# THE PROTECTION OF SCHOOLS AND EDUCATION IN ARMED CONFLICTS

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## AN ANALYSIS OF THE SAFE SCHOOLS INITIATIVE

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*JURI HUTTUNEN*

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## Executive Summary

This study analyses the Safe Schools Initiative led by the Global Coalition to Protect Education from Attack to improve the protection afforded to schools and universities in armed conflicts. For the purposes of this study, attention is directed to the two documents at the heart of this initiative, the Safe Schools Declaration and the related Guidelines for Protecting Schools and Universities From Military Use During Armed Conflict.

Sections 2 and 3 examine the currently applicable rules of international law most relevant for analysing the Safe Schools Initiative. Section 2 focuses on international humanitarian law, demonstrating that under this body of law, the current protection regime for schools, universities and related personnel does not differ from the general protection afforded to civilians and civilian objects. The protection under IHL is highly context-based, making it possible that schools and universities become lawful military objectives or that attacks damaging them remain lawful under IHL. Section 3 examines the right to education under international human rights law, highlighting the conduct-based nature of this state obligation. It is argued that despite the right to education remaining fully applicable during armed conflict, a state does not necessarily have to provide education to the exact same standards as in peacetime, while still complying with its treaty obligations. A state seeking to provide education in good faith by allocating the maximum number of resources may discharge its obligations in alternative teaching locations or for example through the use of distance-learning.

Section 4 turns the focus towards the Guidelines and their content. Comparing the content of the Guidelines to the current applicable IHL and human rights provisions analysed in the previous Sections, it is clear that the Guidelines are seeking to move further from the current international legal obligations and to elevate the protection of schools and universities akin to the special protection of medical establishments. Additionally, while the Guidelines and the Safe Schools Declaration are clear on their non-binding status, the GCPEA is engaged in strong advocacy for the largest possible implementation of these documents, further emphasising the departure from current legal standards.

Section 5 examines the national implementation measures reported by the GCPEA from the point of view of customary international law. While various types of implementation measures have already been conducted, the totality remains rather small given the number of endorsements the Safe Schools Declaration has received. As most of these implementation measures are clearly meant as policy documents instead of binding legal commitments or their legal status remains unclear, this study concludes that the Safe Schools Initiative has not affected current legal obligations for

the endorsing or other states. As such, these documents are still far away from creating new norms of customary law.

The Safe Schools Initiative is a success story. However, it could be argued that its focus and inspiration remain limited to non-international armed conflicts, differing from the threat scenarios states mainly preparing for an international armed conflict find themselves in. This, coupled with the Guidelines' large departure from current IHL standards and the strong advocacy of the GCPEA in implementing the Guidelines, means that for some states willing to stick to their existing legal commitments under international humanitarian and human rights law, endorsing the Guidelines through the Safe Schools Declaration could be rather ill-placed.

# 1 Introduction

This research project was conducted upon the request of the Finnish Ministry for Foreign Affairs ('MFA') at Erik Castrén Institute, University of Helsinki, between August 2023 and January 2024. Based on the request by the MFA, this study examines the international legal rules protecting schools and education in armed conflict, namely the relevant provisions of international humanitarian law ('IHL') and international human rights law ('IHRL'), and against this backdrop, analyses the recent Safe Schools Initiative launched by the Global Coalition to Protect Education from Attack ('GCPEA'). By the term 'Safe Schools Initiative', this study refers to the two international documents published by the GCPEA, the Safe Schools Declaration ('SSD')[1] and the Guidelines for Protecting Schools and Universities From Military Use During Armed Conflict ('GCPEA Guidelines'),[2] seeking to improve the protection of schools and universities and to ensure the continuation of education in conflict situations. As the Safe Schools Declaration has attracted wide international attention and over a hundred state endorsements at the time of writing, the MFA requested this study to take a look at the potential legal implications this initiative might have had or could have in the future. Therefore, the main research questions in this study can be summarised as follows: How are schools and education protected under the current provisions of international humanitarian and international human rights law? How does the Safe Schools Initiative relate to these provisions? What, if any, implications does the Safe Schools Initiative have for existing international legal obligations?

This study follows a doctrinal approach to international law. In order to answer these questions, this study is structured as follows: Section 2 discusses the protection afforded to physical school buildings, educational staff and students under international humanitarian law. Section 3 focuses on the protection of education by looking at the relevant provisions of international human rights law guaranteeing the right to education and how those provisions are to be applied in armed conflicts. In Section 4, the content of the Safe Schools Initiative is examined, focusing on the Safe Schools Declaration and the related GCPEA Guidelines. As the SSD is an international

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[1] Global Coalition to Protect Education from Attack ('GCPEA'), 'Safe Schools Declaration' <https://protectingeducation.org/wp-content/uploads/documents/documents_safe_schools_declaration-final.pdf> accessed 29 December 2023 (SSD)

[2] GCPEA, 'Guidelines For Protecting Schools and Universities From Military Use During Armed Conflict' < https://protectingeducation.org/wp-content/uploads/documents/documents_guidelines_en.pdf> accessed 29 December 2023 (GCPEA Guidelines)

political declaration endorsed at state level, the subsequent implementation practice of endorsing states reported by the GCPEA is also examined in Section 5 in order to determine whether this initiative has the potential of altering existing legal obligations.

The terms 'schools and universities' and 'schools' are used interchangeably in this study in accordance with the Safe Schools Initiative to denote places principally used for education in a broad sense, whatever they are called in the local context.[3] Schools could also be defined as all learning sites and educational facilities as determined by the local context, including all school-related spaces, structures, infrastructure and grounds attached to them, such as water, sanitation and hygiene facilities, which are recognisable and known to the community as such, but may or may not be marked by visible boundaries or signage.[4] Further, this study deals exclusively with educational institutions ordinarily under civilian authorities. Military schools and universities are not separately addressed. While education itself is a vast topic and subject to immense amounts of research spanning multiple disciplines, this study looks at education from a narrow point-of-view even for the purposes of international law, focusing on the provisions of IHL and IHRL. For the purposes of this study, education could be defined as:

'The processes by which societies deliberately transmit their accumulated information, knowledge, understanding, attitudes, values, skills, competencies and behaviours across generations. It involves communication designed to bring about learning.'[5]

Education has also been defined as the 'process of facilitating learning or the acquisition of knowledge, skills, values, benefits and habits.'[6]

This study is meant to serve as a point of departure for anyone interested in the legal protection afforded to schools and universities in armed conflict or the Safe Schools Initiative. When it comes to Sections 2 and 3 discussing the substance of IHL and IHRL, the scope of this study is rather limited in order to cover the provisions most relevant for analysing the Safe Schools Initiative. These Sections are not meant to act as exhaustive research reviews into the respective subjects – they rather aim to offer a summary of the doctrinal legal position at a glance. It is hoped that the literature and

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[3] 'Commentary on the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict' (GCPEA 2014), 7 (GCPEA Guidelines Commentary)

4 Shaheed Fatima (ed), Protecting Children in Armed Conflict (Hart Publishing 2018) 315

5 International Standard Classification of Education ISCED 2011 (United Nations Educational, Scientific and Cultural Organization (UNESCO) 2011) 79

6 UNESCO, 'SDG Resources for Educators - Quality Education' <https://en.unesco.org/themes/education/sdgs/material/04> accessed 19 October 2023

other source materials used in this study provide a keen reader with opportunities to expand on the scope of this study. Further, the general emphasis of this study is on the legal framework and concepts most relevant for the purposes of analysing the Safe Schools Initiative. This means that concepts closely related to the ones discussed in this study, for example the law of occupation and the relationship between IHL and IHRL in those circumstances, cannot be examined at length due to the limited scope of this study.

## 2 The protection of schools, staff, and students under international humanitarian law

As the title of this study suggests, the focus in this study as a whole is on the legal rules governing the protection of schools and education. As for the *schools*, this Section examines the protection of buildings and persons related to education in the physical world. Despite the rise of distance-learning online, the physical locations and the people present in them form the most perceivable aspect of education. This holds especially true in armed conflict, where wireless communication systems can be expected to function below their peacetime capacity. This Section examines the status of schools and universities as well as educational staff and students in armed conflict by looking at the relevant provisions of international humanitarian law, also called the law of war or the law of armed conflict, as this legal regime sets the limits for lawful violence during an armed conflict. This study refers to this legal framework as international humanitarian law ('IHL') without adopting any specific position the different terminological choices in this regard might entail.

IHL applies only in situations of armed conflict.[7] As the GCPEA Guidelines are meant to be applied in all armed conflicts,[8] this study considers the IHL rules applicable to both international armed conflicts ('IAC') and non-international armed conflicts ('NIAC'). In terms of treaty obligations, this study examines also those IHL treaties that have not been universally ratified, most importantly the two Additional Protocols to the Geneva Conventions of 1949.[9] In accordance with the content of the GCPEA Guidelines examined in Section 4 below, the main emphasis in this Section is on the general provisions of IHL governing the conduct of hostilities and their application to schools, staff and students, such as the principle of distinction and proportionality, as well as the obligation to take precautions in and against the effects of attacks. While other IHL provisions could also apply to schools, staff and students, such as the legal provisions governing their protection in situations of occupation, the scope of this study means those provisions relevant for analysing the Safe Schools Declaration need

[7] Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd ed, OUP 2008) 45 *et seq*

[8] GCPEA Guidelines Commentary 7

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 23 January 1979) 1125 UNTS 609 (AP II)

to be prioritised. Occupation-specific questions are briefly mentioned throughout this study where specifically relevant for the discussion.[10]

This Section demonstrates that as no special protection exists under IHL for buildings and personnel related to education, their protection is similarly to civilians dependent on their exclusion from lawful targets, these being military objectives and the military personnel of the adversary. IHL does not altogether prevent damage to civilian objects or the death of individual civilians, but only prohibits direct attacks targeting such objects and disproportionate collateral damage resulting from lawful attacks against military objectives. Additionally, while the defending party is under an obligation to segregate between military and civilian objectives, this obligation covers only 'feasible' precautions governed by the military necessities and circumstances on the ground ruling at the time. It is therefore concluded that IHL does not contain an absolute prohibition of attacks directed against or causing death and destruction to schools, students and educational staff, nor on the military use of schools and universities.

### *2.1 The principle of distinction*

Arguably one the most important principles of international humanitarian law,[11] the principle of distinction obliges the parties to an armed conflict to distinguish between civilian and military persons and objects on the battlefield. It has been called one of the 'cardinal' principles of customary IHL by the International Court of Justice ('ICJ').[12] Distinction has also been codified in all the essential IHL treaties,[13] with the Geneva Conventions of 1949[14] enjoying universal ratification. Indeed, as William Boothby writes:

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[10] See 2.3 and 3.4 below

[11] '(…) distinction (…) is the foundation on which the codification of the laws and customs of war rests' Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross (ICRC) 1987) [1863] (ICRC Additional Protocols Commentary)

[12] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> accessed 19 October 2023 [78] – [79]. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (ICRC 2005) 3 (ICRC CIHL Study Vol I)

[13] AP I arts 48, 51(2), 52(2); AP II art 13

[14] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention relative to the treatment of prisoners

> 'The law of armed conflict and the customary law of targeting are rooted in the principle that a distinction must be made throughout the conflict between those who may be lawfully attacked and those who must be respected and protected.'[15]

While the origins of the principle of distinction can be traced back to the earliest IHL instruments of the 19th century,[16] the current 'basic rule' of distinction is codified in article 48 of Additional Protocol I to the 1949 Geneva Conventions ('AP I'):

> 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.'

In addition to article 48, article 51 AP I sets the protection of the civilian population and individual civilians in more detail, while article 52 AP I governs the division between civilian objects and military objectives. Despite AP I being applicable only in IACs, and the status of a combatant and the attached concept of combatant privilege being relevant only in such armed conflicts,[17] the principle of distinction and the prohibition of attacking civilians or civilian objects is also generally considered to be applicable in NIACs.[18] The universal[19] NIAC provision found in Common Article 3

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of war (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 135 (GC III); Geneva Convention relative to the protection of civilian persons in time of war (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV).

[15] William H Boothby, *The Law of Targeting* (OUP 2012) 60

[16] Horace B Robertson Jr, 'The Principle of the Military Objective in the Law of Armed Conflict' (1998) 72 International Law Studies 197, 198-200

[17] Marco Sassòli, 'Combatants,' *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e272?rskey=twikVL&result=1&prd=MPIL> accessed 20 October 2023; Knut Dörmann, 'Combatants, Unlawful,' *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e425?prd=MPIL#law-9780199231690-e425-div2-2> accessed 19 October 2023

[18] AP II art 13(2). The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has confirmed the customary status of the distinction provisions of both APs, see *e.g., Prosecutor v Pavle Strugar* (Judgment) ICTY-01-42-T (31 January 2005) [220]

[19] Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81(2) American Journal of International Law 348 – 370

to the Geneva Conventions[20] does not provide for this distinction;[21] rather, it follows from article 13(2) AP II for those NIACs that fall under the higher threshold of applicability of a so-called 'AP II NIAC.'[22]

For those NIACs that do not fulfil the extensive criteria under AP II, distinction arguably applies through customary international law. According to the International Committee of the Red Cross ('ICRC') Customary International Law Study ('ICRC CIHL Study') Rule 1: 'The parties to the conflict must always distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.'[23] While the precise customary rule on distinction might not follow this exact formulation,[24] the ICRC has managed to identify widespread support in state practice for the general principle in both IACs and NIACs.[25] I. While the ICRC CIHL study has attracted its fair share of criticism over the years on multiple issues[26] and certainly does not offer a perfect picture of the customary international law relating to IHL and armed conflict by any means, it is still used in this study as a working starting point into the customary status of the fundamental IHL rules and principles discussed. In addition to the ICRC and the ICJ,[27] the principle of distinction has been generally accepted as forming part of customary law applicable in both kinds of armed conflicts by many states,[28] even those not party

[20] GC I – GC IV art 3

[21] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 134 ('Dinstein 2014')

[22] See AP II art 1 for the threshold of application; Dinstein 2014 136

[23] ICRC CIHL Study Vol I 3

[24] See Boothby 61-62 for a commentary

[25] Jean-Marie Henckaerts and Louise-Doswald Beck (eds), *Customary International Humanitarian Law Volume II: Practice Part 1* (ICRC 2005) 24-64 ('ICRC CIHL Study Vol II')

[26] *e.g.* Yoram Dinstein, 'The ICRC Customary International Humanitarian Law Study' (2006) 82 International Law Studies 99. For an overview of the reactions to the Study, see Marko Milanovic and Sandesh Sivakumaran, 'Assessing the Authority of the ICRC Customary IHL Study' (2022) 921-922 International Review of the Red Cross 1857, 1869, 1890 – 1893

[27] *Nuclear Weapons* [78] – [79]

[28] ICRC CIHL Study Vol I 5 fn 14 and the related citations in ICRC CIHL Study Vol II

to the Additional Protocols,[29] and scholars.[30] Accordingly, it is submitted that the parties to a NIAC are bound to not attack the civilian population, individual civilians or civilian objects[31] and instead, need to direct their attacks only against those taking an active (or direct) part in the hostilities.

### *2.1.1 Educational staff and students*

The definition of a civilian and a civilian object are construed negatively under IHL: they consist of those persons and objects that are not 'military' in character, *i.e.*, persons not members of armed forces or organised armed groups and objects falling outside the scope of military objectives. In IACs, article 50 AP I defines a civilian as a person who does not fall into the various categories of persons benefitting from the status of a prisoner of war (POW) or a combatant under article 43 AP I. Article 49 AP I further prescribes that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian. According to article 51 AP I:

> 1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
>
> 2. 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.
>
> 3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
>
> (...)

In addition to these paragraphs, article 51 governs the protection of the civilian population in more detail, for example by prohibiting various types of indiscriminate attacks, reprisals against civilians and their use to shield military objectives from

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[29] *e.g.* USA, J Fred Buzhardt, General Counsel, Department of Defense, Letter to Senator Edward Kennedy (22 September 1972) reprinted in (1973) 67 American Journal of International Law 122; Azerbaijan, Ministry of the Interior, *Command of the Troops of the Interior Order No 42* (9 January 1993) [4] cited in ICRC CIHL Study Practice Vol I 35; Iran, United Nations General Assembly (UNGA) Sixth Committee, 'Thirty-second session' (14 October 1977) UN Doc A/C.6/32SR.18 [20]

[30] *e.g.* Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (CUP 2004) 83 ('Dinstein 2004'); Robertson 197; Stefan Oeter, 'Methods and Means of Combat' in Fleck (ed), *Handbook of International Humanitarian Law* 175 [441]; Boothby 60; ICRC Additional Protocols Commentary 1448 [4761]

[31] Boothby 62

attack (so-called human shields). Article 13 AP II further provides in relation to AP II NIACs:

> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
>
> 2. 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.
>
> 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Both of these articles and various other provisions in AP I and II apply in relation to 'attacks.' According to article 49(1) AP I, attacks denote acts of violence against the adversary, whether in offence or defence.[32]

The protection of civilians in either type of armed conflict lasts only for as long as they do not directly participate in hostilities.[33] While the category of combatants and their privilege of participating in hostilities does not exist in a NIAC,[34] the legal category of persons participating in a NIAC can be approached somewhat similarly to the concept of distinction as seen in IACs. The 'NIAC combatants' consist of those persons directly participating in hostilities, whether in the armed forces of the state or as members of an organised armed group.[35] NIAC civilians on the other hand consist of those persons not directly participating in hostilities,[36] being defined rather similarly to the IAC definition of a civilian, albeit without the support of a written treaty provision. Per Dinstein, 'In other words, persons who take a direct part in hostilities – for such time as they do so – remove themselves from the umbrella of

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[32] AP I art 49(1)

[33] AP I art 51(3); AP II art 13(3)

[34] Marco Sassòli, 'Combatants,' *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e272?rskey=twikVL&result=1&prd=MPIL> accessed 20 October 2023; Knut Dörmann, 'Combatants, Unlawful,' *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e425?prd=MPIL#law-9780199231690-e425-div2-2> accessed 19 October 2023.

[35] 'The Manual on the Law of Non-International Armed Conflict With Commentary' (International Institute of Humanitarian Law 2006) <https://www.legal-tools.org/doc/ccf497/pdf/> accessed 11 January 2024 4 ('NIAC Manual'); Dinstein 2014 58

[36] Dinstein 2014 58 – 59

civilian exemption from attack in a NIAC.'[37] The parties to a NIAC therefore need to direct their attacks only against fighters, members of armed forces or civilians directly participating in hostilities.[38] Situations of doubt as to the person's civilian character might prove especially tricky in NIACs due to the vague definition of the notion of direct participation in hostilities when compared to the rule prescribed in article 49 AP I.[39]

As demonstrated by the considerations above, when it comes to the legal status of educational staff and students associated with schools and universities, the content of the relevant IHL rules is rather clear. Where such persons do not belong to state armed forces or to an organised armed group in a NIAC, they are to be treated as civilians similarly to any other person being excluded from these groups of people. In most instances this would be the default situation with students, teachers and educational staff present in a civilian educational institution. They could however lose their individual protection if they would opt to directly participate in hostilities. In terms of military schools and universities, the decisive criterion vis-à-vis the individuals is not the character of the educational institution, but the individual students' possible affiliation with the armed forces. Conversely, active-duty members of armed forces present in a civilian educational institution are excluded from the possible civilian status of the building and individuals present therein.

