outlined for the purpose of conducting such comparison.

2.4.1 The Erosion of the International/Non-International Dichotomy

The conundrum raised by the fact that IAC are much more exhaustively regulated is that ‘international law has in place a comprehensive set of rules governing a type of armed conflict which is no longer the norm’.⁵⁵⁴ It is increasingly argued that NIAC require better regulation, as most contemporary conflicts are NIAC.⁵⁵⁵ Rowe argues that it is difficult to sustain the distinction between IAC and NIAC from the point of view of the victim, considering that NIAC are more numerous.⁵⁵⁶ Significant in this respect is that in *Tadic*, the ICTY helped blur the traditional legal differentiation between the two types of armed conflict.⁵⁵⁷ It was stated in this case that:

In the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned...If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.⁵⁵⁸

In the context of deliberate and direct attacks, it is true that it is difficult to justify a greater level of protection to schools, students and teachers in an IAC than a NIAC.

⁵⁵⁴ Crawford, (n455), 441-442

⁵⁵⁵ Tawil, (n552), 581; Akande (n442), 5-57; Haines, (n552), 9; Kuper, (n545), 22

⁵⁵⁶ Rowe, (n2), 182

⁵⁵⁷ Crawford (n46), 441

⁵⁵⁸ *Tadic*, (n467), at [97]

While different players are party to both types of conflict, for the victims the effect is equally devastating regardless as to whether the perpetrator was a State or a NSAG. In this sense, it is unfair to offer a lower level of protection to individuals in a NIAC.

This erosion of the distinction between IAC and NIAC is evident in the number of recent IHL treaties that apply to all conflicts without distinction.⁵⁵⁹ The distinction is losing its value as one can often look to customary international law, as ‘rules of international conflict...are widely accepted as applying to non-international conflict as a matter of customary international law’,⁵⁶⁰ evidenced by the ICRC study. Customary IHL can thus play a significant role in the protection of education in the face of deliberate and direct attacks during a NIAC, where treaty law falls short. However, the ICTY also stressed that it should not be implied that NIAC are to be regulated by general international law in all its aspects, as:

[O]nly a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts [and] this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.⁵⁶¹

Even in the ICRC Study, as identified above, while many rules of IAC were determined to be applicable in a NIAC, some rules were also identified as only being applicable in an IAC or NIAC. Where education is protected from deliberate and direct attacks to a lesser degree in a NIAC than in an IAC, customary law, as will be seen, plays a role in closing this gap, though not entirely.

⁵⁵⁹ Akande (n442), 35

⁵⁶⁰ BIICL Handbook (n2), 32

⁵⁶¹ Tadic (n467), at [126]

Zegveld cautions that ‘while there is...a clear trend in international practice to diminish the distinction between humanitarian law for international as opposed to for internal conflicts, the distinction between these conflicts has not been abolished’.⁵⁶² States are reluctant to abolish the distinction due to the belief that State sovereignty, national unity and security would be undermined. States are also concerned that treating IAC and NIAC the same way would encourage secessionist movements by giving international status to NSAG, and might even encourage international intervention.⁵⁶³

2.4.2 The Unification of International Humanitarian Law

In 1988, Reisman and Silk argued that the terms IAC and NIAC ‘are, in effect, a sweeping exclusion device that permits the bulk of armed conflict to evade full international regulation’.⁵⁶⁴ They added that the distinction between the two types of armed conflict ‘is no longer factually tenable or compatible with the thrust of humanitarian law’,⁵⁶⁵ and that continuing the distinction is an unacceptable ‘policy error’.⁵⁶⁶ The closing of the gap between IAC and NIAC through customary law has led to a renewed debate as to whether the division continues to make sense, and whether the unification of IHL is desirable.⁵⁶⁷ Crawford claims that a unified body of law is achievable as there are no significant barriers to a unified approach, and that ‘the ultimate aim of such a law – that of protecting those least able to protect themselves during times of conflict – should be sufficient incentive to overcome most,

⁵⁶² Zegveld, (n47), 35

⁵⁶³ Akande (n442), 37-39

⁵⁶⁴ William M Reisman, ‘Application of Humanitarian Law in Noninternational Armed Conflicts: Remarks by W. Michael Reisman’ (1991) 85 ASIL Proceedings 83, at [85]

⁵⁶⁵ William M Reisman and James Silk, ‘Which law applies to the Afghan conflict?’ (1988) 82 American Journal of International Law 459, 465

⁵⁶⁶ Reisman, (n564), at [90]

⁵⁶⁷ Wilmschurst, (n464), 3

if not all, resistance to creation of such a law'.⁵⁶⁸ The key question is, therefore, what are the barriers, and they insurmountable?

If a uniform law exists, Crawford argues that:

[T]here would be no need to ascertain...whether the war was international, non-international or some hybrid...The prima facie approach would always be one of 'does an armed conflict exist?' and 'have the laws of armed conflict been breached?'.⁵⁶⁹

This would be much simpler than the current approach of determining whether an IAC, NIAC or mixed conflict exists, and which rules apply to each situation. Similarly, Moir claims that we are moving tentatively towards the position where the IAC/NIAC dichotomy is becoming outmoded, and what will matter is simply whether an armed conflict exists.⁵⁷⁰ If so, in the context of education and more widely, IHL would be more easily applied, but this easy application may come at a great cost.

One barrier is that there is difficulty in creating a singular definition of 'armed conflict' that must reflect:

[T]he different levels of intensity that trigger international and non-international armed conflicts at present [and] will need to ensure that States continue to enjoy an ability to deal with internal disturbances under domestic law [while]

⁵⁶⁸ Crawford (n46), 465

⁵⁶⁹ Ibid, 464

⁵⁷⁰ Moir, (n12), 51

international conflicts of low intensity remain subject to international humanitarian protection'.⁵⁷¹

Yet, this is not a significant barrier. A singular definition of armed conflict is not necessary as the problem stems from different sets of rules being applicable in an IAC and NIAC, with lower protection being afforded in a NIAC, particularly when Additional Protocol II is not applicable. What is required is the creation of one body of law applicable equally in IAC and NIAC. This would require the inclusion of a provision within the unified instrument providing for the current thresholds as to when an IAC or NIAC commences, taking the customary definition of a NIAC, and not the stricter definition contained in Additional Protocol II. What would matter is only whether the threshold for an IAC or NIAC has been passed, and the same body of law would be applied to each type of conflict with the same level of protection being afforded regardless of the parties to the conflict.

Stewart argues that a unified body of law would 'present an opportunity to coherently codify and reconcile the rapid development of customary law applicable in internal conflict'.⁵⁷² This would also serve as an excellent opportunity to develop the law beyond the codification of customary IHL. As established, many rules of an IAC are now considered to increase the protection afforded in a NIAC as a matter of customary law, however, where IHL, at least in the context of education, still falls short when the customary rules are considered, the argument for a unified body of IHL is strengthened, as this would provide a great opportunity to close the gaps that remain. However, further research is required to determine whether customary law is

⁵⁷¹ James G Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Conflict' (2003) 85 *International Review of the Red Cross* 313, 344-345

⁵⁷² *Ibid*, 344-345

capable of protecting adequately in a NIAC beyond the scope of education. If so, there may be no need for a new unified body of law, but instead a new instrument providing for the better protection of education. A strength of a unified body of law, or alternatively, a new instrument protecting education, is that ‘there would be no need to ascertain whether the duty arose in treaty or custom’.⁵⁷³ As such, codifying the rules of customary law would strengthen the protection of education significantly, because customary law is prone to greater contestation and debate than treaty law.

It has also been argued that the distinction between IAC and NIAC fails ‘to deal with conflicts that contain both international and non-international elements’.⁵⁷⁴ As discussed above, mixed conflicts are problematic as it can be difficult to determine whether to apply the rules of an IAC or NIAC. A unified body of law would therefore allow for a substantially clearer understanding of which rules to apply to mixed conflicts. Once it is determined that a conflict has reached the threshold of both an IAC and NIAC in the territory of a State, or where both types of conflicts exist in the same territory and the same time, the same rules would apply regardless of this mixed classification. Another issue of a similar nature is that the current dichotomy has proved susceptible to political manipulation, particularly in mixed conflicts.⁵⁷⁵ With a unified body of law, the issue of political manipulation, whereby States seek to apply the rules of a NIAC in a mixed conflict because they offer less protection than the rules applicable in an IAC, would also be eliminated.

However, a significant barrier to the creation of a unified body of law is that there is a considerable risk that it would reduce the protection foreseen for all armed

⁵⁷³ Crawford (n46), 464

⁵⁷⁴ Stewart, (n571), 314

⁵⁷⁵ Ibid, 349

conflicts.⁵⁷⁶ Before a unified body of law is adopted, it would be necessary to determine the impact of a unified IHL on all the areas of protection currently provided for. For example, even if a unified body of IHL strengthened the protection of education in a NIAC, this may be to the detriment of the protection of education during an IAC. Alternatively, even if the protection afforded to education improved in an IAC, NIAC and mixed conflicts, other areas of IHL may suffer. States may be reluctant to extend the rules of an IAC to a NIAC, despite their customary status, considering their previous reluctance to provide such protection. As such, an exhaustive cost-benefit analysis is necessary before a final decision is made to unify IHL.

If, after this cost-benefit analysis, it is determined that the current protection afforded in IHL could not be maintained, rather than creating a unified body of law the solution could be to amend Additional Protocol II so that it regulates NIAC in a manner that better reflects customary law. This would allow IAC to benefit from the wider protection that it currently affords, while ensuring that the rules in a NIAC are strengthened. However, this approach, while an improvement on the current system, does not fully overcome the issues with applying two sets of law to the different situations of conflict, particularly in conflicts that are mixed in nature, and especially if this amendment was to continue to afford a substantially lower level of protection in a NIAC.

2.5 Rules relevant to the explicit protection of education during a non-international armed conflict

Education is not explicitly referred to in Geneva Conventions I and II. The first reference to education is in Geneva Convention III in Articles 38, 72 and 125, in

⁵⁷⁶ Marco Sassòli and Laura M Olsen, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case: New Horizons for International Humanitarian and Criminal Law' (2000) 82 *International Review of the Red Cross* 733, 746

relation to the education of ‘prisoners of war’ during an IAC.⁵⁷⁷ Likewise, Articles 94, 108 and 142 of Geneva Convention IV reiterate the wording of Article 38, 72 and 125 in relation to the education of ‘internees’ during an IAC.⁵⁷⁸ While these are highly important provisions for the protection of education for prisoners of war and internees in an IAC, this thesis focuses on the effect upon the education of non-detained civilians caused by deliberate and direct attacks against education-related targets in a NIAC, and as such these provisions are not relevant for the purposes of this thesis. While Article 78(2) of Additional Protocol I provides for the education of non-detained civilians, namely children during an evacuation,⁵⁷⁹ it is also not relevant to the issue of deliberate and direct attacks against education, but rather to one of the wider impacts of conflict on education.

However, of relevance, Rule 135 of the ICRC study provides that, as a norm of customary international law in an IAC and NIAC, ‘children affected by armed conflict are entitled to special respect and protection’.⁵⁸⁰ This requirement can be found in Articles 24 and 50 of Geneva Convention IV, Article 77 of Additional Protocol I, and within Additional Protocol II in Article 4(3).⁵⁸¹ Article 24 provides that parties to a conflict must ensure that children who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance...and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition’.⁵⁸² Article 50 similarly requires respect for religion and religious practices, providing that occupying powers should ‘facilitate the proper working of all institutions devoted to

⁵⁷⁷ Geneva Convention III, Arts 38, 72, 125

⁵⁷⁸ Geneva Convention IV, Arts 94, 108, 142

⁵⁷⁹ Additional Protocol I, Art 78(2)

⁵⁸⁰ ICRC Study, Rule 135

⁵⁸¹ Ibid, Rule 135

⁵⁸² Geneva Convention IV, Art 24

the care and education of children’, and make arrangements for the education, if possible by persons of their own nationality, language or religion, of children who are orphaned or separated from their parents.⁵⁸³ Rule 105 of the ICRC study reiterates that Article 50 is of customary status in a NIAC.⁵⁸⁴ As such, Article 24 and 50 are important for the protection of culturally, linguistically and religiously appropriate education for orphaned and separated children in a NIAC as a matter of customary law. However, they do not require States to provide for such education for children who are not orphaned or separated. Also, while they assist in determining how States must facilitate the education of children who have become orphaned or separated as a result of deliberate and direct attacks against education, or due to a NIAC more generally, they do nothing to prevent deliberate and direct attacks against education.

Article 77(1) of Additional Protocol I provides that ‘Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require’.⁵⁸⁵ Significantly, Article 4(3)(a) of Additional Protocol II goes further and sets out that in a NIAC, as a fundamental guarantee, children ‘shall be provided with the care and aid they require’, and that in particular, they should ‘receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care’.⁵⁸⁶ Again, Articles 77(1) and 4(3)(a) do not prohibit deliberate and direct attacks against education in a NIAC, they simply assist in determining how States must facilitate the education of children following a deliberate and direct attack, or where education becomes inaccessible due to a NIAC more generally.

⁵⁸³ Ibid, Art 50

⁵⁸⁴ ICRC study, Rule 104

⁵⁸⁵ Additional Protocol I, Art 77(1)

⁵⁸⁶ Additional Protocol II, Art 4(3)(a)

It is argued in *Protecting Children* that three formulas are set out: Article 77(1) provides for ‘special respect...care and aid’; Article 4(3) provides for ‘care and aid’; and customary IHL provides for ‘special respect and protection’. It argues further that as these terms are not defined and not adequately particularised, this may be interpreted as meaning that children are entitled to different protections depending on the classification of conflict and the source of IHL.⁵⁸⁷ It is interesting to note in this regard that the protection of education appears stronger in a NIAC, as not only does Article 4(3) explicitly refer to education, in contrast to Article 77, it also sets out religiously and morally appropriate education, as part of the care and aid that children require, as a ‘fundamental guarantee’ for all children under 15. However, it is unlikely that the obligation to provide special respect, protection, care and aid to children, at least in the provision of education, will differ in an IAC and NIAC. While education is explicitly stated to be a fundamental guarantee in a NIAC, children still have a fundamental right to education in IAC, which must, as evidenced in Articles 24 and 50 of Geneva Convention IV, be provided in a religiously and morally appropriate manner. Similarly, while Article 77(1) appears to protect children to a greater extent by explicitly prohibiting any form of indecent assault in an IAC, the principle of distinction, discussed below, makes clear that children, including students, have such protection in a NIAC. As such, as a matter of treaty and customary law, child students are given special protection in a NIAC as they should be afforded special respect and protection against indecent assault, such as protection against deliberate and direct physical attacks against them, or from recruitment and use in hostilities.

It is further argued in *Protecting Children* that even where not interpreted differently, the three different formulas are an unnecessary complication and should

⁵⁸⁷ *Protecting Children* (n6) at [3.43.7, 3.54-3.54.1, 9.12.1]

be discarded, and the language clarified or developed by standardising and particularising these special treatment provisions.⁵⁸⁸ A standardised language would be beneficial, as it would eliminate the need to embark on a potentially complicated and unnecessary assessment as to whether the obligation differs in an IAC and NIAC and in customary law.

The above provisions clearly indicate that IHL has a contribution to make to the legal framework for the protection of education,⁵⁸⁹ in both IAC and NIAC. However, it is equally clear that very few provisions within IHL explicitly protect education, particularly in the context of deliberate and direct attacks against education. Most importantly, none prohibit such attacks. Moreover, those provisions that do exist are aimed at ensuring the provision of education to prisoners of war and internees, which are not relevant for the purposes of this thesis, or children under the age of 15. It is also important to explicitly prohibit attacks against, and to protect the education of, children aged over 15. Therefore, the recommendation in *Protecting Children* that consideration should also be given to whether children should be defined as including all person aged 18 and under, is reiterated and supported.⁵⁹⁰ Even where agreement as to the age of children being 18 cannot be reached, the protection of the education of those 15 and over is nonetheless equally important. Fortunately, provisions that indirectly protect education from deliberate and direct attacks can mitigate the weakness of IHL in failing to explicitly protect education from deliberate and direct attacks, and in failing to explicitly protect the education of those aged 15 and over. Nonetheless, IHL should be strengthened to ensure that education is afforded such explicit protection.

⁵⁸⁸ *Protecting Children* (n6), at [3.43.7, 3.54-3.54.1, 9.12.1]

⁵⁸⁹ Tawil, (n552), 585, 597

⁵⁹⁰ *Protecting Children* (n6) at [3.43.7, 3.54-3.54.1, 9.12.1]

2.6 Rules relevant to the protection of education from deliberate and direct attacks during a non-international armed conflict

The fundamental principles of IHL relevant to the protection of education from deliberate and direct attacks are: humanity, military necessity, proportionality, distinction, passive precautions and precautions in attack.⁵⁹¹ These principles do not explicitly protect education from deliberate and direct attacks, rather they do so implicitly. The purpose of this section is to demonstrate the manner in which these fundamental principles are applicable in a NIAC in the context of protecting educational institutions, teachers and students from targeted physical attacks, protecting schools from military use, and protecting children in respect of military recruitment and use.

2.6.1 The Principles of Humanity, Military Necessity, and Proportionality

Humanity is a fundamental principle of IHL, which exists on an equilibrium with the equally fundamental principle of military necessity. If only the principle of humanity was to be recognised, the rules of IHL would not be considered practicable by the military branch, whereas if the principle of military necessity dominated, the norms of IHL ‘would be unable to mitigate the evils that accompany war’.⁵⁹² The principle of humanity is therefore of great importance for the protection of education. If military necessity were not countered by the principle of humanity, education would not be protected from the ‘evils’ accompanying a NIAC.

The primary aim of IHL is to protect victims of IAC and NIAC and ‘regulate the conduct of hostilities based on a balance between military necessity and humanity’.⁵⁹³ The principle of humanity permeates the whole of IHL, so in every rule one finds a

⁵⁹¹ Otto R, *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law* (Springer 2012), 215

⁵⁹² Kolb and Hyde (n16), 43

⁵⁹³ ICRC Interpretive Guidance, 11

balance between the two opposing principles.⁵⁹⁴ Melzer argues that keeping the balance between the principles of military necessity and humanity is, however, a difficult and delicate task, particularly in contemporary armed conflicts.⁵⁹⁵ While difficult, one should nonetheless endeavour to strike an appropriate balance between the military necessity of a direct and deliberate attack against education and the protection of students, teachers and educational institutions.

The principles of military necessity and proportionality also permeate IHL.⁵⁹⁶ Military necessity is a long-established principle of IHL,⁵⁹⁷ which allows parties to a conflict to use the force necessary to achieve the military submission of the enemy.⁵⁹⁸ Military necessity requires, however, that two criteria be met. Firstly, an operation must be necessary for the legitimate military purpose of weakening enemy military forces', so measures that offer no definite military advantage are prohibited. Secondly, no less damaging action should be possible, so the least destructive measures that gain the same military advantage should be preferred.⁵⁹⁹ This is significant to education, as where an attack is not taken for the legitimate purpose of weakening enemy military forces, or where other less damaging action was possible, such an attack cannot be considered militarily necessary.

The principle of proportionality is also a fundamental principle of IHL,⁶⁰⁰ which acts as a limit on the operation of military necessity.⁶⁰¹ The principle of

⁵⁹⁴ Kolb and Hyde (n16), 44-45

⁵⁹⁵ Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to the Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *New York University Journal of International Law and Politics* 831, 833

⁵⁹⁶ Yoram Dinstein, *Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004), 16; Kolb and Hyde (n16), 46

⁵⁹⁷ O'Connell (n16), 34

⁵⁹⁸ Müller, *The Relationship* (n12), 54; Otto (n591), 216

⁵⁹⁹ BIICL Handbook (n2), 207; Kolb and Hyde (n16), 47-48; See also, Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (Dartmouth Publishing Company 1990), 116

⁶⁰⁰ Kolb and Hyde (n16), 48

⁶⁰¹ BIICL Handbook (n2), 207

proportionality is contained in Article 51(5)(b) of Additional Protocol I, which states that ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’ would be an indiscriminate attack.⁶⁰² Significantly, Rule 14 of the ICRC Study states that this forms a part of customary international law in relation to both IAC and NIAC.⁶⁰³ Proportionality would therefore be relevant in a NIAC where, for example, educational institutions were within the blast radius of a lawful target, and the injury to students and teachers, or damage to schools or universities would be excessive to the military advantage of conducting the attack. However, Protecting Children argues that IHL could be strengthened by developing the law to require that the position of children, in evaluating proportionality, are an express factor that is given weight and considered.⁶⁰⁴ This being an explicit consideration would of course improve the protection of child students, though it is clear, as will be seen below, that such protection for children already exists implicitly. Even if such consideration was expressly provided, this will only extend to civilian children, and not those children who are taking a direct part in hostilities.

However, another issue is that there is no mathematical formula for determining whether an attack is proportionate,⁶⁰⁵ so proportionality is very difficult to assess.⁶⁰⁶ While determining whether an attack is proportionate is complex, decisions have to be made in good faith on the basis of the information that was available at the time.⁶⁰⁷ Proportionality reflects the balance between the principles of humanity and military

⁶⁰² AP I, Art 51(5)(b); See Gasser, (451), 248

⁶⁰³ ICRC Study, Rule 14

⁶⁰⁴ Protecting Children (n6), at [9.13.1]

⁶⁰⁵ Nilz Melzer, *Targeted Killing in International Law* (Oxford University Press, 2008), 362

⁶⁰⁶ BIICL Handbook (n2), 208

⁶⁰⁷ Gasser (n451), 63-64

necessity,⁶⁰⁸ as such it is doubtful whether such a determination can be made to everyone's entire satisfaction.⁶⁰⁹ Due to the complexity of determining whether, in practice, the principles of humanity and military necessity are balanced and an attack is proportionate, education will be protected to varying degrees depending on the person making the assessment. Nevertheless, the impact on educational institutions, students and teachers should always be calculated when assessing whether an attack is excessive, striving for an appropriate balance to the greatest extent possible.

2.6.2 The Principle of Distinction

The principle of distinction also permeates IHL,⁶¹⁰ and is a central and foundational protection.⁶¹¹ It is one of the oldest rules of IHL,⁶¹² so it is firmly established and its overall validity beyond any doubt.⁶¹³ However, the principle of distinction has been 'perceived by some as an unreasonable and unworkable fetter upon freedom of military action'.⁶¹⁴ On the other hand, the principle of distinction is argued to be a clear example of the attempt to balance the principles of humanity and military necessity, without which the protective rules of IHL are undermined and the protection afforded to civilians is crippled.⁶¹⁵ The key question then is whether the principle of distinction is unreasonable and unworkable in practice, or whether it enables the effective balance between military necessity and protecting education in a NIAC.

⁶⁰⁸ Otto (n591), 217; Müller, *The Relationship* (n12), 58

⁶⁰⁹ McCoubrey, (n599), 116

⁶¹⁰ Dinstein, (n596), 16; Kolb and Hyde (n16), 46

⁶¹¹ BIICL Handbook (n2), 32

⁶¹² Green (n440), 256

⁶¹³ Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck, *The handbook of International Humanitarian Law* (3rd ed, Oxford University Press 2013), 123

⁶¹⁴ McCoubrey (n599), 114

⁶¹⁵ Kolb and Hyde (n16), 32, 46-47, 125

2.6.2.1 Protection of Civilians and Civilian Populations

In relation to NIAC, Article 13(1) of Additional Protocol II sets out the principle of distinction, providing that the ‘civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations’.⁶¹⁶ Article 13(2) further states that:

[T]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations [and that] the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁶¹⁷

Rule 1 of the ICRC Study states that the rule that parties to a conflict must distinguish civilians, and therefore not direct attacks against civilians, is of customary status during both IAC and NIAC.⁶¹⁸ Rule 2 also identifies the prohibition against acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, as a rule of customary IHL during both IAC and NIAC.⁶¹⁹

Protecting Children argues that the IHL framework regarding the conduct of hostilities contains no special consideration of children, so could be developed to take into account the special position of the children which is already recognised in other contexts under IHL, given the vulnerability of children. It is however, acknowledged that this is a difficult issue, because there may be undesirable ramifications if the position of children is differently treated expressly, and that it may be said that it is

⁶¹⁶ AP II, Art 13(1)

⁶¹⁷ AP II, Art 13(2)

⁶¹⁸ ICRC Study, Rule 1

⁶¹⁹ Ibid, Rule 2

unnecessary to specify the position of children as it will be taken into account regardless.⁶²⁰ While the principle of distinction does not afford children specific protection, and while this might afford them better protection, as a matter of treaty and custom, when conducting attacks in a NIAC, parties to the conflict should nonetheless distinguish children who are civilians.

Article 13(3) of Additional Protocol II adds that civilians shall enjoy protection ‘unless and for such time as they take a direct part in hostilities’.⁶²¹ Similarly, Common Article 3 provides that persons taking no ‘active part in hostilities’ benefit from its protection in a NIAC.⁶²² ‘Direct’ and ‘active’ mean the same thing for the purposes of distinction.⁶²³ Rule 6 of the ICRC Study identifies this as a rule of customary IHL in both IAC and NIAC.⁶²⁴ It is therefore clear that educational staff and students are protected by the principle of distinction in a NIAC only to the extent that they are regarded as civilians not taking a direct part in hostilities.⁶²⁵ As civilians do not have a right to take part in hostilities, educational staff or students not only can be legitimately targeted during such direct participation, they also do not benefit from ‘combatant immunity’ so can be subject to domestic criminal prosecution even after they have stopped such participation.⁶²⁶

While there is guidance as to what makes a ‘civilian’ or ‘civilian population’ in Additional Protocol I for an IAC, there are no such definitions in Additional Protocol II.⁶²⁷ The lack of treaty law providing express guidance on the meaning of civilian and civilian population in a NIAC makes the task of distinguishing civilians more difficult, which means that the protection of students and educational staff is higher in

⁶²⁰ Protecting Children (n6), at [3.53]

⁶²¹ AP I, Art 13(3)

⁶²² Common Article 3

⁶²³ The Prosecutor v Jean Paul Akayesu, ICTR-96-4-T, 2 September 1998, para 629

⁶²⁴ ICRC Study, Rule 6

⁶²⁵ BIICL Handbook (n2), 101, 192

⁶²⁶ Ibid, 151

⁶²⁷ ICRC study, 19

an IAC. However, customary law partially narrows the gap between the protection provided by principle of distinction in an IAC and NIAC.

In respect of the meaning of a civilian population, Rule 5 of the ICRC Study identifies the rule in an IAC, namely that the civilian population comprises all persons who are civilians,⁶²⁸ as a rule of customary IHL in both IAC and NIAC.⁶²⁹ However, Article 50(3) of Additional Protocol I provides further that ‘the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character’.⁶³⁰ This rule ensures that the inevitable intermingling of combatants in the civilian population does not impact on the protection afforded to the civilian population.⁶³¹ This rule, however, is not included in Additional Protocol II, nor does the ICRC study identify this rule as being of customary status in a NIAC. A common sense approach provides that the presence of non-civilians within a civilian population would not deprive this population of its civilian status, as an attack would need to be considered subject to the principle of proportionality.

The answer to who is a civilian and what is a civilian population is intrinsically linked to the question of who is a member of an armed force. While Common Article 3 and Additional Protocol II refer to ‘armed forces’, Additional Protocol II also refers to ‘dissident armed forces and other organized armed groups’, but as with the terms ‘civilians’ and ‘civilian populations’, these terms are not defined in the treaties.⁶³² Unfortunately, customary law does not provide any significant clarification.

⁶²⁸ See Additional Protocol I, Art 50(2)

⁶²⁹ ICRC Study, Rule 5

⁶³⁰ Additional Protocol I, Art 50(3)

⁶³¹ *BIICL Handbook* (n2), 145; ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), at [1922]

⁶³² ICRC Study, 12

Rule 3 of the ICRC study identifies that Article 43(2) of Additional Protocol I, which provides that all members of the armed forces of a party to a conflict are combatants, except medical and religious personnel, as a rule of customary IHL during IAC. However, it adds that for purposes of the principle of distinction, State armed forces *may* also be considered combatants in NIAC, while combatant status exists only in IAC.⁶³³ The ICRC study also states that, in a NIAC, ‘practice is not clear as to the situation of members of armed opposition groups’.⁶³⁴ The law remains ambiguous as to whether the States armed forces and NSAG are combatants in a NIAC, particularly in respect of NSAG, due to the lack of clarity as to the customary status of Rule 3 in a NIAC, in respect of both States and NSAG.

States have been reluctant to recognise NSAG as combatants as this would entitle such groups to combatant immunity in a NIAC, and without such immunity individuals can be prosecuted under domestic criminal law.⁶³⁵ As such, in a NIAC a NSAG might conduct an attack that is in accordance with IHL, for example targeting the States armed forces in or near a school in accordance with the principles of IHL, which destroys the school. Yet, if NSAG were to have combatant immunity, the domestic criminal system would not be able to do anything further to protect education. However, combatants can be subject to attack independent of them directly participating in hostilities,⁶³⁶ which may benefit the State fighting against the NSAG, as the State would be able to target a NSAG that is party to a NIAC at any time. Though the NSAG would also be able to target, in accordance with IHL, the State armed forces at any time if both are considered combatants, so the protection of States within IHL would simultaneously be decreased.

⁶³³ Ibid, Rule 3

⁶³⁴ Ibid, 12

⁶³⁵ Gasser, (n451), 145

⁶³⁶ ICRC Study, 19; Otto (n591), 220

Rule 4 of the ICRC Study similarly provides that Article 43(1) of Additional Protocol I *may*, for the purposes of the principle of distinction, also apply to State armed forces in NIAC as a matter of customary law.⁶³⁷ Article 43(1) defines the armed forces of a party to the conflict as consisting ‘of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates’.⁶³⁸ Again, the lack of clarity as to the customary status of this rule in a NIAC weakens the protection of education, as it causes uncertainty in respect of whether the States armed forces, whom are bound by both IHL and IHRL in a NIAC, are operating.

In accordance with Article 50 of Additional Protocol I, Rule 5 of the ICRC Study identifies as a matter of customary law the principle that civilians are persons who are not members of armed forces, in an IAC and NIAC.⁶³⁹ The problem is that, in a NIAC, the State is fighting against civilians who have taken up arms so it can be difficult to make the distinction between who is a civilian and who is not, and the dramatic increase of NIAC since WWII exacerbates this potential for confusion.⁶⁴⁰ The increase in NIAC has led to greater intermingling and involvement of civilians with armed actors, and the difficulty of distinguishing civilians is aggravated further when armed actors do not distinguish themselves from the civilian population, for example, during undercover military operations. This means that civilians are more likely to be erroneously targeted, while armed forces that are unable to identify their adversary run the increased risk of being attacked by persons they cannot distinguish

⁶³⁷ Ibid, Rule 4

⁶³⁸ Additional Protocol I, Article 43(1)

⁶³⁹ ICRC Study, Rule 5

⁶⁴⁰ Kolb and Hyde (n16), 31; ICRC Interpretive Guidance, 11-12

from the civilian population.⁶⁴¹ As such, there is significant risk that students and educational staff may be inaccurately identified as an armed actor.

Article 50(1) of Additional Protocol I provides that in an IAC, ‘in case of doubt whether a person is a civilian, that person shall be considered to be a civilian’.⁶⁴² The principle that a person is presumed to be a civilian in the case of doubt is considered to be a very important rule designed to prevent parties to a conflict from ‘shooting first and asking questions later’.⁶⁴³ Despite the importance of this rule, there is no equivalent rule in a NIAC, and it is not of customary status in a NIAC as ‘the issue of doubt has hardly been addressed in State practice, even though a clear rule on this subject would be desirable as it would enhance the protection of the civilian population against attack’.⁶⁴⁴ As such, students and teachers who are not combatants are protected to a greater extent in an IAC, by benefiting from the presumption of civilian status. Where it is difficult to make such distinction, it undoubtedly ‘seems justified’ in NIAC that the presumption of civilian status is applied,⁶⁴⁵ in accordance with the principle of proportionality.

Another difficulty is that NSAG are not considered combatants, but practice is also ambiguous as to whether members of such groups are instead considered members of armed forces or civilians.⁶⁴⁶ It is not clear whether NSAG are civilians who lose protection from direct attack only when they directly participate in a NIAC, or whether they are liable to attack independently of taking such a part in hostilities.⁶⁴⁷ If a State were only able to attack NSAG where they were directly participating in hostilities due to having civilian status, this could be both a benefit and a detriment to

⁶⁴¹ ICRC Interpretive Guidance, 12

⁶⁴² Additional Protocol I, Art 50(1)

⁶⁴³ BIICL Handbook (n2), 144-145; ICRC, *Commentary* (n808), at [2030]

⁶⁴⁴ ICRC Study, 24

⁶⁴⁵ *Ibid*, 24

⁶⁴⁶ *Ibid*, Rule 5

⁶⁴⁷ *Ibid*, 19; Otto (n591), 220

the protection of education. On the one hand, education may be better protected, as States may be unable to conduct an attack against a member of a NSAG where there is uncertainty as to their direct participation in hostilities. Such an attack could otherwise result in damage to schools, or death or injury to students and teachers. It could also prevent the State from inaccurately identifying a student or teacher as a member of a NSAG and attacking first before clarifying their civilian status. Conversely, where a State is unable to attack a NSAG at any time, this stunts efforts to defeat a NSAG who has a policy of using educational institutions for military purposes, of targeting schools, students and teachers when co-ordinating attacks, or of recruiting children for military purposes. An additional problem is that where a State is considered a combatant who can be attacked at any time during a NIAC, considering members of a NSAG to be civilians who can only be attacked when they are directly participating in hostilities puts the NSAG at a considerable advantage.

The ICRC study argues that the terms ‘dissident armed forces or other organized armed groups’ in Additional Protocol II inferentially recognises that civilians are all persons who are not members of such forces or groups.⁶⁴⁸ Significantly, the ICRC argue that all persons who are not members of State armed forces or NSAG are civilians and entitled to protection against direct attack until they take a direct part in hostilities in a NIAC. It adds that those taking a direct part in hostilities during NIAC can be divided into persons who are members of a NSAG and have a ‘continuous combat function’, and into civilians who engage in ‘sporadic acts of violence’.⁶⁴⁹ Though this is not a rule of customary status and can be disputed, the ICRC have offered guidance where none otherwise exists. The guidance therefore has great scope to improve the protection of individuals in NIAC, including students and teachers.

