



PEIC

PROTECT EDUCATION IN INSECURITY AND CONFLICT
حماية التعليم في ظروف النزاع وانعدام الأمن



UNITED NATIONS HUMAN RIGHTS MECHANISMS and the Right to Education in Insecurity and Armed Conflict

Geneva Academy of International Humanitarian
Law and Human Rights
Académie de droit international humanitaire
et de droits humains à Genève

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INSTITUT DE HAUTES
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Preface

This publication, *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed Conflict*, seeks to respond to the acute need to identify trends in the practice, and contribution, of United Nations human rights mechanisms to the protection of education in times of insecurity and conflict. It is the result of a one-year research project carried out by researchers at the Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy). The research was overseen by a Legal Advisory Committee and subject to multi-disciplinary peer review. Accompanying the publication is a summary policy document intended to guide future work in this area. An electronic version of each publication is available at <http://www.geneva-academy.ch> and at <http://www.educationandconflict.org>.

United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed Conflict is the second in a series of legal research documents commissioned by Protect Education in Insecurity and Conflict (PEIC) on the protection of education during insecurity and armed conflict. PEIC is a programme of the Education Above All Foundation, an independent organization chaired by Her Highness Sheikha Moza Bint Nasser of Qatar, UNESCO Special Envoy for Basic and Higher Education. A policy, research, and advocacy organization, PEIC is concerned with the protection of education during insecurity and armed conflict. PEIC's Legal Programme contributes to such protection through the strategic use of international and national law. Its legal research papers are authored by academics and/or practicing lawyers. They are aimed at a varied audience, including international and national lawyers; non-legally trained education experts and policy-makers within governments; political, social, and cultural bodies; and civil society.

The Geneva Academy aims to provide instruction of a high academic standard, conduct and promote scientific research, organize training courses and expert meetings, and provide legal expertise in the branches of international law relating to situations of armed conflict. Founded in 2007, the Academy replaces the University Centre for International Humanitarian Law created in 2002 by the Faculty of Law of the University of Geneva and the Graduate Institute of International Studies, now the Graduate Institute of International and Development Studies (IHEID).

A Note from PEIC

In her foreword to the first publication in this legal series, *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook*, Dame Rosalyn Higgins DBE QC reminded us that ‘scholarly literature is exceedingly sparse as regards education, especially when the focus is the protection of the right in times of insecurity and conflict’. In providing a detailed and rich analysis of the international legal framework pertinent to such protection, the Handbook sought to narrow this gap.

The present publication, *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed Conflict*, the second in the legal series on the protection of education in times of insecurity and conflict, seeks to complement the Handbook by looking at how the United Nations has sought to protect the right to education.

By scrutinizing the relevant practice and processes of core UN human rights mechanisms, the study draws attention to legal trends that promise to strengthen the protection of the right to education. The study presents also a valuable insight into the challenges of implementing applicable international law. More specifically, through its recommendations, it speaks directly to those individuals and bodies — the UN human rights mechanisms themselves, governments, international agencies and civil society — that have the opportunity and the influence to contribute substantively to the efficacy of that implementation.

PEIC urges the reader to draw from this publication and to respond actively to its recommendations. In so doing, we may contribute to our shared responsibility of fulfilling the right of everyone to a quality education.

Foreword by Professor Eibe Riedel

This study on the protection of education in insecurity and armed conflict, based on the UN human rights institutions and prepared at the Geneva Academy of International Humanitarian Law and Human Rights, is a most welcome addition to the still surprisingly scarce literature on the right to education, particularly during such situations of acute risk.

Seven succinctly written chapters address the key issues. The authors begin by outlining the evolution of this part of human rights law in all its ramifications. Next follows an analysis of substantive treaty obligations with judicious argumentation of the structural problems encountered. The interaction of treaty bodies, Human Rights Council activities, including also Security Council-led mechanisms of child protection in armed conflict, and the work of fact-finding missions and commissions of inquiry ensues. Furthermore, the practice of human rights institutions is systematically and lucidly presented, with a particular emphasis on Special Procedures of the Human Rights Council. Careful attention is also devoted to the controversial issues of the extraterritorial scope of human rights treaties.