### *2.1.2 Schools and universities*

#### *2.1.2.1 The distinction between civilian objects and military objectives*

Civilian objects under AP I are defined as 'all objects which are not military objectives.'[40] According to article 52(2) AP I and customary international law,[41] 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

[37] Dinstein 2014 59

[38] ICRC CIHL Study Vol I 24; NIAC Manual 10; Dinstein 2014 213-214; Boothby 62

[39] On the discussion surrounding this notion, see *e.g.* Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC 2009) and the related symposium articles in (2010) 42 New York University Journal of International Law and Politics 637; see also Boothby 141 *et seq*; Dinstein 2014 58 *et seq*

[40] AP I art 52(1)

[41] ICRC CIHL Study Vol I 25; Boothby 63-64, 101; Dinstein 2004 82; Dinstein 2014 214-215; Robertson 203 – 207

> neutralization, in the circumstances ruling at the time, offers a definite military advantage.'[42]

The test under article 52(2) is effectively two-pronged: both the requirement of the *element* of a military objective (nature, location, purpose or use) and the *military advantage* attacking it offers must be fulfilled for the object to qualify as a military object.[43] As to the element of a military object, the *nature* of the object refers to objects directly or usually used (or more precisely owned) by armed forces, such as weapons, equipment, transports, fortifications, depots etc.[44] *Location* under article 52(2) AP I refers to particularly important geographical locations of a limited size that need to be captured from the enemy or prevented from falling into enemy hands on the basis of their location,[45] while *purpose* refers to the object's intended or planned future use. The *use* of the object, as the name suggests, refers to its current use at the time of attack.[46]

Based on these elements, a civilian object such as a car, could therefore become a military objective on the basis of its *use* when the armed forces begin to use said car to support its operations, for example by commandeering the vehicle to help with transporting military material. The inclusion of purpose in article 52(2) means that the same vehicle could also be targeted even before its use has begun or after the use has stopped.[47] However, it is important to note that the emphasis here is on *intended* use: the party to the conflict seeking to attack an object based on its purpose has to have (credible) information available at the time to support 'a reasonable belief' or a 'certain reasonable probability' that the enemy is indeed going to use the object in the future.[48] Intelligence available to the attacker is therefore crucial in the operation of this category of a military objective, as 'purpose is predicated on intentions known to guide the adversary, and not on those figured out hypothetically in contingency plans based on a worst case scenario.'[49] According to one view, a party to an armed conflict would not for example be justified in attacking a school solely on the basis of 'field intelligence revealing that the enemy intended to use it as a munitions depot when no

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[42] AP I art 52(2)

[43] ICRC Additional Protocols Commentary 635 [2018]; Ian Henderson, *The Contemporary Law of Targeting* (Brill 2009) 51; Dinstein 2004 85; Boothby 100; Robertson 201

[44] Henderson 54 – 55; ICRC Additional Protocols Commentary 636 [2020]

[45] Henderson 56 – 57

[46] ICRC Additional Protocols Commentary 636 [2021] – [2022]; Boothby 103

[47] Henderson 59 – 60

[48] Henderson 61; Boothby 104

[49] Dinstein 2004 90

munitions had actually been moved in prior to the attack.'[50] However, this particular point has also been contested by other commentators as too restrictive of a reading of the purpose criterion.[51]

In addition to fulfilling the first element of the definition under article 52(2) AP I, the total or partial destruction, capture or neutralization of the objective must offer a 'definite' military advantage in the circumstances ruling at the time of the targeting decision, when evaluated by the person responsible for making the decision on the particular attack.[52] It is therefore not lawful to launch an attack which only offers potential or indeterminate advantages.[53] Military advantage was defined already in the St Petersburg Declaration as 'The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.'[54] Permissible action in this regard could still be defined as action that logically relates, either directly or indirectly, to weakening the military forces of the enemy,[55] such as attacking enemy forces directly as well as attacking objects necessary for their military action.

While the general protection of the civilian population is also mentioned in article 13 AP II in addition to AP I, no similar treaty provision to article 52 AP I's definition of a military objective exists in relation to NIACs. Some of the later specialised treaties covering issues such as weapons law[56] or the protection of cultural property[57] applicable in NIACs mention the term 'military objectives' without providing a

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[50] Alexandra Boivin and Yves Sandoz, *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare* (University Centre for International Humanitarian Law 2004) 15, cited in Boothby 104

[51] Boothby 104

[52] Boothby 100 – 101; ICRC Additional Protocols Commentary 636 [2037]; Dinstein 2004 86; Henderson 73

[53] ICRC Additional Protocols Commentary 636 [2024]; Dinstein 2004 84 – 85

[54] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (Saint Petersburg 29 November / 11 December 1868) https://ihl-databases.icrc.org/en/ihl-treaties/st-petersburg-decl-1868 accessed 12 January 2024

[55] ICRC Additional Protocols Commentary 685 [2218]; Henderson 61 – 62

[56] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) (signed 3 May 1996, entered into force 3 December 1998) 2048 UNTS 98 ('CCW Protocol II')

[57] Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (signed 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 art 6(a)(i)

general rule as to how to distinguish between military and civilian objects. The International Criminal Court's ('ICC') Rome Statute further criminalises as a war crime applicable in NIACs the destroying or seizing the property of an *adversary* unless such destruction or seizure be imperatively demanded by the necessities of the conflict,[58] which has been argued in the ICRC CIHL Study to generally make the attacking of *civilian* objects a war crime applicable in NIACs.[59]

Despite these singular instances of treaties mentioning the inanimate aspect of the principle of distinction or the term 'military objective', the answer on whether the division between military and civilian objectives exists in NIACs arguably has to come from customary international law. The ICRC CIHL Study has deemed in its Rule 7 that the distinction between civilian and military objectives would apply also in NIACs by extending the application of the fundamental provisions found in AP I: 'The parties to the conflict must 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.'[60] Rules 8, 9 and 10 then repeat the provisions found in article 52 AP I as to the definition of civilian objects and military objectives, stated to be applicable also in NIACs.[61] The ICTY Appeals Chamber found in *Tadic*[62] and in *Hadžihasanović*[63] that the prohibition on attacks on civilian objects in non-international armed conflicts has attained the status of customary international law. This position is also non-controversial among scholarly works.[64] Perhaps most importantly, any other result would arguably be absurd, as having two different legal standards for distinction between IACs and NIACs would drastically change the legal treatment of objects normally clearly expected to be civilian objects, such as schools, depending on the type of armed conflict being fought.[65]

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[58] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 8(2)(e)(xii) ('Rome Statute')

[59] ICRC CIHL Study Vol I 25

[60] ICRC CIHL Study Vol I 25

[61] ICRC CIHL Study Vol I 29 – 36

[62] *Prosecutor v Dusko Tadic* (Decision) IT-94-1-AR72 (2 October 1995) [127] ('ICTY Tadic Jurisdiction Decision')

[63] *Prosecutor v Enver Hadžihasanović and Amir Kubura* (Decision) IT-01-47-AR73.3 (11 March 2005) [30]

[64] Boothby 71; Dinstein 2014 215; NIAC Manual 7, 11

[65] See Dinstein 2014 215 for examples

#### *2.1.2.2 Schools as military objectives*

The arguably vague definition used in article 52(2) means that no binding categories of legitimate targets (and consequently of civilian objects) could be made beforehand,[66] as the qualification of a military objective is highly dependent on the context in which the object is located at the time of the planning and the execution of the planned attack. Non-exhaustive lists and examples naturally have been drawn to illustrate the potential examples under each category. Similarly to individual civilians, civilian objects benefit from protection in situations of doubt. According to article 52(3) AP I:

> '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.'

This presumption applies only in situations of doubt regarding the *present use* of the object; it does not arise relation to the nature, location, or purpose elements in the definition of military objective.[67] As for the nature of the objective, having no room for doubt is rather is self-explanatory as this element of a military objective refers to objects always producing a military advantage.[68] As discussed above, the location and purpose on the other hand can turn an object ordinarily thought to be completely civilian into a military objective, without the requirement under article 52(3) AP I.

The inclusion of schools in the descriptive list under article 52(3) demonstrates the apparent fact then when used for their ordinary purpose, schools are undoubtedly considered to be civilian. Accordingly, many international organisations and NGOs have called attention for the civilian status of schools and education, with this study being inspired by one such initiative. Among the most prestigious of such organisations is the United Nations Security Council (UNSC) and its call of all parties to armed conflicts to respect the 'civilian character of schools as such' under international law.[69] As the presumed ordinary function of schools is certainly not something contributing to the military effort, it can be safely be submitted in this study

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[66] Henderson 47-48; Dinstein 2004 85-86; Boothby 101-102

[67] Boothby 62, 71; ICRC Additional Protocols Commentary 637 [2031] – [2037]

[68] Boothby 103

[69] United Nations Security Council ('UNSC'), 'Resolution 2143 (2014) (7 March 2014) UN Doc S/RES/2143 [18 a]; UNSC, 'Resolution 2225 (2015)' (18 June 2015) UN Doc S/RES/2225 [1]; UNSC, 'Resolution 2427 (2018)' (9 July 2018) UN Doc S/RES/2427 [16 a]

that for the qualification of schools and related personnel under IHL, the starting point is their qualification as civilian.[70]

A civilian object, even one mentioned under article 52(3) AP I as one 'normally dedicated to civilian purposes,' can still lose its protection if it becomes a military objective by meeting any of the abovementioned criteria under article 52(2). In case of a school building, the location, intended future use (purpose) or current use of the building to make an effective contribution to military action might be particularly relevant for potentially qualifying the building as a military objective. The location of a school building is something that does not relate to the building itself similarly to future or current use; a building located in a tactically important area could potentially become a military objective under article 52(2) AP I regardless of its nature in regular circumstances outside the armed conflict. Therefore, this method of qualifying schools as military objective will not be discussed further.

The *military use* of (civilian) schools by state armed forces and organised armed groups on the other hand is a common issue in various armed conflicts around the world, with wide documentation available for example from UN agencies and the GCPEA.[71] The phenomenon has also begun to receive (legal) scholarly attention[72] and greatly inspired the Safe Schools Initiative currently led by the GCPEA.[73] While schools are sometimes attacked for example by armed groups opposing the government due to them being seen as symbols of state power or an example of an adverse ideology, such as the education of girls, schools can also serve to support the operations of such groups or the state armed forces.[74] School buildings can offer ideal locations for military operations due to the infrastructure they offer, such as electricity, heating, multiple rooms and possible large indoor areas for accommodation and treatment of wounded and sick, as well as additional amenities such as kitchens and running water. [75] These pieces of infrastructure and protection become ever-so-crucial

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[70] The case of military schools and universities is of course very different

[71] See *e.g.* the 'Education Under Attack' reporting series published by the GCPEA

[72] See e.g. *Protecting Children in Armed Conflict*; British Institute of International and Comparative Law and Education Above All Foundation, *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook* (2nd edn, 2019) ('Protecting Education in Insecurity and Armed Conflict'); Ann-Charlotte Nilsson, *Children and Youth in Armed Conflicts* (Brill 2013)

[73] See Section 4 below

[74] For an overview on attacks against education, see *e.g.* GCPEA, 'Education Under Attack 2022' <https://eua2022.protectingeducation.org/> accessed 30 December 2023

[75] Steven Haines, 'Developing International Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict' (2021) 97 International Law Studies 573, 589

in sparsely-populated geographical areas, where a school could well be the one of the only pieces of public infrastructure available.

While the notion of so-called 'dual-use' objects is common in discussing targeting and military objectives especially in urban areas,[76] this term has the potential of confusing the legal situation. As was observed above, civilian objects are defined negatively under AP I and customary international law as those objects not being military objectives. The rule of determining the existence of a military objective, on the other hand, is exclusively expressed in article 52(2) AP I for both treaty and customary law purposes. Thus, the determination of whether an object normally dedicated for civilian purposes, such as a school or university building, has become a military objective rests on the definition contained in article 52(2). A school or university building, while being presumably civilian already on the basis of its normal functions in delivering education to new generations, supported further by (non-exhaustive) list under article 52(3) AP I, could therefore be turned into a military objective same as any other civilian dwelling, building or structure. The presence of military forces inside such a building for whatever reason is easily interpreted in a situation of armed conflict to effectively contribute to military action and when military personnel are present, the destruction or capture of the building would easily offer a definite military advantage, thus fulfilling the definition under article 52(2) AP I and making the school building a permissible target of an attack under IHL.

In addition to attacks directed at the school itself, it is important to note that the definition set out in article 52(2) begins with the words 'in so far as objects are concerned.' This detail makes it clear that members of armed forces (and those directly participating in hostilities during a NIAC) also belong under the category of military objectives.[77] With combatants, the further criteria set out in article 52(2) are not needed, as they are lawful targets until they become *hors de combat* either by capture, being wounded or sick or by being decommissioned and relieved of military service.[78] However, their inclusion in lawful military objectives means that the presence of military forces in a school could make an attack affecting the school lawful under the

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[76] On specific targeting issues relating to these types of objectives see *e.g.* Michael N. Schmitt, 'Targeting Dual-Use Structures: An Alternative Interpretation' (*Articles of War* 28 June 2021) <https://lieber.westpoint.edu/targeting-dual-use-structures-alternative/> accessed 12 January 2024; Ori Pomson, 'Proportionality and Civilian Use of a Military Objective' (*OpinioJuris* 24 June 2021) <http://opiniojuris.org/2021/06/24/proportionality-and-civilian-use-of-a-military-objective/> accessed 12 January 2024

[77] ICRC Additional Protocols Commentary 638 [2017]; Dinstein 2004 85; Oeter 177 [442]

[78] Henderson 80 – 87; on the duration of combatancy and the specific question of reservist forces, see ICRC Additional Protocols Commentary 515; Horscht Fisher, 'Protection of Prisoners of War' in Fleck (ed), *Handbook* 383 – 384

principle of distinction when it is directed at the military forces present inside or adjacent to the school, not the school itself.

### *2.2 Other provisions protecting schools, staff and students from attack*

#### *2.2.1 Principle of proportionality*

It is important to note that the principle of distinction only offers the starting point as to the lawfulness of a specific attack under IHL. Distinction merely dictates whether the 'object' of the attack was lawful, as it is not permissible to make civilian objects the object of an attack or to commit acts or threats of violence the primary purpose of which is to spread terror among the civilian population under article 51(2) AP I. In addition to direct attack, the principle of distinction also prohibits indiscriminate attacks failing to target a specific military objective or to sufficiently distinguish between civilians and military objectives.[79] The principle does not prohibit attacks that may merely cause incidental damage to civilian objects as they are governed by the principle of proportionality.[80] Conversely, an attack complying with the principle of distinction is not automatically lawful under IHL as there are additional safeguards to benefit civilians and civilian objects facing the constant threat of collateral damage suffered from attacks directed at a proximate military objective. It is important to note though that the provisions besides those governing distinction between civilian and military objects do not govern whether a particular school or university or the people present in its vicinity are lawful targets for enemy violence; they prescribe whether a particular *attack* is lawful or not.[81] As the framework of IHL is highly context-based and the battlefield in any given armed conflict in constant motion both in the physical and virtual world, the same target might be unlawful to attack in certain circumstances or with certain technical means, while completely lawfully struck a few moments later after a parameter has changed.

The IHL principle of proportionality prohibits excessive collateral damage to civilians and civilian objects by requiring parties to estimate the civilian casualties and damage to civilian objects before attacking and suspending the otherwise lawful attack, should the damage at any point be deemed disproportionate to the expected military advantage gained from the attack.[82] However, it is important to note that only 'excessive' damage in relation to the 'concrete and direct' anticipated military advantage is prohibited: some degree of civilian harm is thus always permitted by the

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[79] AP I art 51(4) and 51(5)

[80] Boothby 99

[81] Henderson 198; Dinstein 2004 120

[82] AP I art 51(5)(b), 57(2)(a)(iii) and 57(2)(b). A parallel customary provision applicable in both IACs and NIACs certainly exists as well, see Boothby 71, 443; Dinstein 2004 120; Dinstein 2014 217

law.[83] According to scholarship, to be 'excessive,' the expected damage has to be clearly disproportional[84] or 'gross and obvious'[85] so that a reasonable military commander would recognise the disproportion;[86] however the formula for calculating excessive collateral damage is neither prescribed by IHL nor provided in detail for example by the relevant state practice examined in the ICRC CIHL Study.[87] Further, as the eventual decision to conduct a particular attack is to be evaluated against information available to the commander at the time after exhausting all 'feasible' means of obtaining information,[88] the concrete evaluation of facts ends up a highly subjective task additionally governed by the military exigencies and factual circumstances of a particular situation in which the decision maker finds themselves. Therefore, it could well be said that if an attack is directed against a lawful target in a manner that complies with the requirements of the principle of distinction, the threshold for it becoming unlawful under the principle of proportionality is rather high.[89]

### *2.2.2 Precautions*

IHL also provides for various precautions to be taken for the benefit of the civilian population. There are two types of precautions: those to be followed in attack under article 57 AP I and those taken 'against the effects of attacks' as the defending party

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[83] Boothby 94

[84] Dinstein 2004 120; see also Rome Statute art 8(2)(b)(iv)

[85] Boothby 97

[86] ICTY Office of the Prosecutor, Final Report to the Prosecutor by the Committee Established to Review the NATO

Bombing Campaign Against the Federal Republic of Yugoslavia <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal#IVA64d> accessed 10 November 2023 [50] ('ICTY OTP Report')

[87] See Henderson 221 *et seq* for details on applying the proportionality formula; ICRC CIHL Study Vol II 299 – 305

[88] *Prosecutor v Galic* (Judgment and Opinion) IT-98-29-T (5 December 2003) [57] – [58]

[89] An example of a case producing opposing views about proportionality is the NATO attack against the Serbian radio and TV station during Operation Allied Force achieving a three-hour blackout of the station while incidentally killing 16 civilians. For comments, see Amnesty International, "'Collateral damage" or unlawful killings? Violations of the Laws of War by NATO during Operation Allied Force' (5 June 2000) <https://www.amnesty.org/en/documents/eur70/018/2000/en/> accessed 12 January 2024; ICTY OTP Report [77]; Henderson 221

under article 58 AP I.[90] Precautions in attack have been confirmed to be applicable in NIACs through customary international law.[91] In terms or precautions against the effects of attacks, their customary application in NIACs is not as easy to establish, although the ICRC CIHL Study includes it in its rules 22 – 24.[92]

A prevalent concept relating to both types of precautions is the notion of 'feasibility.' In attacks, parties to an armed conflict are required to take constant care to spare the civilian population and take all 'feasible' precautions to avoid, and in any event minimize the incidental damage to civilians before attacking.[93] According to article 57(2)(a)(i) AP I, those who plan or decide upon an attack shall do 'everything feasible' to verify that the objectives attacked truly are military objectives. Under article 57(2)(a)(ii), 'all feasible precautions' need to be taken to minimise collateral damage to civilians and civilian objects. The feasibility criterion is also mentioned under article 58 AP I as the parties are under an obligation to segregate between civilian and military objects, *i.e.*, to avoid placing their military objects within the vicinity of civilian objects and to evacuate and protect civilians from the effects of enemy attacks to the 'maximum extent feasible.' [94]

According to one reading of the feasibility criterion, expressed by some states in connection to the drafting of article 57 AP I, this would entail everything that is *workable* or *practicable* in a particular situation, when the success of military operations is also taken into account.[95] While the ICRC's commentary to AP I deems such a definition too broad as 'invoking the success of military operations in general, one might end up by neglecting the humanitarian obligations prescribed,' the commentary also admits that the interpretation of the feasibility criterion is an exercise of 'common sense and good faith,' where the obligations under article 57 are fulfilled when the person launching the offensive takes the *necessary* identification measures

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[90] Boothby 118

[91] *Prosecutor v Galic* [58]; ICRC CIHL Study Vol I 51 – 67; Dinstein 2014 218; Boothby 443 – 445

[92] ICRC CIHL Study Vol I 68 – 71

[93] On the various reservations made by the Contracting Parties to AP I and how the obligation under art 57 should be understood to apply at different levels of command, see Henderson 159 – 161

[94] AP I art 58

[95] John Redvers Freeland, head of the UK delegation in the Geneva Diplomatic Conference as cited in Eric Talbot Jensen, 'Precautions against the effects of attacks in urban areas' (2016) 98 International Review of the Red Cross 147, 165; see also Michael Bothe, Karl Josef Patsch and Waldermar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Brill 2013) 415; Henderson 161 – 162; Boothby 121

in good time in order to spare the population *as far as possible*. The commentary then takes the position that the success of military operations could not be jeopardised by taking such precautions.[96]

The ICRC commentary has a correct view in that interpreting the feasibility criterion under article 57 or 58 AP I is an exercise of good faith by the military commander and their legal advisor on the ground. However, what the ICRC commentary fails to take into account or to explicitly state when compared with the reading proposed by the UK and various other delegations, is that the success of military operations, and more precisely, the mission at hand when the feasible precautions are being conducted, certainly plays an important role when different execution options are being weighed against each other. According to the Cambridge Dictionary, the ordinary meaning of the word 'feasible' is something that is 'able to made, done or achieved,' synonyms to this word being 'workable' and 'achievable.'[97] It is thus rather impossible to imagine a military person interpreting such a criterion on the field as not including mission success as a relevant parameter when deciding what kind of precautions are to be taken in any given circumstances. Any solution outright sacrificing mission success would certainly not be seen as workable on the field. As the ICRC commentary correctly notes, the obligation is discharged when the civilian population is protected *as far as possible*,[98] arguably within the space allowed by mission success:[99] 'while certainty is not required the attacker must nevertheless do his best but may take military considerations into account in deciding how far to go.'[100] Another factor limiting the notion of 'everything feasible' is the fact that the actions taken in relation to any particular attack have to always be evaluated based on the information available to the commander at the time.[101]

Other obligations under article 57 AP I include for example the duty to refrain from launching and to cancel or suspend an attack that is expected to violate the principle of proportionality or distinction.[102] One such obligation includes the giving of an effective advance warning of attacks which may affect the civilian population, unless

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[96] ICRC Additional Protocols Commentary 682 [2198] emphasis added

[97] <https://dictionary.cambridge.org/dictionary/english/feasible> accessed 10 November 2023

[98] ICRC Additional Protocols Commentary 682 [2198]

[99] Boothby 130 – 131

[100] Boothby 122

[101] Henderson 162 – 163; Dinstein 2004 126; see 2.2.1 above

[102] AP I art 57(2)(a)(iii), 57(2)(b)

circumstances do not permit.[103] The notion of 'affecting the civilian population' is not defined under AP I.[104] It has been interpreted to not cover mere situations of annoyance or stress,[105] or even damage to civilian objects.[106] Others, such as Ian Henderson, have taken the position that the notion of *affecting* the civilian population would, narrowly interpreted, also cover property damage.[107] However, if such a definition still excludes civilian objects that have become military objectives under article 52(2) AP I. Since the attack itself against such an object is lawful under the principle of distinction, advance warnings under article 57(2)(c) AP I would be required only in situations of damage to civilian property and objects proper, *i.e.*, those that retain their civilian status at the moment of the attack. Attacking for example a school that has been turned into a military objective would not require an advance warning would be required under article 57 AP I. Further, article 57(2)(c) prescribes an exception to the giving of an advance warning in situations where circumstances do not permit, such as in the case of attacks that need to conserve the element of surprise.[108]

Article 58 AP I prescribes three types of obligations to protect the civilian population from the effects of attacks. The parties to an armed conflict are bound, to the maximum extent feasible, to endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; to avoid locating military objectives within or near densely populated areas; and to take other measures to protect the civilian population, such as enacting civil defence measures[109] well before the beginning of hostilities.[110] The evacuation obligation under article 58(a) is further governed by article 49 GC IV posing restrictions to the transfer of non-nationals from occupied territory.[111]

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[103] AP I art 57(2)(c)

[104] See ICRC Additional Protocols Commentary 686-687

[105] Bootby 128

[106] Program on Humanitarian Policy and Conflict Research at Harvard University, 'Manual on Air and Missile Warfare' (15 May 2009) 18 [37] only includes 'death or injury to civilians' in its customary reading of the obligation to give an advance warning

[107] Henderson 188 'Affect should be interpreted narrowly to mean directly affected in the sense of injured or killed, as well as property damage'

[108] ICRC Additional Protocols Commentary 686 [2223]; Henderson 185 – 186

[109] See AP I art 61 – 67

[110] AP I Art 58

[111] See the text of GC IV art 49 and Jean Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1959) 278 – 281; Boothby 132

The notion of feasibility plays an important part in complying with article 58 AP I, as the sufficiency of the actions taken by the defending party is a highly contextual matter varying from situation to situation.[112] Implementing all three obligations under article 58 with a rigid standard could prove to be extremely difficult in many settings, such as in urban environments, which led to the adoption of the feasibility standard.[113] However, just like under article 57, it can be evaluated whether the party to the armed conflict has taken 'reasonable'[114] or workable steps towards evacuating the civilian population or avoiding placing military objectives next to civilian objects. After all, outside situations of occupation, it could be presumed that in many cases the party to the armed conflict able to control the movement of the civilian population would have an incentive to ensure their protection to the maximum extent possible.