⁶⁴⁸ ICRC Study, 19

⁶⁴⁹ Interpretive Guidance, 16, 70, 72

The key question, then, is what is meant by ‘continuous combat function’, and ‘sporadic acts of violence’, and ‘direct participation’.

2.6.2.1.1 Members of Non-state Armed Groups with a ‘Continuous Combat Function’

The ICRC argue that while members of dissident armed forces are former members of the State armed forces, they do not become civilians, rather, where they remain organised under the structures of the State armed forces to which they formerly belonged these structures should continue to determine individual membership in such groups.⁶⁵⁰ The ICRC adds that membership in other organised armed groups is more difficult to determine in light of the wide variety of cultural, political, and military contexts in which such groups operate, their informal and clandestine structures and the elastic nature of membership.⁶⁵¹ They argue that the decisive criterion for membership of both types of NSAG must depend on whether the individual assumes a continuous function involving his or her direct participation in hostilities on behalf of a non-State party to the conflict.⁶⁵² Given their continuous direct participation in hostilities, individuals may be targeted at all times until they are no longer a part of a NSAG.⁶⁵³ If accepted, this guidance closes the gap in respect of the lack of clarity within IHL as to whether or not members of NSAG can be targeted at all times.

The ICRC continues to interpret continuous combat function as requiring ‘lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict’.⁶⁵⁴ They add that an individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its

⁶⁵⁰ ICRC Interpretive Guidance, 31-32

⁶⁵¹ ICRC Interpretive Guidance, 32-33

⁶⁵² Ibid, 33

⁶⁵³ Ibid, 65, 70

⁶⁵⁴ Ibid, 34

behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act', but those who leave the NSAG and re-integrate into civilian life are civilians until they are called back to active duty, and those who assume support functions also remain civilians.⁶⁵⁵ The ICRC further provides that 'continuous combat function may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons' or 'identified on the basis of conclusive behaviour, for example, where a person has repeatedly directly participated in hostilities in support of an organized armed group'.⁶⁵⁶

Watkin argues that the Interpretive Guidance defines membership in NSAG too restrictively, clearly disadvantaging States.⁶⁵⁷ Melzer argues that this critique is not justified, as firstly State armed forces benefit from protection as combatants which those in NSAG lack, and secondly:

the criterion for membership is identical for State and non-State actors, namely the assumption of a continuous combat function...While it is true that the resulting notion of regular armed forces may be wider than that of their irregularly constituted counterparts, the practical relevance of this conceptual difference should not be overestimated.⁶⁵⁸

Watkin argues that the best approach is 'to treat all armed forces the same'.⁶⁵⁹ Melzer again refutes this, arguing that:

⁶⁵⁵ Ibid, 34-35

⁶⁵⁶ Ibid, 35

⁶⁵⁷ Melzer, 'Keeping the Balance' (n595), 853, 837; Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance* (2010) 42 New York University Journal of International Law and Politics (n836), 693-694

⁶⁵⁸ Ibid (n595), 851

⁶⁵⁹ Watkin, (n657), 690-691

[T]he Interpretive Guidance goes to great lengths to assimilate, as far as reasonably possible, all organized armed forces, groups, and units, regardless of whether they fight for a State or non-State party to an armed conflict, or whether they wear uniforms or distinctive signs.⁶⁶⁰

It is clear that debate remains. If the interpretation of the ICRC is to be accepted, then civilians and NSAG would have additional protection as a result of a more restrictive interpretation of membership, but this appears to be the appropriate balance, in light of the fact that NSAG armed groups do not benefit from protection as combatants as State armed forces do, and in light of the fact that members of NSAG with a continuous combat function can be targeted at all times. Any further assimilation may unfairly disadvantage civilians, and unjustifiably reduce the level of protection for students and teachers.

2.6.2.1.2 Civilians who Engage in ‘Sporadic Acts of Violence’ and a Revolving Door of Protection

The Interpretive Guidance provides that ‘civilians lose protection against direct attack “for such time” as they directly participate in hostilities’.⁶⁶¹ This means that civilians lose protection for the duration of each specific hostile act.⁶⁶² Civilians, including students and educational staff, therefore benefit from a ‘revolving door of protection [as they lose and regain protection] in parallel with the intervals of their engagement in direct participation in hostilities’.⁶⁶³ Boothby argues that:

[B]y limiting continuous loss of protection to members of organized armed groups

⁶⁶⁰ Melzer, ‘Keeping the Balance’ (n595), 843

⁶⁶¹ Interpretive Guidance, 65, 70

⁶⁶² Ibid, 70

⁶⁶³ Ibid, 70

with a continuous combat function, the ICRC gives regularly participating civilians a privileged, unbalanced, and unjustified status of protection in comparison to members of the opposing armed forces, who are continuously targetable.⁶⁶⁴

Similarly, Watkin argues that the lack of clear guidance on the number of times a civilian can walk back through the revolving door will be particularly controversial, as according to the guidance a civilian can go through the revolving door on a ‘persistently recurring basis’.⁶⁶⁵ Melzer, however, disputes Watkin's critique on the basis that ‘in practice persons directly participating on a persistently recurrent basis will almost always be members of an organized armed group’.⁶⁶⁶ The revolving door approach is an important mechanism to prevent mistakes in the distinguishing of civilians, whereby States must be surer of the status of an individual as a member of a NSAG before being able to attack irrespective of whether they are at that moment acting in a combative function.

As an alternative to the revolving door approach, Schmitt suggests that civilians who have taken a direct part in hostilities are subject to the concept of ‘continuous direct participation’,⁶⁶⁷ whereby they may be targeted at all times until they have opted out of hostilities. Melzer argues that this reflects:

[A]n approach almost exclusively driven by military necessity which is not balanced by equally important considerations of humanity...The Interpretive

⁶⁶⁴ Bill Boothby, ‘“And for Such Time as”: The Time Dimension to Direct Participation in Hostilities’ (2010) 42 *New York University Journal of International Law and Politics* 741, 743

⁶⁶⁵ Watkin (n657), 661; See ICRC Interpretive Guidance,

⁶⁶⁶ Melzer, ‘Keeping the Balance’ (n595), 855

⁶⁶⁷ Michael N Schmitt, ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis’ (2010) 1 *Harvard National Security Journal* 5, 6-44

Guidance, faithful to the ICRC's role as a neutral and impartial intermediary, does not give either consideration preference over the other, but proposes a balanced approach, which takes all legitimate concerns into account, while at the same time aiming to ensure a clear and coherent interpretation of IHL consistent with its underlying purposes and principles.⁶⁶⁸

He adds that neither is there a theoretically coherent and practically convincing alternative to the approach proposed in the Interpretive Guidance.⁶⁶⁹ In the face of no feasible alternative approach, the Interpretive Guidance offers the best solution to protecting civilians, including students and teachers, in practice, while allowing for military necessity.

Significantly, while civilians can no longer be targeted outside of the short and restrictively drawn timespan in which they directly participate in hostilities, they can be arrested and tried for crimes committed during the time in which they participated,⁶⁷⁰ including crimes in respect of IHL, which must be complied with by civilians directly participating in NIAC.⁶⁷¹ As such, civilians, including teachers and students, are not left unregulated while they are not directly participating in the conflict. The revolving door of protection therefore adequately allows for military necessity during active participation, and for the law to function when a civilian has laid down their arms, in line with the concept of humanity.

2.6.2.1.3 Direct Participation in hostilities

The Geneva Conventions and Additional Protocols do not define the term 'direct

⁶⁶⁸ Melzer, 'Keeping the Balance' (n595), 914

⁶⁶⁹ Ibid, 915-916

⁶⁷⁰ Kolb and Hyde (n16), 128; Gasser (n451), 24; See ICRC Interpretive Guidance, 83

⁶⁷¹ ICRC Interpretive Guidance, 84

participation in hostilities’.⁶⁷² The term ‘holds the key to the fundamental protection of innocent life [and therefore] clarification of the concept...and its careful application to present-day conflicts has assumed extraordinary importance’.⁶⁷³ Due to the importance of this term and the need for its definition, the ICRC adopted ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL’.⁶⁷⁴ However, this guidance has been subject to criticism. Schmitt argues that while the way in which the Interpretive Guidance deals with ‘the constitutive elements of direct participation...prove the most satisfactory’, but the way in which it examines the concept of civilian and the temporal scope of participation is fatally flawed, ‘as is the unnecessary and faulty discussion of restraints on the use of force in direct attack’.⁶⁷⁵ He adds that these deficiencies ‘demonstrate a general failure to fully appreciate the operational complexity of modern warfare. Accordingly, States...are unlikely to use it to provide direction to their forces in the field’.⁶⁷⁶ Watkin also argues that the Interpretive Guidance falls short of the mark and is a lost opportunity, as it ‘raises more questions than it answers’.⁶⁷⁷

Conversely, Pejic argues that the Interpretive Guidance was intended as a guide and is therefore necessarily broad in nature, needing ‘to be further “translated” into operational tools in order to be applicable on the ground’.⁶⁷⁸ The BIICL Handbook further argues that ‘although this is not a legally binding document, it is a useful guide

⁶⁷² BIICL Handbook (n2), 152

⁶⁷³ Ryan Goodman and Derek Jinks, ‘The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law: An Introduction to the Forum’ (2010) 42 *New York University Journal of International Law and Politics* 637, 637;

⁶⁷⁴ ICRC, *ICRC Interpretive Guidance on Direct Participation in Hostilities* (ICRC, 2009) (Interpretive Guidance)

⁶⁷⁵ Michael N Schmitt, ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’ (2010) 42 *New York University Journal of International Law and Politics* 697, 738-739

⁶⁷⁶ *Ibid.*, 699

⁶⁷⁷ Watkin, (n657), 641, 643, 693, 695

⁶⁷⁸ Jolena Pejic, ‘Conflict Classification and the Law Applicable to Detention and the Use of Force’, in Elizabeth Wilmshurst, *International Law and the Classification of Conflicts* (Oxford University Press 2012), 106

in determining when the conduct of students or education staff might expose them to lawful attack under IHL'.⁶⁷⁹ Therefore, it is necessary to examine whether the Interpretive Guidance is in fact flawed and liable to being ignored in practice, or whether it has contributed to clarity, being necessarily flexible so that it is broad enough to be applicable in a range of situations in practice, including in the context of deliberate and direct attacks against education.

The Interpretive Guidance provides that for an act to be a direct participation in hostilities it must satisfy three criteria. Firstly, it must pass a certain threshold of harm, as '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'.⁶⁸⁰ Therefore, for a student or teacher to be considered directly participating in a NIAC, they must act in a manner that will affect the military of the State or another NSAG adversely, or in a way which will cause death or injury to, for example, other students or teachers who are civilians, or cause damage to structures such as schools which are not military objects. Secondly, there must be 'a direct causal link between the act and the harm likely to result either from the act, or from a coordinated military operation of which that act constitutes an integral part'.⁶⁸¹ Therefore, the death or injury of a student or teacher, or the destruction of a school or university must be directly caused by the act carried out, such as by shooting a student or teacher, or setting a school on fire. Finally, the act must be 'specifically designed to directly cause the required threshold of harm in support of a party to a conflict and to the detriment of another'.⁶⁸² So if such action was undertaken in self-defence, as opposed to being taken with the

⁶⁷⁹ BIICL Handbook (n2), 152

⁶⁸⁰ Interpretive Guidance, at [46]

⁶⁸¹ Ibid, at [46]

⁶⁸² Ibid, at [46]

intention of military advantage, this should not amount to direct participation.

These important criteria identify when violence by individuals such as a student or teacher would amount to direct participation, but despite this importance it is not always easy to clearly identify when a person is directly participating in a conflict.⁶⁸³ Schmitt argues that a 'strict application of the threshold of harm constitutive element would exclude conduct that by a reasonable assessment should amount to direct participation'.⁶⁸⁴ Alternatively, an over inclusive application would result in students and educational staff being considered to be taking a direct part in hostilities when they should not. The continued lack of clarity means there is an increased likelihood of such a mistake being made in practice, which negatively impacts the protection of students and teachers. Melzer argues that while:

Schmitt contends that the Interpretive Guidance's definition of "direct participation in hostilities" is too restrictive...other experts would criticize the Guidance's definition as too generous because, in certain circumstances, it might allow the targeting of civilians who do not pose an immediate threat to the enemy'.⁶⁸⁵

There is still, therefore, an on-going debate as to the question surrounding what activities constitute 'taking a direct part in hostilities'.⁶⁸⁶

The BIICL Handbook argues that conduct of students and teachers that is 'likely to be' direct participation in hostilities includes: serving as a lookout during an ambush; delivering ammunition to the front line; the recruitment and training of a

⁶⁸³ BIICL Handbook (n2), 152

⁶⁸⁴ Schmitt (n675), 714

⁶⁸⁵ Melzer, 'Keeping the Balance' (n595), 835

⁶⁸⁶ Müller, *The Relationship* (n12), 56

person/persons specifically for hostile acts, such as recruiting children from schools for a particular operation; participation in a military operation that results in harm to an adversary, including the identification and marking of targets, transmission of tactical intelligence to attacking forces, and providing assistance to troops for a specific military operation.⁶⁸⁷ Significantly, assigning guards to protect schools or universities, or arming education staff themselves, is argued not to constitute direct participation in hostilities where this is in defence against an unlawful attack such as looting or attempted abduction of children from an educational institution by soldiers. However, the BIICL Handbook urges caution in pursuing such practices, as ‘there is a real risk that such conduct might be mistaken for a direct participation...and may, therefore, increase the risk of attack.’⁶⁸⁸

Conduct argued ‘likely to be too indirect’ includes: general recruitment and training of children and other persons; teaching material that constitutes propaganda to students in educational facilities or the publishing of such material by academics; designing, producing and shipping of weapons and other military equipment not on the front line in a civilian facility; undertaking construction or repair of a school which may be used for a military purpose; providing supplies or services such as training material, textbooks, electricity, fuel, finances and financial services to a party to a conflict; 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.⁶⁸⁹

This guidance is particularly useful in the context of deliberate and direct attacks. It also makes clear that a wide array of activities can amount to direct participation, and evidences the complexity of determining whether activity is remote or direct in

⁶⁸⁷ BIICL Handbook (n2), 153; See also ICRC Interpretive Guidance, 53-56

⁶⁸⁸ Ibid (n2), 155

⁶⁸⁹ Ibid, 153; See also ICRC Interpretive Guidance, 51-53

respect of the hostilities. Due to the wide range of activity that could amount to direct participation, a broad notion of direct participation strengthens IHL as it allows for the assessment of direct participation on a case-by-case basis that can accommodate for the complexities and evolving nature of NIAC. The necessarily flexible definition proposed by the ICRC is, therefore, capable of ensuring that a reasonable assessment of these criteria can be made on a case-by-case basis. The assessor must keep in mind, however, the issue of over or under inclusiveness, take into account all the facts of the situation when assessing whether an act is ‘likely to pass a certain threshold of harm’, and strive to achieve the appropriate balance between military necessity and humanity.

2.6.2.1.4 Child Soldiers

A particular problem in respect of the principle of distinction is the increasing exploitation of children as combatants in both IAC and NIAC.⁶⁹⁰ IHL recognises the special vulnerability of children by providing for one of the most important special protections for children in conflicts, in the form of a prohibition on the recruitment and participation of children in hostilities.⁶⁹¹ In relation to a NIAC, Article 4(3) of Additional Protocol II states that ‘children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities’.⁶⁹² The prohibition on the recruitment of children under the age of fifteen into the armed forces is said to be a rule of customary IHL within IAC and NIAC in Rule 136 of the ICRC Study.⁶⁹³ Similarly, Rule 137 states that ‘children

⁶⁹⁰ Tawil (n552), 581

⁶⁹¹ Sivakumaran (n469), 316

⁶⁹² Additional Protocol II, Art 4(3)(c-d)

⁶⁹³ ICRC Study, Rule 136

must not be allowed to take part in hostilities' as a matter of customary IHL in both IAC and NIAC.⁶⁹⁴

Article 77(2) replicates much of Article 4(3) of Additional Protocol II, but adds that:

In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.⁶⁹⁵

Arguably, article 4(3) of Additional Protocol II is weaker in relation to the issue of giving priority to those aged 15 to 18, as Additional Protocol II is silent on the matter.⁶⁹⁶ Nor is this identified as a rule of customary status. It is also stated in Article 77(3) that:

If, in exceptional cases...children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.⁶⁹⁷

Again, Additional Protocol II is silent on this matter and the rule is not identified as being customary in nature, so the protection afforded to child soldiers in an IAC is stronger.

However, the protection is stronger in a NIAC in that Article 4(3) provides more

⁶⁹⁴ Ibid, Rule 137

⁶⁹⁵ Additional Protocol I, Art 77(2)

⁶⁹⁶ Doswald-Beck, *Human Rights* (n29), 526

⁶⁹⁷ Additional Protocol I, Art 77(3)

absolutely that States shall not allow children to take part in hostilities’, while Article 77 only requires States to take ‘all feasible measures’ in this regard. It is suggested that the law should be developed so that it also imposes an absolute prohibition in IAC.⁶⁹⁸ Article 4(3) is also stronger as it does not allow children ‘to take part in hostilities’, while Article 77 does not allow children to ‘take a direct part’. Protecting Children calls for the law in an IAC to be developed so that it ensures that the prohibition applies to the use of children beyond their direct participation, so as to reflect the approach taken in Art 4(3) that prohibits wider participation.⁶⁹⁹ The broader wording of Article 4(3) is an important protection for children, as even if they are used in a NIAC in a way that does not constitute a direct participation, while they do not become a legitimate military target, they can still get caught up in active hostilities, and it nonetheless may deprive that child of their education.

Despite the prohibitions against the use of children under the age of fifteen in hostilities, the voluntary or involuntary participation of children in IAC and NIAC causes them to lose their protection from direct attack, regardless of their age and whether they are members of armed groups.⁷⁰⁰ As such, while students under the age of 15 are protected from recruitment and use in a NIAC, their subsequent participation, regardless of the forced nature of such participation, means they do not benefit from civilian status and can be legitimately attacked. It is unreasonable, however, to expect people to sacrifice themselves when faced with a child soldier, attesting to the importance of preventing the recruitment and use of children in the first place. Significantly, there is an absence of a clear prohibition on voluntary enlistment, what is prohibited is recruitment, so a recommendation of Protecting

⁶⁹⁸ Ibid, at [4.53.1, 9.13.6]

⁶⁹⁹ Ibid, at [4.53.2, 9.13.6]

⁷⁰⁰ BIICL Handbook (n2), 156; Additional Protocol I, Art 77(3,5); Additional Protocol II, Art 4-6; Geneva Convention IV, Art 68, 76, 94

Children is that consideration should be given to clarifying or developing the law by amending Art 4(3), to state, for the avoidance of doubt, that the voluntary enlistment of children under the age of 15 years during armed conflict is prohibited.⁷⁰¹

2.6.2.2 The protection of civilian objects

Neither Common Article 3 nor Additional Protocol II explicitly applies the principle of distinction between civilian objects and military objectives in NIAC.⁷⁰² Conversely, Article 52(1) of Additional Protocol I provides that ‘civilian objects shall not be the object of attack or of reprisals’.⁷⁰³ However, Rule 7 of the ICRC study provides that it is a matter of customary law for parties to an IAC and NIAC to ‘at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects’.⁷⁰⁴ Significantly, the distinction between civilian objects and military objectives has been recognised as applicable in a NIAC in other IHL instruments that apply during both IAC and NIAC.⁷⁰⁵

Rule 9 of the ICRC Study identifies that the principle contained in Article 52(1) of Additional Protocol I, namely that civilian objects are all objects that are not military objectives, is a rule of customary IHL applicable in IAC and NIAC.⁷⁰⁶ As such, it is clear that ‘civilian object’ has to be read together with the definition of ‘military objective’.⁷⁰⁷ While IHL does not attempt to provide a list of military objectives,⁷⁰⁸ Article 52(2) of Additional Protocol I specifies two requirements that must be present

⁷⁰¹ Protecting Children (n6), at [4.55, 9.13.6-7]

⁷⁰² Müller, *The Relationship* (n12), 56

⁷⁰³ Additional Protocol I, Art 52(1)

⁷⁰⁴ ICRC CIHL Study 2005, Rule 7

⁷⁰⁵ Ibid, Rule 7; See Amended Protocol II to the Convention on Certain Conventional Weapons, Art 3(7); Second Protocol to the Hague Convention for the Protection of Cultural Property, Art 6(a)

⁷⁰⁶ ICRC Study, Rule 9

⁷⁰⁷ Ibid, 32

⁷⁰⁸ Gasser (n451), 62

at the same time.⁷⁰⁹ Firstly, ‘military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action’. Secondly, the total or partial destruction, capture or neutralization, in the circumstances ruling at the time, of this objective must offer a definite military advantage.⁷¹⁰ The ‘definite military advantage’ must be ‘concrete and direct’ and not ‘hypothetical and speculative’.⁷¹¹ Rule 8 of the ICRC study identifies the criteria of Article 52(2) of Additional Protocol I as customary law applicable in both IAC and NIAC.⁷¹²

Protecting Children argues that a deficiency is that there is a lack of a specific prohibition on targeting schools, and suggest that consideration is given to developing the law in this regard.⁷¹³ However, Rule 10 of the ICRC study provides that the rule that ‘civilian objects are protected against attack, unless and for such time as they are military objectives’, is a matter of customary IHL in both IAC and NIAC.⁷¹⁴ While explicit protection is better than implicit protection, it is clear that an educational institution when used in its ordinary way is a civilian object, and is protected from being targeted. However, the military use of a school converts a school into a military objective that renders attacks against it lawful,⁷¹⁵ in accordance with the principles of military necessary and proportionality. Where no alternative means of education is provided where that educational institution is destroyed, many individuals are left without an education and the benefits of having educated individuals and societies are lost.⁷¹⁶

⁷⁰⁹ Kolb and Hyde (n16), 130-131

⁷¹⁰ Additional Protocol I, Art 52(1-2)

⁷¹¹ ICRC, *Commentary* (n808), at [1976]

⁷¹² ICRC Study, Rule 8

⁷¹³ *Ibid*, at [9.13.14]

⁷¹⁴ ICRC Study, Rule 10

⁷¹⁵ BIICL Handbook (n2), 204

⁷¹⁶ See Introduction for a discussion of why education is deserving of protection.

The legality of attacks against educational institutions being used for military purposes is more complicated where it continues to be simultaneously used for its intended educational purposes. As IHL does not recognise ‘dual use status’ of an object, it may be targeted where it serves both civilian and military purposes.⁷¹⁷ An educational institution that is being used by the military would be rendered a military objective regardless as to whether it had such ‘dual use’. In such a situation, the question as to whether this military objective can be attacked must also be answered in light of the principles of military necessity and proportionality. This ensures that the impact on civilians and civilian objects is taken into account when considering whether an attack on a military objective object that is simultaneously being used for civilian purposes is lawful.⁷¹⁸

Kolb and Hyde argue that the interests of the civilian population should be given high priority in situations where it is open to debate as to whether an attack against a military object that is still being used for civilian purposes is proportionate.⁷¹⁹ In this respect, Article 52(3) of Additional Protocol I is significant for the protection of education in an IAC. It provides that ‘in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used’.⁷²⁰ Kolb argues that it can be difficult to prove that an object normally dedicated to civilian use is being used for military purposes, therefore, if the presumption of civilian use did not exist, civilian objects could be targeted on the slightest of suspicion.⁷²¹ The presumption of civilian use is a key protection of education in a NIAC, but the ICRC study does not identify this as a

⁷¹⁷ BIICL Handbook (n2), 194

⁷¹⁸ Ibid, 195

⁷¹⁹ Kolb and Hyde (n16), 132

⁷²⁰ Additional Protocol I, Art 52(3)

⁷²¹ Kolb and Hyde (n16), 130

rule of customary law in a NIAC. Again, the protection of education is unjustifiably stronger in an IAC.

Also, while IHL ‘equally forbids targeting hospitals, religious buildings, schools, and other civilian buildings unless they become justifiable military objectives...it fails to equally protect these buildings from being used for such objectives in the first place’ in both an IAC and NIAC.⁷²² Hospitals, and to a lesser extent religious buildings and cultural property, benefit from special protection within IHL and cannot be used for military purposes,⁷²³ however, school buildings are provided a less privileged status and can be used on the basis of military necessity.⁷²⁴ Bart argues that the current protection afforded in IHL to educational institutions fails to prevent or discourage the military use of educational institutions, and that the law needs to evolve.⁷²⁵

The importance of protecting education from military use is reflected clearly in the non-binding ‘Safe Schools Declaration’, an instrument through which 96 states have expressed broad political support for the protection and continuation of education in armed conflict, and endorsed and committed to implement the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*.⁷²⁶ State practice, therefore, indicates a potential development towards providing parity of protection to education from military use.

⁷²² Gregory R Bart, ‘The Ambiguous Protection of Schools under the Law of War: Time for Parity with Hospitals and Religious Buildings’ (2009) 40 *Georgetown Journal of International Law* 405, 405

⁷²³ BIICL Handbook (n2), 196; Regarding hospitals, see Geneva Convention I, Arts 21, 22, Geneva Convention II, Arts 22, 34, 35, Geneva Convention IV, Arts 18, 19, Additional Protocol I, Arts 12, 14; Regarding religious buildings, see Additional Protocol I, Art 53; Regarding cultural and religious property, see Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), Arts 1, 4

⁷²⁴ Bart (n722), 405, 440

⁷²⁵ Bart (n722), 440-441

⁷²⁶ Global Coalition to Protect Education from Attack, ‘Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict’ at <http://protectingeducation.org/guidelines> (Last accessed 18/09/2019); For its ratification status, see [<https://ssd.protectingeducation.org/endorsement/>](https://ssd.protectingeducation.org/endorsement/)

Bart further argues that IHL should be updated to provide schools a privileged status that is ‘similar if not superior to the privileges afforded to hospitals and religious buildings’, because of their inherent educational and humanitarian value to society.⁷²⁷ If the military use of educational institutions continues to be permitted, it flows from this that such use will occur, and the buildings will be damaged or destroyed during a NIAC thereby preventing continued education and the benefits that flow from it.⁷²⁸

While distinctive emblems assist in distinguishing civilian objects such as hospitals, there is also ‘a need to create a universally recognized distinctive emblem that would identify a temporary or permanent structure as a protected educational site’.⁷²⁹ Such a distinctive emblem would be particularly useful in helping to identify a building used for educational purposes in the alternative to a school in the area has already been damaged or destroyed, especially where this building is not ordinarily used for such a purpose and determining its educational and civilian status might be difficult. Therefore, educational institutions also need parity of protection in respect of a distinctive emblem.

2.6.3 The Prohibition on the use of Human Shields and precautions against the effects of attacks

Parties to an armed conflict can easily exploit the principle of proportionality by using civilians and civilian objects as human shields,⁷³⁰ as is done when schools are used for military purposes, particularly where students remain inside. The use of human shields is strictly prohibited in an IAC. Article 28 of the Fourth Geneva Convention provides that ‘the presence of a protected person may not be used to

⁷²⁷ Bart (n722), 430-433

⁷²⁸ See Chapter 4 for evidence of widespread military use of educational institutions in Colombia and the DRC.

⁷²⁹ Bart (n722), 437

⁷³⁰ BIICL Handbook (n2), 208

render certain points or areas immune from military operations'.⁷³¹ Article 51(7) of Additional Protocol I elaborates on this, stating that:

[T]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.⁷³²

As such, parties to an IAC are prohibited from using schools, students and teachers as human shields. This is strengthened by Article 58 of Additional Protocol I, which requires the taking of precautions against the effects of attacks, namely, by requiring that: States remove 'the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives'; 'avoid locating military objectives within or near densely populated areas'; and 'take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations'.⁷³³ As such, it clarifies that States should not locate themselves near educational institutions, and remove students, teachers and educational institutions away from military objectives, and take any other necessary precautions to protect education. The phrase 'any other necessary precautions' provides a high level of protection in this regard.

There are, however, no equivalent provisions in Common Article 3 or Additional

⁷³¹ Geneva Convention IV, Art 28

⁷³² Additional Protocol I, Art 51(7)

⁷³³ Additional Protocol I, Art 58

Protocol II, again highlighting the weakness of the treaty-based protection of education in a NIAC in comparison to an IAC. However, it is stated in Rule 97 of the ICRC Study that the prohibition on the use of human shields is a fundamental guarantee and a rule of customary IHL in both IAC and NIAC.⁷³⁴ It is common sense that education should benefit from the same protection, as such, it would be difficult to dispute the customary status of this rule. Similarly, Rule 22 provides that the requirement to ‘take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks’ is a rule of customary status in an IAC and NIAC, however, Rule 23 and 24 state that it is only arguable that the requirements to avoid locating military objectives within or near densely populated areas and to remove civilian persons and objects under its control from the vicinity of military objectives are applicable in NIAC as a matter of customary IHL.⁷³⁵ Clarification on this issue would be beneficial to the protection of education in the context of deliberate and direct attacks, though considering the prohibition of the use of human shields, it is likely that such rules also form a part of customary IHL in a NIAC.

2.6.4 Precautions in attack

The principles of proportionality and distinction require precautions to be taken.⁷³⁶ In relation to an IAC, Article 57 of Additional Protocol I requires the taking of precautions in attack, providing that ‘in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects’.⁷³⁷ Article 57(2)(a) states that those who plan or decide upon an attack shall:

⁷³⁴ ICRC Study, Rule 97

⁷³⁵ Ibid, Rules 22-24

⁷³⁶ McCoubrey (n599), 114-116; Otto (n591), 320

⁷³⁷ Additional Protocol I, Art 57(1)

- i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives...;
- ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
- iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁷³⁸

The principle is therefore multifaceted in the sense that it requires that a range of steps be taken to ensure that the object of attack is a military one and to avoid the erroneous targeting of civilians and civilian objects.⁷³⁹ However, Protecting Children argues that one way in which IHL could be strengthened would be to develop the law so the requirement to take all ‘feasible’ precautions involves express and heightened standards for children.⁷⁴⁰ Such development would certainly increase the protection of child students in a NIAC, where, for example, a school is being used for military and educational purposes.

Article 57(2)(b) further provides that:

[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians,

⁷³⁸ Ibid, Art 57(2)(a)

⁷³⁹ Pejic (n678), 105

⁷⁴⁰ Ibid, at [9.13.1]

damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁷⁴¹

Finally, Article 57(2)(c) states that ‘effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit’.⁷⁴² This principle is therefore of great significance to the protection of education from deliberate and direct attacks, as parties to the conflict would be required to do all they could before conducting an attack to determine the status of an educational institution, student or teacher. Despite the importance of this rule for education, again there are no equivalent provisions for a NIAC in Common Article 3 or Additional Protocol II. However, this principle is reflected in Rules 15 to 20 of the ICRC Study, which provides that all of the above rules are of customary status in both IAC and NIAC.⁷⁴³ While, again, the treaty law protecting education from deliberate and direct attacks in a NIAC is unjustifiably weak, customary law can fill the gaps in protection.

The requirement of taking precautions makes clear that an attack would not be legitimate where it comes to light that an educational institution is a civilian object or where a student or teacher is a civilian, or where an attack against a legitimate target would not be proportionate. When attacking an educational institution that is used for both military and civilian purposes, advance warning should be given for the civilian students and teachers inside to evade the attack, but only where possible. However, while it is clear that parties to an armed conflict must take precautions to avoid the incidental loss of life and injury to students and educational staff, and damage to

⁷⁴¹ Additional Protocol I, Art 57(2)(b)

⁷⁴² Ibid, Art 57(2)(c)

⁷⁴³ ICRC Study, Rule 15-20

educational institutions, such consequences of an attack will not be a violation of IHL where this is proportionate to the concrete and direct military advantage gained.

2.7 Conclusion

The protection of education within a NIAC is inadequate. It is clear that educational institutions, staff and students are granted a lower level of protection during NIAC than an IAC. There are far fewer provisions applicable during situations of NIAC, and it is also much more difficult to determine the existence of a NIAC. While customary international law has diminished the international/non-international dichotomy not all provisions applicable to IAC apply to NIAC as a matter of customary IHL. Few provisions explicitly protect education in a NIAC, with none explicitly prohibiting deliberate and direct attacks. While the principles of distinction, military necessity and proportionality are broad enough to protect education in relation to deliberate and direct attacks, gaps remain in protection.

Chapter Three - The Relationship between International Human

Rights Law and International Humanitarian Law

3.1 Introduction

There is now substantial evidence of, and consensus towards, the continued applicability the right to education alongside IHL during NIAC.⁷⁴⁴ IHL and IHRL norms may therefore be applicable at the same time to the same situation.⁷⁴⁵ As such, much of the controversy now surrounds the question of the manner in which IHRL applies alongside IHL,⁷⁴⁶ as the two regimes are often argued to coexist in a difficult relationship.⁷⁴⁷ Olson argues that it is impossible to implement the law in a manner that provides the fullest level of protection to individuals without clarity as to the relationship between IHRL and IHL.⁷⁴⁸ Yet, important and complex questions are raised as to how IHRL and IHL apply simultaneously during situations of armed conflict, ‘and in some cases the answers have not yet crystallized’.⁷⁴⁹ Academic discussion of this issue is, as will be seen, often contradictory, yet the conclusion that there is no legal solution ‘is not open to legal advisors to the armed forces’.⁷⁵⁰ As such, the purpose of this chapter is to answer how the simultaneous application of IHRL and IHL during situations of NIAC could work in practice, in respect of attacks against education, and more generally.

This chapter examines the differing approaches to interpreting the relationship between IHRL and IHL, with a view to highlighting that there is a lack of clarity as to which approach should be drawn upon in practice. The approaches are categorised in

⁷⁴⁴ See Introduction for a detailed analysis of the continued applicability of IHRL, with a focus on ESCR and the right to education.