### *2.3 The lack of special protection under IHL*

The abovementioned considerations clearly demonstrate that schools, universities and their associated personnel are presumed to be civilian under IHL. This means that they benefit from the protection under the principle of distinction prohibiting attacks directed at individual civilians and civilian objects. However, as they are able to become military objectives and therefore subject to lawful attack by a party to the armed conflict, the protection of schools and associated persons is not absolute. If the civilians or the civilian object lose their protection, an attack targeting them has the capability of being completely lawful, if it complies with the additional provisions of proportionality and precautions. On the other hand, the protection afforded to civilians under the principle of distinction is not unlimited: even where the school building and the associated persons have not lost their civilian status, attacks causing damage and destruction to schools could still be lawful, if their actual target complied with the principle of distinction and the additional IHL provisions governing the conduct of hostilities.

Importantly, schools, universities, educational staff or students do not benefit from a tailored or special protection regime under IHL. No specific provisions exist making all attacks causing damage or destruction to these groups of objects and persons automatically illegal based on their connection to education. While there are additional IHL provisions possibly applicable to schools, staff and students, such as the prohibition against spreading terror within the civilian population[115] or the prohibition

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[112] Boothby 132

[113] Jensen 159 – 165

[114] Boothby 132

[115] AP I art 51(2)

of reprisals,[116] these prohibitions protect civilian objectives and the civilian population in general, not schools and universities specifically. The special protection of objects indispensable to the survival of the civilian population has been argued to include schools,[117] however it is submitted here that such an argument would unduly extend that particular concept outside the ordinary meaning of the treaty provision in question.

The protection of schools, staff and students is therefore dependent on the highly contextual civilian-military dichotomy, made even further complicated with the equally contextual provisions governing collateral damage and necessary precautions. Unlike medical establishments, units and personnel, schools and universities do not benefit from *special protection* extending beyond the protection afforded to civilians and civilian objects.[118] While some schools and universities being 'of great importance to the cultural heritage of every people' or including libraries or archives containing cultural property could benefit from increased protection under the special regime of cultural property,[119] these provisions are not applicable to schools and universities in general. While article 56 of the Hague Regulations and article 3(d) of the ICTY Statute based on the former prohibits all seizure of, and destruction, or intentional damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science, this provision does not change the legal status of schools and universities. This is because article 56 Hague Regulations and article 3(d) ICTY Statute relate to the special (customary) regime of protecting cultural property in armed conflicts, not the general rule of distinction.[120] Various Hague-era provisions still retaining their relevance through customary law[121] deal with the 'constant care' to be afforded to buildings dedicated to education or science, which could be taken to indicate a special protection of these types of buildings. However, they all contain clauses excluding schools and universities turned military objectives

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[116] AP I art 52(1)

[117] See *Protecting Children in Armed Conflict* 321 |7.17.1]; in the view of the present author, this argument is lacking in making a case for its applicability to schools due to the content of the cited NIAC agreements and the text of article 54(2) AP I. The other examples offered in *Protecting Children in Armed Conflict* 322 relate to general provisions applicable *also* to schools.

[118] *Protecting Children in Armed Conflict* 324 [7.21] – [7.22], 354 [7.102], see also 4.2.2.2 below for a comparison between the two regimes

[119] Convention for the Protection of Cultural Property in the Event of Armed Conflict (signed 14 May 1954, entered into force 7 August 1956) 249 UNTS 215 art 1, art 4 ('Hague Convention on Cultural Property')

[120] ICRC CIHL Study Vol I Rule 40 132 - 135

[121] *Nuclear Weapons* [78] – [79]; Dinstein 2004 10

from their scope.[122] The destruction of cultural property, including buildings dedicated to education, is currently criminalised as a war crime under the International Criminal Court's Rome Statute, based on the accurate representation of customary law today[123] – but only in situations where such property is not a military objective.[124] The ICTY approached the issue under article 3(d) of its statute similarly in *Blaskic*.[125]

As the defender's obligation to segregate between civilian and military objects is also defined under the feasibility criterion, no absolute prohibition exists to prevent the military use of schools and universities even where they have not been evacuated or abandoned yet. Unfortunately, such use has the possibility of turning the school building into a military objective, making even direct attacks against them lawful under IHL, if all the other requirements are met.

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[122] Convention (IV) concerning respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907) art 27 ('Hague Regulations'); Convention (IX) concerning Bombardment by Naval Forces in Time of War (signed 18 October 1907) art 5; The Hague Rules of Air Warfare (1923) art XXV

[123] Rome Statute article 8(2)(b) is titled 'Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law'; see Christine Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court* (Manchester University Press 2009) 109 *et seq* for analysis

[124] Rome Statute art 8(2)(b)(ix), 8(2)(e)(iv)

[125] *Prosecutor v Tihomir Blaskic* (Judgment) IT-95-14-T (3 March 2000) [185]

## 3 The protection of education in armed conflict

While Section 2 looked at the protection of schools and associated individuals, this Section examines the immaterial aspect of this study, the activity of *education* and how its provision and continuation is regulated under international law. This Section begins by analysing the relevant provisions of international human rights law ('IHRL') by outlining the content of the most important provisions providing for the right to education and the scope of state obligations under these provisions, as well as their application in situations of armed conflict. This is followed by the IHL provisions aimed at guaranteeing the continuation of education in situations of armed conflict. This Section concludes by analysing the relationship between IHL and IHRL and by arguing that despite the precise manner how these two bodies of law are to be applied simultaneously, the concrete minimum state obligation remains effectively the same even in situations of armed conflict, thus not changing the manner in which state conduct is to be evaluated. As the applicable standard for evaluating state compliant under the right to education is a very much open ended and conduct-based, it is argued that the right to education does not require the provision of education in particular physical locations nor necessarily through physical teaching at all. A state may appropriately discharge its obligations during an armed conflict by arranging alternative locations and measures for the provision of education, including through distance-learning.

### *3.1 The right to education under international human rights law*

The right to education is an essential human right in the context of armed conflicts despite the common focus usually being on other human rights in these situations, such as the right to life or the right to health. Education has been rightfully dubbed a 'multiplier' or a key in that it enables a host of other human rights to achieve meaningful substance[126] as it helps to spread awareness of these rights and the possibilities they create for the individual. According to the UN Committee on Economic, Social and Cultural rights ('ESCR Committee'), education is 'both a human right in itself and an indispensable means of realizing other human rights.'[127] Conversely, this means that the denial of education hinders a society's ability to

[126] *Protecting Education in Insecurity and Armed Conflict* 74

[127] Committee on Economic, Social and Cultural Rights (ESCR Committee), 'General Comment No. 13' (8 December 1999) UN Doc E/C.12/1999/10 [1] (ESCR General Comment 13)

prevent and recover from conflict due to the adverse effect on human rights in general.[128]

This study focuses on the universal level of human rights protection by examining the two most important instruments under international human rights law guaranteeing the right to education: the International Covenant on Economic, Social and Cultural Rights ('ICESCR')[129] and the Convention on the Rights of the Child ('CRC').[130] With the ICESCR's 171 ratifications[131] and CRC's almost universal ratification status (196 state parties, only United States remaining outside),[132] these two treaties represent the widest reach of the right to education worldwide. A wealth of regional human rights instruments in all continents also contain provisions relating to the right to education, but the scope of this study does not allow for their examination in detail.[133]

The provisions guaranteeing the right to education under these treaties can be found in articles 13 and 14 ICESCR and articles 28 and 29 CRC. The provisions under the ICESCR read as follows:

> **Article 13**
>
> 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
>
> 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

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[128] Haines 591

[129] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

[130] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

[131] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 8 December 2023

[132] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en> accessed 8 December 2023

[133] For an overview of the right to education under the regional human rights instruments and various other human rights documents see *e.g.* Ann-Charlotte Nilsson, *Children and Youth in Armed Conflicts* (Brill 2013) 182 *et seq*

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

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

**Article 14**

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Articles 28 and 29 CRC contain similar obligations:

**Article 28**

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

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

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

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

## Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among

all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

In addition to these treaties, the UNESCO Convention Against Discrimination in Education[134] needs a special mention. This treaty was concluded already before the ICESCR in 1960 on the basis of non-discrimination provisions found in articles 2 and 26 of the 1948 Universal Declaration for Human Rights[135] and was the first binding instrument to contain provisions relating to the provision of education at the international level. Article 4(a) provides a similar wording to the material provisions guaranteeing the right to education under the ICESCR and CRC:

**Article 4**

The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:

a. To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law.

However, due to the smaller number of ratifications and the apparent difference in its focus, the Convention Against Discrimination in Education shall not be examined further in discussing the right to education.

The components of the human right to education could be analysed through the so-called 'Four As' framework, developed by the UN Commission on Human Rights and

[134] Convention Against Discrimination in Education (adopted 4 December 1960, entered into force 22 May 1962) 429 UNTS 93

[135] UNGA, Universal Declaration of Human Rights (10 December 1948) UN Doc A/RES/217(III) A

used by many actors in the field of economic and social rights.[136] According to this framework, the right to education consists of the four essential features:

1. Availability

Availability denotes the general obligation of states to establish schools and to ensure that schools, teachers and teaching materials are available.[137] According to the Committee on Economic, Social and Cultural Rights (ESCR Committee), functioning educational institutions and programmes must be available in 'sufficient quantity.' Their precise requirements depend on numerous contexts such as the developmental context of the state in which they operate. According to the ESCR Committee:

'all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.'[138]

In addition to the developmental context, the surrounding context in general could be argued to have to be considered in situations of armed conflict. Such a situation could pose additional requirements of security and repairs of educational facilities[139] and on other the hand, take the physical circumstances of for example children evacuated from conflict zones into account when assessing whether the state is seeking to comply with its obligations. A key element of availability is that once educational facilities have been made available, states must ensure their continued availability. According to the Special Rapporteur on the right to education, the failure of the State to sustain available schooling constitutes 'an apparent violation of the right to education.'[140] So does preventing students from receiving an education, for example through an extended use of a school for military purposes which denies them from exercising their right to education. Where an educational facility can no longer be used for its intended

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[136] *Protecting Education in Insecurity and Armed Conflict* 83 – 84 and the UN documents cited

[137] *Protecting Education in Insecurity and Armed Conflict* 85; Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Martinus Nijhoff 2006) 96

[138] ESCR General Comment 13 [6 a]

[139] See e.g. *Protecting Education in Insecurity and Armed Conflict* 210 and the sources cited; see also UNESCO, 'Protecting Educational from Attack: A State-of-the-Art Review' (UNESCO, 2010)

<https://unesdoc.unesco.org/ark:/48223/pf0000186732> accessed 15 December 2023

[140] UN Economic and Social Council, 'Progress report of the Special Rapporteur on the right to education, Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1999/25' (1 February 2000) UN Doc E/CN.4/2000/6 [32]

purpose, the State has to find a suitable alternative facility to avoid a violation of the right to education.[141] The CRC Committee and the UN Human Rights Council have urged States 'to fulfil their obligation therein to ensure schools as zones of peace,'[142] and to ensure that schools are protected from military attacks and to deter their military use.[143]

2. Accessibility

According to the ESCR Committee, the accessibility of education has three overlapping dimensions: non-discrimination, physical accessibility, and economic accessibility. *Non-discrimination* is a major element of all human rights obligations, the right to education included, denoting that education must be accessible to all without any prohibited discrimination.[144] *Physical accessibility* requires that education has to be within safe physical reach, either by attendance at some 'reasonably convenient' geographic location or via modern technology (*e.g.* through access to a distance learning programme). The ICJ for example found a violation of article 13 ICESCR in the *Palestine Wall* advisory opinion, as the wall being constructed into the Occupied Palestine Territory by Israel prevented local inhabitants from accessing schools.[145]

*Economic accessibility* requires that education has to be affordable to all.[146] Here, it is important to note that this dimension of accessibility is subject to the different standards under article 13 (2) ICESCR in relation to primary, secondary and higher education. While primary education shall be available 'free to all' under this article, States parties are required to introduce free secondary and higher education only progressively under article 13 ICESCR. [147]

Accessibility is crucial aspect when it comes to the provision of education in situations of armed conflict due to the possible destruction, evacuation or seizure of school

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[141] *Protecting Education in Insecurity and Armed Conflict* 211 – 212

[142] CRC Committee, 'Concluding observations: Colombia' (11 June 2010) UN Doc CRC/C/OPAC/COL/CO/1 [25], [39]

[143] Human Rights Council, 'Resolution 47/6 The right to education' (26 July 2021) UN Doc A/HRC/RES/47/6 [8]

[144] See also Convention Against Discrimination in Education (adopted 4 December 1960, entered into force 22 May 1962) 429 UNTS 93

[145] *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory* (Advisory Opinion) [2004] ICJ Rep 136 [134]

[146] ESCR General Comment 13 [6 b]

[147] ESCR General Comment 13 [6 b]

buildings. As can be observed from the ESCR Committee's views expressed in General Comment 13, the precise form of education is not relevant for satisfying the requirement of accessibility, as the obligation can be discharged either through 'a convenient geographical location' (with no mention of *what* should located in these locations as long as the requirements of availability are complied with) or alternatively through modern technology. The State Party needs to primarily ensure safe transport to school, but if security considerations prevent students and staff from attending school, technological measures and creative solutions by the state certainly are permissible and sometimes necessary to ensure continued accessibility to education.[148]

3. Acceptability

The third element of the right to education has to do with the form and substance of education. According to the ESCR Committee, the relevant curricula and teaching methods have to be 'acceptable', *i.e.*, relevant, culturally appropriate and of good quality, to students and parents where appropriate.[149] This requirement is also related to the aim of education being the full development of the human personality and the sense of its dignity and the strengthening of the respect for human rights, fundamental freedoms and the principles enshrined in the Charter of the United Nations, as set out in article 26(2) UDHR, article 13(1) ICESCR and article 29(1) CRC.

An important factor to consider here in relation to situations of armed conflict is the prohibition of war propaganda and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under article 20 of the International Covenant for Civil and Political Rights (ICCPR).[150] In short, the state must not only provide education, but also education that is in line with other human rights, such the prohibition of discrimination. [151] This is particularly relevant for example in situations of occupation, where in addition of the specific IHL rules protecting the functioning of educational facilities and services, the right to education has its say as to the acceptability of the education so provided. The European Court of Human Rights ('ECtHR') has for example found in *Cyprus v Turkey* that the denial of educational opportunities in Greek for Greek-Cypriot children living in the occupied northern parts of Cyprus violated their right to education despite the suitable options available to them in southern Cyprus. According to the Court, there had been a violation of the right to education due to the lack of educational opportunities in the applicants' own language locally and keeping with their cultural and ethnic

[148] *Protecting Education in Insecurity and Armed Conflict* 86, Beiter 489 – 490

[149] ESCR General Comment 13 [6 c]

[150] (adopted 16 December 1966, entered into force 23 Mach 1976) 999 UNTS 171

[151] *Protecting Education in Insecurity and Armed Conflict* 87

tradition.[152] Another case between Ukraine and Russia is pending before the ECtHR at the time of writing. Deemed admissible by the court in December 2020, it relates among other things to the treatment of the Crimean Tatars during the Russian occupation of Crimea since 2014 and the 'suppression of the Ukrainian language in schools and persecution of Ukrainian-speaking children at school.'[153]

4. Adaptability

The final element is rather self-explanatory: according to the ESCR Committee, education must be flexible so it can adapt to the needs of changing societies and communities and to the needs of every child.[154] In a situation of an armed conflict, adaptability could require for example a rapid resumption of educational activities and reintegration of children after an attack on the school or other security-related school closure.[155]

The right to education imposes three levels of obligations on the States Parties to the ICESCR: the obligations to respect, protect and fulfil the essential features under the Four As framework.[156] The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. Finally, the obligation to fulfil has two elements to it: the obligation to facilitate the and to provide for the right to education.[157]

### *3.2 The scope of state obligations under the ICESCR and the CRC*

#### *3.2.1 The progressive realisation of economic, social and cultural rights*

Economic, social, and cultural rights (ESCRs) differ from their civil and political rights counterparts in the legal obligation that they impose upon the contracting states. While civil and political rights are mostly qualified by the immediate obligations to respect, protect, and ensure the rights under the ICCPR for example, ESCRs operate

[152] *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) [273] – [280]

[153] *Ukraine v Russia (re Crimea)* App nos 20958/14 and 38334/18 (ECtHR, 16 December 2020) [488] – [495]; European Court of Human Rights, 'Grand Chamber hearing on inter-State case Ukraine v Russia (re Crimea)' (13 December 2023)

[154] ESCR General Comment 13 [6 d]

[155] *Protecting Education in Insecurity and Armed Conflict* 88

[156] ESCR General Comment 13 [50]

[157] ESCR General Comment 13 [46] – [47]

by the so-called 'progressive realisation' of rights.[158] This principle is expressed in article 2 ICESCR, whereby each State Party

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

Article 4 CRC contains a similar provision, whereby States Parties

> 'shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.'

The exact scope of the right to education under human rights law is therefore at least somewhat dependent on the resources available to the state. However, the progressive realisation of ESCRs does not mean that states would enjoy an unlimited margin of appreciation in how they satisfy their legal obligations or that the rights under the ICESCR would be without concrete meaning. According to the ESCR Committee, while the full realization of the relevant rights may be achieved progressively under the ICESCR, deliberate and concrete steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force. Progressive realization is not to be seen to dispose of the 'clear obligations' to move 'as expeditiously and effectively as possible' towards the full realization of the ESCRs under the Covenant, including the right to education under article 13.[159] Even in the case of inadequate resources, the 'obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances,' through international co-operation if necessary. [160] The ESCR Committee has further stated that resource constraints alone cannot justify inaction:

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[158] See *e.g.* Committee on Economic, Social and Cultural Rights (ESCR Committee) 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (Fifth Session, 1990) UN Doc E/1991/23 [9] (ESCR General Comment 3); Committee of the Rights of the Child (CRC Committee) 'General Comment No. 5 (2003)' (27 November 2000) UN Doc CRC/GC/2003/5 [7] (CRC General Comment 5)

[159] ESCR General Comment 3 [2], [9]; ESCR General Comment 13 [44]

[160] ESCR General Comment 3 [11], [13]

> 'Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances (…) In this regard, the phrase "to the maximum of its available resources" refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.'[161]

While no authoritative definition exists as to which articles under the CRC contain ESCRs and which do not,[162] it could easily be said that the right to education firmly belongs in this category under the CRC rather than that of civil and political rights due to it appearing in the ICESCR[163] and thus being subject to the progressive realisation under article 4 CRC. Article 4 CRC closely follows the wording of article 2(1) ICESCR.[164] The Committee on the Rights of the Child ('CRC Committee') has in its General Comments concurred with the ESCR Committee's formulations on the progressive realisation of rights[165] (as well as various other topics concerning the right to education[166]) and stated that the States parties to the CRC have no discretion as to whether or not to satisfy their obligation to undertake the measures necessary to realize children's rights.[167] The CRC Committee has noted that the rights under progressive realization impose an *immediate obligation* and has recommended the States parties to move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights of children.[168] If necessary due to resource

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[161] ESCR Committee, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant' (21 September 2007) UN Doc E/C.12/2007/1 [4] – [5]. This approach of requiring States Parties to take the resources obtainable through international co-operation has also been endorsed by the CRC Committee, see *e.g.* CRC Committee, 'Day of General Discussion on "Resources for the Rights of the Child – Responsibility of States"' (5 October 2007, 46th session) [24]; see also Beiter 572 *et seq*

[162] John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 129; CRC Committee General Comment 5 [6]

[163] Tobin 130

[164] Tobin 104, 132

[165] CRC General Comment 5 [5], [8]

[166] Se *e.g.* CRC Committee 'General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4) (20 July 2016) UN Doc CRC/C/GC/19 [31] (CRC General Comment 19)

[167] CRC General Comment 19 [18]

[168] CRC Committee, 'Day of General Discussion on "Resources for the Rights of the Child – Responsibility of States"' [46] – [47] (emphasis added)

constraints, the States Parties also have an obligation to actively seek international assistance.[169]

In conclusion, while the ESCRs under the ICESCR and CRC are subject to progressive realisation, meaning that these rights do not need to be guaranteed at the very moment a state joins these treaties, the abovementioned positions by the treaty-monitoring parties unequivocally demonstrate that States do not enjoy unlimited margin of appreciation in discharging their obligation under the right to education. The fact that the States Parties are able to choose the concrete measures taken to achieve the objective of providing education in accordance with these provisions[170] does not change the outcome, as under article 2(1) ICESCR and article 4 CRC, States need to demonstrate how the measures they have implemented are 'appropriate' for the full realisation of the economic, social or cultural right in question.[171]

### *3.2.2 Minimum core obligations*

The progressive realisation of ESCRs and the close connection of their fulfilment with budgetary measures[172] and other technical means of implementation means that it is not always easy to determine when the treaty provisions have been violated. According to the ESCR Committee, the CRC Committee and the Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights prepared by over 30 experts in 1997, a violation of ESCRs can be *prima facie* determined by whether the State Party in question has complied with the so-called 'core minimum obligations' under each respective right, applicable despite the possible resource constraints faced by the state.[173] Put differently, a violation of an economic, social and cultural right can be said to exist at least in situations when the respective core minimum obligations are not complied with. According to the ESCR Committee:

> '(…) 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. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education

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[169] CRC General Comment 19 [35], [75]; Tobin 136

[170] Beiter 98

[171] ESCR General Comment 3 [4]; CRC General Comment [18], [24]; ESCR Committee, 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (2 October 2000) UN Doc E/C.12/2000/13 18 [8]

[172] See *e.g.* CRC General Comment 19

[173] ESCR General Comment 3 [10]; CRC General Comment 19 [31]; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights [9] – [10]

> is, prima facie, failing to discharge its obligations under the Covenant. 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.'[174]

According to the CRC Committee and the experts behind the Maastricht Guidelines, these core obligations need to be ensured in all situations, despite the potential resource constraints faced by the state for example in situations of economic crisis.[175] The ESCR Committee on the other hand has accepted that the resource constraints a state faces may be taken into account when evaluating its compliance with core minimum obligations under the ICESCR. However, the state must still demonstrate that every effort has been made to use all available resources, including those available through international co-operation, to satisfy the core minimum obligations and in any event to secure the widest possible enjoyment of the rights guaranteed under the ICESCR.[176] Thus, the core minimum obligations effectively form the minimum yardstick to evaluate the performance of state obligations when it comes to the effective fulfilment of ESCRs.[177]

In terms of the right to education, the core minimum obligation includes ensuring access to 'the most basic forms of education.'[178] Under article 13 ICESCR, States need to at least to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis and to ensure that education conforms to the objectives set out in article 13 (1), to ensure that education conforms to the objectives set out in article 13 (1), to provide primary education for all in accordance with article 13 (2) (a), to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education, and to ensure free choice of education without interference from the State or third parties, subject to conformity with the 'minimum educational standards' under article 13 (3) and (4).[179]

For the purposes of the present analysis, the most relevant part of this core minimum obligation is the state obligation to ensure the rights of access to public education and to provide primary education for all. Accordingly, the ESCR Committee has stated that the potential violations of article 13 ICESCR include, among other possible

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[174] ESCR General Comment 3 [10]

[175] CRC General Comment 19 [31]; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights [9]

[176] ESCR General Comment 3 [10] – [14]

[177] *Protecting Education in Insecurity and Armed Conflict* 89: 'If States do not meet the minimum core obligations, they are in breach of their treaty obligations'

[178] ESCR General Comment 3 [10]

[179] ESCR General Comment 13 [57]; Tobin 112

violations of the requirements under article 13, the failure to introduce primary education which is compulsory and free to all as a matter or priority, or the failure to take "deliberate, concrete and targeted" measures towards the progressive realization of secondary, higher and fundamental education.[180]

### *3.2.3 State obligations in emergency situations*

The application of human rights in practice is a constant balancing act, where opposing rights and duties need to be weighed against each other, especially when it comes to the open-ended provisions contained in ESCRs. Accordingly, many international and regional instruments contain the possibility of restricting (or limiting) certain rights based on a legitimate aim and following the criteria of necessity and proportionality. Certain human rights instruments, such as the ICCPR, further contain a so-called derogation clause, which allows the State Party to completely shut down the operation of a certain norm for a limited period of time 'in time of public emergency which threatens the life of the nation.'[181]

According to article 4 ICESCR, the State may subject the rights guaranteed under the ICESCR 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.' The ESCR Committee has separately confirmed that this provision is intended to be 'protective of the rights of individuals rather than permissive of the imposition of limitations by the State' and any measure of closing an educational institution on grounds such as national security or the preservation of public order 'has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.'[182] Therefore, *limiting* the right to education due to concerns of national security is only permissible where it is done 'solely for the purpose of promoting general welfare in a democratic society.' The CRC, on the other hand, does not contain any mention of a possibility of limiting the rights contained in the Convention. Neither of these treaties include a *derogation* clause like the one under article 4 ICCPR allowing for a complete termination of a specific provision in public emergencies and the minimum core obligations under the ICESCR have been separately confirmed to be non-derogable in all situations by the ESCR Committee: 'It should be stressed, however, that a State party cannot, under any

[180] ESCR General Comment 13 [59]

[181] ICCPR art 4; Human Rights Committee, 'General Comment No 29: Article 4: Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11 ('HRC General Comment 29')

[182] ESCR General Comment 13 [42]

circumstances whatsoever, justify its non-compliance with the core obligations (…) which are non-derogable.'[183]

Based on these considerations, it is clear that the ICESCR nor the CRC afford the State Parties an opportunity to remove their treaty obligations relating to the right to education during an armed conflict through derogation, an option available with many other human rights provisions. The only way to decrease the scope of state obligations under these treaties would therefore have to comply with the criteria for restricting a particular provision, as the blunt derogation instrument is not applicable. While article 4 ICESCR technically provides for a possibility of restricting the right to education, such restrictions would need to comply with the requirement of promoting general welfare. Such criteria could be argued to take place for example when closing a school in order to protect the safety of students and staff due to proximate fighting, if the requirements of article 4 ICESCR are met. However, the CRC still remains fully in force, making any restrictions on the right to education still a violation of that treaty. From a technical standpoint, this means that the right to education under the ICESCR and the CRC is to be applied in full even in situations potentially qualifying as public emergencies, similarly to its peacetime application described above in this Section.

As the state's compliance with its ESCR obligations is to be measures against the minimum core obligations, the applicable obligation remains conduct-based also during an armed conflict. Accordingly, due to the open-ended nature of the right to education and the content of the Four As framework, if a state were to for example close off a school to protect the staff and students by relocating them elsewhere, this would not necessarily entail a restriction of their right to education if the state would appropriately arrange for their education in some other location or manner. Such action would in fact comply with the state's obligation to protect the civilian population from the effects of attacks under IHL.[184]

### *3.3 The protection of education under international humanitarian law*

Unlike IHRL, IHL does not contain an extensive or unified framework of provisions protecting education similarly to the abovementioned treaties. As this body of law mostly deals with protecting individuals not participating in hostilities and with restricting the means and methods of warfare,[185] the abstract character of education as protected under the right to education does not receive a similar focus as under IHRL.

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[183] ESCR Committee, General Comment 14, 'The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4 [47]; *Protecting Education in Insecurity and Armed Conflict* 26

[184] See Section 2.2.2 above

[185] Greenwood 13 *et seq*; Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2016) 17

However, IHL still contains relevant provisions for ensuring the continuation of education in armed conflicts.

### *3.3.1 The special protection of children*

The most detailed IHL provisions guaranteeing the continuation of education are located in connection with the protection of children, providing for the protection of minors either under eighteen or fifteen years old depending on the specific provision.[186] The special status of children under IHL was first laid out in various provisions of the Fourth Geneva Convention.[187] Most importantly for the purposes of the present analysis, article 24 GC IV provides:

> 'The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, 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, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.'

However, this provision is fairly limited in its scope. The provision only concerns itself with orphaned children or those children who have been separated from their families and who are under fifteen years old and the obligation in article 24 GC IV only provides for the 'facilitating' of the education of such children. Article 50 GC IV similarly provides that in case of occupation, the Occupying Power shall facilitate the proper working of all institutions devoted to the care and education of children in cooperation with local authorities. Should the local institutions prove to be inadequate, the Occupying Power further needs to make arrangements for the maintenance and education of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.[188]

The limited scope of these provisions is further highlighted by the Fourth Geneva Convention's personal scope of application. According to article 4 GC IV, the Convention is applied to those persons 'who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.' Thus, the provisions under article 24 and article 50 GC IV do not extend to the nationals of the state in question and find their relevance mainly in situations of occupation. This gap

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[186] Elina Almila, *Sexual Violence Against Children in Armed Conflict: The Influence of Conceptions of Childhood in International Law* (University of Helsinki Faculty of Law 2022)

[187] GC IV Arts 14, 23, 24, 38, 50, 68, 76 and 89

[188] GC IV art 50(1) and 50(3)

in the protection of children has been remedied by the subsequent provisions of the two Additional Protocols of 1977.

Article 77(1) AP I, article 4(3) AP II and Rule 135 of the ICRC Customary Law Study[189] provide for the so-called special protection of children, extending the protections of the Fourth Convention to all children present in a particular state's territory.[190] Article 77(1) AP I provides:

> '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, whether because of their age or for any other reason.'

Additionally, article 78(2) AP I provides that whenever children are being evacuated outside national borders, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.[191]

A similar provision to article 77 AP I is included in article 4(3)(a) AP II for those NIACs that fall within the scope of this treaty,[192] providing that 'Children shall be provided with the care and aid they require, and in particular: they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care.' Those NIACs not fulfilling the threshold of AP II fall and subsequently falling under the Common Article 3 to the Geneva Conventions and customary international law do not include a treaty provision on the children's right to education, as Common Article 3 is silent on educational matters. However, the customary rule has been deemed applicable in both IACs and NIACs, although no uniform state practice seems to exist in terms of the qualifying age-limit for a 'child' under this provision.[193]

While the text of article 77(1) AP I does not specifically mention providing for the education of children, the purpose of this provision has sometimes been argued to be broad enough to also include 'the provision of facilities necessary for all children in IAC to pursue education.'[194] Other arguments deem the access to such facilities

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[189] ICRC CIHL Study Vol I 479; see also *Protecting Children in Armed Conflict* 123

[190] *Protecting Children in Armed Conflict* 122; ICRC Additional Protocols Commentary 899 [3177]

[191] AP I art 78(2)

[192] See AP II art 1 for the scope of application

[193] *Protecting Children in Armed Conflict* 123

[194] *Protecting Education in Insecurity and Armed Conflict* 115

unclear solely on the basis of the obligation of 'care' and 'aid.'[195] One thing to consider is the fact that based on the *travaux préparatoires*, the purpose of the second sentence in article 77(1),[196] or rather of the whole article, is to prevent *physical or moral injury* to children and to ensure that they develop as normally as possible under the conditions prevailing in armed conflict.[197] Curiously, this formulation expressed by a representative of the ICRC during the drafting of the current article 77 AP I is referred to in the ICRC Commentary in relation to article 4(3)(a) AP II, stating that the article obliges authorities 'both de jure and de facto to protect children from the consequences of hostilities by providing the care and aid they require, preventing physical injury or mental trauma, and ensuring that they develop as normally as circumstances permit.'[198] However, a referral to this formulation from the Diplomatic Conference does not appear in the Commentary in connection with article 77(1) AP I as there is no mention in the ICRC Commentary of education belonging in the scope of article 77(1).[199] Accordingly, it is submitted here that treating the general obligation of 'care and aid' as including access to educational facilities or to education in general would extend the scope of article 77(1) AP I and the customary provision providing for the special protection of children beyond the ordinary meaning given to the text of the provision. It is appropriate to treat the situation differently under those provisions explicitly mentioning the protection or provision of education, such as article 4(3)(a) AP II[200] or article 78(2) AP I.

This does not mean however that such access to education could or should not be provided at all where IHL is applicable. Rather, it is submitted here that the human right to education under the ICESCR and the CRC, discussed above in this Section, provides a more appropriate and legally solid avenue for the state obligation to provide children educational opportunities in armed conflict than the extension of the protection of children under article 77 AP I. This means that in some types of armed conflict, the education of children is protected under both IHL and IHRL (AP II NIACs) while in others (IACs and CA3 NIACs) it is not.[201] This in turn leads to a

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[195] *Protecting Children in Armed Conflict* 322, 357

[196] Bothe, Patsch and Solf 535; citing the Official Record cited *infra*

[197] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974 -1977), Volume XV Part One Third Session CCDH/III/SR.45 [7]

[198] ICRC Additional Protocols Commentary 1377 [4546] and attached fn 38

[199] ICRC Additional Protocols Commentary 900 [3181] – [3182]

[200] *Protecting Children in Armed Conflict* 357

[201] See *e.g. Protecting Children in Armed Conflict* 130 [3.54] *et seq* on how to improve the situation

potentially absurd outcome given that the purpose of ensuring that children 'develop as normally as circumstances permit' was formulated in connection with the drafting of AP I rather than AP II during the Geneva Diplomatic Conference. However, this should not affect the level of protection to be afforded to children's education, as will be discussed below in this Section.

### *3.3.2 Other education-related IHL provisions*

In addition to the protection of children, there are various IHL provisions protecting some specific aspects of education. Notable examples include the treatment of civilian internees and prisoners-of-war (POWs): both article 38 GC III and article 94 GC IV provide that the Detaining Power shall encourage intellectual, educational and recreational pursuits amongst internees and POWs.[202] Relief societies and other organisations assisting internees and POWs must also receive 'all necessary facilities' from the Detaining Power, subject to reasonable security measures, to distribute for example material intended for educational purposes among the detained.[203] Various provisions also relate to the protection of educational facilities during situations of occupation. These provisions are discussed below in relation to the relationship between IHL and IHRL.

## *3.4 The relationship between IHL and IHRL*

It is generally accepted that human rights provisions remain in force during an armed conflict, despite the beginning of IHL application. While IHL is the specialised body of law applicable to the status and protection of individuals in situations of armed conflict, human rights law has its own important role to supplement the protections afforded to individuals in these situations.

The ICJ has addressed the relationship between these two bodies of law in situations of armed conflict. In the *Nuclear Weapons* advisory opinion, the Court famously held:

> 'The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be

[202] GC III art 38; GC IV art 94

[203] GC III art 125; GC IV art 142

> considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.'[204]

This approach of using IHL as the applicable *lex specialis* in order to determine the precise content of an IHRL provision remaining in force during an armed conflict was somewhat modified or at least expressed in different terms in the Court's subsequent case law. In the *Palestine Wall* advisory opinion, the ICJ held that:

> '(…) the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.'[205]

The Court thus decided that it needed to apply both human rights and humanitarian law to the situation at hand in *Palestine Wall.* The Court subsequently found that the ICESCR and the CRC were applicable to the situation of in Occupied Palestinian Territories, as Israel was exercising its jurisdiction in these areas as an Occupying Power.[206] However, instead of applying both bodies of law at the same time, the Court seemed to examine the applicable rules of IHL and IHRL separately without giving much clarity as to how (and if) these two regimes would somehow apply in a combined. manner. For example, the 'military exigencies' justifying a departure from certain provisions under IHL were only analysed in relation to the IHL provisions allegedly violated, while the legality of restricting human rights under the ICCPR and the ICESCR was examined only in relation to this body of law.[207] The Court found various violations of IHL and human rights caused by the wall being constructed by Israel in the Occupied Palestinian Territories, including a violation of the right to

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[204] *Legality of the Threat or Use of Nuclear Weapons* [25]

[205] *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory* (Advisory Opinion) [2004] ICJ Rep 136 [106]

[206] *Wall in the Occupied Palestine Territory* [112] – [113]; see also a similar outcome reached by the ESCR Committee, 'Concluding observations: Israel' (31 August 2001) UN Doc E/C.12/1/Add.69 [12] – [13]

[207] *Wall in the Occupied Palestine Territory* [135] – [136]

education under article 13 and 14 ICESCR as inhabitants in the area were cut off from attending schools.[208]

This approach of continuing applicability of human rights provisions in armed conflict was confirmed by the ICJ in the *Armed Activities* judgment,[209] where the Court continued with its rather silent approach of not explaining how these two bodies of law would work *together* in a situation of armed conflict and instead just determining that both of them had been violated in the case before it.[210] In addition to the ICJ, various UN treaty monitoring bodies[211] and the two ad hoc tribunals[212] have also confirmed the concurrent application of IHL and IHRL in armed conflict. Regional human rights tribunals, such as the ECtHR, have also adopted its own approach to apply human rights provisions during armed conflict.[213] Not surprisingly, while the ICJ's approach has been varying or in some instances perhaps IHL-centric, many human rights bodies have emphasised the complementarity and mutual application of the two legal regimes.[214]

Outside the 'active hostilities phase', occupation provides a specific circumstance in which the coverage of IHL and IHRL norms protecting education have a considerable overlap.[215] As one party to an armed conflict has reached sufficient control of a

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[208] *Wall in the Occupied Palestine Territory* [134]

[209] *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v Uganda*) (Judgment) [2005] ICJ Rep 168 [216]

[210] *Armed Activities* [219] – [220]

[211] HRC General Comment [3]; HRC, 'General Comment No 31 [80] - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [11] ('HRC General Comment 31'); Committee on Rights of the Child, 'Report adopted by the Committee at its 46th Meeting, on 9 October 1992' (19 October 1992) UN Doc CRC/C/10 [68] ('CRC General Discussion on Children in Armed Conflicts');

[212] *Prosecutor v Anto Furundžija* (Judgment) IT-95-17/1-T (10 December 1998); *Prosecutor v Dragoljub Kunarac et al* (Judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001); *Prosecutor v Zdraviko Mucic et al* (Judgment) IT-96-21-T (16 November 1998); *Prosecutor v Ferdinand Nahimana et al* (Judgment) (ICTR-99-52-T, 3 December 2003)

[213] *Protecting Education in Insecurity and Armed Conflict* 60; see *e.g. Varnava and others v Turkey* App no 16064/90 et al (ECtHR, 18 September 2009) [185]; *Hassan v United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) [106]

[214] HRC General Comment 29 [3]; HRC General Comment 31 [11]; CRC General Discussion on Children in Armed Conflicts [68]; *Protecting Education in Insecurity and Armed Conflict* 58 – 59

[215] The ECtHR for example has extensive case law on killing and abduction of individuals in conflict zones and the extraterritorial applicability of the ECHR during occupation. For a critical overview, see *e.g.* 'Episode 12: No License to Kill' (*EJIL: The Podcast* 18 October 2021) available at

geographical area to swap out the administration of the state it has attacked,[216] the protection of human rights naturally enters the picture in a different manner when compared to other situations of IHL applicability. As for the protection of education, the human rights-like IHL provisions have been discussed above: already with the drafting of GC IV in 1949, articles 24 and 50 GC IV required that the education of orphaned children and the working of educational facilities in general be 'facilitated' by the Occupying Power. Currently in situations of occupation, the right to education poses further requirements to the specific IHL rules with its continued applicability confirmed by the ICJ in *Occupied Palestine Territory* and the Four As framework, specifically the requirement of acceptability. The ECtHR cases mentioned above, *Cyprus v Turkey* and *Ukraine v Russia (Re Crimea)* clearly demonstrate that the Occupying Power may not simply impose its own curricula and language on occupied territory. The Occupying Power may not either simply destroy or damage schools and educational facilities, thus effectively depriving the civilian population from enjoying the right to education;[217] their destruction outside attacks against legitimate military objectives further constitutes a war crime under the ICC's Rome Statute.[218]

While the scope of this study does not allow for an examination of this issue in detail, it could be said that the relationship between IHL and IHRL and their mutual application in practice remains a controversial issue in judicial decisions and scholarly debate.[219] Most importantly for the purposes of the present study, it is submitted that the core minimum obligation to provide for education under the ICESCR and the CRC does not necessarily conflict with the education-related IHL provisions pertaining to the special protection of children. Therefore, despite the precise manner in which certain IHL and IHRL provisions are ought to be applied together during an armed conflict, the end result remains that states are bound to ensure access to the most basic forms of education. This holds true whether compliance with IHL and IHRL

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<https://open.spotify.com/episode/3vlTlZ1GKrpS6WDoDAAjE0?si=sNzvvXcITxqdOgtMOCJaaQ> accessed 29 January 2024; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP 2011)

[216] Hague Regulations art 42

[217] Hague Regulations art 46, 56

[218] See 2.3 above

[219] Jonathon Horowitz, 'The Right to Education in Occupied Territories: Making More Room for Human Rights in Occupation Law' (2004) (7) Yearbook of International Humanitarian Law 233; Nancie Prud'homme, 'Lex Specialis: Oversimplifying a more complex and multifaceted relationship?' (2007) 40 Israeli Law Review 356; Iain Scobbie, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict' (2009) 14 Journal of Conflict and Security Law 449; Cordula Droege, 'Elective affinities? Human rights and humanitarian law' (2008) 90 International Review of the Red Cross 50

provisions is examined separately or together as a complimentary protection system. As IHL lacks detailed provisions providing for the right to education, the concrete scope of the minimum state obligation in this regard falls to be determined by the relevant IHRL.