⁷⁴⁵ Protecting Children (n6), at [2.83]

⁷⁴⁶ Kretzmer, Giladi and Shany (n49), 306; Droegge, ‘Elective Affinities?’ (n12), 501-502; Gowlland-Debbas and Gaggioli (n12), 84; Boothby, *Conflict Law* (n12), 326

⁷⁴⁷ Summers, (n550), 2

⁷⁴⁸ Olson, (n41) 437

⁷⁴⁹ Murray, *Guide*, (n12), at [1.05]

⁷⁵⁰ *Ibid*, 1-2

this chapter as: the complementarity approach, humanisation approach, *lex specialis* approach, active hostilities/security operations approach, and the unified approach.⁷⁵¹

The first four approaches suggest how IHRL and IHL should be applied simultaneously during armed conflicts. The final approach suggests how international law could be reformed so that IHRL and IHL both apply in armed conflict having been consolidated into one body of law. I argue that the lack of clarity as to how the two regimes relate during NIAC impacts the adequacy of the manner in which IHRL and IHL regulate the issue of deliberate and direct attacks against education in practice, as IHRL and IHL are liable to being applied in an inconsistent manner.

The strengths and weaknesses of each approach are also assessed in order to determine which of the approaches provides the highest level of protection to education, while concurrently ensuring that military activity can be effectively conducted. I argue that the best approach to the relationship between IHRL and IHL is the ‘active hostilities/security operations’ approach. This is tested in the case studies of this thesis, which goes into greater detail as to how, specifically, IHRL and IHL apply simultaneously in the context of deliberate and direct attacks during NIAC.

3.2 Complementarity Approach

According to the complementarity approach, IHRL and IHL complement each other, while remaining distinct bodies of law.⁷⁵² Following this approach, where both bodies of law apply they must be interpreted in light of one another and harmonised.⁷⁵³ Accordingly, it should never be a choice between IHRL and IHL,

⁷⁵¹ Hathaway and others, (n11) 1883, 1894-1895; Gill, (n11), 251, 255; Hans-Joachim Heintze, (n11), 54-62: Hathaway and others describe three approaches to relationship between IHRL and IHL: the displacement model, complementarity model and conflict resolution model. Gill similarly sets out three approaches, namely the traditional approach, humanisation approach and *lex specialis* approach. Heintze also sets out three approaches: the traditional theory, the complementarity theory and the integration theory. This thesis examines these approaches, but goes further in that it identifies additional approaches, namely the distinct regimes and unified approaches.

⁷⁵² Heintze (n11), 57

⁷⁵³ Hathaway and others (n11), 1897-1898

rather ‘the two bodies should be contextualised and used to complement and strengthen each other’.⁷⁵⁴ Significantly, Article 31(3) of the Vienna Convention on the Law of Treaties, adopted in 1969 following Resolution XXIII, states that treaties should be interpreted alongside ‘any relevant rules of international law applicable in the relations between the parties’.⁷⁵⁵ The rule enshrined in Article 31(3) leads to the harmonisation of IHRL and IHL rather than the exclusion of IHRL.⁷⁵⁶ The VCLT makes clear that IHRL and IHL should be interpreted alongside each other in the context of deliberate and direct attacks against education in a NIAC, because, as demonstrated in Chapters 1 and 2, both contain relevant and applicable rules.

This is also supported by General Comment 31 of the HRC, which states that ‘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’.⁷⁵⁷ This evidences that both IHRL and IHL remain ‘applicable and capable of informing the legal regulation of a situation’, and ‘indicates a balancing of law of armed conflict and international human rights law obligations’.⁷⁵⁸ It is, therefore, necessary to interpret IHRL and IHL in light of each other, in a manner that balances the purposes of both adequately.

A benefit of this approach is that it recognises that there are many situations where IHRL and IHL regulate a situation differently, in more or less detail, and that there is scope for mutual reinforcement.⁷⁵⁹ As will be seen in the case studies of this thesis,

⁷⁵⁴ Hannah Mathews, ‘The Interaction between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-International Armed Conflicts’ (2013) 12 *The International Journal of Human Rights* 633, 642

⁷⁵⁵ VCLT, Arts 31(1), 31(3)(c)

⁷⁵⁶ Gowlland-Debbas and Gaggioli (n12), 87

⁷⁵⁷ HRC, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add. para. 11

⁷⁵⁸ Murray, *Guide*, (n12), at [4.18]

⁷⁵⁹ Droege, ‘The Interplay’ (n15), 344

there are many aspects of IHRL and IHL that are mutually reinforcing in respect of their regulation of the issue of deliberate and direct attacks against education. However, while the two regimes can be complementary, and while there are situations in which each can fill the lacunae in the other, they do not mesh together perfectly.⁷⁶⁰ The content of IHRL and IHL norms are sometimes inconsistent,⁷⁶¹ and at times there may be a fundamental incompatibility and conflict between them that cannot be resolved through interpretation.⁷⁶²

Significantly, the International Law Commission concluded an important and high profile study,⁷⁶³ which refers to a conflict as the application of two different rules or sets of rules to the same subject matter, which point in different directions.⁷⁶⁴ It elaborates that rules would point in different directions where a party to two treaties complies with one but not the other, or more loosely, the goals of one treaty may be frustrated by the fulfilment of the other.⁷⁶⁵ A genuine norm conflict between IHRL and IHL would exist whenever such a conflict cannot be avoided or resolved by interpretive means.⁷⁶⁶

The complementarity approach, while able to resolve some normative conflicts through complementary interpretation, fails to acknowledge that genuine conflicts between IHRL and IHL norms may occur.⁷⁶⁷ Therefore, a fundamental weakness of the complementarity approach is that it assumes that conflicts are always reconcilable

⁷⁶⁰ ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission' (2006) A/CN.4/L.682, at [8, 14, 486]; Marko Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14(3) *Journal of Conflict and Security Law* 459, 481-482; Scobbie, 'Principle' (n15), 456

⁷⁶¹ *Ibid*, at [2.84]

⁷⁶² ILC, 'Fragmentation', (n760) at [8, 14, 486]; Milanovic, 'A Norm Conflict' (n760), 481-482; Scobbie, 'Principle' (n15), 456

⁷⁶³ Anthony E Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56(3) *International and Comparative Law Quarterly* 623, 624, hereinafter ILC study

⁷⁶⁴ ILC, 'Fragmentation' (n760), at [23]

⁷⁶⁵ *Ibid*, at [24]

⁷⁶⁶ *Ibid*, at [36, 42]; Milanovic, 'A Norm Conflict' (n760), 465-466

⁷⁶⁷ *Ibid*, at [42]; Droege, 'The Interplay' (n15), 340, 344

through complementary interpretation, and it does not offer a tool for determining which body of law applies when they are irreconcilable.⁷⁶⁸ While there are rules of IHRL and IHL that are complementary in respect of the issue of deliberate and direct attacks against education, the case studies also demonstrate that there are rules of IHRL and IHL that genuinely conflict, and that cannot be resolved through interpretation.

It is essential, however, that IHRL and IHL are interpreted in light of each other. This brings to light situations where there are genuine conflicts, which may lead to the adoption of new rules to eliminate this genuine conflict. Conversely, failing to interpret the regimes in light of each other may result in greater fragmentation. The notion of fragmentation reflects the fact that international law has become the field of operation for specialist systems whose specialised law-making and institution-building tends to take place with relative ignorance of adjoining fields of international law, which is one of the causes of genuinely conflicting rules.⁷⁶⁹ As such, considering the regimes separately may result in the increased likelihood of avoidable genuine conflicts. Fragmentation and genuine conflicts call into question the coherence of international law, and coherence is important owing to its connection to predictability and legal security, and due to the fact that a coherent legal system treats legal subjects more equally.⁷⁷⁰ Due to a lack of coherence for those on the ground when faced with conflicting rules and no approach to resolving such conflict, there is an increased likelihood that one regime will be ignored over the other and undermined in practice, depending on whether one prefers the rule contained in IHRL over IHL, or vice versa. This also means that individuals will be treated differently in practice, in respect of those responsible for deliberate and direct attacks being held to

⁷⁶⁸ Hathaway and others (n11), 1901-1902

⁷⁶⁹ ILC, 'Fragmentation' (n760), at [8, 14]

⁷⁷⁰ Ibid, at [8, 14, 15, 52, 491]

different standards, and in respect of those individuals impacted by an attack. It is, therefore, important that a solution to resolving genuine conflicts between IHRL and IHL is found.

The complementarity approach is only a feasible approach until the point that a conflict occurs that cannot be harmonised. An approach is needed that further determines how to regulate IHRL and IHL when a conflict cannot be avoided or resolved through interpretive means. Another weakness of the complementarity approach is that in order to achieve harmony any ‘compromise might require the dilution of both bodies of law’.⁷⁷¹ As such, where norms can be harmonised, the complementarity approach should be utilised, but with diligence to ensure that the appropriate balance is struck between IHRL and IHL.

3.3 Humanisation Approach

The humanisation approach views IHL as a branch of IHRL and considers it necessary to adjust and apply IHL with a view to making it conform more closely to human rights standards.⁷⁷² While the traditional approach to the relationship is that IHRL does not apply due to the primacy of IHL in armed conflicts,⁷⁷³ this approach, while acknowledging that both regimes apply, views IHRL as having primacy. This approach can be understood as being an elaboration of the complementarity approach, although requiring that all relevant rules of IHL should be interpreted in a manner that complements IHRL. So where IHL protects education from deliberate and direct attacks to a lesser extent than IHRL, IHL would be adjusted, even where it does not necessarily genuinely conflict with IHRL, so that it affords a stronger level of

⁷⁷¹ Hathaway and others (n11), 1902

⁷⁷² Gill (n11), 255

⁷⁷³ See introduction for a detailed discussion of the traditional approach and its infeasibility in respect of regulating the relationship between IHRL and IHL.

protection to education. Adopting this approach would undoubtedly protect education to a greater extent.

McLaughlin argues that the debate as to the degree to which IHRL should influence, inform and alter the interpretation of IHL is increasing in intensity.⁷⁷⁴ IHL is, as discussed in Chapter 2, predicated on a delicate balance between the principles of humanity and military necessity. The problem with the humanisation approach is, therefore, that focusing on humanity undermines military necessity as a basic purpose of IHL, which is likely lead to IHL being ignored by parties who feel that military considerations are being unduly underplayed.⁷⁷⁵ A further criticism of the humanisation approach is that humanising IHL may also require IHRL to be watered down to make its application possible and practical, and this would defy the whole purpose of the exercise, and also would potentially compromise the values safeguarded by IHRL in peacetime also.⁷⁷⁶ While a strict interpretation of the humanisation approach would protect IHRL by not requiring any watering down of its norms due to its primacy, such a strict interpretation may therefore result in the impossible or impracticable application of rules of IHL, and again lead to it being ignored in practice. As IHL provides essential protection to education in a NIAC, if IHL were to be ignored in practice for favouring IHRL and the principle of humanity, this would be catastrophic for education, and for the wider protection afforded by IHL.

While the traditional approach is infeasible as it undermines the application of IHRL in both IAC and NIAC, the humanisation approach undermines IHL, whether or not the approach is interpreted strictly. This approach is therefore an unsuitable

⁷⁷⁴ Rob McLaughlin, 'The Law of Armed Conflict and International Human Rights Law: Some Paradigmatic Differences and Operational Implications' (2011) 13 Yearbook of International Humanitarian Law 213, 213, 217

⁷⁷⁵ Gill (n11), 256

⁷⁷⁶ Milanovic, 'A Norm Conflict' (n760), 461-462

method for regulating the simultaneous application of IHL and IHRL, including in the context of the issue of deliberate and direct attacks against education in armed conflict. The degree to which IHRL should influence IHL, and vice versa, should be in accordance with the complementarity approach, although where neither regime is given primacy.

3.4 *Lex Specialis Derogate Legi Generali* Approach

Construing the relationship between IHRL and IHL along the lines of the *specialis derogate legi generali* approach is widely accepted, and reflects prevailing opinion.⁷⁷⁷ It is argued to be the most persuasive and coherent approach to regulating the relationship between IHRL and IHL,⁷⁷⁸ and it is often cited as the best approach to maintaining a healthy relationship between the two separate bodies of law.⁷⁷⁹ A criticism, however, is that the concept is vague and ambiguous, lending itself too easily to legal manipulation,⁷⁸⁰ and a significant degree of needless confusion.⁷⁸¹ As this is the approach most advocated for, if it is to adequately protect education from deliberate and direct attacks, and regulate in a NIAC more widely, there must be clarity as to what it means.

There is, however, a lack of clarity surrounding the *lex specialis* approach and the role it plays at the international level, as while the ICJ has discussed the relationship between IHRL and IHL with reference to *lex specialis*, the ICJ ‘has not provided a transparent account’.⁷⁸² As the ICJ gives little detail on the application of *lex specialis*

⁷⁷⁷ ILC, ‘Fragmentation’ (n760), at [56]; Droege, ‘The Interplay’ (n15), 338; Müller, *The Relationship* (n12), 22; Gill (n11), 255-256; d’Aspremont and Tranchez (n12), 225; Lubell, ‘Parallel’ (n39), 655; Protecting Children (n6), at [2.86]

⁷⁷⁸ Gill (n11), 255-256

⁷⁷⁹ Lubell, ‘Parallel’ (n39), 655

⁷⁸⁰ Krieger H, ‘A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study’ (2006) 11(2) *Journal of Conflict and Security Law*, 265; Lubell, ‘Parallel’ (n39), 655; Droege, ‘Elective Affinities?’ (n12), 522-524

⁷⁸¹ Gill (n11), 257

⁷⁸² Scobbie, ‘Principle’ (n15), 452

and does not point clearly to the relationship between IHRL and IHL,⁷⁸³ the decisions of the ICJ have resulted in many interpretations of the *lex specialis* approach. These interpretations are categorised in this chapter as: the displacement approach, the event-specific approach, the reverse event-specific approach, and the specificity approach.⁷⁸⁴ In the absence of clear and authoritative guidance, the numerous interpretations cause increased confusion as to how to regulate the relationship between IHRL and IHL, and this confusion weakens the protection of education in a NIAC.

3.4.1 Displacement approach

The ICJ first dealt with the principle of *lex specialis* in 1996 in the Nuclear Weapons Advisory Opinion, where it was provided that the test of what is an arbitrary deprivation of life ‘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’.⁷⁸⁵ One interpretation is that as with the ‘traditional approach’, namely that IHRL never applies in an armed conflict,⁷⁸⁶ IHRL is considered displaced in its entirety,⁷⁸⁷ though justified on the basis of the ICJ recognising the primacy of IHL over IHRL by designating IHL as *lex specialis*.⁷⁸⁸ Following this interpretation, IHRL would be unable to protect education from deliberate and direct attacks in a NIAC, as the only protection available to education would be that contained in IHL. However, as the ‘traditional approach’ has been superseded by the recognition that IHRL applies during IAC and NIAC, it is common sense that the ‘displacement approach’ is also

⁷⁸³ Ibid, at [2.86]

⁷⁸⁴ Hathaway and others (n11), 1906: Hathaway and others identify the event-specific, reverse event-specific and specificity approaches, which have been adopted here. I have added the displacement approach.

⁷⁸⁵ Nuclear Weapons Advisory Opinion, at [25]

⁷⁸⁶ See Introduction for a detailed discussion of the traditional approach to the applicability of IHRL in IAC and NIAC.

⁷⁸⁷ Lubell, ‘Challenges in Applying’ (n15), 738; Cerone (n38), 400; Olson (n41), 445

⁷⁸⁸ Heintze (n11), 59-60

inaccurate. This interpretation also ignores that the ICJ carefully points out in the Nuclear Weapons Advisory Opinion that IHRL remains applicable in an armed conflict,⁷⁸⁹ and that while they stated that IHL was *lex specialis*, this was only in the context of the assessment of the arbitrary deprivation of life, and did not suggest that human rights were abolished in conflict situations.⁷⁹⁰

In the Wall Advisory Opinion, the ICJ stated that ‘in order to answer the question put to it’, it would have to take into consideration IHRL and, as *lex specialis*, IHL.⁷⁹¹ This is argued to reaffirm that IHL is always *lex specialis*,⁷⁹² as it is believed that the ICJ’s ruling here goes further than it did in the Nuclear Weapons Advisory Opinion by specifically referring to the whole regime of IHL as *lex specialis*.⁷⁹³ This seems entirely unreasonable, when this would amount to a complete abandonment of the ICJ’s introductory sentences in both the Nuclear Weapons and Wall Advisory Opinion about the continuity of human rights in wartime.⁷⁹⁴ It is often argued that the law should not be misunderstood, as what is examined within both the Nuclear Weapons and the Wall Advisory Opinions is a conflict of norms, rather than a conflict of regimes, and as such it is inaccurate to read that IHL displaces IHRL in every situation.⁷⁹⁵ The preceding phrase ‘in order to answer the question put to it’ makes this clear, as it makes clear that the ICJ was only referring to IHL as being *lex specialis* in the context of the questions they were being asked to decide upon. Therefore, it is not

⁷⁸⁹ ILC, ‘Fragmentation’ (n760), at [104]

⁷⁹⁰ Ibid, at [104]; Krieger (n780), 271; Gowlland-Debbas and Gaggioli (n12), 84-85, 86

⁷⁹¹ Wall Advisory Opinion, at [106]

⁷⁹² Françoise J Hampson, ‘The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body’ (2008) 90 International Review of the Red Cross 549, 550; Chevalier-Watts J, ‘Has Human Rights Law become Lex Specialis for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?’ (2010) 14(4) The International Journal of Human Rights 584,586

⁷⁹³ Hampson (n792), 550; Chevalier-Watts (n792), 586; Milanovic, ‘A Norm Conflict’ (n760), 463-464

⁷⁹⁴ Christian Tomuschat, ‘Human Rights and International Humanitarian Law’ (2010) 21(1) European Journal of International Law 15, 17-18; See the Introduction for a discussion of the ICJ affirming the applicability of IHRL in IAC and NIAC.

⁷⁹⁵ Greenwood (n12), 75; Olson (n41), 449; Chevalier-Watts (n792), 588; Milanovic, ‘A Norm Conflict’ (n760), 463; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011),239

adequate to refer to IHL as *lex specialis* for all situations in a manner that would displace IHRL.⁷⁹⁶ As such, it is clear that the ‘displacement approach’ is an inaccurate interpretation of the *lex specialis* principle, and that IHRL continues to apply in a NIAC to protect education from deliberate and direct attacks.

3.4.2 Event-specific and Reverse Event-specific Displacement Approaches

It is argued that two principles should govern the interaction between IHRL and IHL: complementarity and *lex specialis*.⁷⁹⁷ Accordingly, alternative interpretations of the Nuclear Weapons and Wall Advisory Opinions are the ‘event-specific displacement approach’, and the ‘reverse event-specific displacement approach’. The former applies both IHRL and IHL following the complementarity approach, upon which it holds that IHL displaces IHRL only in the context of specific events in which the regimes genuinely conflict.⁷⁹⁸ IHL would always be considered *lex specialis*,⁷⁹⁹ so whenever a genuine conflict occurs between IHRL and IHL, including in the manner in which they both apply to education, IHL would automatically prevail over IHRL.

It is argued by some that this is the prevailing view at present,⁸⁰⁰ and is attractive because of its simplicity.⁸⁰¹ However, this simplicity comes at a cost, as it ignores the contextual nature of the principle of *lex specialis*,⁸⁰² and it denies that IHRL could be *lex specialis* and better designed to regulate certain norm conflicts.⁸⁰³ While, the ICJ ‘does not explain whether IHL is always the *lex specialis* even when [I]HRL provisions may be more specialized and accurate’,⁸⁰⁴ it is increasingly argued that

⁷⁹⁶ Murray, *Guide*, (n12), 3

⁷⁹⁷ Droege, ‘Elective Affinities?’ (n12), 502

⁷⁹⁸ Hathaway and others (n11), 1902, 1906, 1908

⁷⁹⁹ Heintze (n11), 60

⁸⁰⁰ Krieger (n780), 268; Oberleitner (n16), 291

⁸⁰¹ Hathaway and others (n11), 1906, 1908

⁸⁰² Krieger (n780), 270-271

⁸⁰³ Hathaway and others (n11), 1908; Gowlland-Debbas and Gaggioli (n12), 86

⁸⁰⁴ Quenivet N, ‘The History of the Relationship between International Humanitarian Law and Human Rights Law’ in Arnold R and Quenivet N, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008), 11-12

IHRL can be more specific,⁸⁰⁵ especially in the case of ESCR.⁸⁰⁶ This is also more likely in NIAC, in light of the fact that there is less applicable treaty-based law than in an IAC.⁸⁰⁷

Paust argues that the claim that IHRL does not apply during conflicts is unmeritorious, as is the tiresome claim that IHRL is displaced due to an alleged primacy of the laws of war as *lex specialis*.⁸⁰⁸ Milanovic also claims that it can be dangerous to refer to IHL as *lex specialis* as individuals can be left without protection.⁸⁰⁹ As such, the realisation of rights, including the right to education, may be limited in an IAC or NIAC where the event-specific displacement approach is followed, where IHL is taken to displace IHRL in its regulation of the matter. This approach, therefore, undermines IHRL and the protection of education from deliberate and direct attacks, due to the assumption that IHL contains the special rule without any contextual examination to affirm this.

Conversely, following the reverse-event specific displacement approach, where two rules genuinely conflict, including in the context of deliberate and direct attacks, IHL is to be excluded and IHRL followed. Hathaway and others argue that this approach is plagued by the same problems as event-specific displacement, but in mirror image.⁸¹⁰ This approach, therefore, similarly fails to take into account that IHL may contain the more special rule, undermining the regime of IHL, and it ignores the contextual nature of *lex specialis*, limiting its usefulness as a tool to resolve genuine norm conflicts. Also, in both the Nuclear Weapons and Wall Advisory Opinions it was held that IHL was *lex specialis*, so the reverse event-specific interpretation

⁸⁰⁵ Müller, *The Relationship* (n12), 26-28; Droege, 'The Interplay' (n15), 341; Murray, *Guide*, (n12), at [4.22]

⁸⁰⁶ Mottershaw (n15), 456-457

⁸⁰⁷ Müller, *The Relationship* (n12), 26-28; Murray, *Guide*, (n12), at [4.22]

⁸⁰⁸ Paust (n12), 509-510

⁸⁰⁹ Milanovic, '*Extraterritorial*' (n795), 232,234

⁸¹⁰ Hathaway and others (n11), 1909-1910

contradicts the authoritative interpretation of the ICJ. As such, it is clear that this approach is also not a feasible one.

3.4.3 Specificity Approach

Under the ‘specificity approach’ either IHRL or IHL can be *lex specialis*, as the rule that is most specific is to be applied.⁸¹¹ It is increasingly argued that as it should not be presumed that IHL is always *lex specialis* as the principle does not apply to the general relationship between IHRL and IHL, but to specific provisions and the specific situation to which the provision is applied only.⁸¹² Following this approach, where a genuine conflict occurs between IHRL and IHL in the manner in which they, for example, regulate the issue of deliberate and direct attacks against education, depending on the specific rules and the way in which they apply to the specific context under examination, either can amount to *lex specialis*.

Fortin argues that the conclusions of the ILC Study are helpful when seeking clarification on the scope of the *lex specialis* principle.⁸¹³ The ILC study states that the relationship can, firstly, be understood to mean that ‘the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specification of the latter. The specific and the general point, as it were, in the same direction’.⁸¹⁴ This first interpretation of the relationship between general and specific norms is in line with the complementarity approach. So where IHRL and IHL deal with deliberate and direct attacks against education, the rule dealing with the issue more specifically should be

⁸¹¹ Krieger (n780), 271, 273; Greenwood (n12), 75; Olson (n41), 449; Milanovic, ‘A Norm Conflict’ (n760), 463; Hathaway and others (n11), 1910-1911; For supporters of this approach see: Gill (n11), 257; Paust (n12), 509-510

⁸¹² Olson (n41), 449; Greenwood (n12), 75

⁸¹³ Fortin, *The Accountability* (n43), 33

⁸¹⁴ ILC, ‘Fragmentation’ (n760), at [56]

read and understood to be an elaboration, updating or technical specification of the more general rule, therefore being interpreted in light of each other and harmonised.

The ILC study goes on to acknowledge, secondly, that genuine conflicts can occur, stating that the *lex specialis* principle can be applied as a conflict-solution technique in cases where one specific provision and one general provision deal with the same subject matter, ‘are both valid and applicable, are in no express hierarchical relationship, and provide incompatible direction on how to deal with the same set of facts....instead of the (general) rule, one should apply the (specific) exception’.⁸¹⁵ The ILC study added that only the second ‘is thought to involve the application of a genuine *lex specialis*...the *lex specialis* principle is assumed to apply if “harmonious interpretation” turns out to be impossible’.⁸¹⁶ Following this interpretation, the complementarity approach must be utilised as far as possible, and only where harmonious interpretation is impossible can *lex specialis* be invoked. So where IHRL and IHL genuinely conflict on the issue of deliberate and direct attacks against education, the more specific rule should prevail. The ILC goes further to state that there is no formal hierarchy between sources, and therefore rules, of international law.⁸¹⁷ The ILC, therefore, confirms that there is no hierarchy between IHRL and IHL.

The specificity approach is criticised on the basis that it is not clear whether ‘the special prevails over the general, or whether it means that the former actually displaces the latter’.⁸¹⁸ However, this is not a true weakness. The ILC report emphasizes that the replacement of the general rule remains only partial as the ‘general rule remains in the background providing interpretative direction to the

⁸¹⁵ ILC, ‘Fragmentation’ (n760), at [57]

⁸¹⁶ Ibid, at [88]

⁸¹⁷ Ibid, at [85, 224, 324, 414]

⁸¹⁸ Hampson (n792), 558

special one'.⁸¹⁹ Further, the ICJ stated that it 'will have take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law',⁸²⁰ indicating that both need to be taken into account without any displacement. D'Aspremont and Tranchez argue that the ICJ engaged in a conciliatory interpretation of IHRL and IHL, and utilised the *lex specialis*, not as a normative conflict tool, but as a tool to elect which rules should constitute the primary interpretive standard.⁸²¹ It is no surprise that it is increasingly argued that the special rule prevails over the general, but is not displaced.⁸²²

Significantly, in the case of *Democratic Republic of Congo v Uganda*, the ICJ reaffirmed that IHRL and IHL apply in armed conflicts, though refrained from referring to the principle of *lex specialis*, and instead simply concluded 'that both branches of international law...would have to be taken into consideration'.⁸²³ While the ICJ gave no explanation as to whether the omission was deliberate and showing a change of approach,⁸²⁴ this is increasingly argued to reflect an abandonment of the *lex specialis* approach.⁸²⁵ Murray similarly argues that this evidences a departure from a strict interpretation of the *lex specialis* approach, and that while one body constitutes the primary framework, the secondary framework is not displaced, both remain applicable and capable of informing the legal regulation of a situation.⁸²⁶ It is clear, therefore, that the general should not be considered displaced.

⁸¹⁹ ILC, 'Fragmentation' (n760), at [102]

⁸²⁰ Wall Advisory Opinion, at [106]

⁸²¹ d'Aspremont and Tranchez (n12), 239

⁸²² Sassoli M and Olson L M, 'The Relationship Between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *International Review of the Red Cross* 599, 605; d'Aspremont and Tranchez (n12), 225

⁸²³ DRC v Uganda, at [216]

⁸²⁴ Droegge, 'Elective Affinities?' (n12), 522

⁸²⁵ Droegge, 'The Interplay' (n15), 338; Nancie Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 *Israel Law Review* 355, 385; Scobbie, 'Principle' (n15), 453

⁸²⁶ Murray, *Guide*, (n12), at [4.12]

Milanovic argues that the *lex specialis* principle is a tool of norm conflict avoidance, as there is no evidence that *lex specialis* is a rule of conflict resolution whereby States are permitted to override the express language of treaties, as a result of the unfounded assumption that there can only be one regime that regulates a situation.⁸²⁷ Rather, ‘all it can do is assist in the interpretation of general terms and standards in either IHL or IHRL by reference to more specific norms from the other branch...it cannot create hierarchies where there are none’.⁸²⁸ Milanovic goes further, however, and argues that the principle of *lex specialis* must be avoided and abandoned as an explanation of the relationship between IHRL and IHL, as despite all that has been written on the principle its meaning remains unclear and vague, it confuses more than it clarifies, it is unhelpful and misleading, it creates a false impression of facility and it is of little practical use.⁸²⁹ The key question then is whether the approach is a vague one, being unhelpful in determining how to regulate the simultaneous protection of education in practice within IHRL and IHL.

While it is clear that the general regime is not displaced and that IHRL and IHL do not exist in a hierarchy, this key question can be answered in light of the further criticism that the specificity approach lacks clarity due to there being no guidelines to help determine whether IHRL or IHL is the *lex specialis*.⁸³⁰ Droege argues that while there may be controversy over which norm is the *lex specialis*, this should not put into question the principle of *lex specialis*.⁸³¹ Hathaway and others argue that the specific rules in specific circumstances approach ‘is the best available approach to a complex problem, as it gives the widest possible ambit for complementary application of the

⁸²⁷ Milanovic, *Extraterritorial* (n795), 249

⁸²⁸ *Ibid*, 251-252

⁸²⁹ Milanovic, ‘A Norm Conflict’ (n760), 462, 473, 482; *Ibid*, 251-252

⁸³⁰ ILC, ‘Fragmentation’ (n760), at [58, 111]; Droege, ‘The Interplay’ (n15), 339; Sassoli and Olson, ‘The Relationship’ (n822), 600

⁸³¹ Droege, ‘The Interplay’ (n15), 340; Droege, ‘Elective Affinities?’ (n12), 524

two bodies of law... while addressing the inevitable conflicts by tailoring the legal rule to the context in which it operates'.⁸³² However, they acknowledge that a notable drawback of this approach is that it 'lacks a consistent pre-emption rule and the simplicity that comes with it...it calls for a judgment to be made regarding the most relevant law in each instance.'⁸³³ They, nonetheless argue that this 'weakness is not as severe as it may at first seem' and that 'it is not clear that other models for resolving conflict between the two bodies of law serve decision makers any better'.⁸³⁴

Conversely, Boothby argues that this is a fundamental limitation, as the approach cannot function without knowing which rule is the more specific as a starting point, and it is not always clear which of the two regimes is the more specialised.⁸³⁵ The 'specific rules in specific circumstances approach' is said to be unrealistic and inoperable in practice as armed forces need to know what rules apply in advance, which would require the generation of complex and highly fact dependent matrices on when and how IHRL, IHL or both applies in all scenarios.⁸³⁶ There are currently no internationally agreed matrices, and if States make individual assessments they are likely to be contradictory, thus further eroding any notion of a common legal interpretation.⁸³⁷ As individual assessments are the only option at present, following the 'specific rules in specific circumstances approach' will likely result in different levels of protection for education in the context of deliberate and direct attacks, and for protection more widely in a NIAC, as which rule is given priority will depend on the judgement of the decision maker in each instance. While in some instances, such judgement may result in higher protection for education, it may fail to appropriately

⁸³² Hathaway and others (n11), 1911

⁸³³ Ibid, 1911

⁸³⁴ Ibid (n11), 1912

⁸³⁵ Olson (n41), 447-448

⁸³⁶ Boothby, *Conflict Law* (n12), 369-371

⁸³⁷ Ibid, 369-371

consider the concept of military necessity thereby disadvantaging armed forces, or vice versa, putting the armed forces at a considerable advantage without appropriate consideration of the detriment of education.

3.4.4 Active Hostilities/Security Operations Approach

As a result of the above criticism of the *lex specialis* approach, an alternative approach is the comprehensive one proposed by Murray, namely that IHL should be applied in situations of ‘active hostilities’, and IHRL in situations more akin to ‘security operations’, both of which apply in a NIAC.⁸³⁸ This is advocated for in this thesis as the best approach to regulating the protection of education from deliberate and direct attacks in NIAC within both IHRL and IHL, and for protection in a NIAC more widely, while appropriately balancing human and military interests. It is a better alternative model for resolving conflicts between IHRL and IHL. The viability of this approach will be tested further in the case studies of this thesis.

In accordance with this approach, Murray proposes that in determining the relationship between IHRL and IHL, ‘the initial reference point is determined by the existence of explicit rules designed for the situation’, with the explicit rules constituting the ‘primary framework’, which can be either IHRL or IHL depending on the situation.⁸³⁹ The existence of explicit rules designed for the situation indicate how a situation should be regulated, and States’ intent in this regard.⁸⁴⁰ A strength of this approach is that neither regime is undermined, as either can constitute the primary framework where it contains the more explicit rules designed for the situation.

In order to facilitate the practical application of the law, he further argues that the determination of which body of law is the primary framework containing explicit

⁸³⁸ Murray, *Guide*, (n12), at [5.08]; See also, Boothby, *Conflict Law* (n12), 377-378; Droegge, ‘The Interplay’ (n15), 344; Greenwood (n12), 74

⁸³⁹ *Ibid* (n12), at [4.24, 4.78]

⁸⁴⁰ *Ibid*, at [4.26]

rules designed for the situations depends upon whether, as stated above, the situation is one of ‘active hostilities’ or of ‘security operations’, this being an appropriate response to the law and the reality of armed conflicts.⁸⁴¹ Having determined that IHRL and IHL both contain rules that protect schools, students and educational personnel from deliberate and direct attacks, one must then look at the context to which they are applied, and where the situation is one of active hostilities IHL will regulate the protection of education as the primary framework, and where it is one of security operations, IHRL will be the primary framework. This is a simplified approach that would not require the existence of complex matrices, but instead an understanding of what is meant by the terms ‘active hostilities’ and ‘security operations’.