### *3.5 A continued obligation of conduct*

As the Section above describes, the relevant provisions under the ICESCR and the CRC remain fully in force even in situations of armed conflict. While ESCRs have a different way of functioning compared to the more negative civil and political rights in terms of the progressive realization based on available resources, the helpful backboard for evaluating state compliance even in gravest situations of armed conflict can be arguably found from the minimum core obligations. Based on these obligations, states remain bound to provide basic education in a non-discriminatory manner during armed conflict and cannot simply remove this obligation through the technical exercise of a derogation procedure. However, no technical obligations exist as to the means of executing this right, the right to education essentially being a conduct-based obligation. Therefore, states can utilise technologies such as distance learning, where applicable, to supplement their existing educational facilities.[220] Indeed, as the relevant provisions under the ICESCR and the CRC only speak of the right to 'education,' itself defined as a process bringing about 'learning,'[221] the manner of executing this right is clearly technology-neutral. This fact, paired with the ESCRs emphasis on conduct-based obligations based on the progressive realisation of the rights means that a state facing a situation of armed conflict does not necessarily need to provide the same level or same type of education as before the armed conflict, say, in the same physical buildings. Rather, what is relevant from the point-of-view of the CRC and ICESCR is whether the state in question is striving to keep education going and providing its citizens with this right to the maximum level possible with the resources at its disposal. In a situation of armed conflict, this cannot be expected to take the same form as in peacetime, as the civilian population might need to be evacuated from certain areas due to the dangers presented by ongoing military operations under the IHL obligation to protect them from the effects of attacks.[222]

Therefore, it is submitted here that where maximal resources are directed in good faith to the continuation of education in an armed conflict, the state can fulfil its obligations under the right to education even completely without the use of peacetime school and educational buildings, should the need arise. After all, education is about the activity of passing information and creating learning opportunities, not the physical buildings

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[220] ESCR General Comment 13 [6]

[221] International Standard Classification of Education ISCED 2011 (UNESCO 2011) 79

[222] See 2.2.2 above

*per se*. If a state were to for example close off a school to protect the staff and students by relocating them elsewhere, in turn complying with its obligations to take precautions against the effects of attacks under IHL, this would not necessarily entail a restriction of their right to education if the state would arrange for their appropriate education in some other location or manner.

## 4 The Safe Schools Declaration and the GCPEA Guidelines

After examining the relevant provisions of international humanitarian law and international human rights law, this Section turns towards the recent Safe Schools Initiative aiming to improve the protection of schools and education.[223] The focus of this study is on the Safe Schools Declaration[224] ('SSD') and the Guidelines for Protecting Schools and Universities From Military Use During Armed Conflict ('GCPEA Guidelines' or 'Guidelines'),[225] both published by the Global Coalition to Protect Education from Attack ('GCPEA'). This initiative by the various non-governmental and international organisations forming the GCPEA[226] has been an international success story. At the time of writing, the SSD has been endorsed by a total of 118 states since its publication in 2015,[227] with the endorsing states having met in three consecutive international conferences.[228] The GCPEA's efforts have also managed to secure attention at the highest levels of international politics: in 2020, the UN General Assembly proclaimed 9 September the Global Day to Protect Education from Attack,[229] and the UN Security Council (UNSC) has adopted multiple resolutions between 2010 and 2020 calling for increased attention to the protection of education and children in armed conflict.[230]

This Section examines the background and the drafting history of the SSD and the GCPEA Guidelines first to tie the GCPEA's work into the recent, wider framework of strengthening the protection of schools and education in armed conflicts. This is

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[223] <https://ssd.protectingeducation.org/> accessed 15 January 2024

[224] Global Coalition to Protect Education from Attack ('GCPEA'), 'Safe Schools Declaration' <https://protectingeducation.org/wp-content/uploads/documents/documents_safe_schools_declaration-final.pdf> accessed 29 December 2023 (Safe Schools Declaration)

[225] GCPEA, 'Guidelines For Protecting Schools and Universities From Military Use During Armed Conflict' < https://protectingeducation.org/wp-content/uploads/documents/documents_guidelines_en.pdf> accessed 29 December 2023 (GCPEA Guidelines)

[226] <https://protectingeducation.org/about-us/who-we-are/> accessed 16 January 2024

[227] <https://ssd.protectingeducation.org/endorsement/> accessed 29 December 2023

[228] <https://ssd.protectingeducation.org/> accessed 30 December 2023

[229] UNGA Res 74/275 (29 May 2020) UN Doc A/RES/74/275

[230] See *e.g.* UNSC, 'Resolution 2427 (2018)' (9 July 2018) UN Doc S/RES/2427; UNSC, 'Resolution 2143 (2014)' (7 March 2014) UN Doc S/RES/2143; UNSC, 'Resolution 1998 (2011)' (12 July 2011) UN Doc S/RES/1998

followed by an analysis of the content of the two documents and the most relevant UN resolutions on the subject, highlighting the large departure from the scope of current IHL provisions and the Guidelines' attempt to elevate the protection of schools and universities akin to the special protection of medical objects and establishments. As the SSD, the Guidelines and the resolutions examined below do not in and of themselves alter the scope of the current international legal obligations, Section 5 then focuses on the national implementation measures passed by the states endorsing the SSD and the Guidelines and whether such measures have affected the existing international legal obligations.

### *4.1 Background and drafting process*

The background of the GCPEA Guidelines and the GCPEA's efforts in general lies in the work of a few experts documenting attacks on education in the early 2000s published by the United Nations Economic, Scientific and Cultural Organisation ('UNESCO') and Human Rights Watch ('HRW'). A report titled 'Education Under Attack' was originally published by UNESCO in 2007,[231] being informed by the work Zama Neff had conducted for HRW before 2006[232] on attacks on education in Afghanistan.[233] Further reports were published[234] and an expert meeting was held by UNESCO in Paris in 2010 on the protection of education from attack.[235] Following the Paris meeting, the GCPEA was formed in 2010 with multiple renowned NGOs and UN agencies joining the coalition.[236]

According to Steven Haines, one of the main drafters of the GCPEA Guidelines, the newly-founded GCPEA focused from the beginning on data gathering and reporting

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[231] UNESCO, 'Education Under Attack 2007: A Global Study on Targeted Political and Military Violence Against Education Staff, Students, Teachers, Union and Government Officials, and Institutions' <https://unesdoc.unesco.org/ark:/48223/pf0000186303> accessed 29 December 2023

[232] Human Rights Watch, 'Lessons in Terror – Attacks on Education in Afghanistan' <https://www.hrw.org/reports/2006/afghanistan0706/afghanistan0706brochure.pdf> accessed 29 December 2023

[233] Haines 577

[234] UNESCO, 'Education under Attack, 2010: A Global Study on Targeted Political and Military Violence Against Education Staff, Students, Teachers, Union and Government Officials, Aid Workers and Institutions' <https://unesdoc.unesco.org/ark:/48223/pf0000186809> accessed 29 December 2023

[235] UNESCO, 'Protecting Education from Attack: A State-of-the-Art Review' (2010) <https://unesdoc.unesco.org/ark:/48223/pf0000186732> accessed 29 December 2023

[236] Haines 578-579; see <https://protectingeducation.org/about-us/who-we-are/> accessed 30 December 2023

on attacks on education. The GCPEA took over the Education Under Attack reporting series from UNECSCO, which had moved to be a part of the GCPEA's Global Steering Committee alongside HRW and other organisations involved with the early efforts to raise awareness on the subject. The first Education Under Attack report was published by the GCPEA in 2014,[237] with subsequent reports published in 2018,[238] 2020,[239] and 2022.[240] The reporting helped establish patterns and trends in attacks against education and led the GCPEA to conclude that states and non-state armed groups ('NSAGs') not deliberately targeting schools and education could be approached and influenced in order to improve the protection of schools in conflict zones by reducing the military use of educational buildings.[241] The GCPEA's approach ultimately came in the form of a 'soft law' instrument instead of drafting new conventional rules, leading to the GCPEA Guidelines and the SSD, which, if applied, 'would have the potential to reduce the extent and intensity of military presence in and around schools and other educational establishments.'[242]

The drafting process leading to the finalised GCPEA Guidelines began in 2012 with an expert meeting in Geneva.[243] In 2013, the GCPEA published the Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict ('Lucens Draft Guidelines'),[244] a document preceding the actual GCPEA

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[237] GCPEA, 'Education Under Attack 2014' <https://protectingeducation.org/publication/education-under-attack-2014/> accessed 30 December 2023

[238] GCPEA, 'Education Under Attack 2018' <https://eua2018.protectingeducation.org/> accessed 30 December 2023

[239] GCPEA, 'Education Under Attack 2020' <https://eua2020.protectingeducation.org/> accessed 30 December 2023

[240] GCPEA, 'Education Under Attack 2022' <https://eua2022.protectingeducation.org/> accessed 30 December 2023

[241] Haines 581 – 582

[242] Haines 583

[243] See Haines 600 – 608 for a detailed account of the drafting process; see also Ashley Ferelli, 'Military Use of Educational Facilities during Armed Conflict: An Evaluation of the Guidelines for Protecting Schools and Universities from Military during Armed Conflict as an Effective Solution' 44 Georgia Journal of International and Comparative Law 339, 348; GCPEA Guidelines Commentary 6 – 7

[244] GCPEA, 'Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict' <https://protectingeducation.org/wp-content/uploads/documents/documents_draft_lucens_guidelines.pdf> accessed 30 December 2023

Guidelines deliberately left at the draft stage. According to Haines, the GCPEA recognized after completing the Lucens Draft Guidelines that if its efforts to protect education from attack were to achieve a real difference on the ground, the guidelines would need widespread acknowledgement and acceptance at the state level. This would in turn require diplomatic efforts. Consequently, the governments of Norway and Argentina took the lead in the international advocacy campaign effectively turning the content of the Lucens Draft Guidelines into the Safe Schools Declaration and the GCPEA Guidelines in 2015 and 2014 respectively.[245] Norway also acts as the leader of the current state implementation network of the Guidelines.[246]

### *4.2 The GCPEA Guidelines*

The GCPEA Guidelines form the heart of the GCPEA's efforts to improve the protection of schools and universities, while the SSD's purpose is to act as a 'diplomatic vehicle' for obtaining international support for the Guidelines.[247] The SSD, 'an inter-governmental political commitment' as described by the GCPEA,[248] refers to the GCPEA Guidelines as 'legally non-binding, voluntary guidelines that do not affect existing international law.'[249] However, by endorsing the SSD, states commit to endorsing the Guidelines and to 'use the Guidelines, and bring them into domestic policy and operational frameworks as far as possible and appropriate.' The endorsing states also endorse some of the UNSC resolutions on the protection of schools and education, seek to ensure the continuation of education during armed conflict, and support the re-establishment of educational facilities.[250]

#### *4.2.1 Full text of the Guidelines*

The GCPEA Guidelines themselves contain three different parts: they deal with the military use of education (Guideline 1 and 2), attacks on educational facilities used by opposing forces (Guideline 3 and 4) and the defence and security of educational facilities (Guideline 5). Guideline 6 further deals with the national implementation of the Guidelines. The full text of the Guidelines follows:

> **Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict**

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[245] Haines 606 – 608; GCPEA Guidelines Commentary 7

[246] <https://protectingeducation.org/ssd-online-platform/> accessed 5 January 2024

[247] Haines 575; GCPEA Guidelines Commentary 7

[248] <https://ssd.protectingeducation.org/> accessed 30 December 2023

[249] SSD, GCPEA Guidelines Commentary 5

[250] Safe Schools Declaration

Parties to armed conflict are urged not to use schools and universities for any purpose in support of their military effort. While it is acknowledged that certain uses would not be contrary to the law of armed conflict, all parties should endeavour to avoid impinging on students' safety and education, using the following as a guide to responsible practice:

**Guideline 1**

Functioning schools and universities should not be used by the fighting forces of parties to armed conflict in any way in support of the military effort.

(a) This principle extends to schools and universities that are temporarily closed outside normal class hours, during weekends and holidays, and during vacation periods.

b) Parties to armed conflict should neither use force nor offer incentives to education administrators to evacuate schools and universities in order that they can be made available for use in support of the military effort.

**Guideline 2**

Schools and universities that have been abandoned or evacuated because of the dangers presented by armed conflict should not be used by the fighting forces of parties to armed conflict for any purpose in support of their military effort, except in extenuating circumstances when they are presented with no viable alternative, and only for as long as no choice is possible between such use of the school or university and another feasible method for obtaining a similar military advantage. Other buildings should be regarded as better options and used in preference to school and university buildings, even if they are not so conveniently placed or configured, except when such buildings are specially protected under International Humanitarian Law (e.g. hospitals), and keeping in mind that parties to armed conflict must always take all feasible precautions to protect all civilian objects from attack.

(a) Any such use of abandoned or evacuated schools and universities should be for the minimum time necessary.

(b) Abandoned or evacuated schools and universities that are used by the fighting forces of parties to armed conflict in support of the military effort should remain available to allow educational authorities to re-open them as soon as practicable after fighting forces have withdrawn from them, provided this would not risk endangering the security of students and staff.

(c) Any traces or indication of militarisation or fortification should be completely removed following the withdrawal of fighting forces, with every

effort made to put right as soon as possible any damage caused to the infrastructure of the institution. In particular, all weapons, munitions and unexploded ordnance or remnants of war should be cleared from the site.

**Guideline 3**

Schools and universities must never be destroyed as a measure intended to deprive the opposing parties to the armed conflict of the ability to use them in the future. Schools and universities—be they in session, closed for the day or for holidays, evacuated or abandoned—are ordinarily civilian objects.

**Guideline 4**

While the use of a school or university by the fighting forces of parties to armed conflict in support of their military effort may, depending on the circumstances, have the effect of turning it into a military objective subject to attack, parties to armed conflict should consider all feasible alternative measures before attacking them, including, unless circumstances do not permit, warning the enemy in advance that an attack will be forthcoming unless it ceases its use.

(a) Prior to any attack on a school that has become a military objective, the parties to armed conflict should take into consideration the fact that children are entitled to special respect and protection. An additional important consideration is the potential long-term negative effect on a community's access to education posed by damage to or the destruction of a school.

(b) The use of a school or university by the fighting forces of one party to a conflict in support of the military effort should not serve as justification for an opposing party that captures it to continue to use it in support of the military effort. As soon as feasible, any evidence or indication of militarisation or fortification should be removed and the facility returned to civilian authorities for the purpose of its educational function.

**Guideline 5**

The fighting forces of parties to armed conflict should not be employed to provide security for schools and universities, except when alternative means of providing essential security are not available. If possible, appropriately trained civilian personnel should be used to provide security for schools and universities. If necessary, consideration should also be given to evacuating children, students and staff to a safer location.

(a) If fighting forces are engaged in security tasks related to schools and universities, their presence within the grounds or buildings should be

avoided if at all possible in order to avoid compromising the establishment's civilian status and disrupting the learning environment.

**Guideline 6**

All parties to armed conflict should, as far as possible and as appropriate, incorporate these Guidelines into, for example, their doctrine, military manuals, rules of engagement, operational orders, and other means of dissemination, to encourage appropriate practice throughout the chain of command. Parties to armed conflict should determine the most appropriate method of doing this.

According to the definitions used in the drafting of the GCPEA Guidelines, 'schools and universities' refer to all places principally being used for educational purposes, whatever they are called in the local context, such as pre-primary or early childhood education centres, primary or secondary schools, learning centres, and tertiary education centres such as universities, colleges, or technical training schools. The term also includes any land or grounds immediately adjacent to or attached to the institutions and school and university buildings that have been evacuated because of the security threats posed during armed conflict.[251] The concept of using 'in support of the military effort' is further understood as the 'broad range of activities in which the fighting forces of parties to armed conflict might engage with the physical space of a school or university in support of the military effort, whether temporarily or on a long-term basis.' The term includes for example the following uses: as barracks or bases; for offensive or defensive positioning; for storage of weapons or ammunition; for interrogation or detention; for military training or drilling of soldiers; for the recruitment of children as 'child soldiers' contrary to international law; as observation posts; as a position from which to fire weapons (firing position) or to guide weapons onto their targets (fire control). The presence of forces in the vicinity of schools and universities to provide for the school's protection or as a security measure when schools are being used are not included in this term, nor is their use as election polling stations or for other non-military purposes.[252]

### *4.2.2 Analysis of the Guidelines*

#### *4.2.2.1 The military use of schools (Guideline 1, 2, 3, and 5)*

The Guidelines set a number of detailed recommendations when it comes to tactical-level decisions concerning the use of schools and universities. Guideline 1 sets in rather straightforward terms an absolute prohibition to use 'functioning' schools and universities in any way in support of the military effort. Guideline 2 extends parts of

[251] GCPEA Guidelines Commentary 7

[252] GCPEA Guidelines Commentary 8

this protection to schools and universities that have been 'abandoned or evacuated because of the dangers presented by armed conflict.' The terms 'functioning' and 'abandoned or evacuated' have not been defined in connection with the Guidelines. The definition of schools and universities used in the drafting of the Guidelines requires the building's 'principal use for educational purposes,' barring any building not principally used for education from qualifying as a school or university under the Guidelines. This analysis consequently takes a 'functioning' school under Guideline 1 as one (still) being principally used for educational purposes, while an abandoned or evacuated school building is not used for educational purposes at all.

Consequently, the content of Guideline 1 does not produce a major difference when compared with the relevant IHL provisions governing the status of school and university buildings. A building or any other type of an inanimate object principally used for educational purposes would *prima facie* qualify as a civilian objective. As discussed above in Section 2, article 52(3) AP I provides that in case of a doubt, an object normally dedicated to civilian purposes, such as a school, is not to be considered to make an effective contribution to military action, thus effectively preventing it from being qualified as a military objective under article 52(2) AP I in such situations. However, in situations where there is no doubt as to the contribution made to military action, such as in cases involving the military use of schools and universities, the qualification of the building under IHL is dependent on the highly contextual definition of a military objective.[253] This explains the rationale behind the prohibition contained in Guideline 1, which seeks to prevent such situations from occurring. In formulating an absolute prohibition, Guideline 1 departs from the current IHL provisions, which do not govern the military use of civilian objects *per se* but require that military objectives and civilian objects are segregated 'to the maximum extent feasible.'[254] The military use of civilian property within state territory is a matter governed by domestic law and related human rights standards, as IHL does not prescribe any standard in justifying the acquisition of private property in these situations.[255]

Guideline 2 extends the protection afforded to functional schools and universities in Guideline 1 to schools and universities that have been abandoned or evacuated because of the dangers presented by armed conflict, allowing their use only in 'extenuating

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[253] AP I art 52(2), see 2.1.2 above

[254] See 2.2.2 above

[255] The situation differs in occupation situations, where GC IV and customary international law protect the private and public property in the occupied territory. Various human rights instruments also extend their application to certain extraterritorial situations, such as occupation on the territory of a foreign state, see 3.4 above; Milanovic 2011

circumstances' with no viable alternative and only for as long as no choice is possible between such use and another feasible method for obtaining a similar military advantage. However, Guideline 2 also requires that other (non-protected) buildings should be used in preference to school and university buildings, even if they are not so conveniently placed or configured for the purposes of obtaining a military advantage similar to using an evacuated or abandoned school building. Further, even in situations complying with all of the requirements above, Guideline 2 sets additional criteria for the permissible use of abandoned schools and universities by requiring that any such use should be for the minimal time necessary.

Guideline 2's prohibition of using evacuated or abandoned schools and universities marks a further departure from the current legal rules. While abandoned or evacuated schools and universities remain civilian objectives similarly to functional schools and universities where they are not used to make an effective contribution to military action, a party to an IAC is by no means prevented from taking advantage of such buildings if article 58 AP I is complied with. While the party to the conflict needs to segregate between civilian objects and military objectives, the applicable standard of conduct binding their armed forces in an IAC is that of feasibility coupled with considerations of mission success, offering no absolute prohibition to use abandoned schools and universities if those buildings are not otherwise protected, such as under the regime of cultural property.[256] As the status of such precautions against the effects of attacks is much more uncertain in NIACs, Guideline 2 potentially contains a completely new formulation in these types of conflicts. Further, IHL does not recognise a rigid hierarchy between different objects possibly being used for military purposes as proposed in Guideline 2; rather, the rules governing the use of civilian objects for military purposes and the protection of civilian objects in general are highly context-based, with no possibility to tell in abstract which buildings would be more suitable for military use, even where the goal is maximising the protection of civilians and civilian objects.