The term ‘active hostilities’ is an obvious and self-explanatory reference to situations where there is active fighting in an IAC or NIAC.⁸⁴² ‘Security operations’ is said to denote activities that are largely of the nature of law enforcement.⁸⁴³ Murray argues that in a NIAC, two situations are regulated by the ‘active hostilities’ framework: the use of force, firstly, in situations of high-intensity fighting involving sustained and concerted military operations that resemble traditional military operations; secondly, in situations where a State does not exercise effective territorial control sufficient to conduct law enforcement operations and therefore has difficulty regulating primarily by means of IHRL.⁸⁴⁴ The two criteria are interrelated, as ‘where a State exercises a high degree of territorial control, the intensity of the fighting must be high in order to necessitate the application of the ‘active hostilities’ framework,

⁸⁴¹ Ibid, at [4.01-4.02, 4.25]

⁸⁴² Ibid, at [4.31]

⁸⁴³ Ibid, at [4.34]

⁸⁴⁴ Ibid, at [4.41, 4.46-4.47, 4.49, 4.52, 4.53, 4.55, 4.82, 5.08]

and vice versa.⁸⁴⁵ All other situations, including situations of low-intensity fighting, are to be regulated by the ‘security operations’ framework, as IHRL was specifically designed for such situations, and is capable of responding to emergency situations on the basis of either limitations or derogations.⁸⁴⁶ Murray argues that in a NIAC that exists just above the threshold for the applicability of Common Article 3, most of the activity that occurs is a form of law enforcement, while in situations ‘where normal life is completely disrupted and public authorities are unable to function, at least in respect to certain areas of the territory’, conduct will be directed towards defeating the enemy and will resemble traditional military operations.⁸⁴⁷ These criteria not only allow for the clear application of either body of law as the primary framework, it will also result in greater consistency in the application of IHRL and IHL in practice, to the issue of deliberate and direct attacks against education and beyond.

This approach is also in line with the understanding that one regime should not be displaced by another. Murray argues that the ‘secondary framework’ remains applicable and must be interpreted in the light of the ‘primary framework’, so this terminology does not indicate that the secondary framework is displaced, or placed exclusively in the background.⁸⁴⁸ He adds that the case law appears to have moved beyond a strict application of the principle of *lex specialis* in a manner that would displace IHRL, towards a complementary approach, where although one body of law may provide the primary framework in light of its appropriateness to the regulation of the situation, both bodies of law are applicable and capable of informing the overall legal framework.⁸⁴⁹ While one regime is recognised as the primary framework, the protection of education in a NIAC, and protection more widely, is strengthened by this

⁸⁴⁵ Ibid, at [4.51]

⁸⁴⁶ Ibid, at [4.41, 4.46-4.47, 4.49, 4.52, 4.53, 4.55, 4.82, 5.08]

⁸⁴⁷ Ibid, at [4.43]

⁸⁴⁸ Ibid, at [4.03, 4.61]

⁸⁴⁹ Ibid, at [4.24]

approach, as it does not undermine the secondary regime by requiring its displacement.

In determining the appropriate balance between the primary and secondary frameworks, Murray provides that three distinct contexts are envisaged.⁸⁵⁰ Firstly, IHRL and IHL may establish a complementary approach to a specific situation, although one may be much more detailed. This situation is straightforward, as although one will be the primary framework depending on whether the situation is closer to active hostilities or security operations, the secondary framework will likely play a significant role consequent to its additional specificity, though is interpreted in the context of the primary framework.⁸⁵¹ Secondly, one body of law may be silent on an issue addressed by the other, but whether IHRL fills the gap in IHL, and vice versa, should be decided on a case-by-case basis, as the gap ‘may be a deliberate omission, reflective of the reality of armed conflict’.⁸⁵² Thirdly, one body may allow something that seems to be prohibited by the other.⁸⁵³ While there is no clearly established approach to resolving this third situation, Murray argues that the Nuclear Weapons Advisory Opinion provides that the rules most closely designed for the situation should provide the primary framework and the influence of the primary framework will be significant, though while the secondary is interpreted in the context of the primary framework, both remain applicable, and the secondary can contribute to, and inform, the understanding of the overall legal situation.⁸⁵⁴

⁸⁵⁰ Ibid, at [4.84]

⁸⁵¹ Ibid, at [4.62, 4.64-4.65, 4.84]

⁸⁵² Ibid, at [4.62, 4.67]

⁸⁵³ Ibid, at [4.62, 4.69,]

⁸⁵⁴ Ibid, at [4.70-4.71, 4.78, 4.84]; See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ, 8 July 1996, para. 25

One problem ‘revolves around the relationship between customary international law and other “sources” of international law’.⁸⁵⁵ There may be difficulty in reconciling treaty obligations and customary international law where they regulate the same matter in a manner that genuinely conflict.⁸⁵⁶ However, the active hostilities/security operations approach provides clarification on this matter. While the existence of explicit rules should be determined primarily by reference to treaty law, custom must also be taken into consideration.⁸⁵⁷ In the absence of explicit law of IHL designed for NIAC, the influence of IHRL is argued to be greater,⁸⁵⁸ yet the rules of IAC relating to the conduct of hostilities applicable in an NIAC as a matter of customary law are more closely designed for that specific situation and so provide the primary framework.⁸⁵⁹ However, not only may there be difficulty in determining whether a rule has attained the status of customary international law,⁸⁶⁰ while a considerable body of customary international law may be applicable in the absence of treaty-based law in NIAC, there is also some uncertainty regarding the extent to which certain rules of IAC are applicable to NIAC.⁸⁶¹

Murray argues that while the absence of explicit rules designed for the situation causes difficulty in determining which body of law provides the primary framework in NIAC, in circumstances where the applicability of certain rules is unclear, the ‘active hostilities’ framework is applied where it constitutes the more appropriate body of law, namely ‘situations that are closer to the situations that the law of armed conflict

⁸⁵⁵ B. D. Lepard, ‘Introduction’ in B. D. Lepard, *Reexamining Customary International Law* (Cambridge University Press, 2017), 31

⁸⁵⁶ *Ibid.*, at [2.74.2, 2.81]

⁸⁵⁷ Murray, *Guide*, (n12), at [4.26]

⁸⁵⁸ *Ibid.*, at [4.42]

⁸⁵⁹ *Ibid.*, at [4.47]

⁸⁶⁰ Protecting Children (n6), at [2.74.2]; See above for a discussion of the difficulty in determining whether a rule has attained customary status, and the ICRC study.

⁸⁶¹ Murray, *Guide*, (n12), at [4.44]; See Chapter 2 for a discussion of the uncertainty of some rules of customary law applicable in a NIAC relevant to the protection of education from deliberate and direct attacks.

was primarily designed to regulate than those that international human rights law was designed to regulate'.⁸⁶² So, for example, in a NIAC, IHL would provide the primary framework, even if based on customary law, in respect of deliberate and direct attacks against students or teachers, or educational institutions where the rules invoked relate to the conduct of hostilities. IHRL should play a greater role though as the secondary framework, particularly, where there is debate as to whether a rule of IAC applies to a NIAC as a matter of customary law.

3.5 Unified Approach

While the applicable rules can currently be discerned and identified, this is a complex task,⁸⁶³ as such, a final approach is the 'unified approach'. Under the unified approach, a unified body of law would be created incorporating the relevant provisions of both IHRL and IHL in a complementary, conflict free manner.⁸⁶⁴ This may be possible due to the 'considerable convergence' between the two regimes in recent times.⁸⁶⁵ Odello argues that 'a possibility of convergence...is envisaged to achieve a better protection for the victims of violence...this development would be of course welcome, as it would give a clearer understanding of the legal obligations for all actors involved'.⁸⁶⁶ A unified approach may therefore be capable of achieving better protection for students, educational personnel, and educational institutions in a NIAC in the future.

Significant in this respect is that a key recommendation of Protecting Children is that consideration be given to collecting, in one international instrument, the

⁸⁶² Ibid, at [4.26, 4.31, 4.45, 4.78]

⁸⁶³ Ibid, at [1.8.1, 2.88, 3.52.1]

⁸⁶⁴ Javaid Rehman, *International Human Rights Law* (2nd ed, Pearson Education Limited 2010), 765; Olson (n41), 4

⁸⁶⁵ Rehman (n864), 765

⁸⁶⁶ Marco Odello, 'Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law' in Roberta Arnold and Noelle Quenivet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008), 56

protections applicable to children in armed conflict within IHRL and IHL.⁸⁶⁷ It proposes further that the instrument could be an Optional Protocol to the CRC, which would enable the deployment of the CRC Committee as the monitoring and adjudicative body, functions which it already has.⁸⁶⁸ The CRC Committee would likely need greater funding and additional members with expertise in IHL, however, this is said to be preferable to setting up and financing a wholly new institution.⁸⁶⁹ It is further proposed that the UN Special Representative for Children and Armed Conflict could have a broadened mandate that would enable them to assist the CRC Committee.⁸⁷⁰ However, the instrument proposed in *Protecting Children* would only potentially increase the level of protection for children. While a consolidated instrument specific to children could be adopted, it is also important to attempt to consolidate the law applicable to adults. This could be in the form of two instruments, where States can agree to greater and specific protection for children in the instrument specific to children, being careful that these two instruments do not create greater fragmentation within international law, or the additional protections for children could be incorporated into a single instrument. Two instruments are likely to be preferable. As the CRC evidences, being almost universally ratified, there is an increased likelihood of States accepting a greater level of protection for children, so if additional protections for children were to be incorporated into a more controversial instrument that also protects adults, the additional protections might be lost due to a reluctance on the part of States to ratify it.

It is argued in *Protecting Children* that the lack of clarity as to the relationship between IHRL and IHL, and the lack of clarity in relation to customary international

⁸⁶⁷ *Protecting Children* (n6), at [1.8.1]

⁸⁶⁸ *Ibid*, at [1.12.5, 2.159, 9.49]

⁸⁶⁹ *Ibid*, at [1.12.5, 9.45]

⁸⁷⁰ *Ibid*, at [1.12.5, 9.45, 9.49]

law, contribute to the conclusion that it is desirable to simplify the law and make it easier to identify by collecting together presently scattered treaty provisions, and by codifying existing customary international law.⁸⁷¹ Given the lack of treaty-based rules of IHL applicable in a NIAC, and given the unclear customary status of some rules of IAC in a NIAC, codifying customary international law may significantly increase the protection of education in a NIAC, and increase protection more generally in a NIAC, for both adults and children. As the law currently stands, those responsible for determining what law applies may interpret IHL strictly and find that a rule is inapplicable in a NIAC as a matter of customary when it is indeed a customary rule.

One singular instrument is also argued to have the benefit of ensuring that as many people as possible, including States, NSAG, victims, and NGOs, are able to identify and understand the applicable legal framework, making it easier to secure compliance and enhance accountability, both domestically and internationally.⁸⁷² A clearer knowledge of the law by all concerned may therefore prevent deliberate and direct attacks against education, or ensure those responsible for such attacks are held to account. A single instrument could also clarify the law by defining or identifying more precisely certain concepts, or the scope of substantive protections, that are vague or unclear,⁸⁷³ and it would provide an opportunity to develop the law.⁸⁷⁴ Such clarification and development is especially important in a NIAC, which is significantly underdeveloped compared to the law applicable in an IAC, and would be helpful in the context of the protection of both children and adults, including in the context of education.

⁸⁷¹ Ibid, at [1.12.4, 2.87, 9.9, 9.17-9.18, 9.19.1-9.19.2, 9.20, 9.49]

⁸⁷² Ibid, at [2.82, 9.9, 9.23, 9.40, 9.49]

⁸⁷³ Ibid, at [1.12.4, 9.9, 9.21, 9.49]

⁸⁷⁴ Ibid, at [1.12.4, 9.9, 9.22, 9.49]

However, despite some convergence so far, significant differences between the two regimes remain.⁸⁷⁵ As such, Droege argues that a complete merging is impossible.⁸⁷⁶ Similarly, it is accepted in *Protecting Children* that consolidation may not be possible in relation to all relevant norms.⁸⁷⁷ Moreover, a complete merger is also argued to be neither desirable nor practicable, as this risks lowering the standard of protection that currently exists, particularly in situations of NIAC.⁸⁷⁸ Both IHRL and IHL have unique advantages in particular circumstances, so care must be taken not to lose these advantages in the search for smoother co-application.⁸⁷⁹ In response to the criticism that whilst political reality may mean that some seek to dilute or diminish protections, *Protecting Children* counters that this risk, as part of the effort to improve the law, must be weighed up against preserving the status quo, and that the virtues of greater clarity, coherence, compliance and enforcement considerably outweigh those of potential dilution.⁸⁸⁰ Fear of diluting the law should not prevent efforts to improve it. An attempt to consolidate and improve the law may prove futile and come to nothing, or may be less exhaustive than anticipated, however, doing nothing is not a sustainable stance.

While a complete merger might not be possible, desirable or practical, a solution may be to merge IHRL and IHL at least where they are complementary. IHRL and IHL could also be merged as far as possible in respect of rules that genuinely conflict where agreement can be reached as to how a situation should be handled. Where agreement can be reached but it unreasonably results in the lowering of current standards of protection, this new rule should not be incorporated into the new body of

⁸⁷⁵ Theodor Meron, 'The Humanization of Humanitarian Law (2000) 94 *American Journal of Internal Law* 239; Moir (n12), 194

⁸⁷⁶ Droege, 'Elective Affinities?' (n12), 521

⁸⁷⁷ *Protecting Education*, at [1.8.1, 2.88, 3.52.1]

⁸⁷⁸ Müller, *The Relationship* (n12), 21; Droege, 'Elective Affinities?', (n12), 521; Provost (2002), 349-350

⁸⁷⁹ Lubell, 'Parallel' (n39), 655

⁸⁸⁰ *Protecting Education*, at [1.8.1, 9.24.2]

law, and the current rules should continue to dictate how to regulate this situation. This would make the law substantially clearer and easier to apply in practice in situations of both IAC and NIAC, especially if it is possible to eradicate numerous genuine conflicts that currently exist, while ensuring that important protections are not lost unjustifiably. Where consolidation was not possible, those tasked with determining how IHRL and IHL regulate a situation should continue to utilise the ‘active hostilities/security operations’ approach.

It is also important that IHRL and IHL are construed in a manner that does not undermine their integrity.⁸⁸¹ As to the complexity of consolidating IHRL and IHL, it is argued that these are not insurmountable legal obstacles, as evidenced by the CRC and the OPCRC, single international instruments that address both IHRL and IHL.⁸⁸² Consolidation will, however, need to be done with considerable care. If the two regimes were to be consolidated in way that does not delicately balance the needs of both IHRL and IHL, then the risk is that the unified body of law is not complied with in practice, ultimately having the opposite effect intended, namely a lowering of protection for education in the context of deliberate and direct attacks, and for protection more widely.

3.6 Conclusion

There is currently a lack of clarity as to how to regulate the simultaneous application of IHRL and IHL, as a result of many conflicting interpretations as to their relationship. The ‘active hostilities/security operations’ approach is advanced as the best approach to regulate the relationship between IHRL and IHL in practice. It is also suggested that the unified approach, and while not a feasible approach presently, this is certainly a possibility in the future, and is one that should be pursued.

⁸⁸¹ Cassimatis (n763), 631

⁸⁸² Ibid, at [1.12.7]

Chapter 4 - Case studies: Deliberate and Direct Attacks Against Education in Colombia and the Democratic Republic of Congo

4.1. Introduction

The purpose of this chapter is to analyse the simultaneous application of IHRL and IHL to the issue of deliberate and direct attacks against education in the context of real life scenarios, namely, in Colombia and the DRC. This is done in order to examine the adequacy of the protection of education when the context, intricacies and nuances of a NIAC are taken into account, giving a more realistic analysis of whether IHRL effectively provides for the right to education and whether IHL adequately protects education.

I analyse whether violations of IHRL and breaches of IHL have occurred in Colombia and the DRC in respect of deliberate and direct attacks against education. Chapter Three of this thesis argued that while IHRL and IHL can complement each other when they are applied simultaneously, genuine norm conflicts can exist, though at present, there is no authoritative approach to regulating the relationship between the two regimes when such conflicts arise. The analysis of violations and breaches is necessary, as it allows the examination of whether IHRL and IHL coexist in a complementary, or more importantly, a contradictory manner, in their simultaneous application to the same conduct in respect of deliberate and direct attacks against education. Without a clear approach to regulating the relationship between IHRL and IHL, the legal uncertainty created by genuine norm conflicts causes a risk of the norm offering a lower standard of protection being incorrectly given precedence in practice, with the norm offering the higher level of protection considered to be displaced. The examination of violations and breaches of IHRL and IHL respectively also permits the testing of the argument that the ‘active hostilities/security operations’ approach is the

best approach to regulating the relationship of the two regimes in practice. Chapters One and Two highlighted various gaps and ambiguities in the provision for education within both IHRL and IHL as individual regimes. The examination of gaps in existing regulation should be identified so that new norms can be created to fill those gaps.⁸⁸³ As such, this chapter also identifies whether gaps remain and whether there is a need for additional regulation.

The chapter starts by setting out the research methodology for the case studies. I then provide an outline of the conflicts in Colombia and the DRC, with a view to determining the existence of an IAC or NIAC in the territory of these States between 2009 and 2016, and provide a comparative analysis as to the conflicts in both States.⁸⁸⁴ Next, I look in turn at the simultaneous application of IHRL and IHL to the issues of attacks against schools and universities, the military use of schools, attacks against students and educational personnel, and the recruitment of children in Colombia and the DRC.

4.2. Methodology

4.2.1. The Sample

Significant patterns of deliberate use of force and threats against schools, universities, teachers and students were reported in 30 States in ‘Education under Attack: 2014’, with there being widespread military use of educational buildings in 24 of these 30 States, and the military recruitment and use of children in schools or along school routes in six of these 24 States, namely Colombia, the DRC, Pakistan, Somalia, Thailand and Yemen.⁸⁸⁵ In Education Under Attack: 2018, it is reported that between 2013 and 2017 at least 20 attacks on education occurred and the military recruitment of children transpired in these 6 States. However, the military use of educational

⁸⁸³ Sivakumaran, ‘Re-envisaging’ (n51), 222

⁸⁸⁴ See Chapter Three for a discussion of the classification of IAC and NIAC.

⁸⁸⁵ GCPEA, *Education under Attack: 2014* (n102), 8, 19, 20

institutions was reported in only 5, to the exclusion of Thailand.⁸⁸⁶ Therefore, Colombia, the DRC, Pakistan, Somalia and Yemen were the starting point from which to choose my case studies.

It would not have been feasible in terms of time and word limit constraints to examine more than two case studies. I chose to examine Colombia and the DRC. Colombia, the DRC and Yemen have shown a stronger commitment to realising the right to education during situations of NIAC, by ratifying all of the relevant IHRL and IHL instruments. While all five States have ratified the ICESCR, only Colombia, the DRC, and Yemen have ratified the OPCRC. Similarly, all five States have ratified the four Geneva Conventions,⁸⁸⁷ which is unsurprising in light of the fact that they have been universally ratified. However, only Colombia, the DRC and Yemen have ratified Additional Protocol II.⁸⁸⁸ The OPCRC and Additional Protocol II are key instruments for the realisation of the right to education in the context of deliberate and direct attacks during a NIAC, and as such, Pakistan and Somalia should ratify these instruments as a matter of urgency.

The failure of Pakistan and Somalia to ratify these key international instruments means that important protections may be lost. Child soldiers will only be afforded the

⁸⁸⁶ GCPEA, *Education under Attack: 2018* (n103), 8-12

⁸⁸⁷ ICRC, 'Treaties and States Parties to Such Treaties: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the field' at <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4825657B0C7E6BF0C12563CD002D6B0B> (last accessed 20/02/2018); ICRC, 'Treaties and States Parties to Such Treaties: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea' at https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=370 (last accessed 20/02/2018); ICRC, 'Treaties and States Parties to Such Treaties: Convention (III) Relative to the Treatment of Prisoners of War' at https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375 (last accessed 20/02/2018); ICRC, 'Treaties and States Parties to Such Treaties: Convention (IV) Relative to the Protection of Civilian Persons in Time of War' at <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/380> (last accessed 20/02/2018)

⁸⁸⁸ ICRC, 'Treaties and States Parties to Such Treaties: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts (Protocol I)' at <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/470> (last accessed 20/02/2018); ICRC, 'Treaties and States Parties to Such Treaties: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Conflicts (Protocol II)' at <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/470> (last accessed 20/02/2018)

lower level of protection within the CRC and IHL. Also, NIAC will only be regulated by Common Article 3 and customary international law. The Special Representative for Children and Armed Conflict could, as argued by Protecting Children, assist in securing greater ratification by Pakistan and Somalia, as well as wider ratification by other States.⁸⁸⁹ While customary law may fill in the gaps in protection where the OPCRC and Additional Protocol II have not been ratified, determining whether a rule is of customary status can be difficult. This is a particular difficulty in the context of customary IHRL, as while the existence of the ICRC study clarifies customary IHL, no equivalent comprehensive study on what aspects of IHRL constitute customary law exists. While the ICRC study has been subject to criticism, it is well accepted that it constitutes an excellent starting point for determining what rules of IAC apply to NIAC as a matter of customary law. The possible application of these customary rules to NIAC is significant because there is more treaty law, containing more detail, for an IAC, while for a NIAC, there is some treaty law, with less detail.

While Yemen has ratified all of the relevant international instruments, the issue of attacks against education is more longstanding in Colombia and the DRC. UNESCO previously published 'Education under Attack' in 2007 and 2010, and in these two earlier reports, Colombia and the DRC were identified as countries in which attacks against education occurred, but Yemen was not.⁸⁹⁰ Given the long-lasting nature of the issue of deliberate and direct attacks against education in Colombia and the DRC, they were chosen as my case studies.

The reasoning behind analysing the States that have shown a stronger commitment to IHRL and IHL is two-fold. Firstly, it allows the examination of whether those States showing a firmer commitment to the realisation of the right to education in

⁸⁸⁹ Ibid, at [1.12.3]

⁸⁹⁰ UNESCO, *Education Under Attack: 2007* (n100); UNESCO, *Education Under Attack: 2010* (n101);

theory are taking their obligations seriously in practice. Secondly, as the key purpose of this chapter is to examine the effectiveness of the simultaneous application of IHRL and IHL, examining how the regimes apply when all the relevant instruments can be taken into account gives a fuller picture of the effectiveness of the law. It is clearly important to also analyse the effectiveness of IHRL and IHL during situations of both IAC and NIAC, and in those countries where ratification of international instruments is less committed. Where the rules of an IAC are to be applied instead of those of a NIAC, or where fewer instruments apply, this will impact the assessment of the effectiveness of IHRL and IHL in providing for education, and there is scope for further research into what this impact would be.

4.2.2. Analysing Documented Direct and Deliberate Attacks against Education

This thesis is original as I have undertaken an analysis of existing data on deliberate and direct attacks against education during a NIAC, in order to apply the legal framework of simultaneously applicable IHRL and IHL to such attacks, which has not been done before. I examined documented direct and deliberate attacks against education in order to develop insights on patterns and trends in such attacks in Colombia and the DRC respectively, and to determine violations of IHRL and breaches of IHL in respect of specific incidents.

The data analysed was quantitative and qualitative in nature. Quantitative methods involve statistics, counting and measuring.⁸⁹¹ Some of the data examined was quantitative in the sense that the data reported on the amount of attacks in a given time frame, and was therefore general, numerical and quantitative. Some of the numerical data reported on the number of attacks over a few years, and some reported on attacks on a yearly basis. These yearly and multiple year figures often do not correlate

⁸⁹¹ Gillham (n127), 9-10.

exactly, but both are included in the tables below to provide for a fuller and more accurate picture of patterns and trends in deliberate and direct attacks. The different figures in the yearly and multiple year reports are likely due to the manner in which attacks were reported to the various bodies documenting such attacks. A limitation of the quantitative data on attacks against education was that the information available was often vague. Where such data was vague, this is acknowledged.

Qualitative methods are descriptive and inferential in character, and the focus is primarily on the kind of evidence that will enable you to understand the meaning of what is going on.⁸⁹² Other data documented specific incidents of attacks against education and was descriptive and qualitative. While it was important to examine quantitative data in order to determine patterns and trends in attacks, adopting a purely quantitative approach was unsuitable, as it was the specific detail within the qualitative data that was key to the identification of violations of IHRL and breaches of IHL. It was not possible to apply IHRL and IHL to each documented attack against education, as such, only selected incidents are analysed. A limitation of the qualitative data was also that it was often vague, though less so than the quantitative data. Where necessary, namely where the information required was simply not available, the law has been applied to the chosen specific incidents hypothetically.

I adopted a longitudinal study methodology, as the data examined related to attacks between 2009 to 2016. A benefit of a longitudinal methodology is that examining data over a longer period of time may enable a cumulative view of data drawn from different contexts, and therefore one is able to determine the true state of affairs.⁸⁹³ A longitudinal analysis of documented attacks against education not only demonstrates the fact that attacks on education within Colombia and the DRC are long

⁸⁹² Gillham (n127), 9-10.

⁸⁹³ David Silverman, *Doing Qualitative Research* (Sage: London, 4th Ed, 2013), 136

standing issues in need of addressing, it also enabled the adequate identification of patterns and trends in attacks. While incidents of attacks against education in Colombia and the DRC are documented from the late 1990's onwards and the issue is clearly longstanding, it was not practical or necessary to have examined attacks against education for such an extended period of time. The 'Education Under Attack: 2014' report was the starting point for choosing my case studies, and the report documents attacks against education between 2009 and 2013, as such, it is logical to similarly examine attacks from 2009 onwards. There was also a sufficient amount of information available to enable me to carry out an analysis of documented attacks between 2009 and 2016. Examining attacks until the end of 2016 highlights that attacks against education in both Colombia and the DRC remain recent issues, and illustrates the importance of this research.

A wide range of sources document attacks against education, including UN reports, reports of NGO's, and reports of attacks within the media. The use of a wide variety of sources facilitates the validation of data through triangulation.⁸⁹⁴ The term 'triangulation' can be understood to mean that multiple sources that explore the same phenomenon are utilised.⁸⁹⁵ Triangulation allows one to examine how people with different roles describe the same event.⁸⁹⁶ A benefit of triangulating data is that concerns about validity and bias are minimised, as chances of making errors or drawing the wrong conclusions are less likely.⁸⁹⁷ As such, as far as possible, attacks are validated through triangulation. A weakness of the methodology is that it was not possible to directly examine sources written in Spanish and French, the national

⁸⁹⁴ Denscombe (n129), 54, 62

⁸⁹⁵ Hilary Arksey and Peter T. Knight, *Interviewing for Social Scientists: An Introductory Resource with Examples* (Sage: London, 1999), 23

⁸⁹⁶ Michael Hammond and Jerry Wellington, *Research Methods: The Key Concepts* (Routledge, London, 2013), 145

⁸⁹⁷ Arksey and Knight (n895), 21

languages of Colombia and the DRC respectively. However, Education Under Attack 2014 and 2018 comprehensively examine the occurrence of attacks in Colombia and the DRC, and these reports include information from sources in these languages, so this weakness is mitigated.

Having set out the trends and patterns in attacks, I apply IHRL and IHL to specific incidents of attacks, adopting the ‘violations approach’ to examine whether there were IHRL violations and breaches of IHL in Colombia and the DRC. Chapman, who argued that if effective and systematic monitoring of ESCR is to work then we need to work to identify and rectify violations, developed the ‘violations approach’.⁸⁹⁸ Likewise, if effective and systematic monitoring of IHL is to work, then we also need to identify and rectify breaches. Cahill-Ripley states that the violations approach is useful as it reflects the reality of the enjoyment of a right in practice.⁸⁹⁹ This chapter assesses the reality of the enjoyment of the right to education in practice, and also the reality of enjoying the protection afforded to education within IHL.

Measuring progressive realisation ‘involves the gathering of data which is often not available, is complex to assess and is often inexact’.⁹⁰⁰ Progressive realisation also requires long-term measurement over a considerable period of time, and this is ‘not suitable for a small-scale individual research project with time and financial constraints’.⁹⁰¹ As such, it is not possible to conclusively determine whether violations of progressively realisable elements of the right to education occurred in the context of this small-scale individual research project. As this chapter does not seek to determine violations of progressive elements of the right to education, it is not necessary to analyse the steps taken by Colombia and the DRC to realise those

⁸⁹⁸ Chapman, ‘A Violations Approach’ (n253), 36

⁸⁹⁹ Cahill-Ripley (n246), 141

⁹⁰⁰ Cahill-Ripley (n246), 141; See Chapman, ‘A Violations Approach’ (n253), 23, 31, 33

⁹⁰¹ Ibid (n246), 141

progressive elements, such as the adoption of legislation. Conversely, violations of immediate obligations can be measured without the need to examine missing, incomplete or complex data as to a State's available resources and as to the steps taken by the State to realise the right to education. As such, I determine violations of immediate obligations of the right to education in accordance with the violations approach. Similarly, considerations as to available resources are not relevant to assessing measuring breaches of IHL, so such determinations can be more conclusively made.

4.2.3. A Comparative Approach

A final point to make on methodology is that I have adopted a comparative approach. According to Coomans et al, there are three general comparative methods; global comparisons, few country comparisons and single case comparisons.⁹⁰² Clearly a global comparison is not possible, as examining the thirty States in which attacks against education have occurred is beyond the scope and resources of this thesis. The focus of a few country comparison approach tends to be on the similarities and differences among cases, and makes generalisations that are less broad. The few countries approach suffers from two major methodological weaknesses; firstly, such studies may identify a large number of explanatory variables, which may make it difficult to determine the relationship between these variables and the outcome. Secondly, the intentional selection of cases rather than a random selection can undermine the inferences that can be drawn due to bias.⁹⁰³ The single country approach tends to focus on a country with particularly problematic human rights records and provide the richness of contextual description and analysis. However, it is

⁹⁰² Coomans, Grunfeld and Kamminga (n111), 31

⁹⁰³ Ibid, 34-36

difficult to make inferences wider than the context of the individual case.⁹⁰⁴ Despite the weaknesses of a few country comparison, this approach was most suitable as it allows a comparison and thus wider inferences than a single country approach. In this respect, I have adopted a ‘few country comparison approach’.

It is, therefore, possible to generalise from case study research.⁹⁰⁵ It is in terms of generalisability that the case study approach is most vulnerable. However, although each case is in some respects unique, it is a specific example of a broader class of things, and the breadth of generalisability depends on how far the case study in question is similar to others of its type.⁹⁰⁶ As the contexts of the conflicts are unique in Colombia and the DRC, selecting these two case studies is beneficial as the findings of the case studies are generalisable to a greater extent, as the same gaps and inconsistencies in IHRL and IHL can be identified when applied to both conflict settings. Considering that direct and deliberate attacks against education are a global phenomenon, it is important that wider inferences can be drawn from the recommendations contained within this thesis.

4.3. Colombia

4.3.1. The Context

In 2009, in the case of *Gian Carlo Gutierrez Suarez*, the Colombian Supreme Court held that a NIAC existed in its territory.⁹⁰⁷ Additionally, the government of Colombia recognised the existence of a NIAC in Colombia with the enactment in June 2011 of the Victims and Land Restitution Law.⁹⁰⁸ Various UN bodies also refer to an

⁹⁰⁴ Ibid, 36-38

⁹⁰⁵ Peter T Knight, *Small-scale Research: Pragmatic Inquiry in Social Science and the Caring Professions* (Sage Publications 2002), 46

⁹⁰⁶ Denscombe (n129), 60, 62

⁹⁰⁷ *Gian Carlo Gutierrez Suarez*, Supreme Court of Colombia, Radicado No.32.022 (21 September 2009), at [59]

⁹⁰⁸ SGCAC Colombia 2012, at [5]; Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (Oxford University Press 2015), 194

armed conflict in Colombia between 2009 and 2016.⁹⁰⁹ It is, therefore authoritatively confirmed that a NIAC existed between 2009 and 2016, due to the fact that hostilities were between Colombia and NSAG operating within the territory of Colombia.

The NIAC is a particularly protracted one. The 1960's saw the emergence of the two main leftist NSAG:⁹¹⁰ *Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo*,⁹¹¹ and *Ejército de Liberación Nacional*.⁹¹² FARC-EP and ELN represented the poor in rural areas of the country, and sought to overthrow the Colombian government and end perceived social inequality.⁹¹³ This evidences the argument that social inequality can cause the outbreak of conflict, including social inequality in the context of education.⁹¹⁴ The threat posed by FARC-EP and ELN led to the adoption of Law 48 in 1968, authorising the State to create civilian patrols to repel guerilla activities, and authorising the Ministry of Defence to provide them with

⁹⁰⁹ UN Secretary-General for Children and Armed Conflict, 'Countries Where Children are Affected by Armed Conflict' <<https://childrenandarmedconflict.un.org/countries-caac/>> accessed 13 April 2018. The reports of the UN Secretary General for Children and Armed Conflict present 'information about grave violations committed against children in 20 conflict situations', including Colombia. See United Nations Security Council, *Children and armed conflict: Report of the Secretary-General*, A/65/820–S/2011/250, 23 April 2011, at [151] (SGCAC 2011); United Nations Security Council, *Children and armed conflict: Report of the Secretary-General*, A/66/782–S/2012/261, 26 April 2012, at [127] (SGCAC 2012); United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict in Colombia, S/2012/171, 21 March 2012, at [4]; hereinafter SGCAC Colombia 2012; United Nations Security Council, *Children and armed conflict: Report of the Secretary-General*, A/67/845*–S/2013/245*, 15 May 2013, at [172, 180] (SGCAC 2013); United Nations General Assembly Security Council, *Children and armed conflict: Report of the Secretary-General*, A/68/878–S/2014/339, 15 May 2014 (SGCAC 2014); United Nations General Assembly Security Council, Children and Armed Conflict: Report of the Secretary-General, A/69/926*–S/2015/409*, 5 June 2015 (SGCAC 2015); United Nations Security Council, *Report of the Secretary-General on children and armed conflict in Colombia (September 2011–June 2016)*, S/2016/837, 4 October 2016 (SGCAC Colombia 2016); See also, United Nations General Assembly, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, A/HRC/13/72, 4 March 2010, 4 (UNHCHR Colombia 2010); Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia, UN Doc. A/HRC/19/21/Add.3, 31 January 2012 (UNHCHR Colombia 2012)

⁹¹⁰ Felicity Szesnat and Annie R. Bird, 'Colombia' in Elizabeth Wilmshurst, *International Law and the Classification of Conflicts* (Oxford University Press: Oxford, 2012), 205; Crawford (n908), 191

⁹¹¹ Hereinafter FARC-EP

⁹¹² Hereinafter ELN.