Guideline 3 does not seem to be raise a similar conflict with the applicable IHL rules as Guidelines 1 and 2 do. The first sentence relates to the *purpose* criterion under the definition of a military objective[257] and ensuring the possibility of restoring educational opportunities after the fighting has ended. While the prohibition contained in Guideline 3 has relevance in certain battlefield situations, the most important portion of this guideline for the general conduct of hostilities and the protection of schools and universities can be summarised by its second sentence: 'Schools and universities (…) are ordinarily civilian objects.' Emphasising the notion of *ordinarily*,

[256] See 2.2.2 above

[257] See 2.1.2.1 above

this holds true from the point-of-view of the principle of distinction.[258] Accordingly, similar statements emphasising the *prima facie* civilian character of schools and universities have been made in numerous instances for example by the UNSC and other international actors.[259] Guideline 5 also seeks to ensure the civilian character of schools and universities by preventing the use of armed forces in security assignments at schools and universities. As members of armed forces and organised armed groups are lawful targets for enemy violence similarly to military objectives, their mere presence in an otherwise civilian object could draw (lawful) attacks damaging schools and universities. The second sentence of Guideline 5 also considers the need of evacuating the staff and students to protect them from dangers arising from military operations.[260]

#### *4.2.2.2 Attacking schools and universities (Guideline 4)*

The content of Guideline 4 is one of the more controversial aspects of the Guidelines from the perspective of the applicable IHL rules. By requiring that parties to an armed conflict consider all feasible *alternatives* before attacking a school or university even in situations where the building has been rendered a lawful military objective, Guideline 4 goes beyond the requirement of taking precautions before attacking.[261] While the principle of precautions requires parties to an armed conflict to constantly weigh different options in attacking a military objective and to halt the attack in case the expected civilian casualties would become disproportionate to the expected military advantage,[262] the legality of attacking a particular target is solely governed by the principle of distinction. Based on its wording, Guideline 4 rather seeks to prevent schools and universities being selected as the target of an attack rather than governing the modalities related to the conduct of hostilities in relation to such targets, thus raising the requirement beyond the principle of precautions.

Further, the requirement of giving an advance warning to the enemy in Guideline 4 paragraph a) seeks to elevate the precautions taken in relation to schools and universities to a similar level of special protection afforded to medical objects and units, such as military or civilian hospitals, sickbays, hospital ships and ambulances. According to the relevant treaty and customary provisions, the protection of such medical objects and units shall not cease unless they are used to commit acts harmful to the enemy outside their humanitarian duties. The protection may only cease after a

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[258] See 2.1 above

[259] See 4.3 below

[260] AP I art 51(1)

[261] See 2.2.2 above

[262] AP I art 57

due warning has been given with a reasonable time limit, where applicable, and such warning has been unheeded.[263] As discussed above in Section 2, schools and universities are not afforded similar special protection under IHL.[264] In its Guidelines Implementation Toolkit,[265] the GCPEA further claims that even an evacuated or abandoned school building used by a party to an armed conflict would be subject to the precautions in attack as prescribed under article 57 AP I.[266] However, where such a building has been turned into a military objective, for example based on its use by the opposing party to an armed conflict, no such precautions would need to be taken under current IHL in relation to the building itself. The obligation to take precautions and the principle of proportionality only relate to damage, death and destruction caused to *civilians* and *civilian* objects. Where a school or university building has become a military objective under IHL, its civilian character is excluded until the circumstances qualifying it as a military objective have ceased.[267]

### *4.2.3 The GCPEA's advocacy outside the text of the Guidelines*

Guideline 4's and the GCPEA Guidelines major departure from existing legal provisions in general begins with the definition used. As schools and universities are defined as places principally used for educational purposes, extending the protection afforded to evacuated or abandoned buildings begs the question as to whether these buildings truly remain 'schools' and 'universities' under the definition used by the

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[263] GC I art 21; GC II art 34; GC IV art 19; AP I art 13; AP II art 11. On the discontinuation of medical objects' protection, see Jan Kleffner, 'Protection of the wounded and sick' in Fleck 2008 343; Jean Pictet (ed), T*he Geneva Conventions of 12 August 1949: Commentary – I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) 202. While the ICRC's updated 2016 Commentary to the GC I disagrees with Pictet's position that the warning may not be given at all circumstances, the 2016 Commentary notes that certain states maintain the position expressed in the 1952 Commentary, see Knut Dörmann, Liesbeth Lijnzaad, Marco Sassòli and Philip Spoerri (eds), *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* (ICRC/CUP 2016) [1848] fn 22. Further on the special protection of medical objects under IHL, see Juri Huttunen, 'Puolustusvoimien lääkintähenkilöstö ja sodan oikeussäännöt' in Kari Takamaa, Juri Huttunen and Verneri Paavola (eds), *Sotaoikeudellisia kirjoituksia I* (Maanpuolustuskorkeakoulu, upcoming)

[264] See 2.3 above

[265] GCPEA, 'Implementing the Guidelines – A Toolkit to Guide Understanding and Implementation of the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict' <https://protectingeducation.org/wp-content/uploads/documents/documents_toolkit.pdf> accessed 15 January 2024 ('Guidelines Implementation Toolkit')

[266] Guidelines Implementation Toolkit 16

[267] See 2.2.2 above

Guidelines. While the definition does formally include evacuated and abandoned buildings, what makes a school 'a school' under the Guidelines is clearly its use for educational purposes. In this sense, the Guidelines arguably create an internal discrepancy or at least somewhat of an impractical situation by attempting to extend the protection also to evacuated or abandoned buildings. Arguably, without *education* taking place within their walls, these buildings remain inanimate objects, akin to every adjacent civilian object in a legal and concrete sense. This is emphasised by the analysis of the right to education above in Section 3, which demonstrates that a state is possibly acting well within its treaty obligations when placing educational facilities in a different geographical location, thus highlighting the attempted increase in protection by the GCPEA even further.

The GCPEA's strong advocacy is highlighted by the claims and arguments made also outside the actual Guidelines, such as the Implementation Toolkit mentioned above in relation to the precautions under Guideline 4. The SSD Implementation Network, led by the government of Norway, has published recommendations on how to best implement the SSD and the Guidelines, which sum up the position sought by the GCPEA. According to these recommendations, the 'security sector' of each endorsing state should 'give explicit instructions to national armed forces either not to use educational facilities for military purposes in any circumstance, or to only use them as a last resort, for the shortest time possible, and when such facilities are no longer functioning as educational institutions.'[268] While a similar recommendation is contained in Guideline 6, seeking the issuing of 'explicit instructions' in another setting demonstrates the strong push by the GCPEA for a *de facto* binding implementation of the Guidelines.

### *4.3 Resolutions on the protection of schools and education*

The UNSC has adopted various resolutions in recent years concerning the status and protection of schools and education in armed conflicts. In these resolutions, the Security Council has for example stressed the need to put an end to attacks on schools and/or hospitals in contravention of international law[269] and the attacks against

[268] GCPEA 'Use the Guidelines for Protecting Schools and Universities from Military Use' <https://ssd.protectingeducation.org/implementation/use-the-guidelines/> accessed 21 November 2023

[269] UNSC, 'Resolution 1998 (2011)' (12 July 2011) UN Doc S/RES/1998 [6]; UNSC, 'Resolution 2143 (2014) (7 March 2014) UN Doc S/RES/2143 [1], [7]; UNSC, 'Resolution 2225 (2015)' (18 June 2015) UN Doc S/RES/2225 [1]; UNSC, 'Resolution 2427 (2018)' (9 July 2018) UN Doc S/RES/2427 [1], [15]

'protected persons' related to schools.[270] The SC has also stressed the parties to put an end to the military use of schools,[271] which according to the SC may render them legitimate targets of attack[272] and has on multiple occasions called for parties to armed conflict to respect the civilian character of schools, sometimes further qualifying it 'as such under international law.'[273] For example in resolution 1998 (2011), specifically mentioned in the SSD, the SC requested the UN Secretary-General to report on those parties to armed conflicts that engage in contravention of applicable international law in recurrent attacks or threats of attacks against protected persons in relation to schools and/or hospitals. The SC further urged all parties to armed conflict to refrain from actions that impede children's access to education and to health services and called upon parties listed for multiple violations by the Secretary-General to halt recurrent attacks on schools and/or hospitals, recurrent attacks or threats of attacks against protected persons in relation to schools and/or hospitals, in violation of applicable international law.[274]

The UN General Assembly has also passed resolutions concerning the protection of schools and education. In resolution 64/290 (2010) the General Assembly urged all parties to armed conflict:

> 'to fulfil their obligations under international law, in particular their applicable obligations under international humanitarian law and international human rights law, including to respect civilians, including students and educational personnel, to respect civilian objects such as educational institutions and to refrain from the recruitment of children into armed forces or groups, urges Member States to fulfil their applicable obligations under international law, including international humanitarian law, related to the protection of and respect for civilians and civilian objects, and urges them, in order to prevent and combat impunity, to criminalize under their domestic law attacks on educational buildings, and stresses that such attacks may constitute grave breaches of the Geneva Conventions and, for States parties, war crimes under the Rome Statute of the International Criminal Court'[275]

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[270] UNSC Res 1998 (2011) [3 b]; UNSC, 'Resolution 2427 (2018)' (9 July 2018) UN Doc S/RES/2427 [15]

[271] UNSC Res 2143 (2014) [18]; UNSC Res 2225 (2015) [7]

[272] UNSC Res 2427 (2018) [16]

[273] UNSC Res 2143 (2014) [18 a]; UNSC Res 2225 (2015) [1]; UNSC Res 2427 (2018) [16 a]

[274] UNSC, 'Resolution 1998 (2011)' (12 July 2011) UN Doc S/RES/1998 [3], [4], [6]

[275] UN General Assembly, 'Resolution 64/290 (2010)' (27 July 2010) UN Doc A/RES/64/290 [10]

The Human Rights Council has also called on states to continue to strengthen the protection of schools and universities against attacks, 'making them free from all forms of violence, including by taking measures to deter the military use of schools, such as by considering implementing the Guidelines for Protecting schools and universities from military use during armed conflict.'[276]

A few observations are in order. The resolutions discussed above, while being just a scratch of the surface when it comes to vast international documentation relating to the protection of children and the right to education, are ambitious in their scope and approach to the protection of schools and education, being passed on many levels of the UN apparatus and within the organisation of other international organisations.[277] However, at the same time it should be noted that the language in these resolutions, especially those passed by the UN Security Council and General Assembly, is carefully drafted not to extend beyond the current state of applicable international law. These resolutions are careful to add a mention binding the condemnation of for example attacks against schools to the scope of current international law (for example by saying that only attacks *in contravention of international law* are condemned).[278] The UN organs are therefore in essence saying nothing – nobody would argue at the highest fora of international politics that attacks against schools *that breach international law* are reprehensible and should be condemned.[279] The case could be different if all attacks against schools anywhere and in any situation where to be condemned.

### *4.4 Political commitments beyond existing obligations*

Based on the abovementioned considerations and the IHL obligations outlined in Section 2, it is clear that the Guidelines are attempting to move beyond the currently applicable legal provisions under IHL. As no special protection is afforded to schools and universities under IHL, the Guidelines are seeking to elevate the protection of such buildings akin to, or even past that of medical objects, such as hospitals by

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[276] Human Rights Council, 'Resolution 47/6 The right to education' (26 July 2021) UN Doc A/HRC/RES/47/6 [8]

[277] *E.g.* African Union Peace and Security Council, 'Communique of the 994th meeting of the PSC held on 11 May 2021, on the protection of children in conflict situations in Africa' <https://www.peaceau.org/en/article/communique-of-the-994th-meeting-of-the-psc-held-on-11-may-2021-on-the-protection-of-children-in-conflict-situations-in-africa> accessed 15 January 2024 [3]

[278] *E.g.* UNSC Res 1998 (2011) [3]; UNSC, 'Resolution 2601 (2021)' (29 October 2021) UN Doc S/RES/2601, which is according to the GCPEA the 'first thematic resolution on attacks in education'

[279] The UNSC resolutions discussed above were all passed unanimously

creating an almost absolute prohibition on their military use and the additional precaution of warning the enemy before attacking such buildings. Drawing a connection between schools and hospitals is not unique to the Guidelines, as similar statements have been included in UNSC resolutions[280] and scholarly works.[281] However, none of these other sources equate the two protection frameworks besides calls for increased compliance with their protected status.

Despite being clear about their non-binding status, the SSD and the Guidelines are effectively pushing for a greater formal status by requiring the endorsing states to implement the Guidelines for example in operational practice and national legislation. This is witnessed further by the GCPEA's advocacy seeking to extend the interpretations of certain key IHL concepts in relation to schools and education outside the text of the Guidelines. The efficiency of such efforts will be turned to next, as Section 5 discusses the national implementation of the SSD and the GCPEA Guidelines.

[280] *E.g.* UNSC Res 1998 (2011) [4]; UNSC Res 2225 (2015) [1]

[281] *Protecting Children in Armed Conflict* 311 *et seq*

## 5 Implementing the Guidelines and the SSD

The main question being addressed in this Section is whether the efforts of the GCPEA described in the previous Section already have, or possible could have in the future the capability of altering existing international legal obligations. Since the Guidelines and the SSD are clear on their non-binding status, these documents do not create legal obligations themselves. Instead, the only way these documents could realistically affect existing international law is if their content could become an expression of binding customary international law or a general principle of law under article 38(1)(b) and (c) ICJ Statute.

While the hard division into binding sources of international law under article 38 ICJ Statute and non-binding 'soft law' sources could be criticised for a number of reasons,[282] this study does not address the deliberate choice of a non-binding document behind the GCPEA Guidelines and the SSD at length, nor their capability of achieving their objective, that is the altering of conduct related to armed conflicts. Rather, the focus in this Section is on the formalistic side of things, namely, whether the endorsement and national implementation of these documents would in and of itself be able to produce concrete legal[283] effects on the endorsing or external states. As the formulation of a general principle of law is arguably a much more tedious task compared to a new rule of customary international law,[284] the focus shall be solely on the Guidelines' and the SSD's potential influence over customary norms. This Section begins by examining the traditional method of identifying rules of customary

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[282] Generally, see *e.g.* Daniel Bradlow and David Hunter (eds), *Advocating Social Change Through International Law: Exploring the Choice Between Hard and Soft International Law* (Brill 2019)

[283] Understood from a doctrinal perspective while adhering to the formulation of article 38(1) ICJ Statute; see Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016)

[284] According to Bassiouni, general principles of law are 'first, expressions of national legal systems, and, second, expressions of other unperfected sources of international law enumerated in the statutes of the PCIJ and ICJ; namely, conventions, customs, writings of scholars, and decisions of the PCIJ and ICJ,' while Hersch Lauterpacht has defined general principles as 'Those principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character... a comparison, generalization and synthesis of rules of law in its various branches-private and public, constitutional, administrative, and procedural--common to various systems of national law' as cited in M Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' (1990) 11 Michigan Journal of International Law 768, 768 – 770

international law and against this backdrop, analyses the national acts of SSD and Guidelines implementation reported by the GCPEA.

### *5.1 State-led implementation network and the GCPEA implementation guidance*

Despite their declared non-binding status, the GCPEA actively promotes for an effective implementation of the SSD and the Guidelines at national level, which makes sense considering the Guidelines' goal of leading to a change in behaviour by promoting an advanced protection to the one afforded by the current legal rules, possibly leading to the formulation of new customary law.[285] According to Guideline 6, the states endorsing the SSD and therefore the Guidelines should incorporate the Guidelines into their doctrine, military manuals, rules of engagement, operational orders, and other means of dissemination to encourage appropriate practice throughout the chain of command. The SSD state implementation network led by the government of Norway has published a non-exhaustive list of recommendations on how to best implement the SSD and the Guidelines.[286] According to the recommendations, the implementing governments should:

> 'Create provisions for the protection of educational facilities from military use in domestic policies and legislation;
>
> Include protection of education from military use in military doctrine, codes of conduct, rules of engagement;
>
> Disseminate the Guidelines in military training activities and outline specific measures that armed forces can take to mitigate potential risks for local students and teachers. Such trainings should take into account the specific needs of males and females; and
>
> Record cases of military use of schools by national armed forces or armed non-state actors.'

The recommendations further include instructions directed at the Security Sector. The members of this sector should:

> 'Give explicit instructions to national armed forces either not to use educational facilities for military purposes in any circumstance, or to only use them as a last resort, for the shortest time possible, and when such facilities are no longer functioning as educational institutions;

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[285] Haines 600

[286] GCPEA 'Use the Guidelines for Protecting Schools and Universities from Military Use' <https://ssd.protectingeducation.org/implementation/use-the-guidelines/> accessed 21 November 2023

> Ensure that, if national armed forces are presently using schools or universities in a situation of armed conflict, action is swiftly taken to correct the situation, as appropriate, and in accordance with the government's policy;
>
> Integrate the Guidelines into operational frameworks and training manuals, as far as is possible and appropriate.'

The recommendations further highlight the examples of national practice that have implemented these recommendations in accordance with the Guidelines' extension of protection afforded by IHL. However, in reporting these national implementation acts, the webpage makes no difference between official acts, such as inclusions in national military manuals and declared policy documents.[287]

### *5.2 On the creation and identification of customary international law*

The modalities governing the identification of rules of customary international law are subject to a wealth of academic discussion,[288] with no opportunity to cover even a fraction of them within the scope of this study. Instead, the traditional approach followed by the ICJ is put forward here. Under article 38(1)(b) ICJ Statute, the Court shall apply 'international custom, as evidence of general practice accepted as law.'[289] This two-part requirement means that there needs to be a general practice (what states do), which is also accepted as law (they do it out of a sense of a legal obligation) also known as *opinio juris sive necessitatis*.[290] In the assessment of relevant state practice,

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[287] For example the United Kingdom has only chosen to include the SSD and the Guidelines in a declared policy document, while other states, such as New Zealand, have chosen to include the protection envisaged in the Guidelines in their official military manual. On national implementation acts, see discussion below.

[288] Any list of scholarly works would arguably only be a scratch of the surface, however on specific technical questions see *e.g.* Omri Sender and Sir Michael Wood, 'Between 'Time Immemorial' and 'Instant Custom': The Time Element in Customary International Law' (2021) 42(2) *Grotiana* 229-251; Christiana Ochoa, 'The Individual and Customary International Law Formation' (2007) 48 Virginia Journal of International Law 119; Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757

[289] Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) XV UNCIO 355 art 38(1)(b); on the correct way to cite the UN Charter and the ICJ Statute, see Martin Baumgartner, 'Lost in Citation: How to Reference the UN Charter and the ICJ Statute' (*OpinioJuris* 29 August 2023) <http://opiniojuris.org/2023/08/29/lost-in-citation-how-to-reference-the-un-charter-and-the-icj-statute/> accessed 15 January 2024

[290] James Crawford, *Brownlie's Principles of Public International Law* (9th ed, OUP 2019) 21; *Case Concerning The Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgment 3 June 1985) [1985] ICJ Rep 13 [27]

it needs to be evaluated whether the practice examined contributes to the creation of customary international law, in other words whether the practice is relevant because states believe that this practice is rendered obligatory by the existence of a rule of law.[291] Another aspect to consider is whether the examined practice creates a rule of customary international law, namely whether the practice is general enough to warrant a legal rule applicable to all states.[292] In examining state practice, both verbal and physical acts, such as declarations and statements as well as military orders, manuals and instructions and concrete battlefield practice could be taken into account.[293]

These considerations have guided the review of the state implementation practice reported by the GCPEA. The most relevant examples of national implementation acts for the purposes of establishing the possible existence of a customary norm are thus found from official acts, such as national legislation and binding military manuals and orders issued by the competent authorities.

### *5.3 National implementation practice reported by the GCPEA*

The GCPEA has compiled reports of the SSD's and the Guidelines' implementation by states and various other international actors. While it needs to be borne in mind that these reports are drafted to promote and demonstrate the practical importance of these instruments and do not necessarily follow a similar objective as stated in this report, it also means that the GCPEA has an interest in including the relevant implementation practice as widely as possible. Regardless, particular attention needs to be directed to the state practice being analysed, as the documents from which the state practice is said to originate do not bind the implementing states. Thus, not every act of implementation at the national level can be automatically said to contain an expression of a *legal* obligation by the implementing state.

This Section mostly considers such examples of implementation practice that could be verified outside the reporting by the GCPEA, for example by accessing an original document published by the implementing state or a third-party. Some examples were only cited by the GCPEA or NGOs forming part of the GCPEA, such as the HRW in other documents. Certain examples being referred to solely as information on file with the GCPEA or other organisations have been included in order to provide additional context into the reported implementation practice.