⁹¹³ Crawford (n908), 191

⁹¹⁴ See Introduction for a discussion as to the lack of equality in education and the contribution of this to the outbreak of conflict.

weapons normally reserved for the military.⁹¹⁵ Paramilitary groups began to emerge in the 1980's to provide private protection to individuals from NSAG such as FARC-EP and ELN, and citizens armed as a result of Law 48 were involved in such paramilitary activity. This led to most of Law 48 being revoked by 1989, and self-defence groups were made illegal.⁹¹⁶ However, scattered paramilitary groups consolidated in 1997 to form the *Autodefensas Unidas de Colombia*.⁹¹⁷ The AUC were demobilised between 2003 and 2006, however, former paramilitaries who reneged on this deal went on to form new NSAG, including *Los Urabeños*, *Los Rastrojos*, *Los Paisas*, and *las Águilas Negras*. These groups are considered to be the third generation of paramilitary groups, the initial objective of which was the maintenance of control over areas where the AUC formerly operated.⁹¹⁸ This highlights that one danger of arming civilians for self-defence purposes is that armed civilians can form NSAG, and cause a conflict or increase tensions.

Colombia ratified the relevant IHRL and IHL instruments prior to 2009, and no relevant reservations, derogations or limitations were made. Therefore Colombia, as the primary IHRL obligations holder, was bound fully by IHRL between 2009 and 2016. The applicable rules of IHL in a NIAC, however, depend on whether the thresholds for Common Article 3 of the Geneva Conventions and Additional Protocol II are reached.⁹¹⁹ As discussed in Chapter 2, it is harder to determine when a NIAC has commenced than an IAC, as while an IAC simply requires armed force between States,⁹²⁰ Common Article 3 and Additional Protocol II have different thresholds,

⁹¹⁵ Szesnat and Bird (n910), 205

⁹¹⁶ Ibid, 206-207

⁹¹⁷ Crawford (n908), 192; Hereinafter AUC

⁹¹⁸ SGCAC Colombia 2012 (n909), at [9]; Angel Rabasa and others, *Counternetwork: Countering the Expansion of Transnational Criminal Networks* (RAND 2017), 29, 30; These groups are often referred to as post-demobilisation groups, *Bandas Criminales*, BACRIM, and *los Autodefensas Gaitanistas de Colombia*, namely, Gaitanist Self-Defense Forces of Colombia.

⁹¹⁹ See Chapter Two for a detailed discussion of the classification of NIAC.

⁹²⁰ Geneva Conventions 1949, Common Article 2

which are both nonetheless higher than that for an IAC. There is a lack of a precise definition of NIAC within Common Article 3,⁹²¹ however, the customary definition of the ICTY in the case of *Tadic* gives guidance on its applicability.⁹²² The ICTY provided that a NIAC exists whenever there is ‘protracted armed violence between governmental authorities and organised armed groups or between such groups within a state’.⁹²³ In *Ramush Haradinaj*,⁹²⁴ the ICTY also clarified that the phrase ‘protracted armed violence’ refers to the intensity rather than duration of the violence.⁹²⁵ While these decisions provides substantial clarification, it may, however, be difficult to ascertain whether the violence in question is of sufficient intensity, and whether a NSAG has adequate levels of organisation.⁹²⁶ However, determining whether Additional Protocol II applies is more difficult. Additional Protocol II has a higher threshold, requiring that parties to a NIAC also exercise control over part of territory as to enable them to carry out sustained and concerted military operations.⁹²⁷ As such, it is often more difficult to determine whether Additional Protocol II applies. The case of Colombia evidences the difficulty in determining the applicability of these provisions, though this is largely due to the unavailability of information.

Significantly, in 2009, the Colombian Supreme Court ruled that both Common Article 3 and Additional Protocol II were applicable,⁹²⁸ which makes the determination slightly easier. The UN stated that in 2010, clashes intensified between the government, FARC-EP and ELN,⁹²⁹ and the armed conflict continued in 2011 and

⁹²¹ Geneva Conventions, Common Article 3

⁹²² BIICL Handbook (n1), 36

⁹²³ Prosecutor v. Tadic, IT-94-1-AR72, 2 Oct 1995, at [70]

⁹²⁴ *Prosecutor v Ramush Haradinaj et al*, IT-04-84-T, 3 April 2008

⁹²⁵ *Ibid*, para 49

⁹²⁶ Protecting Children, at [2.77.2]

⁹²⁷ Additional protocol II, Art 1(1)

⁹²⁸ *Gutierrez Suarez* (n949), at [189]

⁹²⁹ SGCAC 2011, at [151]

2012.⁹³⁰ In light of the intensification of armed conflict in 2010, and its continuation between 2011 and 2012 it is likely that both Common Article 3 and Additional Protocol II remained applicable. Of relevance in this respect is that Szesnat and Bird argue that the period from the mid-1990's until the time of writing in 2012 experienced the greatest intensity in fighting,⁹³¹ and that during this period the hostilities between Colombia and FARC-EP constituted a NIAC within Common Article 3 that also reached the threshold for the application of Additional Protocol II.⁹³² Between 2009 until at least 2012, FARC-EP retained the capability to conduct large operations, was estimated to have 6000-12,000 fighters forming 110 operational units, and control of around 15 to 20 per cent of territory. On the other hand, ELN had a command structure consisting of a 15-member high command, around 2200 to 3000 members, with several units trained in special operations as well as the manufacture of explosives.⁹³³ As such, during this period FARC-EP and ELN satisfied the criteria of Common Article 3, due to both the duration and the intensity of the fighting between governmental authorities, and the organisation of the groups. It is also clear that during this period FARC-EP satisfied the additional criteria of Additional Protocol II, as it had had a responsible command structure that enabled sustained and concerted military operations and it had control over part of territory. Szesnat and Bird argue, however, that from the late 1990's until 2012, only a Common Article 3 NIAC existed between ELN and Colombia, as a result of fewer attacks and fighters.⁹³⁴ However, they had a command structure and 2200 to 3000 members, which is a substantial number, so it appears that the requirements of organisation and intensity were met.

⁹³⁰ SGCAC 2012, at [127]; SGCAC 2013, at [180]

⁹³¹ Szesnat and Bird (n910), 203

⁹³² *Ibid*, 226-2277

⁹³³ *Ibid*, 211

⁹³⁴ Szesnat and Bird (n910), 227

Yet, it is also less clear from the available information whether ELN controlled territory. On the facts, it appears that they did not.

Following the signing of the ‘General Agreement for the end of the conflict and the construction of a stable and lasting peace’ in Havana on 26 August 2012,⁹³⁵ peace talks were initiated on 18 October 2012 between the Government and FARC-EP.⁹³⁶ As a consequence, the UN reported that the period of September 2011 and June 2016 was marked by an overall decrease in the number of armed actions and attacks against civilians.⁹³⁷ However, despite this, and despite on-going talks between FARC-EP and the Government of Colombia in 2013, hostilities between FARC-EP, ELN and the Colombian army continued and also intensified in multiple parts of the country.⁹³⁸ In 2014, peace talks between the government and FARC-EP continued, and in December they started talks about de-escalating the conflict. However, hostilities between FARC-EP, ELN, and the Colombian Armed Forces continued and again intensified in some parts of the country.⁹³⁹ In light of the fact that, despite a general decrease in hostilities, there were also parts of the country, which experienced the increased tensions, it appears that between 2012 and 2015, that Common Article 3 applied to the hostilities between Colombia and FARC-EP and ELN, while in respect of FARC-EP, Additional Protocol II continued to apply.

However, in 2015, substantial progress was made in the peace talks and armed violence between FARC-EP and government forces reached its lowest level in 50 years following a unilateral ceasefire in July. However, activities by ELN and other

⁹³⁵ SGCAC 2013, at [180]; SGCAC 2014, at [163]

⁹³⁶ SGCAC 2013, at [172]

⁹³⁷ SGCAC Colombia 2016, at [4]

⁹³⁸ SGCAC 2014, at [163-164]

⁹³⁹ SGCAC 2015, at [217-218]

armed groups continued.⁹⁴⁰ In March 2016, the Government of Colombia and ELN announced an agreement to commence peace talks.⁹⁴¹ Also, peace talks between the government and FARC-EP continued in 2016, and the year was marked by the signing of a final peace agreement between the Government and FARC-EP on 26th September. However, despite the withdrawal of FARC-EP and a decline in conflict intensity and with armed violence between the Colombian military and FARC-EP again reaching its lowest level in 50 years, ‘the presence of NSAG, such as ELN and post-demobilization groups, as well as FARC-EP dissident fronts, continued to pose child protection challenges’.⁹⁴² While hostilities continued, it is clear, in light of the significant de-escalation in the intensity of the conflict, that only Common Article 3 was applicable between 2015 and 2016 between Colombia, FARC-EP dissidents and ELN.

More complicated still is the question of whether post-demobilisation NSAG satisfies the thresholds of Common Article 3 and Additional Protocol II. Szesnat and Bird add that any hostilities between Colombia and post-demobilisation NSAG amounting to an armed conflict between 2009 and 2012 would qualify as a Common Article 3 conflict, unless it can be shown that these groups met the criteria of Additional Protocol II.⁹⁴³ However, due to the lack of specific information as to the makeup of each of these groups, it is difficult to determine whether hostilities between them and Colombia are regulated by Common Article 3, let alone Additional Protocol II. More information is required to make an accurate assessment on this matter, as such no assessment is proposed here. This is, however, unnecessary, as the specific

⁹⁴⁰ United Nations General Assembly Security Council, *Children and Armed Conflict: Report of the Secretary General*, A/70/836–S/2016/360, 20 April 2016, at [176-177] (SGCAC 2016); SGCAC Colombia 2016, at [14]

⁹⁴¹ SGCAC Colombia 2016, at [7]

⁹⁴² SGCAC Colombia 2016, at [15]; United Nations General Assembly Security Council, *Children and Armed Conflict: Report of the Secretary General*, A/72/361–S/2017/821, 24 August 2017, at [50] (SGCAC 2017)

⁹⁴³ Szesnat and Bird (n910), 227

incidents analysed relate to the activity of the State, FARC-EP or ELN. A brief discussion of such groups was, however provided here, to provide a fuller picture of the conflict and to highlight the dangers of armed civilians in the name of self-defence.

Fig. 1 Table showing the relevant NSAG party to the NIAC in Colombia and the years in which they were active between 2009 and 2016

<u>NSAG active in the NIAC</u>	<u>Years active between 2009 and 2016</u>
FARC-EP	2009 - 2016
ELN	2009 - 2016
Post-demobilisation groups	2009 - 2016

4.3.2. Attacks against Educational Institutions in Colombia

Fig. 2 Table showing the number of, and description of, schools damaged or destroyed in Colombia as a result of explosive ordnance between 2009 and 2016

<u>Year of attacks</u>	<u>Number of attacks</u>	<u>Description of attacks</u>
2009 – 2012	10 ⁹⁴⁴	Schools were damaged or destroyed by explosives, explosive remnants of war, and landmines in or near schools.
2013 – 2017	31 ⁹⁴⁵	Schools were damaged or destroyed by explosives, explosive remnants of war, and landmines in or near schools.
2009	Unknown	The UN reported incidents of attacks on

⁹⁴⁴ GCPEA, *Education under Attack: 2014* (n102), 126

⁹⁴⁵ GCPEA, *Education under Attack: 2018* (n103), 105

2010 2011 2012	Unknown Unknown Unknown	educational institutions each year in 2009, 2010, 2011 and 2012 individually. Schools were damaged by explosive ordnance, but no numerical information is provided as to the number of attacks each year individually. ⁹⁴⁶
2013	4 ⁹⁴⁷ -26 ⁹⁴⁸	4 schools reported to be attacked in the first half of 2013. The UN also identified 26 education-related incidents resulting in damage to schools or suspension of classes in the whole of 2013. It is unclear how many, if any, of these incidents relate to explosive ordnance or landmines, or also what the nature of such attacks were. The GCPEA, however, reported one incident involving explosive ordnance on a school, and one further incident targeting a university. ⁹⁴⁹
2014	12 ⁹⁵⁰	Schools were caught in crossfire and affected by anti-personnel mines and explosive remnants of war. It is unclear how many of these incidents relate to crossfire, which is outside the scope of this thesis, and how many relate to explosive ordnance. However, the GCPEA identified 3 incidents involving landmines being planted in or near schools in 2014, as well as 1 incident at a university. ⁹⁵¹
2015	11 ⁹⁵²	Schools were damaged in crossfire and by landmines and explosive remnants of war. It is unclear how many of these incidents relate to crossfire, which is outside the scope of this thesis, and how many relate to explosive ordnance. However, the GCPEA identified 4 individually reported incidents involving landmines and explosive ordnance. ⁹⁵³

⁹⁴⁶ SGCAC 2010, at [132]; SGCAC 2011, at [163]; UNHCHR Colombia 2011, 26; SGCAC 2012, at [133]; SGCAC Colombia 2012 (n909), at [39-40]; SGCAC 2013, at [177]

⁹⁴⁷ GCPEA, *Education under Attack: 2014* (n102), 129; GCPEA, *Education under Attack: 2018* (n103), 105

⁹⁴⁸ SGCAC 2014, at [168]

⁹⁴⁹ GCPEA, *Education under Attack: 2018* (n103), 105, 110

⁹⁵⁰ SGCAC 2015, at [222]

⁹⁵¹ GCPEA, *Education under Attack: 2018* (n103), 105-106, 110; See HRW (n983)

⁹⁵² SGCAC 2016, at [181]

⁹⁵³ GCPEA, *Education under Attack: 2018* (n103), 106

2016	6 ⁹⁵⁴	Schools were damaged during crossfire and as a result of landmines planted in or near schools. It is unclear how many of these incidents relate to crossfire, which is outside the scope of this thesis, and how many relate to explosive ordnance. The GCPEA identified one incident involving explosive ordnance being planted near a school, and three incidents at universities. ⁹⁵⁵
------	------------------	---

One pattern and trend can be identified in respect of deliberate and direct attacks against educational institutions in Colombia between 2009 and 2016. Each year there were incidents of landmines or explosive ordnance being planted in or near schools by NSAG, which often resulted in damage to educational institutions. The total number of incidents affecting educational institutions reported by the UN suggests the possibility that incidents involving landmines were more frequent between 2013 and 2016 than 2009 and 2012, but that such attacks decreased in frequency each year between 2013 and 2016. However, conclusively determining this is difficult, as it is unclear how many of these incidents relate specifically to the deliberate planting of landmines and explosive ordnance. Such attacks have mainly been attributed to FARC-EP, but also ELN.⁹⁵⁶ Schools were often targeted with landmines and

⁹⁵⁴ SGCAC 2017, at [54]

⁹⁵⁵ GCPEA, *Education under Attack: 2018* (n103), 106, 111

⁹⁵⁶ Global Terrorism Database, 'Global Terrorism Database', 2009, <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=200901240017>; Global Terrorism Database, 'Global Terrorism Database', 2009, <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=200906140010>; UNHCHR Colombia 2010, 28; SGCAC 2010, at [132]; United Nations General Assembly, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, A/HRC/16/22, 3 February 2011, at [Annex 15a, 17d, 18] (UNHCHR Colombia 2011); SGCAC 2011, at [163]; Global Terrorism Database, 'Global Terrorism Database', 2011, <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=201103010029>; UNHCHR Colombia 2012, at [Appendix 1, 10h]; SGCAC 2012, at [133]; Watchlist on Children and Armed Conflict, No One to Trust: Children and Armed Conflict in Colombia (New York: Watchlist on Children and Armed Conflict, April 2012), 30; SGCAC Colombia 2012, at [39, 42]; United Nations General Assembly, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, A/HRC/22/17/Add.3, 7 January 2013, at [85]; GCPEA, *Education under*

explosive ordnance because of their military use, or proximity to military bases and police stations, or because of their use as polling stations.⁹⁵⁷

Fig. 3 Table showing the number of, and details of, incidents of the military use of educational institutions between 2009 and 2016

<u>Year of attacks</u>	<u>Number of attacks</u>	<u>Description of attacks</u>
2009 – 2012	75 ⁹⁵⁸	The ICRC recorded 75 cases of occupation of school facilities by all armed actors, including the State of Colombia.
2013 – 2017	18 ⁹⁵⁹	The GCPEA reported that FARC-EP used at least 18 schools for weapons storage. ELN and other NSAG also used schools as bases, while ELN also stationed troops in front of or near schools, placing students at risk, though the total number of such incidents is unclear.
2009 2010 2011 2012 2013	Unknown Unknown Unknown Unknown Unknown	Between 2009 and 2013, the UN reported incidents of military use of schools, but did not provide the numerical information for the amount of such incidents per year. ⁹⁶⁰
2014	11 ⁹⁶¹	The UN reported that there were 11 cases of military use in 2014, at least one of which was committed by the armed forces and at least one by FARC-EP.

Attack: 2014 (n102), 126; HRW, ‘Colombia: FARC Battering Afro-Colombian Areas - Atrocities by Guerrillas, Criminal Groups Go Unpunished’ (2014) <<https://www.hrw.org/news/2014/07/30/colombia-farc-battering-afro-colombian-areas>>; Committee on the Rights of the Child, Concluding observations on the combined fourth and fifth periodic reports of Colombia, CRC/C/COL/CO/4-5, 6 March 2015, at [51e] (CRC Concluding Observations Colombia 2015); SGCAC 2015, at [222]; SGCAC 2016, at [181]; SGCAC Colombia 2016, at [36]; United Nations General Assembly, Annual report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, A/HRC/34/3/Add.3, 23 March 2017, at [53] (UNHCHR Colombia 2017); SGCAC 2017, at [54]; GCPEA, *Education under Attack: 2018* (n13), 105-107
⁹⁵⁷ SGCAC Colombia 2012, at [42]; SGCAC Colombia 2016, at [36]
⁹⁵⁸ GCPEA, *Education under Attack: 2014* (n102), 127
⁹⁵⁹ GCPEA, *Education under Attack: 2018* (n103), 108
⁹⁶⁰ SGCAC 2010, at [132]; SGCAC 2011, at [162]; SGCAC Colombia 2012, at [43]; SGCAC 2012, at [134]; SGCAC 2013, at [177]; SGCAC 2014, at [168]
⁹⁶¹ SGCAC 2015, at [222]

2015	5 ⁹⁶² - 8 ⁹⁶³	The UN reported 5 cases of military use of schools, one by FARC-EP and four by the Colombian military. The GCPEA reported three incidents in 2015. It is unclear whether these overlap with the 5 reported by the UN, or whether they are 3 additional incidents.
2016	3 ⁹⁶⁴ - 7 ⁹⁶⁵	The UN verified 3 cases of military use. The GCPEA reported two cases of military use by the Colombian armed forces, as well as two incidents by NSAG, one by ELN and another by a post-demobilisation NSAG. It is unclear whether these overlap with the 3 reported by the UN, or whether they are 4 additional incidents.

Three patterns and trends in respect of the military use of schools in Colombia between 2009 and 2016 can be identified. Firstly, each year schools were used for military purposes by the Colombian armed forces and police.⁹⁶⁶ Secondly, schools were used for military purposes by NSAG, with incidents mainly being attributed to FARC-EP, but also ELN.⁹⁶⁷ Thirdly, the military use of schools by the Colombian armed forces and NSAG resulted in schools being damaged and minefields being left

⁹⁶² SGCAC 2016, at [181]

⁹⁶³ GCPEA, *Education under Attack: 2018* (n103), 109

⁹⁶⁴ SGCAC 2017, at [54]

⁹⁶⁵ GCPEA, *Education under Attack: 2018* (n103), 109; See HRW (n999)

⁹⁶⁶ UNHCHR Colombia 2010, at [73, Annex, 29]; 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, 21 June 2010, at [39] (CRC Concluding observations Colombia 2010); SGCAC 2010, 13 April 2010, at [132]; UNHCHR Colombia 2011, at [86, Annex 19a, 19c]; SGCAC 2011, at [162]; UNHCHR Colombia 2012, at [79, 91]; SGCAC Colombia 2012, at [39, 43]; SGCAC 2012, at [134]; Watchlist (n983), 28-29; SGCAC 2013, at [177]; SGCAC 2014, at [168]; GCPEA, *Education under Attack: 2014* (n102), 106, 127; CRC Concluding Observations Colombia 2015, at [51e]; SGCAC 2015, at [222]; SGCAC 2016, at [181]; SGCAC Colombia 2016, at [38]; SGCAC 2017, at [54]; GCPEA, *Education under Attack: 2018* (n103), 108-109

⁹⁶⁷ SGCAC 2011, at [163]; UNHCHR Colombia 2012, at [Appendix 1, 10e]; SGCAC Colombia 2012, at [39, 42]; SGCAC 2014, at [168]; GCPEA, *Education under Attack: 2014* (n102); CRC Concluding Observations Colombia 2015, at [51e]; SGCAC 2016, at [38]; HRW, 'Colombia: Armed Groups Oppress Riverside Communities,' Human Rights Watch news release, June 7, 2017, <https://www.hrw.org/news/2017/06/07/colombia-armed-groups-oppress-riverside-communities> (Accessed 22/05/2018); GCPEA, *Education under Attack: 2018* (n13), 108-109

behind.⁹⁶⁸ The military use of schools appears to have been more common between 2009 and 2013, and seems to have reduced in frequency each year between, at least, 2014 and 2016. In addition to being used as bases from which to conduct military operations, NSAG also used schools for the purposes of storing weapons.⁹⁶⁹

On 26 May 2009, FARC-EP threatened several people in the indigenous Emera and Katio communities in Carmen de Atrato, Chocó, informing them that a number of antipersonnel mines had been laid around schools.⁹⁷⁰ As the focus of this chapter is on the obligations of States, it is not necessary to analyse whether FARC-EP has violated IHRL and IHL. The situation is clearly one that relates to targeting and precautions against the effects of attacks, as it involves the practice of mining educational institutions as part of a pattern and trend on the part of FARC-EP in particular, and precautionary measures on the part of States. As such both the active hostilities and security operations approaches would be applied, requiring that IHL be considered as the primary framework, and IHRL as the secondary framework. IHRL would reinforce the obligations of IHL and provide further content and specificity.⁹⁷¹ This is significant as IHRL provides a stronger level of protection in this situation.

As the perpetrator was FARC-EP, and not the State, few provisions of IHL apply directly to Colombia. However, the most important provision in this context is Article 4(3) of Additional Protocol II, assuming that the schools attacked were of primary and secondary level for those under the age of 15. Article 4(3) provides that in a NIAC, as a fundamental guarantee, children ‘shall be provided with the care and aid they

⁹⁶⁸ UNHCHR Colombia 2011, at [86]; SGCAC 2011, at [162]; Watchlist (n983), 28-29; SGCAC Colombia 2012, at [39, 42]; SGCAC 2013, at [177]; SGCAC 2014, at [168]; GCPEA, *Education under Attack: 2014* (n12), 126-128; SGCAC Colombia 2016, at [36, 38]

⁹⁶⁹ SGCAC 2015, at [222]; SGCAC Colombia 2016, at [38];

⁹⁷⁰ United Nations General Assembly, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, A/HRC/13/72, 4 March 2010, 28.

⁹⁷¹ Murray, *Guide*, (n12), at [5.35, 5.88]

require’, and that in particular, they should ‘receive an education’.⁹⁷² While the terms care and aid are not defined nor adequately particularised,⁹⁷³ at least in the context of education, it is clear that these terms require that Colombia protect a ‘fundamental guarantee’ to education for all children under 15. Article 77(1) of Additional Protocol I also explicitly provides that ‘Children shall be the object of special respect and shall be protected against any form of indecent assault’, though this obligation arguably applies to NIAC as a matter of customary law, in accordance with Rule 135 of the ICRC study.⁹⁷⁴ In order to protect the fundamental guarantee to education, the State would be required to de-mine the schools affected by the attack by FARC-EP. The mining of schools could be argued to be an indecent assault against children, as the term ‘any form’ allows for flexibility as to the meaning of indecent assault, and if considered to be applicable in a NIAC, better protects children from attacks that target them specifically.

These provisions can also be read in light of Article 58 of Additional Protocol I, which, of great importance, protects all students, and not just those under the age of 15. It is not clear from the information available whether the schools mined were for children aged 15 to 18, or whether they were universities. While not entirely clear on the facts available, it also appears as though the schools targeted were civilian objects, as the mines were planted as part of a wider threat to the indigenous community, and were not, for example, placed in the schools for storage purposes, which would make the schools a military objective.

The civilian status of the school is relevant as it requires the taking of precautions against the effects of attacks, requiring that States ‘take the other necessary precautions to protect the civilian population, individual civilians and civilian objects

⁹⁷² Additional Protocol II, Art 4(3)(a)

⁹⁷³ Protecting Children (n6) at [3.43.7, 3.54-3.54.1, 9.12.1]

⁹⁷⁴ ICRC Study, Rule 135

under their control against the dangers resulting from military operations'.⁹⁷⁵ While there are no equivalent provisions in Common Article 3 or Additional Protocol II, highlighting the weakness of the treaty-based protection of education in a NIAC in comparison to an IAC, Rule 22 of the ICRC study provides that the requirement to 'take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks' is a rule of customary status in an IAC and NIAC. The phrase 'any other necessary precautions' provides a high level of protection in this regard, as it is flexible enough to regulate the situation by requiring that Colombia take a range of steps to protect civilian students and teacher in the schools targeted, such as ensuring they are not located in or near the schools and the mines, and to protect the schools themselves by removing the mines.

Significant in this respect is that Article 58 also requires that States remove 'the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives', and while this obligation would be helpful in this context, Rule 24 of the ICRC study states that it is only arguable that rule is applicable in NIAC as a matter of customary IHL.⁹⁷⁶ It is clear that IAC benefit from greater protection in this regard, but the justification for this is not clear, as ensuring that civilians are removed from a school with numerous mines planted within it seems equally important whether an IAC or a NIAC. Interpreting this rules as failing to consider this an obligation in a NIAC seems counterproductive in light of the fact above-mentioned wider-ranging requirement to 'take all-feasible measure' would require this step to be taken. Clarification on this issue would, however, be beneficial for the protection of education in the context of deliberate and direct attack, while the development of IHL in this regard would be even better.

⁹⁷⁵ Additional Protocol I, Art 58

⁹⁷⁶ ICRC Study, Rules 22-24

These obligations should be read in light of IHRL. IHRL provides a complementary regulation of attacks against schools, though in a way that supplements and protects education to a far greater degree in the context of a NIAC. The setting out of a fundamental guarantee for education in Article 4(3) is in line with the wording of Article 13 of the ICESCR on the right to education, though the Covenant provides for the right to education for all and not just children and is therefore stronger. Article 13 of the ICESCR makes clear that each of the levels of education should be provided to all. This provision should be read alongside Article 2(2), and considered in light of the fact that Afro-Colombian and indigenous children were particularly affected by all grave violations reported on by the UN Secretary General on Children and Armed Conflict, including attacks on educational institutions.⁹⁷⁷ So it is clear that, while there is no explicit protection for indigenous peoples, such individuals would be protected under the term ‘other status’, as this is broad and all encompassing.

It is clear on the facts available that the practice of threatening several people from an indigenous community and informing them that mines were planted in schools is discriminatory in nature, and while it is not clear whether it was a primary, secondary, higher or fundamental educational institutions that were deliberately and directly mined, this is irrelevant. Significantly, IHRL provides for the principle of non-discrimination in education in a strong manner, as this is clearly set out within the ICESCR, but also because it is a minimum core obligation that always remains applicable in a NIAC and is immediately realisable irrespective of available resources and means of the State. While the minimum core has been subject to extensive debate, and there have been various calls for its abandonment, it is clear that it serves a

⁹⁷⁷ SGCAC Colombia 2012, at [6, 32]; SGCAC 2012, at [127]; SGCAC 2013, at [179]; SGCAC 2014, at [164]; SGCAC 2015, at [218]; SGCAC 2016, at [183]; SGCAC Colombia 2016, at [9]

fundamental purpose in the context of NIAC, even when understood, as proposed in this thesis, to mean that some elements of the minimum core are immediately realisable while others are subject to progressive realisation. A particular strength of this being an immediately realisable minimum core obligation is that one does not have to embark on a complicated assessment as to progressive realisation and whether the maximum of available resources and means were utilised, as this is difficult to determine, despite increased consensus and clarity as to the meaning of such concepts.

This obligation is made clearer with reference to the tripartite typology and its relationship to the 4-A framework, and as such these concepts constitute useful tools for the evaluation as to whether Article 13 of the ICESCR was violated by the State. The State has obligations to protect and fulfil the availability, accessibility, acceptability and adaptability of education in this context of this attack. In respect of the obligation to protect the availability, accessibility, acceptability, and adaptability of education, while it is not clear on the facts, if the State were in a position to know of, and be able to prevent, the planting of the mines in the schools by FARC-EP, and it did nothing to do so, this would be a violation of Article 13 of the ICESCR. It would amount to non-compliance with the obligation to protect the availability and accessibility of education, where, respectively, the mines meant that there was no functioning educational institution available, or prevented safe access to the school for individuals protected by the immediately realisable principle of non-discrimination. Having learnt of this attack, where the State has done nothing to rectify the availability and accessibility of education, this would similarly amount to a violation of the immediate minimum core obligation to fulfil the right to education for indigenous peoples. Such steps to rectify the situation could include the provision of

an alternative building in which to conduct classes until the schools are de-mining. IHRL, therefore, provides a strong level of protection in the context of this attack.

If for example, the schools were conversely used for the military purpose of storing mines, in light of the pattern and trend identified above in respect of using schools to store weapons, schools would not benefit from the above IHL protections, though civilian students and teachers would continue to benefit from them. As IHRL is the secondary framework in this context, IHL would have to be interpreted in light of IHRL. As such, Colombia would need to protect education from the military use from NSAG, to ensure that schools are available and accessible. Similarly, it would also need to fulfil the right to education by adapting to the situation and providing education through some other means. The obligation to fulfil, however, is progressive, so individuals may legitimately be left without an education for some time.

4.3.3. Attacks on Students and Educational Personnel in Colombia

Fig. 4 Table showing the number of, and details of, children killed or injured as a result of explosive ordnance between 2009 and 2016 in Colombia

<u>Year of attacks</u>	<u>Number of attacks</u>	<u>Description of attack</u>
2009 – 2011	116 ⁹⁷⁸	The UN reported that between January 2009 and August 2011, according to the Presidential Programme for Comprehensive Action against Anti-personnel Mines, 116 children were victims of landmines and unexploded ordnance.
2011 – 2016	264 ⁹⁷⁹	The UN verified a further 117 cases of children killed and 147 cases of children injured between September 2011 and

⁹⁷⁸ SGCAC Colombia 2012, at [32]

⁹⁷⁹ SGCAC Colombia 2016, at [25]

		June 2016.
2014 – 2016	10 ⁹⁸⁰	The GCPEA reported that between January 2014 and December 2016 there were 10 incidents involving land mines planted in schools or along schools routes, and that students were gravely injured in these attacks.
2009	33 ⁹⁸¹	The UN reported that between January and October 2009, anti-personnel mines resulted in the deaths of 9 children and injury of 24 children.
2010	18 ⁹⁸²	The UN reported that between January and November 2010 2 girls and 16 boys were injured by landmines.
2011	39 ⁹⁸³	The UN reported that at least 32 children had been injured and 7 killed by anti-personnel mines and explosive remnants of war.
2012	65 ⁹⁸⁴	The UN reported that at least 52 children were injured and 13 children killed by anti-personnel mines or explosive remnants of war.
2013	165 ⁹⁸⁵	The UN reported that at least 43 children were killed and 83 maimed during attacks by NSAG, and that 11 children were killed and 28 maimed by anti-personnel mines or explosive remnants of war. ⁹⁸⁶
2014	69 ⁹⁸⁷	The UN reported that at least nine children were killed and 60 maimed. These were mostly landmine incidents.
2015	22 ⁹⁸⁸	The UN verified the killing of 12 children and maiming of 10, mainly as a result of landmines.

⁹⁸⁰ GCPEA, *Education under Attack: 2018* (n103), 107

⁹⁸¹ SGCAC 2010, at [130]

⁹⁸² SGCAC 2011, at [157]

⁹⁸³ SGCAC 2012, at [131]

⁹⁸⁴ SGCAC 2013, at [175]

⁹⁸⁵ SGCAC 2014, at [166]

⁹⁸⁶ Ibid, at [166]

⁹⁸⁷ SGCAC 2015, at [221]

⁹⁸⁸ SGCAC 2016, at [179]

2016	8 ⁹⁸⁹	The UN verified the killing of 6 children and the maiming of 2 children by landmines and unexploded ordnances.

One pattern and trend is identifiable in respect of attacks against students between 2009 and 2016 in Colombia: each year there were incidents of children being killed or injured as a result of landmines and explosive ordnance. Such attacks have been attributed mainly to FARC-EP but also ELN.⁹⁹⁰ As established above, there was a significant practice of targeting schools and school routes with landmines and explosive ordnance, and the UN reported that between September 2011 and June 2016 ‘cases of children killed or maimed by antipersonnel mines and unexploded ordnance near or within schools were a particular concern’.⁹⁹¹ The numerical data above does not, however, make clear how many children were killed or injured as a result of the specific practice of planting landmines and explosive ordnance in or near schools. However, it is important to highlight the frequency of incidents where children were killed or injured by landmines and explosive ordnance, as a result of the likeliness of children being killed or injured due to the practice of targeting schools with such devices.

While the true scale of students killed or injured as a result of landmines and explosive ordnance planted in or near schools within schools is unclear, such incidents were at least a problem between 2011 and 2016. The total number of children killed or injured by landmines and explosive ordnance suggests that such incidents were likely to have been a problem throughout the entirety of the reporting period, being a

⁹⁸⁹ SGCAC 2017, at [52]

⁹⁹⁰ SGCAC 2010, at [130]; SGCAC 2011, at [157]; SGCAC Colombia 2012, at [26, 33]; SGCAC 2012, at [131]; Watchlist (n983), 30; SGCAC 2013, at [175]; SGCAC 2014, at [166]; GCPEA, *Education under Attack: 2014* (n102), 106, 127; SGCAC 2015, at [221]; SGCAC 2016, at [179]; SGCAC Colombia 2016, at [25, 27]; SGCAC 2017, at [52]

⁹⁹¹ SGCAC Colombia 2016, at [27-28]

particular problem in 2012 and 2013, and with a downward trend at least between 2014 and 2016. The sharp decrease in 2016 has been attributed to the 2015 de-mining agreement between the Government and FARC-EP.⁹⁹²

Fig. 5 Table showing the number of, and details of, teachers killed or threatened between 2009 and 2016 in Colombia

<u>Year of attacks</u>	<u>Number of teachers killed</u>	<u>Description of attack</u>	<u>Number of teachers threatened</u>	<u>Description of attack</u>
2009 – 2011	Unknown	The UN reported that between January 2009 and August 2011 teachers were attacked. Though the number of such attacks is not specified. ⁹⁹³	1007 - 1086 ⁹⁹⁴	The Ministry of Education recorded 1086 death threats made against teachers, and ENS recorded 1007.
2009 – 2013	140 ⁹⁹⁵	The GCPEA reported that 140 teachers were killed according to the Colombian Ministry of Education.	1,086 ⁹⁹⁶	The GCPEA reported that 1,086 teachers received death threats according to the Ministry of Education. ⁹⁹⁷
2011 – 2016	13 ⁹⁹⁸	Between September 2011 and June 2016,	41 ⁹⁹⁹	There were 41 allegations of teachers being

⁹⁹² SGCAC 2017, at [52]

⁹⁹³ SGCAC Colombia 2012, at [41]

⁹⁹⁴ GCPEA, *Education under Attack: 2014* (n102), 126, 129

⁹⁹⁵ Ibid, 14, 43, 124.

⁹⁹⁶ Ibid, 14, 43, 124

⁹⁹⁷ Ibid, , 14, 43, 124

⁹⁹⁸ SGCAC Colombia 2016, at [37]

⁹⁹⁹ Ibid, at [37]

		the UN reported that there were 13 allegations of teachers being killed.		threatened.
2009	34 ¹⁰⁰⁰ - 48 ¹⁰⁰¹	According to the Ministry of Education, 34 teachers, both unionised and non-unionised, were killed. The GCPEA reported that the Escuela Nacional Sindical ¹⁰⁰² recorded 21 murders of unionised teachers, and according to the Federación Colombiana de Educadores, ¹⁰⁰³ another teachers union, 27 of its members were killed.	135 - 243 ¹⁰⁰⁴	The Ministry of Education recorded 135 threats, while ENS recorded 243.
2010	22 ¹⁰⁰⁵ - 55 ¹⁰⁰⁶	According to the Ministry of Education, 40 teachers, both unionised and non-unionised, were killed. ¹⁰⁰⁷ The UN reported that 22 teachers were killed. The GCPEA reported	284 - 334 ¹⁰⁰⁸	The Ministry of Education recorded 334 threats, and ENS 284.

¹⁰⁰⁰ GCPEA, *Education under Attack: 2014* (n12), 126

¹⁰⁰¹ Ibid, 126

¹⁰⁰² Hereinafter ENS

¹⁰⁰³ Hereinafter FECODE

¹⁰⁰⁴ GCPEA, *Education under Attack: 2014* (n102), 126, 129

¹⁰⁰⁵ SGCAC Colombia 2012, at [41]

¹⁰⁰⁶ GCPEA, *Education under Attack: 2014* (n102), 126

¹⁰⁰⁷ GCPEA, *Education under Attack: 2014* (n102), 126

¹⁰⁰⁸ Ibid, 126, 129

		that ENS recorded 28 murders of unionised teachers, and FECODE reported that 27 of its members were killed.		
2011	20 ¹⁰⁰⁹ - 37 ¹⁰¹⁰	According to the Ministry of Education, 36 teachers, both unionised and non-unionised, were killed. ¹⁰¹¹ Watchlist on Children and Armed Conflict reported that during the first half of 2011, in the province of Cordoba alone, 20 teachers were killed. The GCPEA reported that ENS recorded 16 murders of unionised teachers, and FECODE reported that 21 of its members were killed.	299-3000 ¹⁰¹²	FECODE reported that more than 3,000 threats against teachers in 2011, while the Ministry of Education recorded 310 threats, and ENS 299.
2012	17 ¹⁰¹³ - 30 ¹⁰¹⁴	According to the Ministry of Education, 30 teachers, both unionised and non-unionised, were killed. The	181 - 2000 ¹⁰¹⁵	FECODE reported 2,000 reported threats between January and September

¹⁰⁰⁹ Watchlist (n983), at [29]

¹⁰¹⁰ GCPEA, *Education under Attack: 2014* (n102), 126

¹⁰¹¹ Ibid, 126

¹⁰¹² Ibid, 126, 129

¹⁰¹³ Ibid, 126

¹⁰¹⁴ Ibid, 126

¹⁰¹⁵ Ibid 126, 129

		GCPEA reported that ENS recorded 4 murders of unionised teachers, and FECODE reported that 13 of its members were killed.		2012, while the Ministry of Education recorded 287 threats in 2012, and ENS 181.
2013	5 ¹⁰¹⁶	The UN reported that 5 teachers were killed.	350 ¹⁰¹⁷	Between January and September 2013, around 350 teachers were threatened according to the Ministry of Education.
2014	3 ¹⁰¹⁸	The UN reported that 3 teachers were killed.	82 ¹⁰¹⁹	The GCPEA reported that the Medellin prosecutor's office found that 82 teachers in 63 institutions were threatened.
2015	2 ¹⁰²⁰	The UN reported that at least 2 teachers were killed.	24 ¹⁰²¹	The GCPEA reported threats against 24 teachers in 2015.
2016	1 ¹⁰²²	The GCPEA reported the killing of a teacher and vice president of a local teachers' union.	Unknown	

¹⁰¹⁶ SGCAC 2014, at [168]

¹⁰¹⁷ Ibid 126, 129

¹⁰¹⁸ SGCAC 2015, at [222].

¹⁰¹⁹ GCPEA, *Education under Attack: 2018* (n13), 107

¹⁰²⁰ SGCAC 2016, at [181]

¹⁰²¹ GCPEA, *Education under Attack: 2018* (n13), 107

¹⁰²² GCPEA, *Education under Attack: 2018* (n103), 108

Two patterns and trends are identifiable in respect of attacks against educational personnel between 2009 and 2016 in Colombia. Firstly, each year teachers were killed by NSAG. While the UN does not specify the number of deaths each year in their yearly reports, they confirm that such deaths occurred each year between 2010 and 2016.¹⁰²³ This confirmation strengthens the reliability of the above data. Attacks were attributed to FARC-EP, ELN and post demobilisation armed groups.¹⁰²⁴ Between 2013 and 2016, perpetrators were reported to be more often post-demobilisation groups, rather than FARC-EP or ELN.¹⁰²⁵ Secondly, the use of threats by NSAG towards teachers and other educational personnel was particularly widespread, occurring every year. Threats were attributed mainly to FARC-EP and ELN, but also other NSAG.¹⁰²⁶ This indicates that the killing of teachers was an issue within Colombia between 2009 and 2016, with a general downward trend in the number of teachers killed per year. The GCPEA, however, reported that it ‘was unable to include Ministry of Education and teachers’ union information on threats to teachers’ in Education Under Attack 2018, and as a result ‘comparisons with similar information

¹⁰²³ SGCAC Colombia 2012, at [39, 41]; SGCAC 2012, at [133]; SGCAC 2013, at [177]; SGCAC 2014, at [168]; SGCAC 2015, at [222]; SGCAC 2016, at [181]; SGCAC Colombia 2016, at [37]; SGCAC 2017, at [54]

¹⁰²⁴ UNHCHR Colombia 2010, at [25, 67]; CRC Concluding observations Colombia 2010, at [39]; UNHCHR Colombia 2011, at [12, 80]; UNHCHR Colombia 2012, at [19]; SGCAC Colombia 2012, at [41]; Watchlist (n983), at [29]; GCPEA, *Education under Attack: 2014* (n12), 14, 43, 124, 126, 127; United Nations General Assembly, *Report of the United Nations High Commissioner for Human Rights: Situation of human rights in Colombia A/HRC/25/19/Add*, 24 January 2014, at [70]; SGCAC 2014, at [168]; United Nations General Assembly, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, A/HRC/28/3/Add.3*, 23 January 2015, at [48] (UNHCHR Colombia 2015); SGCAC 2015, at [222]; SGCAC 2016, at [181]; SGCAC Colombia 2016, at [37]

¹⁰²⁵ GCPEA, *Education under Attack: 2018* (n103), 107

¹⁰²⁶ SGCAC Colombia 2012, at [39, 41]; SGCAC 2012, at [133]; SGCAC 2013, at [177]; SGCAC 2014, at [168]; GCPEA, *Education under Attack: 2014* (n12), 14, 43, 124, 126-129; CRC Concluding Observations Colombia 2015, at [51e]; Committee against Torture, *Concluding observations on the fifth periodic report of Colombia, CAT/C/COL/CO/5*, 29 May 2015, at [26]; SGCAC 2015, at [222]; SGCAC 2016, at [181]; SGCAC Colombia 2016, at [37]; SGCAC 2017, at [54]

from the 2009-2013 period were not possible'.¹⁰²⁷ As, it may be that such threats are not as well reported and that this is still a particularly problematic issue.

Given the problematic nature of threats in conflict, the specific incident chosen to examine relates to this issue. In August 2011, 44 teachers in Córdoba were threatened by NSAG, of which at least 18 resorted to displacement for protection.¹⁰²⁸ As the focus of this chapter is on the obligations of States, it is again not necessary to analyse whether FARC-EP has violated IHRL and IHL. In this situation, given it also relates to the targeting of teachers by NSAG and precautions against the effects of attack by States, both the active hostilities and security operations approaches would be applied. However, while Article 13 of Additional Protocol II explicitly prohibits threats towards civilians in the context of NIAC,¹⁰²⁹ as the threats were committed by NSAG, it appears as though the only rule applicable is Rule 22 of the ICRC study which requires as a matter of customary law the State 'take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks' is a rule of customary status in an IAC and NIAC. It could be argued that States would be required to take all feasible precautions to protection teachers from threats. As such, IHRL would provide a substantial amount of protection for teachers subject to threats in a NIAC. This emphasises the importance of the continuity of the right to education during situations of conflict, as it shows that IHRL can protect education above and beyond IHL. The issue of threats is significant. As evidenced in the above example, teachers who are threatened will flee, which will in turn disrupt or prevent education altogether. Article 13(2)(e) clearly instructs States to continuously

¹⁰²⁷ GCPEA, *Education under Attack: 2018* (n103), 107

¹⁰²⁸ United Nations General Assembly Security Council, *Children and armed conflict: Report of the Secretary-General, A/66/782-S/2012/261*, 26 April 2012, at [133].

¹⁰²⁹ Additional Protocol II, Art 13

improve the material conditions of teaching staff.¹⁰³⁰ It is also acknowledged in General Comment 13 that unacceptably low levels of material conditions and teaching staff are major obstacles to the full realization of students' right to education'.¹⁰³¹ As such it is clear that threats against teachers forces teachers to work in conditions not conducive to a quality education, or flee the situation, also impacting the realisation of the right to education for students. However, continuously improving conditions is likely to be more difficult during a NIAC in the face of persistent threats, and conditions will likely instead deteriorate. Nonetheless, States should clearly strive, in accordance with the ICESCR and customary IHL, to ensure the best possible conditions during a NIAC in order to fully realise the right to education. In achieving this progressively realisable obligation, the tripartite obligation framework once again clarifies what is expected of States. They should not only protect the availability, accessibility, acceptability, and adaptability of the right to education, by taking steps to prevent threats towards teachers.¹⁰³² Where education is prevented due a systematic use of threats towards them, States should take steps to fulfil the right to education to the maximum of their available resources.

4.3.4. The Military Recruitment and Use of Children

Fig. 6 Table showing the number of, and details of, children recruited and used for military purposes between 2009 and 2016 in Colombia

<u>Year of attacks</u>	<u>Number of attacks</u>	<u>Description of attack</u>
2009 – 2011	343 ¹⁰³³	343 cases of the recruitment and use of children were verified by the UN, and reported recruitment campaigns were

¹⁰³⁰ ICESCR, Art 3(2)(e)

¹⁰³¹ General Comment 13, at [27]

¹⁰³² For the purpose of maintaining focus, other rights, such as the right to life, will not be examined.

¹⁰³³ SGCAC Colombia 2012, at [15, 19]

		conducted in schools.
2011 – 2016	1556 ¹⁰³⁴	The UN verified a total of 1,556 cases of recruitment and use of children, and reported a progressive annual reduction in verified cases.
2009	215 ¹⁰³⁵	The UN further reported widespread and systematic recruitment and use of children in 2009 and 2010, and schools were a major venue for recruitment by NSAG. A total of 215 children had been separated from NSAG.
2010	338 ¹⁰³⁶	The UN further reported widespread and systematic recruitment and use of children in 2009 and 2010, and schools were a major venue for recruitment by NSAG. 338 children, 114 girls and 224 boys had been separated from NSAG.
2011	300 ¹⁰³⁷	The UN reported widespread and systematic recruitment and use of children by NSAG, and acknowledged that ‘although the actual scale and scope remains unknown, 300 cases of recruitment and use were reported’.
2012	300 ¹⁰³⁸	The UN similarly reported widespread and systematic recruitment and use of children by NSAG, again acknowledging that ‘although the full scale and scope remain unknown, around 300 cases of recruitment and use were reported’.
2013	81 ¹⁰³⁹	The UN verified 81 cases of recruitment and use of children by NSAG.
2014	343 ¹⁰⁴⁰	In 2014, the UN verified 343 cases of recruitment and use of children by NSAG.
2015	289 ¹⁰⁴¹	The UN verified 289 cases of child

¹⁰³⁴ SGCAC Colombia 2016, at [17-18]

¹⁰³⁵ SGCAC 2010, at [127-128]

¹⁰³⁶ SGCAC 2011, at [153-156, 163]

¹⁰³⁷ SGCAC 2012, at [128]

¹⁰³⁸ SGCAC 2013, at [173]

¹⁰³⁹ SGCAC 2014, at [165]

¹⁰⁴⁰ SGCAC 2015, at [219]

¹⁰⁴¹ SGCAC 2016, at [178]

		recruitment and use by armed groups in 2015.
2016	230 ¹⁰⁴²	the UN verified the recruitment and use of 151 boys and 79 girls.

Three patterns and trends in relation to the military recruitment and use of children between 2009 and 2016 can be identified in Colombia. Children were recruited and used for military purposes by Colombia. Children were used for intelligence purposes by the Colombian armed forces in 2009 and 2011 and in 2015 and 2016.¹⁰⁴³ Significantly, between 2009 and 2011, there were incidents where children were killed or threatened by NSAG due to the suspicion of them being informants for the State armed forces.¹⁰⁴⁴ Secondly, each year between 2009 and 2016, children, including children under the age of 15, were recruited for military purposes by NSAG, with some of the recruitment taking place in schools and along schools routes, and with attacks often being attributed to FARC-EP, but also ELN and post-demobilisation groups.¹⁰⁴⁵ Children were used by NSAG for various reasons, including for direct participation in hostilities, for intelligence purposes whereby children acted as spies

¹⁰⁴² SGCAC 2017, at [51]

¹⁰⁴³ SGCAC 2010, at [129]; UNHCHR Colombia 2011, at [77, 84, Annex 6g, 10f, 16]; SGCAC 2011, at [156]; UNHCHR Colombia 2012, at [79]; SGCAC Colombia 2012, at [22]; SGCAC 2012, at [130]; CRC Concluding Observations Colombia 2015, at [65(e)]; SGCAC Colombia 2016, at [23]; United Nations Human Rights Committee, Concluding Observations on the seventh periodic report of Colombia, CCPR/C/COL/CO/7, 17 November, 2016, at [40] (UNHRC Colombia 2016)

¹⁰⁴⁴ SGCAC 2010, at [130]; CRC Concluding observations Colombia 2010, at [19, 26, 30, 39]; SGCAC Colombia 2012, at [25]

¹⁰⁴⁵ SGCAC 2010, at [127-128]; UNHCHR Colombia 2010, at [44, 60-61, 69, Annex, 27, 28, 29]; SGCAC 2011, at [154-155]; UNHCHR Colombia 2012, at [76-77, 84-85, Appendix 1, 9c, 10e, 10j, 13g, 13p]; SGCAC Colombia 2012, at [16-21, 23, 31]; SGCAC 2012, at [129]; Watchlist (n983), 29; SGCAC 2013, at [173-174]; United Nations General Assembly, Report of the Working Groups on the Universal Periodic Review: Colombia, A/HRC/24/6, 4 July 2013, at [105] (UPR Colombia 2016); SGCAC 2014, at [165]; GCPEA, *Education under Attack: 2014* (n12), 20, 54, 106, 124, 128; UNHCHR Colombia 2015, at [49-50]; United Nations General Assembly Security Council, SGCAC 2015, at [219-220]; SGCAC 2016, at [178]; SGCAC Colombia 2016, at [18-19, 21]; UNHRC Colombia 2016, at [40]; UNHCHR Colombia 2017, at [19, 99]; SGCAC 2017, at [50-51, 60]; Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Colombia, E/C.12/COL/CO/6, 19 October 2017, at [43]; GCPEA, *Education under Attack: 2018* (n13), 109-110; Mónica Hurtado, Ángela Iranzo Dosdad and Sergio Gómez Hernández, 'The relationship between human trafficking and child recruitment in the Colombian armed conflict' (2018) 39 Third World Quarterly 941, 941-942, 946, 952

and informants, to recruit other children, for logistics activities, and for running drug business.¹⁰⁴⁶ NSAG also used recruited children, particularly girls, for sexual purposes.¹⁰⁴⁷ Thirdly, at least between 2009 and 2012, there was a pattern of threats of military recruitment and use towards children by FARC-EP, ELN and post-demobilisation groups.¹⁰⁴⁸ Afro-Colombian and indigenous children were particularly affected by all grave violations reported on by the UN Secretary General on Children and Armed Conflict, which includes the military recruitment of children, with recruitment by FARC-EP and ELN mostly affecting these communities in rural areas.¹⁰⁴⁹ Conversely, ‘post-demobilization groups and other local armed groups frequently recruited and used children in marginalized urban areas’.¹⁰⁵⁰ It is not clear how many new cases of recruitment there were each year, but the table clearly indicates the prevalence of the military recruitment and use of children within Colombia between 2009 and 2016, with such attacks decreasing in frequency from 2015 onwards, in line with the adoption of the peace agreement. This emphasises the importance of peace for the protection of education from deliberate and direct attack.

On February 8, 2011, in the village of Concha Medio, Anorí, Antioquia, FARC-EP had been occupying a school and carried out political propaganda and military training activities with the students. Some of these children were victims of

¹⁰⁴⁶ UNHCHR Colombia 2010, 27; SGCAC 2010, at [127]; SGCAC 2011, at [154-155, 157]; SGCAC Colombia 2012, at [19]; GCPEA, *Education under Attack: 2014* (n12), 20, 54, 124, 128; SGCAC 2015, at [221]; SGCAC Colombia 2016, at [26]; Hurtado, Dosdad & Hernández (n1048), 945

¹⁰⁴⁷ UNHCHR Colombia 2010, 25; SGCAC 2010, at [127]; SGCAC 2011, at [160]; SGCAC Colombia 2012, at [132]; CRC Concluding Observations Colombia 2015, at [65(c)]; SGCAC 2013, at [176]; SGCAC Colombia 2016, at [32]; Hurtado, Dosdad & Hernández (n1048), 945

¹⁰⁴⁸ UNHCHR Colombia 2010, at [69]; SGCAC 2010, at [127]; SGCAC 2011, at [154]; UNHCHR Colombia 2012, at [76-77, Appendix 1 10c, 11n, 13g]; SGCAC 2013, at [174]

¹⁰⁴⁹ United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, CERD/C/COL/CO/14, 28 August 2009, at [14]; SGCAC 2010, at [127]; CRC Concluding observations Colombia 2010, at [19, 26, 30]; SGCAC 2011, at [151]; SGCAC Colombia 2012, at [6, 14, 21, 32]; SGCAC 2012, at [127]; SGCAC 2013, at [179]; UPR Colombia 2016, at [80, 107]; SGCAC 2014, at [164]; CRC Concluding Observations Colombia 2015, at [57, 65]; SGCAC 2015, at [218]; SGCAC 2016, at [183]; SGCAC Colombia 2016, at [9, 19]; UNHRC Colombia 2016, at [40]

¹⁰⁵⁰ SGCAC Colombia 2016, at [19]; CRC Concluding Observations Colombia 2015, at [65];

recruitment.¹⁰⁵¹ The differences between IHL and IHRL on the recruitment and use of children make the law complex.¹⁰⁵² However, the argument of Murray is reiterated, namely, in respect of the protection of civilians, IHRL significantly expands on IHL.¹⁰⁵³ Therefore, while IHL protects children under the age of 15 from military recruitment or use in States' armed forces, States Parties to the OPCRC 'must raise the age of recruitment to a minimum of 16, taking into account the special protections extended to persons under the age of 18, must raise the conscription age to 18, and must take all feasible measures to ensure that members of their armed forces who have not reached the age of 18 do not take a direct part in hostilities'.¹⁰⁵⁴

Additionally, in respect of the States IHRL obligations when faced with the issue of military recruitment of children by NSAG, Article 4 of the OPCRC places obligations on the State to prevent the recruitment and use of children under the age of 18 years by NSAG.¹⁰⁵⁵ This is a highly important provision for the protection of children in NIAC where the military recruitment and use of children by NSAG is widespread, and it should influence the interpretation of the IHL obligations as such. However, the OPCRC is criticised as imposing a double standard, in that the standard expected from NSAG under Article 4 is much higher than that expected of States, as the OPCRC permits the voluntary recruitment of those under the age of eighteen. This weakness could significantly undermine the OPCRC. Protecting Children recommends that States should be encouraged to adopt the higher standard attributed to NSAG, and that international law could be developed by heightening the standards

¹⁰⁵¹ United Nations General Assembly, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, A/HRC/19/21/Add.3, 21 January 2012, 27.

¹⁰⁵² Ibid, at [4.117, 9.12.5]

¹⁰⁵³ Murray, *Guide*, (n12), at [9.02]

¹⁰⁵⁴ Murray, *Guide*, (n12), at [9.52]

¹⁰⁵⁵ OPCRC, Art 4

for States to match those for NSAG.¹⁰⁵⁶ States and NSAG should be encouraged to uphold the higher standard. However, where the double standard would result in them disregarding IHRL entirely, they should be encouraged to uphold, at least, the same standard as States. This is an inconsistency that requires urgent attention. IHRL, nonetheless, imposes a higher obligation on States than IHL and offers increased protection in a NIAC.

4.4. The Democratic Republic of Congo

4.4.1. The Context

The UN has referred to a state of armed conflict in the DRC between 2009 and 2016.¹⁰⁵⁷ The DRC has experienced a range of IAC and NIAC since 1993, with a multitude of NSAG involved.¹⁰⁵⁸ However, the armed conflict during the period between 2009 and 2016 was between the DRC and a wide range of NSAG operating within the territory of the DRC, as such this armed conflict is a NIAC.

Armed conflict emerged in the eastern province of North Kivu in 1993 due to disputes over land use and ownership between different ethnic communities, exacerbated in 1994 by a flood of refugees following the Rwandan genocide.¹⁰⁵⁹ Among the refugees were members who had played a pivotal role in the Rwandan genocide.¹⁰⁶⁰ There were direct interventions by Rwanda and Uganda, justified on the

¹⁰⁵⁶ Ibid, at [9.13.8]

¹⁰⁵⁷ UN Secretary-General for Children and Armed Conflict, 'Countries Where Children are Affected by Armed Conflict' <<https://childrenandarmedconflict.un.org/countries-caac/>> accessed 13 April 2018. The reports of the UN Secretary General for Children and Armed Conflict present 'information about grave violations committed against children in 20 conflict situations', including the DRC. See United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo, S/2010/369, 9 July 2010, at [1] (SGCAC DRC 2010); SGCAC 2011, at [90] SGCAC 2013, at [56]; SGCAC 2014, at [58]; United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo, S/2014/453, 30 June 2014, Summary (SGCAC DRC 2014); SGCAC 2015

¹⁰⁵⁸ For the purpose of maintaining focus, only the conflict between 2009 and 2016 will be examined, and only the NSAG relevant for the purpose of this chapter will be discussed.

¹⁰⁵⁹ Louise Arimatsu, 'The Democratic Republic of Congo 1993-2010' in Elizabeth Wilmshurst, *International Law and the Classification of Conflicts* (Oxford University Press: Oxford, 2012), 148-149

¹⁰⁶⁰ Ibid, 149

grounds of national security.¹⁰⁶¹ In 1997, President Mobutu fled, and on the same day Laurent Kabila proclaimed himself to be president.¹⁰⁶² The country was renamed from Zaire to the DRC,¹⁰⁶³ and the east of the DRC remained volatile.¹⁰⁶⁴ In 1999, the Lusaka ceasefire agreement was entered into, and the UN Security Council established the United Nations Organization Mission in the Democratic Republic of Congo,¹⁰⁶⁵ a ‘peace-keeping’ military force with a mandate to monitor the cessation of hostilities and use force in self-defence to protect civilians.¹⁰⁶⁶ However, serious fighting continued and President Kabila was assassinated in 2001. His son, Joseph Kabila, was sworn in as the new president.¹⁰⁶⁷

In 2002, Rwanda withdrew from the DRC, Uganda began to withdraw, and a transition government was established, but fighting continued in the east, and high levels of violence between NSAG were also documented in the Orientale and Katanga provinces, particularly in Ituri in the Orientale Province.¹⁰⁶⁸ One of the groups operating in this region at the time was the *Force de Résistance Oatritique en Ituri*.¹⁰⁶⁹ Soon after, the armed forces were renamed the *Forces Armées de la République Démocratique du Congo*,¹⁰⁷⁰ and individuals involved in the Rwandan genocide who fled into the DRC alongside Rwandan refugees regrouped to form the *Democratic Forces for the Liberation of Rwanda*.¹⁰⁷¹ Due to the failure of President Kabila in disarming FDLR insurgents, large-scale armed conflict affected the province

¹⁰⁶¹ Ibid, 157

¹⁰⁶² Ibid, 159

¹⁰⁶³ MONUSCO, ‘Background’ at <https://monusco.unmissions.org/en/background> (accessed 27 February 2017)

¹⁰⁶⁴ Arimatsu (n1065), 67

¹⁰⁶⁵ MONUSCO (n1069)

¹⁰⁶⁶ Arimatsu (n1065), 170

¹⁰⁶⁷ Ibid, 171

¹⁰⁶⁸ Ibid 171, 188

¹⁰⁶⁹ Ibid, 177; Hereinafter FRPI

¹⁰⁷⁰ Hereinafter FARDC

¹⁰⁷¹ Arimatsu (n1065), 171; Hereinafter FDLR

of North Kivu from the latter half of 2008 until early 2009.¹⁰⁷² Also, the *Congrès national pour la défense du peuple* was formed in 2007 in North Kivu, ostensibly to champion the rights of the Congolese Tutsi community, who extended their control over territory throughout 2007, stretching up the to the Congolese border with Uganda. By summer 2008 tensions escalated between the CNDP and FARDC.¹⁰⁷³ In January 2009 CNDP issued a declaration announcing the end of hostilities between them and the FARDC, and an agreement was reached for the integration of CNDP forces into FARDC to combat the FDLR, which paved the way for the fast-track integration process of NSAG into FARDC, including *Alliance des patriotes pour un Congo libre et souverain*,¹⁰⁷⁴ *Patriotes résistants congolais*,¹⁰⁷⁵ and Mai-Mai groups.¹⁰⁷⁶ On 23 March 2009, CNDP and other NSAG of North and South Kivu, except FDLR, signed a peace agreement. However, the APCLS denounced ‘preferential treatment’ of CNDP and the PARECO during the integration process.¹⁰⁷⁷ Similarly, at the end of June 2009, the PARECO leader rejected the integration process, claiming that it provided preferential treatment of CNDP.¹⁰⁷⁸ Additionally, CNDP appeared to have maintained a parallel chain of military and political command within FARDC, and in late 2009, the desertion of several CNDP cadres from FARDC units in North Kivu were reported.¹⁰⁷⁹ Additionally, the *Lords Resistance Army* began committing mass atrocities in Northern Congo in December 2008,¹⁰⁸⁰ and continued to show a significant capacity to commit grave violations against local populations

¹⁰⁷² Ibid, 185

¹⁰⁷³ Ibid, 186

¹⁰⁷⁴ Hereinafter APCLS

¹⁰⁷⁵ Hereinafter PARECO

¹⁰⁷⁶ SGCAC DRC 2010, at [2-4]; Arimatsu (n1065), 187; SGCAC DRC 2014, at [8]

¹⁰⁷⁷ Hereinafter PARECO

¹⁰⁷⁸ SGCAC DRC 2010, at [2-5]

¹⁰⁷⁹ SGCAC DRC 2010, at [8-10]; SGCAC DRC 2014, at [8]

¹⁰⁸⁰ Arimatsu (n1065), 188, 202; Hereinafter LRA

during the course of 2009.¹⁰⁸¹ As will be seen, the FRPI, FDLR, APCLS, PARECO, CNDP, Mai-Mai groups, and the LRA were among the NSAG responsible for attacks against education during the NIAC in the DRC between 2009 and 2016.

As stated above, the DRC ratified the relevant IHRL and IHL instruments prior to 2009, and no relevant reservations, derogations or limitations were made. Therefore the DRC, as the primary obligations holder, was bound by IHRL and IHL obligations between 2009 and 2016. The applicable IHL in a NIAC depends on whether the thresholds for Common Article 3 of the Geneva Conventions and Additional Protocol II are reached.¹⁰⁸² Arimatsu argues that as ‘both the CNDP and FDLR operated under a responsible command and each exercised control over a part of territory such as to enable them to carry out sustained and concerted military operations and to implement its terms’, Common Article 3 and Additional Protocol II applied to the conflicts involving these actors between 2003 and 2011.¹⁰⁸³ She added that ‘the intensity of the fighting in many cases leaves little doubt that the armed encounters should have been governed by non-international conflict rules’.¹⁰⁸⁴ Arimatsu is correct in respect of the CNDP and FDLR. It is clear that during the period between 2009 and 2011 that the low threshold of Common Article 3 is reached in respect of the CNDP and the FDLR. Additional Protocol II requires that parties to a NIAC operate under responsible command, and exercise control over part of territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol, which is established by Arimatsu in respect of the CNDP and the FDLR.¹⁰⁸⁵ The additional requirement of intensity, as established by the ICTY, is also satisfied. However, it is also necessary to discuss developments since 2011 until 2016, and determine whether

¹⁰⁸¹ SGCAC DRC 2010, at [8-10-14]

¹⁰⁸² See Chapter Three for a detailed discussion of the classification of NIAC.

¹⁰⁸³ Arimatsu (n1065), 189-190

¹⁰⁸⁴ *Ibid*, 190

¹⁰⁸⁵ Additional protocol II, Art 1(1)

both Common Article 3 and Additional Protocol II applies to the other relevant NSAG involved in the conflict in the DRC.