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[291] *The case of the SS Lotus* PCIJ Rep Series A No 10 28; *North Sea Continental Shelf (Germany v The Netherlands)* (Judgment) [1969] ICJ Rep 3 [77]

[292] ICRC CIHL Study Vol I xxxii

[293] ICTY Tadic Jurisdiction Decision [99]; ICRC CIHL Study Vol I xxxiii – xxxiv

### *5.3.1 Military manuals and orders*

National military manuals could arguably serve as an important source material in determining how a particular state approaches its international legal obligations in situations of armed conflict. However, not all documents titled 'Military Manuals' should be treated equally. Important differences might exist between the issuer of such a document, the intended audience and the official status of the document in the national legal and military systems as well as the intended legal consequences of views expressed in such a document.[294] However, it is submitted here that official manuals issued by the political or military leadership to a nation's armed forces guiding their operations based on binding international law and possible additional political constraints could arguably be used as evidence of state practice,[295] at least where the legal nature of the obligation is clearly expressed or deducible. The ICRC CIHL Study for its part relied heavily on national military manuals as evidence of general state practice.[296]

According to the GCPEA, Denmark, Ecuador, New Zealand, and Switzerland have updated their military manuals 'including explicit protections for schools from military use.'[297] The Code of Conduct for the Palestinian National Security Forces present in Lebanese refugee camps has also been reportedly updated to include the protection of educational facilities in all situations,[298] despite there being no schools in these camps.[299] The South Sudan Peoples' Defence Forces Code of Conduct was also updated with the so-called 'Safe Schools Declaration Guidelines.'[300]

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[294] Generally, see David Turns, 'Military Manuals and the Customary Law of Armed Conflict' in Nobuo Hayashi (ed), *National Military Manuals on the Law of Armed Conflict* (2nd ed, Torkel Opsahl/Peace Research Institute Oslo 2010) 65

[295] W Michael Reisman and William K Leitzau, 'Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict' (1991) 64 International Law Studies 1, 7 – 8

[296] ICRC CIHL Study Vol I xlv – xlvi; see also ICRC CIHL Study Vol II

[297] GCPEA, 'Practical Impact of the Safe Schools Declaration Fact Sheet October 2019' <https://reliefweb.int/report/world/practical-impact-safe-schools-declaration> accessed 6 January 2024 ('SSD Practical Impact Report 2019') 2

[298] Human Rights Watch, 'Protecting Schools from Military Use – Laws, Policies, and Military Doctrine' (2019) <https://www.hrw.org/report/2019/05/27/protecting-schools-military-use/law-policy-and-military-doctrine> accessed 6 January 2024 83 ('Protecting Schools from Military Use 2019')

[299] SSD Practical Impact Report 2019 2

[300] Education Under Attack 2022 70

#### *5.3.1.1 Denmark*

The Danish Military Manual ('Danish Manual') has been updated in 2016,[301] with some minor corrections being issued in 2020.[302] These corrections do not however affect the sections of the Manual discussed here. Interestingly, the Danish Manual is applied only to 'international operations outside the borders of Denmark to which Denmark contributes military forces.'[303] The English terminology is a bit misleading here, as the original Danish title of the Manual is 'Militærmanual Om Folkeret for danske væbnede styrker i internationale operationer, with the term 'internationale operationer' being used to refer to so-called crisis management operations the Danish Armed Forces have participated in various parts of the world.[304] The scope of application for the Danish Manual seems to exclude all operations within Danish territory as well as operations abroad under Danish command, as according to the Manual 'military operations under national auspices are not described.'[305] According to the Manual, it 'sets out Denmark's approach to how international law should be implemented in practice in a Danish defence context. Parts of the Manual reflect policies, teaching theory, operational considerations and, in some cases, deliberate additions for the protection of individual groups.'[306] However, since the Danish Manual is not applied to operations under national command, referring to the 'Danish defence context' is a bit misleading here. The scope of application begs the question whether the Danish government reserves a different kind of approach to national defence, including collective defence within the framework of the North Atlantic Treaty Organisation ('NATO').

According to the Danish Manual:

> 'The protection of children and youth also implies a certain respect for the right of children to education, etc., even in areas of conflict. It is necessary, therefore, to exercise restraint with respect to the military use of children's

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[301] Danish Ministry of Defence and Defence Command Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (2016) ('Danish Military Manual')

[302] Danish Ministry of Defence and Defence Command Denmark, 'Correction sheet 001 – Military Manual on international law relevant to Danish armed forces in international operations 2016 (English translation 2019)' <https://www.forsvaret.dk/globalassets/fko---forsvaret/dokumenter/publikationer/-correction-sheet-001-2020-.pdf> accessed 6 January 2024

[303] Danish Military Manual 22

[304] See *e.g.* <https://www.forsvaret.dk/da/opgaver/afsluttede-operationer/> accessed 6 January 2024

[305] Danish Military Manual 25

[306] Danish Military Manual 23

institutions, including day-care facilities, schools, and orphanages. This also applies in situations in which the international legal basis, including SOFAs, allows for the evacuation of such institutions for use by international military forces.'[307]

This passage is marked as Addendum 3.1. According to the Danish Manual, it makes deliberate addendums to the explicit obligations of the Danish armed forces under international law 'in certain carefully selected contexts,' which cannot be seen as an indication that Denmark feels obliged under international law to act in this way.[308] In terms of Addendum 3.1, the legal situation is explained further:

'There is no specific obligation to exercise such restraint provided for by international law. A presumption of civilian status applies to schools, but the use of schools in support of military operations is based on the same assessments of military necessity as other civilian objects that do not qualify for special protection under IHL. The background to this addendum may be found in various UNSC resolutions, which draw attention to these matters.'[309]

Another section of the Danish Manual also makes a reference to the status of schools:

'Objects that maintain a civilian function at the same time as they are used or are planned to be used for military purposes (dual use) may constitute, in their entirety, military objectives for the adversary. Therefore, Danish forces should consider the possibility of separating or protecting the civilian component of the objective in the best possible way from the effects of attacks. This applies particularly in situations in which the civilian component of the objective is considerable or of material civilian importance. [Addendum 6.1]

In this context, restraint should be exercised in using schools and other educational institutions in support of Danish military operations [Addendum 6.2] The reason for such special consideration of schools, etc., is that the military use of schools has severe consequences not only in that it immediately endangers the lives of children and youths who are present in and near such schools but also in regard to the longer-term consequences for the education of school children. Reference is also made to Section 3.3 of

[307] Danish Military Manual 87

[308] Danish Military Manual 704

[309] Danish Military Manual 705

> Chapter 3 for information about the UN Security Council's focus on children in conflict areas.'[310]

Outside the general mention that according to the Danish government, they do not correspond to a international legal obligation, Addendums 6.1 and 6.2 are not explained further in the Danish Manual. While it is clear why the GCPEA chose to include this document in its reporting due to these mentions of the special status of schools and education in armed conflicts, the Danish Manual is being very clear in that these formulations do not represent the *opinio juris* of Denmark.

#### *5.3.1.2 Ecuador*

The Ecuadorian Military Manual is being cited by both the GCPEA311 and Human Rights Watch312 as containing an explicit protection of schools from military use. During the course of this study, it was not possible to obtain the 2016 version313 of the Manual being referred to in these documents. The only document obtained relating to the Ecuadorian Manual was something resembling a 2014 version of the Manual, with no mention of 'educacion' (education) or 'escuela' (school) found in the document. In the Spanish version of the Protecting Schools from Military Use report, the HRW cites the Ecuadorian Manual as follows:

> 'Serán considerados como neutrales, y como tales, respetados y protegidos por los beligerantes (…) las instituciones dedicadas a la (…) educación (…) en tiempo de paz como de guerra.'314

The English version of the report contains a translation of the same passage:

> 'Educational ... institutions shall be considered as neutral and as such respected and protected by belligerents. The same respect and protection shall be due to the personnel of the institutions mentioned above. The same

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[310] Danish Military Manual 195 (brackets added)

[311] SSD Practical Impact Report 2019 2

[312] Protecting Schools from Military Use 2019 72

[313] Fuerzas Armadas del Ecuador, Comando Conjunto, *Manual de Derecho Internacional Humanitario DBM-*

*DOC-CC.FF.AA.-05-2016* (Mayo 2016) Capitulo VIII, sec D

[314] Human Rights Watch, 'Protegiendo las escuelas del uso militar- Una selección de leyes, políticas y doctrinas militare' (2019) https://www.hrw.org/sites/default/files/report_pdf/crd0519spn_web.pdf accessed 6 January 2024 56

respect and protection shall be accorded to (…) educational (…) institutions in time of peace as well as in war.'315

The citation provided by HRW seems to indicate that the Ecuadorian Manual would afford protection to schools and educational institutions in rather absolute terms. However, without having access to the complete document it is difficult to precisely analyse the position of the Ecuadorian government possibly expressed in this regard.

#### *5.3.1.3 New Zealand*

The second edition of the New Zealand Manual[316] was published in 2017. It contains wide and detailed regulations on the protection of schools and education in armed conflict. The New Zealand Manual sets out a special protection for schools:

> '14.8.13 Schools are to be afforded particular protection from the effects of war as their destruction or endangerment is an attack on the learning and development of future generations who bear no responsibility for the armed conflict from which the damage arises. NZDF commanders are to take all practicable steps to protect the right of children to have an education. Use and occupation of schools and other educational institutions (…) is to be avoided wherever possible. Where, for military reasons, it is necessary for the force to use such an institution (…) all feasible steps must be taken, in consultation with local authorities, to ensure that the disruption to the education of children is reduced as much as practicable. This may include identifying and facilitating the use of other suitable facilities for such purposes.' [317]

In setting out the special protection of schools under 14.8.13, the New Zealand Manual cites the GCPEA Guidelines and article 13 ICESCR. The Manual continues with concrete instructions on servicemembers:

> '14.8.14 Members of the NZDF are not to:
>
> a. attack, damage or destroy schools;
>
> b. make schools the objects of reprisals; or
>
> c. booby-trap or use other emplaced munitions in or around schools.'[318]

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[315] Protecting Schools from Military Use 2019 72

[316] New Zealand Defence Force, *Manual of Armed Forces Law DM 69 - Volume 4 Law of Armed Conflict* (2nd ed, 2017) <https://www.nzdf.mil.nz/assets/Uploads/DocumentLibrary/DM-69-2ed-vol4.pdf> accessed 6 January 2024 ('New Zealand Military Manual')

[317] New Zealand Military Manual Amendment 1 14-25 [14.8.13]

[318] New Zealand Military Manual Amendment 1 14-26 [14.8.14]

In connection to paragraph a, the Manual refers to article 52(3) AP I and the presumption of the civilian status of schools, as well as the war crime provisions under Rome Statute article 8(2)(b)(ix) and 8(2)(e)(iv) criminalising attacks against cultural property in IACs and NIACs.[319] Paragraph b is based on article 52(1) AP I and the prohibition of making civilian objects the object of reprisals, while paragraph c is based on article 7(1)(e) of the Protocol II on the Convention on Conventional Weapons prohibiting the use of booby-traps attached to or associated with children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children.[320] The Manual concludes on the special protection of schools:

> '14.8.15 Members of the NZDF are not to use school buildings or facilities for military purposes unless it is absolutely necessary. In such cases, all feasible steps are to be taken to ensure that:
>
> a. civilians and, in particular, children are protected from the effects of attack upon the institutions by opposing forces, including, where necessary, the removal of such persons from the vicinity;
>
> b. such use is for the minimum time possible;
>
> c. use of the facility does not breach the prohibition on treachery, ie the protection applicable to the school is not be used to induce the opposing force into thinking that this protection is being relied upon with the intention of betraying that confidence; and
>
> d. adverse effects on children, in particular in respect to their right to education, are reduced to the maximum extent possible'[321]

In connection with paragraph a, the Manual cites the obligation to take precautions against the effects of attacks under article 58 AP I. With paragraph d, article 50 GC IV is cited, prescribing a duty for the Occupying Power to facilitate the proper working of all institutions devoted to the care and education of children in connection.[322]

In addition to providing for special protection, the Manual sets out the criteria for attacking a school after the loss of protection:

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[319] For a discussion of these provisions and their relationship to defining schools and universities as military objectives, see 2.3 above

[320] CCW Protocol II art 7(1)(e)

[321] New Zealand Military Manual Amendment 1 14-25 – 14-26 [14.8.13] – [14.8.15]

[322] GC IV art 50

‘14.8.16 If the opposing force uses cultural property, places of worship, buildings dedicated to charitable purposes or schools or their immediate environs for a military purpose, they become a military objective and their protection may be lost. Such property may only be attacked, however, if imperatively demanded by military necessity. The opportunity to inflict casualties on the enemy, by itself, does not provide an imperative. Commanders are to carefully consider the overall effects of an attack, the value of the target, and whether they have an alternative to doing so. Members of the NZDF are not to attack forces using cultural property, places of worship, buildings dedicated to charitable purposes or schools unless:

a. the opposing force is warned that it must cease its military use of the property and fails to do so within a reasonable time

b. attack is the only feasible means of terminating that misuse; and

c. all feasible precautions are taken in the choice of means and methods of attack to avoid, or in any event minimise, damage to the property.‘

The New Zealand Manual cites article 52(2) in determining that schools could become military objectives. The requirement of an ‘imperative military necessity’ before attacking a school being used by the enemy is taken from the system of protection of cultural property, namely articles 4(2) and 11(2) of the Hague Convention on Cultural Property, not generally applicable to all schools. The requirement of precautions in paragraph c cites article 57 AP I.

In sum, it could be said that the obligations prescribed in the New Zealand Manual towards schools considerably extend beyond the obligations under current international law. The Manual has chosen to equate educational buildings with other buildings under special protection, such as cultural property, places of worship or buildings dedicated to charitable purposes.[323] The definition used for ‘schools’ in the Manual is taken from the GCPEA Guidelines and the mentions of ‘educational buildings’ for example in connection with provisions protecting cultural property are taken to apply generally to all school buildings, despite whether they actually constitute cultural property under article 1 of the Hague Convention on Cultural Property or not.[324] Further, the referral to these provisions in the Hague Conventions of 1907 or the Rome Statute in the New Zealand Manual completely dismisses the fact

[323] See New Zealand Military Manual Amendment 1 14-22

[324] Hague Convention on Cultural Property art 1

that the protection under these provisions applies only to such objects that have not become military objectives.[325]

#### *5.3.1.4 Switzerland*

The current Swiss Military Manual[326] entered into force on 1 May 2019. The Manual first lays out the distinction between civilian objects and military objectives, including the mention of schools as an example of a civilian object,[327] and the possibility of civilian objects turning into military objectives[328] before providing in relation to educational establishments:

> 'Une attention particulière doit être accordée aux établissements d'enseignement. Leur destruction peut affecter considérablement un peuple et l'avenir de son pays. À cela s'ajoute le fait qu'il y a, dans les écoles, de nombreux enfants particulièrement dignes de protection en raison de leur vulnérabilité. Les universités et les autres hautes écoles abritent souvent des biens culturels importants et peuvent également elles-mêmes constituer de tels biens. Il sied par conséquent de reconnaître l'importance de ces établissements, que cela soit dans le cadre des mesures de précaution (ch 266 s) ou dans celui du respect du principe de la proportionnalité (ch 180 s). Il faut éviter de les affecter à des fins militaires.'[329]

As the rest of the section of the Swiss Military Manual on civilian objects closely follows the obligations prescribed in AP I, the content of the paragraph discussing

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[325] See 2.3 above

[326] Armée suisse, *Règlement 51.007.04 f Bases légales du comportement à l'engagement* <https://www.vtg.admin.ch/fr/actualite/themes/internationale-beziehungen/das_kriegsvoelkerrecht/konventionen.html#publikationen> accessed 15 January 2024 ('Swiss MIlitary Manual'). The Swiss Military Manual is available in the three Swiss national languages, German, French and Italian. This study refers to the French version as it is the one version understood by the present author. The content is assumed to be similar across all three language versions.

[327] Swiss Military Manual 37 [224]

[328] Swiss Military Manual 37 [225]

[329] 'Educational institutions require special attention. Their destruction could considerably affect a people and the future of their country. Additionally, schools have a lot of children in need of special protection due to their vulnerability. Universities and other establishments of higher education often contain important cultural property and could themselves constitute such property. It is therefore appropriate to recognise the importance of such establishments whether in the framework of precautions (ch 266 s) or the principle of proportionality (ch 180 s). Affecting them for military purposes should be avoided.' (translation by author) Swiss Military Manual 37 [226]

educational establishments seems to indicate potential, non-binding commitments to be undertaken as a matter of policy instead of a legal obligation. Instead of prohibiting attacks on schools and universities altogether, the Swiss Military Manual underscores the importance of educational institutions to the future well-being of a nation and prescribes a duty to be mindful of their importance when considering precautions or proportionality before an attack, therefore not going beyond the scope of current IHL obligations. As discussed above in Section 2, precautions and proportionality operate as non-absolute standards under the highly contextual notion of feasibility.

#### *5.3.1.5 Palestine and South Sudan Codes of Conduct*

In addition to the whole military manuals including mentions relating to the protection of schools and education, the GCPEA has reported on smaller updates in issuing binding orders to the armed forces in certain states. The Code of Conduct for the Palestinian National Security Forces present in Lebanese refugee camps was updated in 2019 to include the special protection of educational facilities in all situations.[330] According to HRW reporting, the updated Code of Conduct reads:

> 'Part 6: Special protections
>
> Article 5: The leadership of the Palestinian National Security Forces is committed to protecting (…) schools and universities during armed violence and clashes. Equally, the civilian character of (…) educational facilities should be preserved at all times. No attack on such facilities should be tolerated and concrete measures should be taken to avoid the military use of such institutions.'[331]

Within the course of this study it was not possible to locate a copy of the updated Code of Conduct. A similar fate took also place with the South Sudanese Code of Conduct, which was reportedly updated in 2021 to include the so-called 'Safe School Declaration Guidelines' (seemingly not to be confused with the GCPEA Guidelines) prepared with the help of Save the Children the same year.[332] According to a Save the Children press release:

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[330] Geneva Call, 'The Palestinian National Security Forces adopt a Code of Conduct and Code of Ethics, committing to improve respect of international humanitarian norms in the Palestinian camps in Lebanon' (26 March 2019) https://www.genevacall.org/news/the-palestinian-national-security-forces-adopt-a-code-of-conduct-and-code-of-ethics-committing-to-improve-respect-of-international-humanitarian-norms-in-the-palestinian-camps-in-lebanon/ accessed 15 January 2024

[331] Protecting Schools from Military Use 2019 83

[332] Education Under Attack 2022 74

> 'The Ministry of General Education and Instruction, and Charity and Empowerment Foundation (CEF), with support from Save the Children International developed the guidelines to facilitate the dissemination of the guidelines of the Declaration incorporated into the South Sudan People Defense Forces (SSPDF) code of conduct. (…) The printed guidelines offer direction on concrete measures that armed forces and non-state actors can take to avoid military use of educational facilities, to reduce the risks of attacks, and to mitigate the impact of attacks and military use when they occur.'[333]

While the precise content and status of these documents remains unknown at the time of writing, these documents and their inclusion in the armed forces Codes of Conduct demonstrate a higher commitment to the protection of schools and education than in most instances reported by the GCPEA. While their importance for relevant state practice cannot be verified, this does not present an insurmountable problem due to the overall argument presented below.

#### *5.3.1.6 Reports of military orders*

While the inclusion of instructions in military manuals or codes of conduct could be taken to indicate a higher level of preparation and commitment, thus creating a better case for arguing the existence of *opinio juris*, national military orders have reportedly also played an important part in the implementation of the SSD and the GCPEA Guidelines.

In 2017, Sudan circulated a command order to all divisions prohibiting the military use of schools,[334] with the UN verifying the vacating of at least one school in 2018.[335] In Yemen, it was reported that the Yemeni Armed Forces had begun to withdraw from schools as per commitments under the SSD.[336] In Nigeria, based on the implementation of the SSD, the armed forces reportedly ordered the military teachers to stop openly carrying weapons in schools, with further training activities taking place

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[333] Save the Children, 'South Sudan Launches 'Safe School Declaration Guidelines' With Support from Save the Children to Protect Schools from Military Use' (26 October 2021) <https://southsudan.savethechildren.net/news/south-sudan-launches-%E2%80%98safe-school-declaration-guidelines%E2%80%99-support-save-children-protect-schools> accessed 15 January 2024

[334] SSD Practical Impact Report 2019 2

[335] UNSC, 'Report of the Secretary-General on children and armed conflict' (30 July 2019) UN Doc S/2019/509 [165]; the GCPEA reported the UN reporting three schools, see SSD Practical Impact Report 2019 2

[336] Human Rights Council, 'Situation of human rights in Yemen, including violations and abuses since September 2014' (3 September 2019) UN Doc A/HRC/42/CRP.1 [722]; SSD Practical Impact Report 2019 2

in 2020 and 2021.[337] However, the GCPEA does not provide a source for these reports besides a policy document enacted in 2021 by the Nigerian Ministry for Education.[338]

In Somalia, in the context of implementing the SSD, the African Union Mission to Somalia (AMISOM) reportedly handed a number of educational buildings back to the authorities, rehabilitating them first, and working with partners to ensure the grounds were clear of explosive remnants. However, the GCPEA does not provide a source for this information.[339] In 2020, the Malian Ministry of Education reportedly issued a letter to the Ministry of Defense asking them to respect the spirit of the Guidelines while schools were closed due to the pandemic, and not use schools for military purpose. Mali is also reportedly working on a draft law on Protecting Schools and Universities during the Armed Conflicts.[340] The GCPEA does not provide a source for this information aside from stating that the information was received from the government of Mali during a consultation as part of the work of the state implementation network. Finally, according to the GCPEA, Ukraine adopted an action plan for implementing the Safe Schools Declaration in August 2021 and had civil society actors supporting the government in training officers in the armed forces on the Safe Schools Declaration and the Guidelines.[341] Unfortunately, no source is provided by the GCPEA confirming this information.

In 2017, Cameroon's education minister reportedly cited the Safe Schools Declaration to encourage military personnel working as teachers in schools affected by the conflict with Boko Haram to carry out their educational actions in civilian clothes and without weapons in order to 'comply with the provisions of the Safe School Declaration.'[342]

Overall, the military manuals, orders and reports of military practice discussed above contain a variety of examples ranging from the New Zealand Manual's thorough and detailed adoption of the GCPEA Guidelines into a binding national manual to Denmark's explicit mention of adding such details only as a matter of policy and further to the unclear status of various documents, such as the Ecuadorian Manual or the Codes of Conduct reportedly updated in Palestine and South Sudan. The letters

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[337] SSD Practical Impact Report 2019 2; SSD Practical Impact Report 2022 3

[338] Federal Ministry of Education, *National Policy On Safety, Security And Violence-Free Schools With Its Implementing Guidelines* (August 2021) <https://education.gov.ng/wp-content/uploads/2021/09/National-Policy-on-SSVFSN.pdf> accessed 15 January 2024

[339] SSD Practical Impact Report 2022 3

[340] SSD Practical Impact Report 2022 3

[341] SSD Practical Impact Report 2022 4

[342] Letter from Youssouf Hadidja Alim, Minister of Basic Education, to Governor of the Far North Region (30 November 2017), cited in Protecting Schools from Military Use 2019 51

and requests cited in various African countries face the issue of not knowing precisely why these requests or actions where taken in the first place. The fact that in connection with some of the examples the implementation of the SSD is mentioned does not bring the enquiry much further, as being inspired or motivated by the SSD does not necessarily prove that the state would be acting out of a legal obligation.

### *5.3.2 National legislation*

In addition to military manuals and orders, relevant state practice could be found in national legislation and the reporting by the GCPEA includes a few examples of national legislation being passed to implement the SSD and the Guidelines, yet these examples are also plagued by similar deficiencies as seen with the other types of reported cases above. For example, Nigeria has been reportedly in the process of enacting an amendment to its Armed Forces Act since 2018, which would ban the requisition of premises used for educational purposes by the armed forces.[343] However, the GCPEA does not elaborate on this topic in its reporting and does not provide a source. As of 2022, the process in Nigeria was still ongoing.[344] Mali is also reportedly working on a draft law on Protecting Schools and Universities during the Armed Conflicts.[345] in March 2020, the Safe Schools Declaration Technical Committee launched an Action Plan that included concrete activities to disseminate the GCPEA Guidelines and incorporated the protection of schools and universities into national legislation.[346] On the other hand, Central African Republic reportedly succeeded in passing an amendment to its Child Protection Code, which criminalises attacks on schools.[347]

### *5.3.3 Policy documents*

Many of the documents included in the reporting by the GCPEA consist of various communiqués and policy initiatives, which are hard to qualify as expressions of state practice being undertaken out of the sense of a legal obligation. These include undertakings and statements by states as part of their military policy such as the United

[343] SSD Practical Impact Report 2019 2

[344] SSD Practical Impact Report 2022 3

[345] SSD Practical Impact Report 2022 3

[346] Education Under Attack 2022 73

[347] Education Under Attack 2022 73; GCPEA, 'Protecting Schools from Military Use: 2021 – Law, Policy and Military Doctrine' https://protectingeducation.org/wp-content/uploads/Protecting-Schools-from-Military-Use-2021.pdf accessed 15 January 2024 42 – 43 ('Protecting Schools from Miitary Use 2021')

Kingdom[348] and Norway.[349] Italy,[350] Luxembourg,[351] and Slovenia[352] have made policy commitments to update their military manuals to reflect their commitment to the SSD and the Guidelines.

Spain updated its military policy document called the National Defence Directive in 2020.[353] The document sets so-called 'operational guidelines,' according to which the Spanish military will support the implementation of the United Nations Women, Peace and Security Agenda and the Safe Schools Initiative during their operations abroad.[354] Similarly to the Danish Military Manual,[355] this begs the question of whether another approach has been reserved for combat within domestic territory or within the collective defence arrangements of NATO.

Most successfully out of the implementation acts reviewed here, Nigeria enacted in 2021 a detailed national policy document describing the safe school environment following its commitment to the SSD.[356]

### *5.4 No customary status*

The SSD, Guideline 6 of the GCPEA Guidelines, and the best practices collected by the Norway-led state implementation network demonstrate the ambitious implementation objectives related to these instruments. This is easy to understand: the

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[348] Foreign & Commonwealth Office, Department for International Development, Ministry of Defence, 'UK Approach to Protection of Civilians in Armed Conflict' (27 August 2020) <https://www.gov.uk/government/publications/uk-paper-on-the-approach-to-protection-of-civilians-in-armed-conflict/uk-approach-to-protection-of-civilians-in-armed-conflict> accessed 15 January 2024 Box 3 Children and Armed Conflict (CAAC)

[349] Speech by Ms. Ine Eriksen Søreide, Minister of Defence, Norway, at the Oslo Conference on Safe Schools (29 May 2015), cited in SSD Practical Impact Report 2022 2

[350] 'World Humanitarian Summit Commitments Italy 2019' 5, cited in SSD Practical Impact Report 2022 2

[351] 'World Humanitarian Summit Commitments Luxembourg 2019' 4, cited in SSD Practical Impact Report 2022 2

[352] Letter from Darja Bavdaž Kuret, State Secretary, Ministry of Foreign Affairs, Slovenia to Norway's Ministry of Foreign Affairs (Norway, 12 April 2016); SSD Practical Impact Report 2022 2

[353] National Defence Directive 2020 https://www.defensa.gob.es/Galerias/defensadocs/ddn-ingles-2020.pdf accessed 15 January 2024

[354] National Defence Directive 2020 [10]

[355] See 5.3.1.1 above

[356] Federal Ministry of Education, *National Policy On Safety, Security And Violence-Free Schools With Its Implementing Guidelines* (August 2021) <https://education.gov.ng/wp-content/uploads/2021/09/National-Policy-on-SSVFSN.pdf> accessed 15 January 2024

protection of schools and universities under IHL remains similar to any other civilian objective, yet communities and populations might be equally harmed by the damage or destruction of such buildings as with attacks against medical facilities, subject to a regime of special protection.[357] The UNSC resolutions passed in relation to this subject underline the importance of protecting education from attack, yet do not offer language going beyond the current scope of IHL in this regard, despite the seemingly contradictory declarations contained in them.

As the SSD and the Guidelines themselves clearly highlight their legally non-binding nature, it is clear that their mere implementation into national military orders or legislation *prima facie* lacks the necessary *opinio juris* for the creation of new customary rules of international law. Of course, such implementation might be guided by a sense of a (customary) legal obligation in some cases, but as the source material is non-binding in nature, such a *legal* obligation would need to be separately pronounced by the implementing state. The national implementation acts reported by the GCPEA discussed above present a mixed variety of solutions for the purposes of establishing relevant state practice. As can be observed in some of the national implementation acts, the states have deliberately kept their mentions of the SSD and the Guidelines to policy documents and policy commitments, subsequently highlighting the voluntary nature of the obligations contained therein. Others, such as New Zealand and Nigeria, have thoroughly incorporated the Guidelines into national military orders or policy documents.

Overall, the reports of national implementation discussed in this study contain examples from around 20 states, with most of these examples being clearly referred to as 'policy' or being unclear about their formal status under national law. Only a few examples could certainly be categorised as relevant state practice even capable of containing the necessary expression of *opinio juris*. While the situation would certainly warrant more attention if the practice reported would show more signs of uniformity, the practice discussed above certainly does not allow this study to make the conclusion that the SSD and the GCPEA Guidelines would have in full or in part become a part of applicable customary international law. The variety and orientation towards policy documents present in the examples reported by the GCPEA rather suggests that the possible success of the Safe Schools Initiative would be in affecting concrete behaviour, however any conclusions on this matter remain outside the scope of a legal analysis such as this study. Therefore, it can be concluded that the two instruments under examination here have no bearing on the international legal obligations of the endorsing nor third states.

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[357] *Protecting Children in Armed Conflict* 324

# 6 Conclusion

This study has sought to lay out the applicable rules of international law governing the protection of schools and universities in armed conflict and to use them to analyse the Safe Schools Initiative. As the Sections above demonstrate, the Safe Schools Declaration and the GCPEA Guidelines are at times at odds with the applicable rules of international law, particularly the relevant IHL provisions governing the civilian status of schools and universities and the individuals associated with them. The Guidelines contain an ambitious framework departing from current IHL provisions and seeking to raise the level of protection of schools and universities to correspond to the current protection afforded to medical objects under IHL. Examining the national implementation practice reported by the GCPEA provided a view into the different approaches chosen by states that have endorsed the SSD. The majority of the approaches could be described as policy-oriented rather than stringent implementation enacted out of an explicit belief that the SSD and the Guidelines set a legal obligation affecting customary international law. Therefore, it is concluded that the SSD and the GCPEA Guidelines have not affected existing international legal obligations and as these instruments are clear on their non-binding status, they do not create new ones.

The choice of a 'soft law' instrument instead of a 'hard law' one such as a treaty in the preparation of the GCPEA Guidelines was a deliberate one.[358] This choice has been deemed successful by many commenting on the Guidelines. According to Ferelli, 'it is evident that the need for a rapidly adaptable, changeable, and more inclusive form of lawmaking prevails over the accountability benefits that a hard law approach could provide.'[359] Haines had voiced his support for the soft law option already during the early days of the process that led to the finalized Guidelines.[360] Indeed, looking at the results the agile soft law option has managed to achieve in a relatively short time speaks volumes in support of the approach chosen by the GCPEA and those working on the Guidelines. However, the chosen avenue also has its drawbacks, mainly in that the produced documents cannot in themselves change existing international legal obligations,[361] thus leaving this task to national implementation acts conducted by the states endorsing the SSD. This was in fact the way in which the GCPEA sought to influence behaviour on the ground: by having actors not deliberately targeting education change their conduct in order to improve the protection of schools and

[358] Haines 583

[359] Ferelli 360

[360] Haines 583

[361] GCPEA Guidelines Commentary 4 – 5

universities by preventing or reducing situations where they are being used for military purposes.[362]

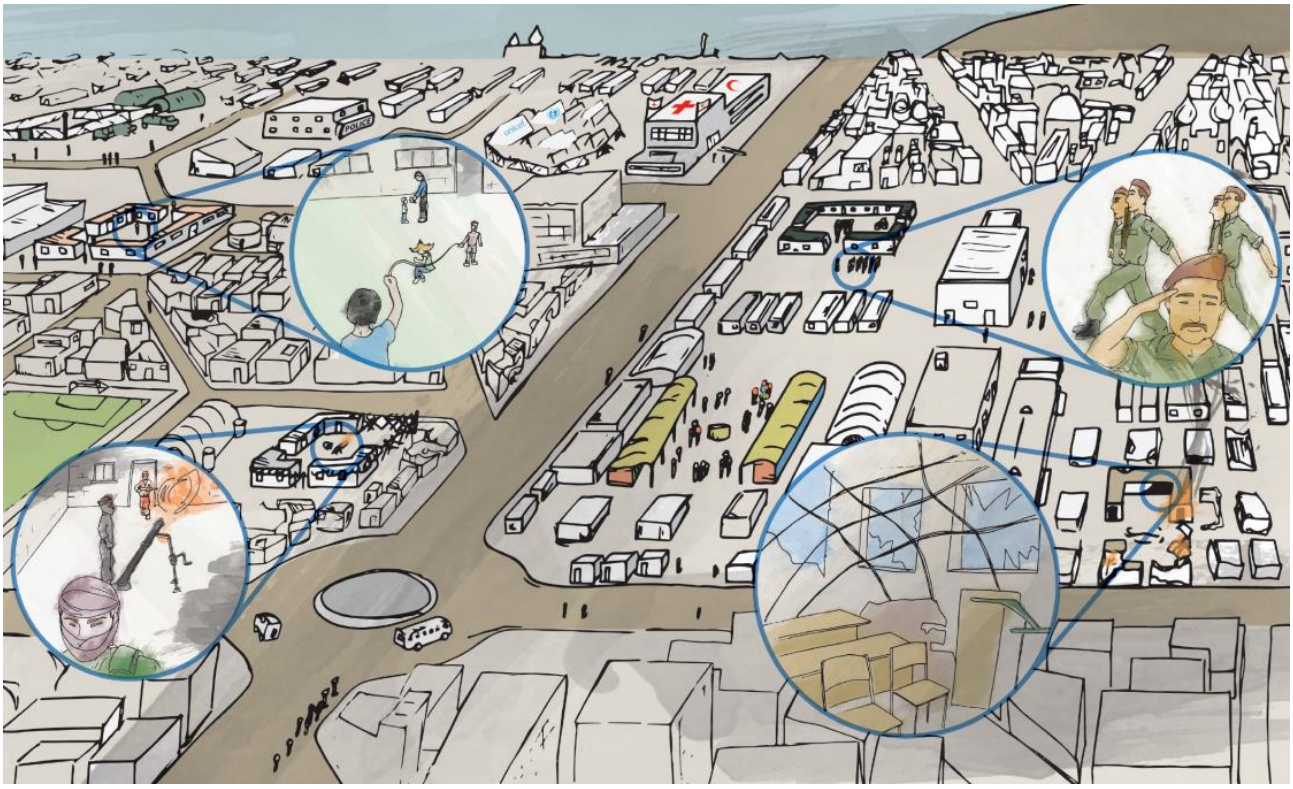
The GCPEA's approach of affecting concrete behaviour 'behind the scenes' instead of drafting an extensive legal document in a lengthy diplomatic conference is also visible in the materials connected to the Guidelines and the additional advocacy contained in them.[363] One such example includes the Implementation Toolkit published by the GCPEA designed to help national military authorities bring the Guidelines into action. Below is a picture taken from this publication, portraying a fictional Area of Operations used to bring about discussion relating to the Guidelines' application in practice.[364] The urban area portrayed in the picture could be interpreted to relate to a NIAC, with the possible presence of foreign armed forces in a foreign operation, possibly a crisis management operation under international command. This is due to the large military base located on the top-left corner of the picture next to a sea or a lake and one of four school-related scenarios in the picture being a school occupied by an armed group firing from school premises.[365]

[362] Haines 583

[363] See 4.2.3 above

[364] Guidelines Implementation Toolkit 12

[365] Guidelines Implementation Toolkit 12



Picture 1. SSD Guidelines Implementation Toolkit 12

In the view of the present author, this picture describes the point-of-view and inspiration behind the Guidelines being NIAC-focused. Most of the grave conflict situations affecting education worldwide take place within NIACs in Africa and Asia. The GCPEA has also managed to report the greatest successes after the implementation of the SSD's in such situations.[366] In such conflicts, the understandable objective is the largest possible protection of school buildings due to the harsh reality of NIACs, where civilians and fighters intertwine with civilian objects such as schools. IACs however, especially ones where a state is defending against the aggression of another, such as the war in Ukraine, offer a different picture and a point-of-view to the Guidelines' content. For state armed forces defending against a superior enemy, possibly committing grave violations of IHL in their wake, not being able to take advantage of the possible vast infrastructure abandoned or evacuated schools offer would be simply unacceptable. A state that cares for its population seeks to evacuate the civilians from areas affected by the fighting as fast as possible, meaning that the effective fulfilment of the right to education of evacuated children rests upon

[366] SSD Practical Impact Report 2019; SSD Practical Impact Report 2022, Education Under Attack 2022

alternative means being used to deliver their education, not on the abandoned physical buildings located in an active combat zone. As discussed in Section 3, such conduct is potentially well within the relevant state obligations under the right to education. The stringent provisions of the GCPEA Guidelines do not provide for optimal protection of education and the civilian population in all situations; for some armed forces, such as the Ukrainian Armed Forces, using the school as a means of supporting defensive operations against an aggressor offers the civilians much more protection than not using the building or giving the enemy using such buildings an advance warning.

Consider for example the report published by Amnesty International in August 2022, a part of the GCPEA, critical of the use of civilian objects by Ukraine in its fight against Russian aggression.[367] The report received intense criticism from the general public and IHL scholars[368] and after a while, an Expert Panel was called to examine the factual and legal premises presented in the report. The Expert Panel determined that while Amnesty International had had some grounds to conclude using conditional language that violations by Ukraine had been possible in the examined circumstances, Amnesty did not have enough evidence to support a certain claim of Ukrainian IHL violations.[369] The discrepancy between the original report and the findings of the Expert Panel emphasize the highly contextual nature of IHL in general, particularly the provisions governing precautions taken to protect civilians when planning an attack and from the effects of attacks under article 57 and 58 AP I.[370] However, in a context of a defensive war being waged against an aggressor utterly in violation of the basic principles of IHL and the *jus ad bellum*, the overly critical approach sometimes present in NGO reporting is not a great look, especially where it fails to properly consider the applicable legal rules in practice.

Granted, the GCPEA is not engaging in a similar activity as Amnesty International did with the Ukraine report, as they are rather seeking to change the rules at play when militaries face schools and other educational buildings on the battlefield. Yet, it could be said that similar

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[367] Amnesty International, 'Ukrainian fighting tactics endanger civilians' (4 August 2022) <https://www.amnesty.org/en/latest/news/2022/08/ukraine-ukrainian-fighting-tactics-endanger-civilians/> accessed 16 January 2024

[368] See *e.g.* Michael N Schmitt, 'Ukraine Symposium – Amnesty International's Allegations of Ukrainian IHL Violations' (*Articles of War* 8 August 2022) <https://lieber.westpoint.edu/amnesty-allegations-ukrainian-ihl-violations/> accessed 16 January 2024

[369] 'Report of the Legal Review Panel on the Amnesty International Press Release Concerning Ukrainian Fighting Tactics of 4 August 2022' <https://int.nyt.com/data/documenttools/revised-final-report-of-legal-review-panel-amnesty-international-ukraine-press-release-02-02-2023/35ae76eaaa90405e/full.pdf> accessed 16 January 2024; cited in Michael N Schmitt, 'The Expert Panel's Review of Amnesty International's Allegations of Ukrainian IHL Violations' (*Articles of War* 1 May 2023) <https://lieber.westpoint.edu/expert-panels-review-amnesty-internationals-ai-allegations-ukrainian-ihl-violations/> accessed 16 January 2024

[370] See 2.2.2 above

considerations that made the Amnesty report subject to critique are present with the GCPEA Guidelines and the GCPEA's strong push for their implementation. An overly restrictive approach to military necessity is not likely to be well-received by military personnel or effectively adopted in states facing a potential conflict similar to the one being fought in Ukraine, especially when delivered as part of a non-binding instrument. While Haines reports on a favourable position taken by servicemembers after understanding the strategic goal of a 'properly functioning society' and how attacking schools or using them for military purposes undermines this goal,[371] such a goal seems to be related to foreign crisis management operations rather than the defence of national territory, thus highlighting further the Guidelines' NIAC-centred and NIAC-appropriate character.

Before the publication of the Guidelines in 2014, the GCPEA published a set of recommended goals the Guidelines sought to achieve. These included a recognition that the military use of schools during armed conflict is a common practice in need of a remedy; adherence to international law, including international humanitarian law and international human rights law; promoting implementation of the Guidelines' ban; the monitoring and reporting of activity; and encouraging the mitigation of harm.[372] While the Guidelines certainly fulfil most of these recommended goals, they also fall short on some of them, such as the monitoring and reporting aspect.[373] Despite the critique presented in this study, the Safe Schools Initiative remains a global success story that has arguably shaped the discourse on schools and education in armed conflicts at the international level. The hard work of the GCPEA should not be undermined, although a cautious approach might be in order when considering the endorsement of the SSD and the subsequent implementation of the Guidelines in a state preparing for a different scenario of armed conflict than the one described above in relation to the Implementation Toolkit. After all, endorsing the SSD and not implementing the Guidelines effectively in accordance with the recommendations discussed above has the risk of undermining the political commitment undertaken by the state endorsing the SSD.

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[371] Haines 589 – 590 reports on a favourable position taken by servicemembers after understanding the strategic goal of a 'properly functioning society' and how attacking schools or using them for military purposes undermines this goal.

[372] Ferelli 360; GCPEA, 'Protect Schools and Universities from Military Use' <https://protectingeducation.org/wp-content/uploads/documents/documents_protect_schools_and_universities_from_military_use.pdf> accessed 30 December 2023

[373] Ferelli 365 – 366