Between 2009 and 2016, ethnic tensions continued to be an issue,¹⁰⁸⁶ as was the continued struggle for control over land and natural resources.¹⁰⁸⁷ Despite a total of 12,074 armed group elements being integrated into the FARDC during the fast-track integration process of 2009, the humanitarian situation deteriorated as a result of military operations and human rights violations.¹⁰⁸⁸ In the beginning of 2009, FARDC launched two simultaneous anti-FDLR military operations in the Kivu provinces, with MONUC providing logistical support. However, one operation lasting for 10 months proved to be hugely contentious with atrocities committed by both the FDLR and FARDC.¹⁰⁸⁹ Continued MONUC support was conditioned on FARDC respect for international law, rising levels of violence against civilians, including by FARDC, were reported during a third military operation beginning in January 2010.¹⁰⁹⁰ The DRC also launched military operations against the LRA in 2009,¹⁰⁹¹ but the security situation concerning this group deteriorated further in 2011.¹⁰⁹² MONUC was renamed the *United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* in 2010.¹⁰⁹³ MONUSCO was authorised to use all necessary means to carry out its mandate relating to the protection of civilians, humanitarian personnel and human rights defenders and to support the Government of the DRC in its stabilisation and peace consolidation efforts.¹⁰⁹⁴ Arimatsu correctly argues that even if MONUC and MONUSCO were parties to the conflicts, ‘there is no question

¹⁰⁸⁶ Arimatsu (n1065), 148-149, 185

¹⁰⁸⁷ Ibid, 148-149

¹⁰⁸⁸ SGCAC DRC 2010, at [8-10]; SGCAC DRC 2014, at [8]

¹⁰⁸⁹ SGCAC DRC 2010, at [2-4]; Arimatsu (n1065), 187

¹⁰⁹⁰ Arimatsu (n1065), 187-188

¹⁰⁹¹ SGCAC DRC 2010, at [8-10-14]

¹⁰⁹² Arimatsu (n1065), 188, 202; Hereinafter LRA

¹⁰⁹³ Hereinafter MONUSCO

¹⁰⁹⁴ Ibid

that the conflicts remained non-international in character since all the military operations were conducted either with the support of the DRC or in close collaboration with the FARDC'.¹⁰⁹⁵

Between 2010 and 2013, the presence and activities of NSAG in eastern DRC remained a major source of insecurity and violence. Several NSAG remained active, including the LRA, FRPI, FDLR, the Allied Democratic Forces,¹⁰⁹⁶ and Mai Mai groups.¹⁰⁹⁷ The UN reported that 'the absence of State authority in conflict-affected areas and weak accountability and command and control of the national security forces contributed to an environment in which children were victims of grave violations'.¹⁰⁹⁸ In January 2011 FARDC began to withdraw units from remote areas in the Kivu provinces, creating security voids and resulting in a further deterioration of the security situation. Taking advantage of this situation, the FDLR and Mai-Mai groups expanded their area of control, which in turn led to the mobilization of local self-defence militias such as Raia Mutomboki.¹⁰⁹⁹ In April 2012, there was a resurgence of conflict in the eastern DRC, as former CNDP and PARECO commanders defected from FARDC and created the Mouvement du 23 mars rebellion,¹¹⁰⁰ which resulted in security vacuums and the remobilization of NSAG, some in support of the Government and others in support of the rebellion. Between November and December 2012, M23 occupied the city of Goma, fighting erupted between two M23 factions, and in November 2013, FARDC, supported by MONUSCO, inflicted a military defeat on M23.¹¹⁰¹ The Orientale Province was also affected by a deteriorating humanitarian crisis between 2010 and 2013, as the LRA

¹⁰⁹⁵ Arimatsu (n1065), 191-192

¹⁰⁹⁶ Hereinafter ADF

¹⁰⁹⁷ SGCAC DRC 2014, at [3-4]

¹⁰⁹⁸ *Ibid*, at [5]

¹⁰⁹⁹ *Ibid*, at [9]

¹¹⁰⁰ Hereinafter M23

¹¹⁰¹ SGCAC 2013, at [56]; SGCAC DRC 2014, at [2, 11-13]

remained extremely active in 2010 and 2011, while between August 2011 and December 2013, LRA activities progressively decreased, Mai-Mai groups intensified their activities at the end of 2012 and throughout 2013.¹¹⁰² The situation in the Katanga province remained relatively calm throughout 2010 and 2011, but attacks by FARDC and Mai-Mai groups continued in 2012 and 2013, with attacks by Mai Mai groups intensifying particularly in 2013.¹¹⁰³ In the northern part of North Kivu, the ADF intensified attacks on FARDC and the civilian population, prompting FARDC to respond with the support of MONUSCO in early 2014.¹¹⁰⁴ In 2014, the situation in eastern DRC remained volatile and witnessed major political and security developments, including a series of military operations against NSAG.¹¹⁰⁵ The security situation in Ituri, North Kivu and Tanganyika remained volatile in 2015, marked by military operations by FARDC against the FDLR, the ADF, the FRPI, and other armed groups.¹¹⁰⁶ In 2016, the UN reported that the east of the country remained volatile and was marked by military operations by the FARDC against NSAG. The number of child casualties was also the highest recorded since 2012.¹¹⁰⁷

The situation in the DRC between the DRC is clear an incredibly complex one, involving numerous NSAG. In terms of whether both Common Article 3 and Additional Protocol II applied to hostilities between the DRC and the various armed groups, as established above, both were applicable to the CNDP prior to its demobilisation in 2009, and both were applicable to the FDLR between 2009 and 2011, in light of the FDLR continued significant involvement in the NIAC and continued control of territory, both instruments apply to hostilities between FARDC

¹¹⁰² SGCAC DRC 2014, at [14-15]

¹¹⁰³ SGCAC 2014, at [58]; SGCAC DRC 2014, at [16-17]

¹¹⁰⁴ *Ibid*, at [58]; SGCAC 2015, at [58]

¹¹⁰⁵ SGCAC 2015, at [58]

¹¹⁰⁶ SGCAC 2016, at [4]; Hereinafter FRPI

¹¹⁰⁷ SGCAC 2017, at [6, 61]

and the FDLR. In relation to the FRPI, in the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, the International Criminal Court held that they had a certain degree of organisation, acted under a responsible command, and had an operative internal disciplinary system, and had the capacity to plan and carry out sustained and concerted military operations as a result of control of parts of the territory of the Ituri District between 2002 and 2003.¹¹⁰⁸ As such, it is clear that both Common Article 3 and Additional Protocol II applied to the NIAC between FARDC and the FRPI between 2002 and 2003. Again, in light of the continuous and significant armed activity of the FRPI between 2009 and 2016, and its control of territory, it is clear that this group remained bound by these instruments. As established above, the ADF, LRA and Mai-Mai groups also held control of territory and were significant actors in the NIAC, being able to carry out sustained and concerted armed activities, therefore, clearly operating under a responsible command, and both Common Article 3 and Additional Protocol II. In regards to M23, it is clear that at least during its occupation of Goma that Additional Protocol II was applicable to armed activities between this group and FARDC, and in light of its clear ability to carry out sustained and concerted military activities during its entire existence, it is clear that both Common Article 3 and Additional Protocol II were applicable. In light of the above-mentioned NSAG level of organisation and territorial control, in addition to IHL obligations, they also have IHRL obligations, at least in relation to the obligation to respect.¹¹⁰⁹ As will be seen, additional NSAG were reported to have perpetrated attacks against education between 2009 and 2016, these groups include: *Forces républicaines fédéralistes*,¹¹¹⁰ *Forces populaires congolais-Armée Populaire*,

¹¹⁰⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of the Charges (Pre-Trial Chamber I), 30 September 2008, at [239]

¹¹⁰⁹ See Chapter 1 for a detailed discussion of the international obligations of NSAG

¹¹¹⁰ Hereinafter FRF

who are ex-PARECO,¹¹¹¹ *Union des patriotes congolais pour la paix*,¹¹¹² and *Nduma défense du Congo*.¹¹¹³ It was not possible to determine whether Additional Protocol II was applicable to them, and similarly whether they held IHRL obligations. Nonetheless, it is clear that at least Common Article 3 is applicable to their activities, as parties to the conflict.

Fig. 7 Table showing the relevant NSAG party to the NIAC in the DRC and the years in which they were active between 2009 and 2016

<u>NSAG active in the NIAC</u>	<u>Years active between 2009 and 2016</u>
CNDP	2009
PARECO	2009
FRPI	2009 - 2016
FDLR	2009 - 2016
LRA	2009 - 2016
ADF	2009 - 2016
Mai-Mai	2009 – 2016
M23	2012 - 2013
APCLS	At least in 2009 and between 2013 and 2014
FRF	At least in 2010 and 2011
FPC/AP	At least in 2013
NDC/Cheka	At least between 2013 and 2014
UPCP	At least between 2013 and 2014

¹¹¹¹ Hereinafter FPC-AP

¹¹¹² Hereinafter UPCP

¹¹¹³ Hereinafter NDC/Cheka

4.4.2. Attacks on Educational Institutions

Fig. 8 Table showing the number of, and description of, schools damaged or destroyed or looted between 2009 and 2016

<u>Year of attacks</u>	<u>Number of attacks</u>	<u>Description of attack</u>
2010 – 2013	129 ¹¹¹⁴	The UN reported that between January 2010 and December 2013 47 schools were destroyed and 82 were looted.
2013 – 2017	Unknown	The GCPEA reported that hundreds of schools were reportedly shelled, burned, and looted by NSAG. ¹¹¹⁵
2009	81 ¹¹¹⁶	Between October 2008 and December 2009, the UN reported 51 attacks against schools, though it is not clear how many of these attacks occurred in 2008.
2010	14 ¹¹¹⁷	At least 14 schools were reported by the UN to be destroyed or looted.
2011	53 ¹¹¹⁸	The UN reported 53 attacks against schools and health centres, though it is not clear how many of these attacks were against schools rather than health centres.
2012	18 ¹¹¹⁹ -600 ¹¹²⁰	The UN documented 18 attacks against schools. However, the GCPEA reported that, according to local protection monitors, the number of attacks increased significantly, as there were at least 561 incidents of looting and damage, affecting 548 primary schools and 13 secondary schools. UNICEF similarly reported that the total number of schools

¹¹¹⁴ SGCAC DRC 2014, at [47]

¹¹¹⁵ GCPEA, *Education under Attack: 2018* (n13), 112

¹¹¹⁶ SGCAC DRC 2010, at [42]

¹¹¹⁷ SGCAC 2011, at [89]

¹¹¹⁸ SGCAC 2012, at [37]

¹¹¹⁹ SGCAC 2013, at [62]

¹¹²⁰ GCPEA, *Education under Attack: 2014* (n102), 132; UNICEF (n1126)

		affected by conflict in 2012 was over 600, and that families and NSAG occupied or looted some 250 additional schools. It is not clear how many of these attacks were carried out by NSAG, or how many relate to looting rather than the sole military use of the school.
2013	95 ¹¹²¹ -133 ¹¹²²	In 2013, the United Nations verified 95 attacks on schools. The GCPEA reported that ‘as of March 2013, the Education Cluster had received 133 reports of schools affected by looting and damage’.
2014	22 ¹¹²³	The UN reported that 22 schools were attacked.
2015	22 ¹¹²⁴	The UN verified 22 attacks on schools.
2016	51 ¹¹²⁵ -243 ¹¹²⁶	A total of 51 attacks on schools were verified by the UN, and there were further allegations of a high number of attacks on schools. Amnesty International reported that in 2016, according to local chiefs and civil society organizations, over 150 schools were burned down. ¹¹²⁷ The GCPEA reported that there were at least 639 verified and unverified attacks on schools in 2016 and 2017, at least 396 of which were verified by the UN to have occurred in 2017, and also that ‘approximately 87 schools were attacked, set on fire, or looted in Kasai-Central by either the FARDC or militias between August and December 2016’ alone.

Two patterns and trends can be identified in respect of attacks against educational institutions between 2009 and 2016 in the DRC. Firstly, at least between 2009 and

¹¹²¹ SGCAC 2014, at [65]

¹¹²² GCPEA, *Education under Attack: 2014* (n12), 132

¹¹²³ SGCAC 2015, at [63].

¹¹²⁴ SGCAC 2016, at [49].

¹¹²⁵ SGCAC 2017, at [67]

¹¹²⁶ GCPEA, *Education under Attack: 2018* (n13), 112-113

¹¹²⁷ Amnesty International, ‘World Report 2016/2017’ at

<<https://www.amnesty.org/download/Documents/POL1048002017ENGLISH.PDF>>, 140

2011, in 2013, and in 2016, educational institutions were destroyed, damaged, subjected to arson attacks and looted by FARDC.¹¹²⁸ Secondly, between 2009 and 2016, schools were often destroyed or damaged, subjected to arson attacks and looted by NSAG. Such attacks were attributed mainly to FDLR, FRPI, Mai-Mai groups, and the ADF throughout this period, but also to LRA in 2009 and 2012, to PARECO and the FRF in 2010, while in 2012-2013 attacks were attributed to the M23 and the NDC, in 2014 to the UPCU, and between 2015 and 2016, to self-defence groups.¹¹²⁹ This indicates that deliberate and direct attacks against educational institutions were a problem in the DRC between 2009 and 2016, particularly in 2012, 2013 and 2016.

¹¹²⁸ SGCAC DRC 2010, at [44-45]; SGCAC 2011, at [89]; CRC Concluding Observations DRC 2012, at [8(d), 30]; SGCAC 2012, at [37]; SGCAC 2014, at [65]; SGCAC DRC 2014, at [47]; GCPEA, *Education under Attack: 2014* (n12), 132; GCPEA, *Education under Attack: 2018* (n13), 112

¹¹²⁹ UN Organization Mission in the Democratic Republic of the Congo and UN Human Rights Office of the High Commissioner, Summary of fact finding missions on alleged human rights violations committed by the Lord's Resistance Army (LRA) in the districts of Haut-Uélé and Bas-Uélé in Orientale province of the Democratic Republic of Congo, December 2009, at [3]; SGCAC DRC 2010, at [43-45]; SGCAC 2011, at [89]; CRC Concluding Observations DRC 2012, at [32]; SGCAC 2012, at [37]; UNSC, Report of the Secretary-General on the situation of children and armed conflict affected by the Lord's Resistance Army, S/2012/365, 25 May 2012, at [37]; UNICEF, 'Over 600 schools looted or damaged by DR Congo violence this year', December 2012, <http://www.unicef.org/media/media_66599.html>; SGCAC 2013, at [62]; UN Stabilization Mission in the Democratic Republic of the Congo and UN Human Rights Office of the High Commissioner, *Report of the UN Joint Human Rights Office on Human Rights Violations Perpetrated by Soldiers of the Congolese Armed Forces and Combatants of the M23 in Goma and Sake, North Kivu Province, and in and around Minova, South Kivu Province, from 15 November to 2 December 2012*, May 2013, at [31] (MONUSCO UNHCHR joint report); Save the Children, *Attacks on Education: The impact of conflict and grave violations on children's futures* (Save the Children 2013), 13; SGCAC 2014, at [65]; SGCAC DRC 2014, at [47-48]; GCPEA, *Education under Attack: 2014* (n12), 21, 57, 132-133; SGCAC 2015, at [63]; HRW, "Our School Became the Battlefield": Using Schools for Child Recruitment and Military Purposes in Eastern Democratic Republic of Congo', October 2015, <https://www.hrw.org/report/2015/10/27/our-school-became-battlefield/using-schools-child-recruitment-and-military>, 25, 51; SGCAC 2016, at [49]; United Nations Committee on the Rights of the Child, *Concluding observations on the combined third to fifth periodic reports of the Democratic Republic of the Congo*, CRC/C/COD/CO/3-5, 28 February 2017, at [39(f)] (CRC Concluding Observations DRC 2017); SGCAC 2017, at [67]; GCPEA, *Education under Attack: 2018* (n13), 112-114

Fig. 8 Table showing the number of, and description of, schools used for military purposes in the DRC between 2009 and 2016

<u>Year of attacks</u>	<u>Number of attacks</u>	<u>Description of attack</u>
2010 – 2013	51 ¹¹³⁰	Between January 2010 and December 2013, the UN verified the use of 51 schools for military purposes.
2010	7 ¹¹³¹	The UN reported 7 cases of military use of schools and hospitals, though it is not clear how many were schools or who used the schools.
2011	2 ¹¹³²	The UN reported 2 cases of military use of schools in 2011.
2012	12 ¹¹³³ -42 ¹¹³⁴	The UN reported the military use of 12 schools in 2012. The UN also reported that from 20 November 2012 to at least 24 December 2012, FARDC reportedly occupied 42 primary and secondary schools.
2013	25 ¹¹³⁵	The UN reported 25 incidents of military use of schools.
2014	12 ¹¹³⁶	12 schools were reported by the UN to have been used for military purposes.
2015	30 ¹¹³⁷	The UN reported that 30 schools were used for military purposes.
2016	19 ¹¹³⁸	The UN reported that a total of 19 schools were used for military purposes.

Two patterns and trends can be identified in respect of the military use of educational institutions between 2009 and 2016 in the DRC. Firstly, at least between 2011 and 2016, educational institutions were used for military purposes by FARDC, which has resulted in the destruction or damage to schools as a result of fighting

¹¹³⁰ SGCAC DRC 2014, at [47]

¹¹³¹ SGCAC 2011, at [89]

¹¹³² SGCAC 2012, at [37]

¹¹³³ SGCAC 2013, at [62]

¹¹³⁴ MONUSCO UNHCHR joint report, at [24]

¹¹³⁵ SGCAC 2014, at [65]

¹¹³⁶ SGCAC 2015, at [63]

¹¹³⁷ SGCAC 2016, at [50]

¹¹³⁸ SGCAC 2017, at [68]

NSAG, or because of arson and looting.¹¹³⁹ Secondly, at least between 2012 and 2016 NSAG have also used of educational institutions for military purposes, with such attacks attributed to the FDLR, Mai Mai groups, and M23, and which often resulted in the destruction or damage of schools as a result of arson and looting.¹¹⁴⁰ This indicates that the issue of military use of schools was a problem in the DRC at least between 2010 and 2016, with a general trend of such attacks increasing per year until 2015.

Three schools in the locality of Ntoto, Walikale territory in North Kivu, were attacked and looted twice in July 2009 and again on 4 September 2009, allegedly perpetrated by a battalion of the FARDC 212th Integrated Brigade temporarily deployed. Teachers and students reported that schoolbooks and stationery were looted, and that blackboards and desks were burned.¹¹⁴¹ The situation is clearly one that relates to targeting, as it involves the State armed forces in the DRC attacking schools outside of the context of normal law enforcement, but rather in the context of military deployment. As such the active hostilities approach should be applied, requiring that IHL be considered as the primary framework, and IHRL as the secondary framework. The provisions relevant to this situation are complementary in their approach, however, as the applicable IHL rules are of a customary nature, the role that IHRL plays in informing the regulation of the situation is significantly greater. This is significant as IHRL provides a stronger level of protection in this situation.

¹¹³⁹ SGCAC 2012, at [37]; SGCAC 2013, at [62]; MONUSCO UNHCHR joint report, at [24]; GCPEA, *Education under Attack: 2014* (n12), 132-133; SGCAC 2014, at [65]; SGCAC 2015, at [63]; HRW (n1121), 67-69, 71, 86, 88, 94; SGCAC 2016, at [50]; Amnesty International (n1135), 141; SGCAC 2017, at [68]; GCPEA, *Education under Attack: 2018* (n13), 115

¹¹⁴⁰ SGCAC 2013, at [62]; SGCAC 2014, at [65]; GCPEA, *Education under Attack: 2014* (n12), 132-133; SGCAC 2015, at [63]; HRW, 'When Schools Become Barracks, Children Suffer', 29 October 2015, <<https://www.hrw.org/news/2015/10/29/when-schools-become-barracks-children-suffer>>; HRW (n1121), 27-31, 85, 87; SGCAC 2016, at [50]; Amnesty International (n1135), 141; CRC Concluding Observations DRC 2017, at [39(f)]; SGCAC 2017, at [68]; GCPEA, *Education under Attack: 2018* (n13), 115

¹¹⁴¹ United Nations Security Council, Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo, S/2010/369, 9 July 2010, at [45]

As the arson and looting was carried out by the State armed forces, one can examine the manner in which the principle of distinction protects educational institutions from attack in a NIAC. Article 13 of Additional Protocol II sets out the principle of distinction, but it does not explicitly prohibit the targeting of civilian objects.¹¹⁴² It should first, therefore, be ascertained whether the three schools affected were civilian objects deserving of protection. A particular weakness of IHL is, however, that neither Common Article 3 nor Additional Protocol II explicitly applies the principle of distinction between civilian objects and military objectives in NIAC.¹¹⁴³ This distinction has, nonetheless, been recognised as applicable in a NIAC in other IHL instruments.¹¹⁴⁴ Rule 7 of the ICRC study also provides that it is a matter of customary law for parties to an IAC and NIAC to ‘at all times distinguish between civilian objects and military objectives’ and to ensure that attacks are not ‘directed against civilian objects’.¹¹⁴⁵ Schools therefore benefit from the principle of distinction where they are not used for military purposes. Article 52(2) of Additional Protocol I is, according to Article 8 of the ICRC study, a rule of customary IHL, which provides that ‘military objectives are limited to 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’.¹¹⁴⁶

While not entirely clear on the facts available, if on the one hand, the three schools were simply looted and subject to arson in an attack by FARDC and not used for military purposes, the looting and arson were prohibited by the principle of

¹¹⁴² Additional Protocol II, Art 13

¹¹⁴³ Müller, *The Relationship* (n12), 56

¹¹⁴⁴ ICRC CIHL Study 2005, Rule 7; See Amended Protocol II to the Convention on Certain Conventional Weapons, Art 3(7); Second Protocol to the Hague Convention for the Protection of Cultural Property, Art 6(a)

¹¹⁴⁵ ICRC CIHL Study 2005, Rule 7

¹¹⁴⁶ Additional Protocol I, Art 52(1-2)

distinction, as it should not have been subjected to attack. As the rules identified are of customary status and not treaty based, their applicability to NIAC could be disputed, though this is unlikely. As such, IHL would benefit from being developed to explicitly protect educational institutions from deliberate and direct attacks where they constitute civilian objects in a NIAC. Conversely, if the damage was caused to the school because FARDC were using it as a military base, this would cause the school to lose its protection as a civilian object, and it could legitimately be targeted by other parties to the NIAC. A significant problem with IHL is that despite this loss of protection, unlike with hospitals there is no prohibition on the military use of schools. The law should be developed in this regard.

These obligations should be read in light of IHRL, with IHRL being interpreted in light of IHL, it being the secondary source. Article 13 of the ICESCR makes clear that each of the levels of education should be provided to all. It is not clear on the facts available what level of school was affected, however, if this concerned the right to primary education, education would be protected to a greater extent than secondary, higher and fundamental education. As the right to primary education forms part of the minimum core of the right it always remain fully applicable in a NIAC. The right to primary education is nonetheless progressively realisable in line with resources, as are the other levels of education. Again it is clear that the minimum core obligations approach serves a fundamental purpose in the context of NIAC. Although, while all the levels of education can be achieved progressively, reference to the tripartite typology makes clear that FARDC, where it is considered to have attacked a school rather than used it for military purposes, violated their immediate obligation to respect the availability, accessibility and acceptability of education, and as such, should have refrained from attacking the three schools. The looting and arson resulted in

significant damage to blackboards and desks were burned. This not only affects the availability of functioning educational institutions, it means the building may also be unsafe and inaccessible, while the lack of schoolbooks and stationery due to looting means that education was also not acceptable. In the context of the military use, IHRL must be interpreted in light of IHL, so the military use of schools should similarly be considered to be permitted in IHRL. However, IHRL can supplement IHL. Where it is considered necessary to use a school for military purposes. The State should be considered to have an obligation to fulfil the availability, accessibility, acceptability, and adaptability of education by ensuring alternative means of realising education are provided as appropriate, where possible. The fulfilment criteria is progressively realisable, so a weakness of IHRL is that individuals may be left without an education for an extended period of time where schools are destroyed or used for military purposes. IHL is unable to fill this gap. If IHL were to be developed to better protect education from military use, IHRL could also be interpreted accordingly.

4.4.3. Attacks on Students and Educational Personnel

It was not possible to identify patterns and trends in respect of attacks against students and educational personnel between 2009 and 2016 in the DRC. However, students may have been deliberately and directly attacked between 2009 and 2016 as children were frequently killed and injured, though it is not clear from the evidence available whether children were targeted as a result of being students.

4.4.4. The Military Recruitment and Use of Children

Fig. 11 Table showing the number of children recruited and used for military purposes in the DRC between 2009 and 2016

<u>Year of attacks</u>	<u>Number of attacks</u>	<u>Description of attack</u>
2010-2013	4194 ¹¹⁴⁷	The UN documented 4194 cases, including 3,773 boys and 421 girls, of military recruitment, and approximately one third of the documented cases involved children under 15 years of age.
2009	848 ¹¹⁴⁸ -2280 ¹¹⁴⁹	The UN reported that MONUC documented 848 newly recruited children, including 52 girls. At a later date, the UN reported 1235 cases, with attacks on schools corresponding with reports of child recruitment, ¹¹⁵⁰ and later still, the UN reported 2280 new cases of recruitment in 2009.
2010	447 ¹¹⁵¹ -1108 ¹¹⁵²	The UN initially reported 447 cases of child recruitment, including 49 girls, and including recruitment from school, and later reported a total of 1108 new cases of recruitment, including 78 girls.
2011	272 ¹¹⁵³ -767 ¹¹⁵⁴	The UN initially reported 272 cases of recruitment and use of children, 259 boys and 13 girls, and later reported 767 cases, 680 boys and 87 girls.
2012	578 ¹¹⁵⁵ -1296 ¹¹⁵⁶	The UN initially reported that 578 children, including 26 girls, were recruited, and later reported 1296 cases, 1167 boys and 129 girls.
2013	910 ¹¹⁵⁷ -1023 ¹¹⁵⁸	The UN initially documented the new

¹¹⁴⁷ SGCAC DRC 2014, at [21-22]

¹¹⁴⁸ SGCAC 2010, at [69]

¹¹⁴⁹ SGCAC DRC 2014, at [23]

¹¹⁵⁰ SGCAC DRC 2010, at [17, 42]

¹¹⁵¹ SGCAC 2011, at [85]

¹¹⁵² SGCAC DRC 2014, at [33]

¹¹⁵³ SGCAC 2012, at [34]

¹¹⁵⁴ SGCAC DRC 2014, at [23]

¹¹⁵⁵ SGCAC 2013, at [57]

¹¹⁵⁶ SGCAC DRC 2014, at [23]

¹¹⁵⁷ SGCAC 2014, at [59]

		recruitment and use of 910 children, 783 boys and 127 girls, and later documented 1023 cases, 896 boys and 127 girls.
2014	241 ¹¹⁵⁹	The UN documented 241 new cases of recruitment, 223 boys, 18 girls, though the total figure is likely higher as it was acknowledged that a large backlog of children separated was still under verification.
2015	488 ¹¹⁶⁰	In 2015, the UN verified the new recruitment of 488 children, including 26 girls.
2016	492 ¹¹⁶¹	The UN verified the new recruitment and use of 492 children, including 63 girls, in 2016, and 129 of those children were under fifteen at the time of recruitment.

Three patterns and trends in respect of the military recruitment of children can be identified between 2009 and 2016 in the DRC. Firstly, between 2009 and 2016, members of FARDC have recruited and used children for military purposes, including from schools.¹¹⁶² Secondly, NSAG have recruited children, including those under the age of 15, and including while they were in school or as they travelled to or from school, between 2009 and 2016. Such attacks were attributed mainly to FDLR, Mai-Mai groups, FRPI, the LRA, and ADF throughout this period, but also to CNDP in 2009 and ex-CNDP elements in 2010, to PARECO, and FRF between 2009 and 2011, to M23 in 2012 and 2013, and to UPCLS, NDC/Chaka, UPCP, and the FPC/AP

¹¹⁵⁸ SGCAC DRC 2014, at [23]

¹¹⁵⁹ SGCAC 2015, at [59]

¹¹⁶⁰ SGCAC 2016, at [45]

¹¹⁶¹ SGCAC 2017, at [63]

¹¹⁶² CESCR, *Concluding observations DRC*, at [27]; United Nations Human Rights Council, Second joint report of seven United Nations experts on the situation in the Democratic Republic of the Congo, A/HRC/13/63, 8 March 2010, at [Summary, 4, 36, 71] (UNHCR Second joint report DRC 2010); SGCAC 2010, 13 April 2010, at [69-70]; SGCAC DRC 2010, at [17]; United Nations Human Rights Council, *Third Joint Report of Seven United Nations Experts on the Situation in the Democratic Republic of the Congo*, A/HRC/16/68, 9 March 2011, at [10]; SGCAC 2011, at [85]; SGCAC 2012, at [34]; SGCAC 2013, at [57-58]; SGCAC 2014, at [60]; SGCAC DRC 2014, at [29-30]; United Nations General Assembly, Report of the Working Groups on the Universal Periodic Review: Democratic Republic of Congo, A/HRC/27/5, 7 July 2014, at [15, 52, 57, 115]; GCPEA, *Education under Attack: 2014* (n12), 133; SGCAC 2015, at [59]; U SGCAC 2016, at [45]; CRC Concluding Observations DRC 2017, at [47]; SGCAC 2017, at [64]

between 2013 and 2014.¹¹⁶³ Children were used in military operations as combatants, they were used as informants, as escorts of commanders, cooks and porters, and for forced labour.¹¹⁶⁴ Children, mainly girls, were also used for sexual purposes.¹¹⁶⁵ This indicates that the military recruitment and use of children between 2009 and 2016 was widespread within the DRC, with recruitment and use being a particular problem between 2009 and 2013, and while dropping in frequency between 2014 and 2016, there was an upward trend in the frequency of such attacks between 2014 and 2016.

Near Kingi, Masisi territory, on April 19, 2012, M23 forces rounded up at least 32 male students at Mapendano secondary school in North Kivu. It was one of their methods of forcibly recruiting school students when villagers refused to hand over their sons.¹¹⁶⁶ To avoid repetition, it is sufficient too state that this

¹¹⁶³ CESCR, *Concluding observations DRC*, at [27]; UNHCR Second joint report DRC 2010, at [36, 71]; MONUSCO (n1121), at [3]; SGCAC 2010, at [69, 71, 74]; SGCAC DRC 2010, at [17, 25, 27, 39-40]; SGCAC 2011, at [85]; SGCAC 2012, at [34, 62]; SGCAC 2013, at [57]; MONUSCO UNHCHR joint report, at [32-33]; United Nations General Assembly, Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo, A/HRC/24/33, 12 July 2013, 2; SGCAC 2014, at [59, 66]; SGCAC DRC 2014, at [8, 25, 27, 44]; UN Stabilization Mission in the Democratic Republic of the Congo and UN Human Rights Office of the High Commissioner, *Report of the UN Joint Human Rights Office on Human Rights Violations Committed by the Mouvement Du 23 Mars (M23) in North Kivu Province April 2012 – November 2013*, October 2014, at [32]; GCPEA, *Education under Attack: 2014* (n12), 20, 54, 133; Global Terrorism Database, 'Global Terrorism Database', 2014, <<https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=201406100084>>; UN Stabilization Mission in the Democratic Republic of the Congo and UN Human Rights Office of the High Commissioner, *Report of the United Nations Joint Human Rights Office on International Humanitarian Law Violations Committed by Allied Democratic Forces (ADF) Combatants in the Territory of Beni, North Kivu Province, Between 1 October and 31 December 2014*, May 2015, at [2, 50-53]; SGCAC 2015, at [59, 64]; United Nations General Assembly, *Report of the United Nations High Commissioner for Human Rights: Situation of Human Rights and the Activities of the United Nations Joint Human Rights Office in the Democratic Republic of Congo*, A/HRC/30/32, 27 July 2015, at [48]; HRW (n1121), 17, 18, 21-22, 31; SGCAC 2016, at [45]; CRC Concluding Observations DRC 2017, at [17(a), 39(f), 47]; SGCAC 2017, at [63, 69]; GCPEA, *Education under Attack: 2018* (n13), 116

¹¹⁶⁴ UNHCR Second joint report DRC 2010, at [37]; SGCAC 2011, at [85]; SGCAC 2012, at [34, 62]; SGCAC 2013, at [57-59]; SGCAC 2014, at [59-60, 66]; SGCAC 2015, at [59, 64]; SGCAC 2016, at [45, 51]

¹¹⁶⁵ SGCAC 2010, at [74]; SGCAC 2012, at [62]; SGCAC 2014, at [59-60, 66]; GCPEA, *Education under Attack: 2014* (n12), 133; SGCAC 2015, at [59, 64]; SGCAC 2016, at [45, 51]; SGCAC 2017, at [63, 69]; GCPEA, *Education under Attack: 2018* (n13), 116-117

¹¹⁶⁶ HRW, "Our School Became the Battlefield": Using Schools for Child Recruitment and Military Purposes in Eastern Democratic Republic of Congo', October 2015, <https://www.hrw.org/report/2015/10/27/our-school-became-battlefield/using-schools-child-recruitment-and-military>, 18

issue would be regulated in the same manner as described in respect of Colombia above, with the same issues in respect of the gaps and weaknesses in need of addressing. This evidences that the problem with the gaps identified in respect to Colombia are not specific to Colombia but also to other contexts. As such, the State would nonetheless be required to prevent the recruitment of children by NSAG, regardless as to whether the recruitment was forcible or not.

4.5. Conclusion

Overall, it is clear that the current state of IHRL and IHL is inadequate as it fails to properly protect education in practice. The use of two case studies was useful in this sense, as weaknesses show even when the contexts and nuances of a conflict are taken into account. Applying IHRL and IHL to the issue of deliberate and direct attacks against education in practice highlights the insufficiencies of international law. While IHRL may be used to fill in the gaps in protection in IHL, and IHL can be used to fill in gaps in protection in IHRL, gaps remain.

Conclusion

5.1. Are the Current Legal Provisions Concerning Education within International Human Rights Law and International Humanitarian law Effective?

The central research question of this thesis was answered from a working hypothesis that education is inadequately provided for within IHRL and IHL, as a result of gaps and inconsistencies within the two regimes which impact the realisation of the right to education in practice. As such, Chapters One to Three were approached with a view to exposing such gaps and inconsistencies, and Chapter Four applied IHRL and IHL simultaneously to the conflicts in Colombia and the DRC in order to determine whether the IHRL was capable of filling in the gaps and inconsistencies within IHL, and vice versa.

Chapter One examined the protection of education during a NIAC within IHRL. While the nature and scope of the normative content of the right to education is generally clear, albeit broad, some aspects would benefit from being developed or clarified. There is a well-established principle of non-discrimination within IHRL, which is clear in scope; everyone has a right to non-discrimination in education. While Article 2(2) of the ICESCR does not as exhaustively set out the grounds for discrimination as other IHRL instruments, this is not a gap or an ambiguity. The term ‘other status’ within Article 2(2) is, in and of itself, broad and all encompassing enough to ensure that an individual is prevented from accessing their right to education on additional grounds not explicitly mentioned within the ICESCR. Other IHRL instruments, nonetheless, inform the understanding of *who* can be discriminated against under the term ‘other status’ within the ICESCR, such as those individuals discriminated against due to their economic condition, ethnic origin, or disability.

Other IHRL instruments also inform the understanding within the ICESCR as to *how* individuals can be discriminated against in the provision of education. As the prohibition against discrimination forms part of the minimum core of the right to education, the protection against discrimination in the provision of the right to education is strong, as in the context of a NIAC, minimum core cannot be restricted in their applicability through reservation, derogation or limitation. Similarly, while the ICESCR does not sufficiently set out the aims and objectives of education, this apparent weakness is overcome by considering the ICESCR alongside other applicable IHRL instruments that elaborate on what the aims and objectives of education should be. Again, as the aims and objectives of the right to education form part of the minimum core, they remain applicable in a NIAC, and are instrumental to ensuring that education has a peace-building function in such a situation.

Article 13 of the ICESCR sets out broad rules in respect of the various levels of education and the corresponding obligations of States. The obligation to make primary education free and compulsory is clearly set out, and the manner in which it is provided for is particularly strong. Such protection continues in the context of NIAC, in light of the fact that the provision of free and compulsory primary education, progressively if necessary, is a minimum core obligation. While the other levels of education are not stated as explicitly forming part of the minimum core, there is nonetheless a minimum core obligation to adopt and implement a national educational strategy in respect of these levels of education. In respect of secondary education, while the obligations of States are clear, unlike primary education, there is no legal obligation to make secondary education compulsory, despite the importance of this level of education for the individual and society. Similarly, while the provision for higher education is clear, the ‘capacity’ criterion is problematic in the context of a

NIAC, as a NIAC may affect the primary and secondary education of individuals, which will have a knock on effect on the capacity. The provision of fundamental education is similarly important in the context of a NIAC, as a NIAC may deprive an individual of the right to primary education. However, there is a gap in the ICESCR as it does not contain a requirement to make fundamental education progressively free. It is also unclear whether, in light of the importance of primary education, the realisation of free fundamental education should be prioritised over secondary and higher education. The 4-A framework is also particularly helpful in determining how each level of education should apply in the context of a NIAC.

In relation to the IHRL obligations of States, Article 2(1) of the ICESCR is weak. The meaning of progressive realisation is sufficiently clear, in practice, however, compliance with this principle is difficult to measure from an academic perspective, as it requires substantial access to information that is often not available. Issues arise, in particular, when determining whether the maximum available resources and means were utilised by States. While it is now clearer what resources and means are to be used, and there is guidance as to how they should be allocated, determining whether this has been done to the 'maximum' is a subjective and complex decision. Also, while it is clear that there is a legal obligation for States to seek international assistance and cooperation where they cannot realise the right to education themselves, whether, and the extent to which, those States in a position to assist and cooperate have a moral or legal obligation to do so is also uncertain.

As to the obligations provided for within the General Comments of the CESCR, The minimum core obligations approach, while controversial, should not be abandoned. Although, we should abandon the rhetoric that minimum core obligations are immediate. Minimum core obligations remain useful when understood, as

advanced in this chapter, to correlate to content that is either immediate or progressive in nature depending on the element of the right in question. Minimum core obligations are also particularly useful in situations of NIAC in the context of deliberate and direct attacks, in light of the fact that they cannot be subject to reservation, derogation or limitation. The tripartite obligations are less controversial, and also constitute useful tools for the realisation of education during a NIAC. They are broad, although clear in their application, particularly when considered alongside the 4-A framework.

While the CRC and the OPCRC more appropriately regulate the use of child soldiers, there are numerous inadequacies in the manner in which they do. Firstly, the CRC only protects those under the age of 15, and while the OPCRC closes this gap in protection by protecting those under the age of 18, the OPCRC instrument would benefit from wider ratification so as to ensure that all States adhere to the same higher standard. Secondly, there is no absolute obligation on States to prevent the involvement of children in hostilities, those below the age of 18 can voluntarily enlist, and while Article 4 refers to NSAG, this is framed as a moral, not a legal obligation. Thirdly, and most significantly, the OPCRC imposes a double standard, in that the standard expected from NSAG under Article 4 is much higher than that expected of States, undermining the OPCRC.

Chapter Two examines the protection of education within IHL in the context of a NIAC. There are various gaps and ambiguities within IHL that may impact the protection of education in practice. The first thing to note is that while the Geneva Conventions benefit from universal ratification, a weakness of IHL is that the Additional Protocols, particularly Additional Protocol II, could benefit from further ratification, to ensure consistency in the application of IHL rules. Another issue is that it is clear that educational institutions, staff and students are granted a lower level of

protection during NIAC in comparison to an IAC. There are far fewer provisions applicable during situations of NIAC. Customary IHL is, however, capable of filling in some of the gaps in protection left by the lack of applicable treaty law in a NIAC. The ICRC study is an excellent starting point for determining the applicable customary IHL in a NIAC, but it should be noted that the methodology of the study has been subject to criticism, and should be used with caution. The possible application of customary rules to NIAC is significant because there is more treaty law, with more detailed provisions, on IAC, accepted by a greater range of States, while for a NIAC, there is fewer and less detailed treaty law, with more limited participation.

Despite the significance of classifying a conflict as IAC or NIAC, making the distinction between them is often factually and politically difficult, particularly in the context of mixed conflicts. Though the gap between them has also narrowed with the adoption of a customary definition in *Tadic*. There has been renewed debate as to whether the division between IAC and NIAC continues to make sense. Before a unified body of law is adopted, it would be necessary to determine the impact of a unified IHL in respect of all the areas of protection currently provided for within IHL. If, after this cost-benefit analysis, it is determined that the current protection afforded in IHL could not be maintained, rather than creating a unified body of law the solution could be to amend Additional Protocol II so that it regulates NIAC in a manner that better reflects customary law. This would allow IAC to benefit from the wider protection that it currently affords, while ensuring that the rules in a NIAC are strengthened.

Few provisions explicitly protect education in either an IAC or NIAC, again with fewer provisions existing that explicitly protect education during NIAC. None explicitly prohibit deliberate and direct attacks against education. However, the

provision for care and aid is a significant protection for children in a NIAC. In light of the significance of this provision, the suggestion that consideration should also be given to whether children should be defined as including all person aged 18 and under, is reiterated and supported.¹¹⁶⁷ The principles of distinction, military necessity and proportionality are also broad enough to protect education in relation to deliberate and direct attacks. However, determining whether an attack is proportionate is complex, decisions have to be made in good faith on the basis of the information that was available at the time.

In relation to the principle of distinction, the concept is regulated to a much greater extent in an IAC. The protection granted through the principle of distinction depends upon whether someone or something comes within the definition of civilian, civilian population or civilian object respectively, but there is a lack of authoritative guidance on when a person is a civilian entitled to protection from attack, or taking a direct part in hostilities and liable to targeting, and the suggestion of a revolving door of protection is subject to criticism. A particular weakness of IHL is that only protects those under the age of 15 from military recruitment and use. As to a civilian object, again the protection granted in a NIAC is weaker still, as no provisions explicitly prohibit attacks against civilian objects, though this is said to apply a matter of customary law. The greatest weakness in the protection of education within IHL is that educational institutions are not given special protection in respect of a prohibition on their military use. They would also benefit from distinctive emblems. In light of the fact that educational institutions lack special protection, the presumption of being a civilian and of civilian use is a key protection.

¹¹⁶⁷ Protecting Children in AC, at [3.43.7, 3.54-3.54.1, 9.12.1]

Chapter three dealt with the more debated and difficult question as to the manner in which IHRL and IHL applies in armed conflict simultaneously. There is currently a lack of clarity as to how to regulate the simultaneous application of IHRL and IHL. While the ICJ attempted to provide guidance on this matter, the lack of clarity in its effort resulted in many conflicting interpretations. The implication of this is that the application of relevant legal norms may vary in practice depending on the approach adopted, resulting in the inconsistent and therefore inadequate realisation of the right to education during NIAC.

It is clear that the humanisation approach, like the traditional approach, is no longer an accepted interpretation of the relationship between the two regimes. It is also clear that the complementarity approach is insufficient on its own, as this approach fails to take into account that genuine conflicts between IHRL and IHL may occur. As such, the complementarity approach remains relevant, but recourse to a further approach is needed to explain how to resolve such conflicts.

The *lex specialis* is often argued to be the prevailing approach that appropriately regulates the relationship, particularly when understood with the ‘specificity’ context. However, it should be borne in mind that the application of the *lex specialis* principle is still controversial, as there is no clear consensus as to the manner in which one determines which rule is special and which is general. I further argue it is not always possible to determine which rule is special and which is general, as will be seen in the case study. A further, and significant, problem with the *lex specialis* approach is that it is difficult for those on the ground, in the absence of matrices that determine which rule is the special rule, to apply the law in practice. These difficulties are overcome with the ‘active hostilities/security operations’ approach, which I advance as the best approach to regulation the relationship between IHRL and IHL in practice, one

regime, to varying degrees depending on the context, works as the primary framework, with the other being taken into account as the secondary framework. This not only simplifies the relationship, making the law more easily applicable in practice, it also appropriately balances the regimes and makes clear that neither regime is undermined because both remain applicable and neither is displaced. This approach also clarifies the relationship in respect of conflicts between treaty and customary rules.

The final approach examined in this chapter is the unified approach, and while not a feasible approach presently, this is certainly a possibility in the future, and is one that should be pursued. If the unified approach were to be pursued, it would need to be done with considerable care so that the two regimes are consolidated in way that delicately balance the needs of both. It is correct that the suggested obstacles to such an approach are surmountable.

Chapter Four of this thesis examined the adequacy of IHRL and IHL when applied simultaneously in practice to the issue of deliberate and direct attacks against education in the States of Colombia and the DRC. This chapter highlights the gaps and weaknesses highlighted in the earlier chapters, and makes clear that the current state of IHRL and IHL is inadequate as it fails to properly provide for education in practice. While IHRL can be used to fill in some of the gaps in IHL, and vice versa, gaps remain.

5.2. Recommendations

The recommendation contained in *Protecting Children* is reiterated, namely that the Additional Protocols to the Geneva Conventions and the OPCRC be subject to greater ratification, and that the Special Representative for Children and Armed Conflict could assist in raising awareness and securing greater ratification of such

instruments.¹¹⁶⁸ Wider ratification is necessary as these are essential instruments for the protection of education from deliberate and direct attacks in a NIAC. It is clear that the biggest problem permeating IHRL and IHL is ambiguity, there are also some gaps in protection that need rectifying. Both areas of law can be reformed to better provide for education in the context of deliberate and direct attacks during NIAC in respect of the gaps or ambiguities outlined above.

5.3. Scope for further research

There are avenues for further research. Firstly, the effectiveness of the manner in which international criminal law protects education in a NIAC in the context of deliberate and direct attacks can be examined. Secondly, there is scope for further research into the immediate and progressive nature of minimum core components of other ESCR. Thirdly, case studies involving IAC and mixed conflicts could be examined, or case studies analysing how effective IHRL and IHL are when, for example, Additional Protocol II has not been ratified by a State, and what the impact of this would be. Fourthly, the IHRL and IHL obligations of NSAG in respect of deliberate and direct attacks against education could be examined in the context of case studies. Fourthly, an examination of which rules of IHRL relevant to the protection of education form a part of customary law could be undertaken, alongside an analysis of the accuracy of the ICRC study in identifying relevant customary rules of IHL.

¹¹⁶⁸ Ibid, at [1.7, 1.12.3, 2.69, 9.8, 9.49]

Bibliography

- Akande D, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Wilmshurst E, *International Law and the Classification of Conflicts* (Oxford University Press 2012)
- Aldrich G H, 'The Laws of War on Land' (2000) 94 *American Journal of International Law* 42
- Alfredsson G, 'The Right to Human Rights Education' in Eide A and others, *Economic, Social and Cultural Rights: A Textbook* (2nd ed, Martinus Nijhoff 2001)
- Alston P, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 332
- Alston P and Goodman R, *International Human Rights: The Successor to International Human Rights on Context: Law, Politics and Morals* (Oxford University Press 2013)
- Alston P and Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156
- Arambulo K, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Intersentia 1999)
- Arimatsu L, 'The Democratic Republic of Congo 1993-2010' in Wilmshurst E, *International Law and the Classification of Conflicts* (Oxford University Press 2012)
- Arksey H and Knight P T, *Interviewing for Social Scientists: An Introductory Resource with Examples* (Sage: London, 1999)
- Bart G R, 'The Ambiguous Protection of Schools under the Law of War: Time for Parity with Hospitals and Religious Buildings' (2009) 40 *Georgetown Journal of International Law* 405
- Beiter K D, *The Protection of Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Koninklijke Brill NV 2006)
- Bellinger J B and Haynes W J, 'A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law' (2007) 89 *International Review of the Red Cross* 443
- Bethlehem D, 'The Methodological Framework of the Study' in Wilmshurst E and Breau S, *Perspectives on the ICRC Study on Customary International Law* (Cambridge University Press 2007)

Boothby W, ‘And for Such Time as’’: The Time Dimension to Direct Participation in Hostilities’ (2010) 42 *New York University Journal of International Law and Politics* 741

— — *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors* (T.M.C. Asser Press 2014)

Boyle A, ‘Soft Law in International Law Making’ in Malcolm D Evans, *International Law* (5th edn, Oxford University Press 2018)

Brand D, ‘The Minimum Core Content of the Right to Food In Context: A Response to Rolf Kunnemann’ in Brand D and Russell S (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002)

British Institute of International and Comparative Law, *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook* (British Institute of International and Comparative Law 2012)

— — *Protecting Education in Insecurity and Armed Conflict: New Developments 2015* (British Institute of International and Comparative Law 2015)

Burton M, ‘Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries’ in Watkins D and Burton M (eds), *Research Methods in Law* (Routledge 2013)

Butler D, ‘Lost Generation Looms as Refugees Miss University: Educational Void Risks Hampering Reconstruction in Middle East’ (Nature, September 2015) at <https://www.nature.com/news/lost-generation-looms-as-refugees-miss-university-1.18403>

Cahill-Ripley A, *The Human Right to Water and its Application in the Occupied Palestinian Territories* (Routledge 2011)

Cassimatis A E, ‘International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law’ (2007) 56(3) *International and Comparative Law Quarterly* 623

Cerone J, ‘Jurisdiction and Power: the Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context’ (2007) 40(2) *Israel Law Review* 396

Chapman A R, ‘A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996) 18(1) *Human Rights Quarterly* 23

— — ‘Core Obligations Related to the Right to Health and their Relevance for South Africa’ in Brand D and Russell S (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002)

Chapman A and Russell S, 'Introduction' in Chapman A and Russell S (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002)

Chenwi L, 'Unpacking "Progressive Realisation", its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 39 *De Jure* 742

Chevalier-Watts J, 'Has Human Rights Law become *Lex Specialis* for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?' (2010) 14(4) *The International Journal of Human Rights* 584

Christian Tomuschat C, 'Human Rights and International Humanitarian Law' (2010) 21(1) *European Journal of International Law* 15

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

Collier P, 'Doing Well out of War: An Economic Perspective' in Berdal M and Malone D M (eds), *Greed and Grievance: Economic Agendas in Civil Wars* (Lynne Rienner 2000)

Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of State Parties' Obligations (Art. 2, Para 1, of the Covenant)*, 14 Dec. 1990, E/1991/23

— — *Concluding Observations: Philippines*, 1995, UN Doc. E/C.12/1995/7

— — *General Comment 7: The Right to Adequate Housing (art. 11.1 of the Covenant: Forced Evictions)*, 20 May. 1997, E/1998/22

— — Committee on Economic, Social and Cultural Rights, *General Comment 11: Plans of Action for Primary Education (Art 14)*, 10 May 1999, E/C.12/1999/4

— — *General Comment No. 12: The Right to Adequate Food (Art 11)*, 12 May.1999, E/C.12/1999/5

— — *General Comment No. 13, The Right to Education (Art. 13 of the Covenant)*, 8 Dec. 1999, E/C.12/1999/10

— — *General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12)*, 11 Aug. 2000, E/C.12/2000/4

— —, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel* 31 Aug. 2001, E/C.12/1/Add.69

— — CESCR, *Concluding Observations: Senegal*, (2001) UN Doc. E/C.12/1/Add62

— — *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 Jan. 2003, E/C.12/2002/11

— — *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, 26 Jun. 2003, E/C.12/1/Add.90

— — *Report on the Thirtieth and Thirty-First Sessions*, 2004, E/2004/22

— — *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he or she is the Author (article 15, paragraph 1 (c), of the Covenant)* 12 Jan. 2006, E/C.12/GC/17

— — *General Comment No. 19: The Right to Social Security (art. 9)*, 4 Feb. 2008, E/C.12/GC/19

— — *Concluding observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of the Congo* 16 Dec. 2009, E/C.12/COD/CO/4

— — *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, 7 Jun. 2010, E/C.12/COL/CO/5

— — *Implementation of the International Covenant on Economic, Social and Cultural Rights: Third Periodic Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Nepal*, 2011, E/C.12/NPL/3

— — CESCR, *Concluding Observations: DRC*, at [16]; CRC, *Concluding Observations: Democratic Republic of Congo*, (2012) CRC/C/OPAC/COD/CO/1, at [18]

Coomans F, 'Clarifying the Core Elements of the Right to Education' (1995) 18 SIM Special 11

— — 'In Search of the Core Content of the Right to Education' in Chapman A and Russell S (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002)

— — 'Education and Work' in Moeckli D and others, *International Human Rights Law* (2nd ed, Oxford University Press 2014)

Coomans F, Grunfeld F and Kamminga M T (eds), *Methods of Human Rights Research* (Intersentia 2009)

Cownie F and Bradney A, 'Socio-legal Studies: A Challenge to the Doctrinal Approach' in Watkins D and Burton M (eds), *Research Methods in Law* (Routledge 2013)

Craven M, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995)

— — ‘The International Covenant on Economic, Social and Cultural Rights’ in Hanski R and Suksi M, *An Introduction to the International Protection of Human Rights: A Textbook* (2nd ed, Abo Akademi University 1999)

Crawford E, ‘Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts’ (2007) 20 *Leiden Journal of International Law* 441

— — *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford University Press 2010)

— — *Identifying the Enemy: Civilian Participation in Armed Conflict* (Oxford University Press 2015)

d’Aspremont J and Tranchez E, ‘The Quest for a Non-conflictual Existence of International Human Rights Law and Humanitarian Law: Which Role for the *Lex Specialis* Principle?’ in Kolb Rand Gaggioli G, *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013)

Deane, S ‘Syria’s Lost Generation: Refugee Education Provision and Societal Security in an Ongoing Conflict Emergency’ (2016) 47 *IDS Bulletin* 35

Denscombe M, *The Good Research Guide: For Small Scale Research Projects* (5th edn, Open University Press 2014)

De Schutter O, ‘The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food: Moving from Charity to Obligation’ (2009)

— — ‘Introduction’ in De Schutter O (ed) *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2013)

Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd edn, Cambridge University Press 2019)

Dinstein Y, *Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004)

Dixon R, ‘Creating Dialogue about Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited’ (2007) 5 *International Journal of Constitutional Law* 391

Dobinson I and Johns F, ‘Qualitative Research Methods’ in McConville M and Chui W H (eds), *Research Methods for Law* (Edinburgh University Press 2007)

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

Droege C, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40(2) *Israel Law Review* 310

— — 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 *International Review of the Red Cross* 501

Dupuy K E, 'Education in Peace Agreements, 1989–2005' (2008) 26 *Conflict Resolution Quarterly* 149

Eatwell, T, *State Responsibility for Human Rights Violations Committed in the State's Territory by Armed Non-State Actors* (Geneva Academy of International Humanitarian Law and Human Rights 2018), 7

Eide A and Rosas A, 'Economic, Social and Cultural Rights: A Universal Challenge' in A Eide and others, *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001)

Fatima S QC, *Protecting Children in Armed Conflict* (Hart Publishing 2018)

Felner E, 'Closing the Escape Hatch: A Toolkit to Monitor the Progressive Realization of Economic, Social and Cultural Rights' (2009) 3 *Journal on Human Rights Practice* 402

Flinterman C, 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1997) 15 *Netherlands Quarterly of Human Rights* 691

Fortin K, 'Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948 to 1968' (2012) 94 *International Review of the Red Cross* 1433

— — *The Accountability of Armed Groups under Human Rights Law* (Oxford University press 2017)

Gasser H, *International Humanitarian Law: An Introduction* (Paul Haupt Publishers 1993)

— — 'Protection of the Civilian Population' in Dieter Fleck, *The Handbook of International Humanitarian Law* (Oxford University Press 2009)

Giacca G, *Economic, Social and Cultural Rights in Armed Conflict* (Oxford University Press 2014)

Gill T D, 'Chapter 9: Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law – A Plea For Mutual Respect and a Common-sense Approach' (2013) 12 *The Yearbook of International Humanitarian Law*

Gillham B, *Case Study Research Methods* (Continuum International Publishing Group 2010)

Global Coalition to Protect Education from Attack, *Education under Attack: 2014* (GCPEA 2014)

— — ‘Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict’ at <http://protectingeducation.org/guidelines>

— — ‘Safe Schools Declaration Endorsements’ at <http://www.protectingeducation.org/guidelines/support>

— — *Education under Attack: 2018* (GCPEA 2018)

Global Education Cluster, *Booklet 6: Education for Building Peace, Protecting Education in Countries Affected by Conflict Series* (Global Education Cluster 2012)

Goodman R and Jinks D, ‘The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law: An Introduction to the Forum’ (2010) 42 *New York University Journal of International Law and Politics* 637

Gowlland-Debbas V and Gaggioli G, ‘The Relationship between International Human Rights and Humanitarian Law: An Overview’ in Kolb R and Gaggioli G, *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013)

Green F, ‘Fragmentation in Two Dimensions: The ICJ’s Flawed Approach to NonState Actors and International Legal Personality’ (2008) 9 *Melbourne Journal of International Law* 50

Green L C, *The Contemporary Law of armed Conflict* (3rd edn, Manchester University Press 2008)

Greenwood C, ‘Scope of Application of Humanitarian Law’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd Ed, Oxford University Press 2008)

Haines S, ‘The Nature of War and the Character of Contemporary Armed Conflict’, in Wilmshurst, E *International Law and the Classification of Conflicts* (Oxford University Press 2012)

Hammersley M and Atkinson P, *Ethnography: Principles in Practice* (3rd edn, Routledge 2007)

Hammond M and Wellington J, *Research Methods: The Key Concepts* (Routledge 2013), 145

Hampson F J, ‘The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body’ (2008) 90 *International Review of the Red Cross* 549

Hathaway O A and others, 'Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review

Heintze H, 'Theories on the Relationship between International Humanitarian Law and Human Rights Law' in Kolb R and Gaggioli G, *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013)

Hoecke M V, 'Legal Doctrine: Which method(s) for what kind of discipline?' in Hoecke M V (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011)

Human Rights Watch, "'Our School Became the Battlefield": Using Schools for Child Recruitment and Military Purposes in Eastern Democratic Republic of Congo', October 2015, <https://www.hrw.org/report/2015/10/27/our-school-became-battlefield/using-schools-child-recruitment-and-military>

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

Hurtado M, Dosdad A I and Hernández S G, 'The relationship between human trafficking and child recruitment in the Colombian armed conflict' (2018) 39 Third World Quarterly 941

Hutchinson T, 'Doctrinal Research: Researching the Jury' in Watkins D and Burton M (eds), *Research Methods in Law* (Routledge 2013)

Iles K, 'Limiting Socio-economic Rights: Beyond the Internal Limitations Clause' (2004) 20 South African Journal on Human Rights 448

International Committee of the Red Cross, *Commentary IV Geneva Convention Relative to the Protection of Civilian Person in Time of War* (ICRC: Geneva, 1958)

— — *Conference of Government Experts and the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1971)

— — *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987)

— — *How is the Term Armed Conflict Defined in International Humanitarian Law: Opinion Paper* (ICRC, 2008)

— — *ICRC Interpretive Guidance on Direct Participation in Hostilities* (ICRC, 2009)

— — *Customary International Humanitarian Law: Volume I: Rules* (Cambridge University Press 2009)

— — *Commentary on the First convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC 2016)

<https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5087F3472575591CC1257F150049C80B> (Accessed at 30/09/2019)

— — *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (2nd edn, ICRC 2017)

Jochnick C, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 *Human Rights Quarterly* 60

Knight P T, *Small-scale Research: Pragmatic Inquiry in Social Science and the Caring Professions* (Sage Publications 2002)

Kolb R and Hyde R, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008)

Kretzmer D, Giladi R and Shany Y, 'Introduction - International Humanitarian Law and International Human Rights Law: Exploring Parallel Application' (2007) 40 *Israel Law Review* 306

Krieger H, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11(2) *Journal of Conflict and Security Law* 265

Kunnemann R, 'The Right to Adequate Food: Violations Related to its Minimum Core Content' in Brand D and Russell S (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002)

Kuper J, *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff 2005)

Lehmann K, 'In Defense of the Constitutional Court: Litigating Socio-economic Rights and the Myth of the Minimum Core' (2006) 22 *American University International Law Review* 163

Liebenberg S, 'The Right to Social Security: Response from a South African Perspective' in Brand D and Russell S (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002)

Lubell N, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *International Review of the Red Cross* 737

— — 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the debate' (2007) 40(2) *Israel Law Review* 648

Mačák K, *Internationalized Armed Conflicts in International Law* (Oxford University Press 2018)

Mathews H, 'The Interaction between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-International Armed Conflicts' (2013) 12 *The International Journal of Human Rights* 633

McCoubrey H, *International Humanitarian Law: The Regulation of Armed Conflicts* (Dartmouth Publishing Company 1990)

McLaughlin R, 'The Law of Armed Conflict and International Human Rights Law: Some Paradigmatic Differences and Operational Implications' (2011) 13 *Yearbook of International Humanitarian Law* 213

Mégret F, 'Nature of Obligations' in Moeckli D, Shah S and Sivakumaran S (eds), *International Human Rights Law* (2nd ed, Oxford University Press 2014)

Melish T J, 'Rethinking the 'Less as More' Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas' (2006) 39 *New York University Journal of International Law and Politics* 171

Melzer N, *Targeted Killing in International Law* (Oxford University Press, 2008)

— — 'Keeping the Balance between Military Necessity and Humanity: A Response to the Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *New York University Journal of International Law and Politics* 831

Meron T, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of Internal Law* 239

Milanovic M, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14(3) *Journal of Conflict and Security Law* 459

— — *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011)

Moir L, *The Law of Internal Armed Conflict* (Cambridge University Press 2002)

Mottershaw E, 'Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law' (2008) 12(3) *The International Journal of Human Rights* 449

Murray D, *Human Rights Obligations of Non-State Armed Groups: Studies in International Law* (Hart Publishing 2016)

Murray D and others (eds), *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016)

Müller A, 'Limitations to and Derogations from Economic, Social and Economic Rights' (2009) 9(4) *Human Rights Law Review* 557

— — *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health-Related Issues in Non-International Armed Conflicts* (Martinus Nijhoff Publishers 2013)

Neuman G L, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863

Nolan A, Lusiani N J and Curtis C, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social rights' in Nolan A (Ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge university Press 2014)

Nowak M, 'The Right to Education' in Eide A and others, *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001)

Oberleitner G, 'Humanitarian Law as a Source of Human Rights Law' in Shelton D (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013)

O'Connell M E, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd ed, Oxford University Press 2013)

Odello M, 'Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law' in Arnold R and Quenivet N, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008)

Odello M and Seatzu F, *The UN Committee on Economic, Social and Cultural Rights: The Law, process and Practice* (Routledge 2013)

Oeter S, 'Methods and Means of Combat' in Fleck D, *The handbook of International Humanitarian Law* (3rd ed, Oxford University Press 2013)

Olson L M, 'Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict' (2009) 40(3) *Case Western Reserve Journal of International Law* 437

Otto R, *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law* (Springer 2012)

Paust J, 'Human Rights on the Battlefield' (2015) 47 *The George Washington International Law Review* 509

Pejic J, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', in Wilmshurst E, *International Law and the Classification of Conflicts* (Oxford University Press 2012)

Pictet J, *Commentaries on the Geneva Conventions of 12 August 1949, Vol. III: Geneva Convention relative to the Treatment of Prisoners of War* (ICRC 1960)
Provost R, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002)

Prud'homme N, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 *Israel Law Review* 355

Rodenhäuser T, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law* (Oxford University Press 2018), 1-4

Quenivet N, 'The History of the Relationship between International Humanitarian Law and Human Rights Law' in Arnold R and Quenivet N, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008)

Rabasa A and others, *Counternetwork: Countering the Expansion of Transnational Criminal Networks* (RAND 2017)

Rehman J, *International Human Rights Law* (2nd ed, Pearson Education Limited 2010)

Reisman W M, 'Application of Humanitarian Law in Noninternational Armed Conflicts: Remarks by W. Michael Reisman' (1991) 85 *ASIL Proceedings* 83

Reisman W M and Silk J, 'Which law applies to the Afghan conflict?' (1988) 82 *American Journal of International Law* 459

Robertson R E, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realising Economic, Social and Cultural Rights' (1994) 16 *Human Rights Quarterly* 693

Rodley N S, 'Can Armed Opposition Groups Violate Human Rights?' in Mahoney K E and Mahoney P (eds), *Human Rights in the Twenty-First Century* (Springer 1993)

— — 'International Human Rights Law' in Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018), 783

Rowe P, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press 2006)

— — 'Chapter 10: The Application of International Humanitarian Law to Attacks on Education in Armed Conflict' in UNESCO, *Protecting Education from Attack: A State-of-the-Art Review* (UNESCO 2010)

Russell S, 'Introduction: Minimum State Obligations - International Dimensions' in Brand D and Russell S (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives* (Pretoria Book House 2002)

Salter M and Mason J, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman 2007)

Sambanis N, 'Using Case Studies to Expand Economic Models of Civil War' (2004) 2 *Perspectives on Politics* 259

Sassòli M and Olsen L M, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case: New Horizons for International Humanitarian and Criminal Law' (2000) 82 *International Review of the Red Cross* 733

Sassoli M and Olson L M, 'The Relationship Between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *International Review of the Red Cross* 599

Saul B, Kinley D and Mowbray J, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014)

Save the Children, 'Attacks on Education: The Impact of Conflict and Grave Violations on Children's Futures' (Save the Children, 2013)

http://www.protectingeducation.org/sites/default/files/documents/grave_violations.pdf

Save the Children, *Education for Peace: Building Peace and Transforming Armed Conflict Through Education Systems* (Save the Children 2008)

Save the Children, 'Education under Attack in Syria' (Save the Children, 2015)

Save the Children, 'The Future is Now: Education for Children in Countries Affected by Conflict' (Save the Children, 2010)

Save the Children, *Futures Under Threat: The Impact of the Education Crisis on Syria's Children* (Save the Children, 2014)

Save the Children, 'What do Children Want in Times of Emergency and Crisis? They Want an Education' (Save the Children, June 2015)

www.savethechildren.org/content/dam/global/reports/education-and-child-protection/what-children-want.pdf

Schmitt M N, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *New York University Journal of International Law and Politics* 697

Schmitt M N, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 *Harvard National Security Journal* 5

Scobbie I, 'The Approach to Customary International Law in the Study' in Elizabeth Wilmshurst and Susan Breau, *Perspectives on the ICRC Study on Customary International Law* (Cambridge University Press 2007)

— — ‘Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflicts’ (2010) 14(3) *Journal of Conflict and Security Law* 449
Sepúlveda M, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights (Intersentia 2003)

Silverman D, *Doing Qualitative Research* (4th ed Sage 2013)

Sivakumaran S, ‘Re-envisaging the International Law of Internal Armed Conflict’ (2011) 22(1) *The European Journal of International Law* 219

— — *The Law of Non-International Armed Conflict* (Oxford University Press 2012)

Skogly S I, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia 2006)

— — ‘The Requirement of Using the ‘Maximum of Available Resources’’ for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12 *Human Rights Law Review* 393

Socio-Legal Studies Association, ‘Statement of Principles of Ethical Research’ (2009),
at http://www.slsa.ac.uk/images/slsdownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf

Special Representative for Children in Armed Conflict’s, ‘Guidance Note on Security Council Resolution 1998: Protect Schools + Hospitals’, (May 2014),
<https://childrenandarmedconflict.un.org/publications/AttackonSchoolsHospitals.pdf>

Sriram C L, Martin-Ortega O, and Herman J, *War, Conflict and Human Rights: Theory and Practice* (3rd ed, Routledge 2018)

Ssenyonjo M, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009)

— — ‘Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law’ (2011) 15 *The International Journal of Human Rights* 969

Stewart J G, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Conflict’ (2003) 85 *International Review of the Red Cross* 313

Summers J, ‘Introduction’ in Harvey C, Summers J and White N D (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014)

Szesnat F and Bird A R, ‘Colombia’ in Wilmschurst E, *International Law and the Classification of Conflicts* (Oxford University Press 2012)

Tawil S, 'International Humanitarian Law and Basic Education' (2000) 82 *International Review of the Red Cross* 581

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

Thyne C L, 'ABC's, 123's, and the Golden Rule: The Pacifying Effect of Education on Civil War, 1980-1999' (2006) 50 *International Studies Quarterly* 733

Tobin J, *The Right to Health in International Law* (Oxford University Press 2012)

Toebes B, 'The Right to Health' in Eide A, Krause C, and Rosas A (eds), *Economic, Social and Cultural Rights: A textbook* (2nd ed, Martinus Nijhoff 2001)

Tomasevski K, *Education Denied: Costs and Remedies* (Zed Books 2003)

UNESCO, *Education under Attack: 2007* (UNESCO 2007)

— —, *Education under Attack: 2010* (UNESCO 2010)

— — Education Counts: Towards the Millennium Development Goals (UNESCO, 2011) <<http://unesdoc.unesco.org/images/0019/001902/190214e.pdf>>, 7

— — *International Standard Classification of Education: ISCED 2011* (UNESCO 2011)

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

UNICEF, *The Two Faces of Education in Ethnic Conflict: Towards a Peacebuilding Education for Children* (UNICEF 2000)

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

UNICEF, 'Syria's Children: A Lost Generation?' (UNICEF, March 2013)

UNICEF 'Investment in Education Desperately Needed to Avert "Lost Generation" of Rohingya children – UNICEF: One Year After Mass Exodus from Myanmar, the Futures of More than 500,000 Refugee Children in Bangladesh are in the Balance' (UNICEF, August 2018)

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

UNICEF and others, 'Syria Crisis: Education Interrupted – Global Action to Rescue the Schooling of a Generation' (UNICEF and others, 2013)

http://www.protectingeducation.org/sites/default/files/documents/education_interrupted.pdf;

United Nations General Assembly, *Report of Four Special Rapporteurs on their Mission to Lebanon and Israel*, 2 Oct. 2006, A/HRC/2/7

— — *Report of the Special Rapporteur on the Right to Education, Vernor Munoz: Right to Education in Emergency Situations*, 20 May. 2008, A/HRC/8/10

— — *Interim Report of the Special Rapporteur on the Right to Education, Kishore Singh: The Right to Education*, 5 Aug. 2011, A/66/269

United Nations General Assembly Security Council, *Children and armed conflict: Report of the Secretary-General*, A/66/782–S/2012/261

van Dijk B, ‘Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions’ (2018) 112 *The American Journal of International Law* 553

Van Bueren G, ‘Alleviating Poverty Through the Constitutional Court’ (1999) 15 *South African Journal on Human Rights* 52

— — ‘Of Floors and Ceilings: Minimum Obligations and Children’ in Brand D and Russell S (eds), *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives*, (Pretoria Book House 2002)

Vick D W, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163

War Child, ‘Yemeni Children are Becoming a Lost Generation’ (War Child, May 2019), <https://www.warchild.org.uk/whats-happening/news/yemen-children-lost-generation>

Watkin K, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’ (2010) 42 *New York University Journal of International Law and Politics* 641

Wesson M, ‘Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court’ (2004) 20 *South African Journal on Human Rights* 284

Wilmshurst E, *International Law and the Classification of Conflicts* (Oxford University Press 2012)

Winkler I, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing 2014)

Young K G, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *The Yale Journal of International Law* 113

Zamir N, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar Publishing 2017)

Zegveld L, *The Accountability of Armed Opposition Groups in International Law* (Oxford University Press 2002)

Zhu L, 'International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council an Empirical Survey' (2014) *Journal of International Humanitarian Legal Studies* 186