A further chapter deals with the application of international humanitarian law. An original and highly innovative chapter on obligations of non-state actors concludes the carefully argued and well-balanced assessment of the reach of the right to education, by carefully depicting the practice of UN human rights treaty bodies and other human rights institutions. The authors correctly state that there is a growing tendency towards holding armed non-state actors responsible for violations of human rights, either where they exercise effective control over certain territories or where they violate *jus cogens* norms. The study also convincingly argues that greater restrictions ought to be imposed on the military use of school buildings during conflict situations, and pleads for testing the issues of the right to education in armed conflict situations in the new individual complaints procedure under the Optional Protocol to the 1966 Covenant on Economic, Social and Cultural Rights that entered into force in May 2013.

The well-researched and thought-provoking study by Geneva Academy scholars is a welcome and up-to-date addition to the still relatively limited literature on the right to education at the international level. It undoubtedly will assist governments and education authorities, researchers, practitioners, non-governmental organizations and national human rights institutions alike in their monitoring practice.

PROFESSOR EIBE RIEDEL

Former Member, Committee on Economic, Social and Cultural Rights

Former Human Rights Chair, Geneva Academy of International Humanitarian Law and Human Rights

Abbreviations

1977 Additional Protocol I	1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
1977 Additional Protocol II	1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts
ANSA	armed non-state actor
CEDAW	1979 Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CERD	1965 Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of All Forms of Racial Discrimination
CRC	1989 Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRC-OP-AC	2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
CRPD	2006 Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
DPKO	United Nations Department of Peacekeeping Operations
EAA	Education Above All
EFA	Education For All
ESC	economic, social, and cultural (rights)
ESCR Committee	Committee on Economic, Social and Cultural Rights
GCPEA	Global Coalition to Protect Education from Attack
HRC	United Nations Human Rights Council
HRW	Human Rights Watch
IAC	international armed conflict

ICC	International Criminal Court
ICC Statute	1998 Rome Statute of the International Criminal Court
ICCPR	1966 International Covenant on Civil and Political Rights
ICESCR	1966 International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRC	International Committee of the Red Cross
IDP	internally displaced person
IHL	international humanitarian law
IHRL	international human rights law
ILO	International Labour Organization
MDG	Millennium Development Goal
MRM	Monitoring and Reporting Mechanism
NGO	non-governmental organization
NIAC	non-international armed conflict
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the United Nations High Commissioner on Human Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
OPT	Occupied Palestinian Territory
PEIC	Protecting Education in Insecurity and Conflict
UDHR	1948 Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
UPR	Universal Periodic Review
VCLT	1969 Vienna Convention on the Law of Treaties

Executive Summary

STUDY CONTEXT AND AIMS

Awareness of the international normative framework for the direct (and indirect) protection of education in situations of insecurity and armed conflict is evolving. Yet, until now, no detailed analysis has been conducted of practice of international bodies with responsibilities for monitoring, reporting, and responding to violations of international norms protecting education in conflict and situations of insecurity. The present study, based on systematic research for the period 2007–2012, seeks to identify important trends in the practice and contribution of United Nations (UN) human rights mechanisms (broadly defined)¹ to conceptualizing the issue in legal and operational terms and to identifying outstanding challenges. This summary sets out conclusions drawn from the present study with recommendations of what could be done to enhance the protection of education in situations of insecurity and armed conflict. The conclusions and recommendations contain elements of a procedural as well as a substantive nature.

In particular, we explore how international legal norms related to the protection of the right to education have been used, interpreted, and applied by human rights mechanisms. An important issue that the study addressed was when UN human rights bodies characterize acts such as killings, injuries, abductions, forced disappearance, illegal imprisonment, torture, and sexual violence of civilians, or recruitment and use of children as soldiers or suicide bombers, as violations of the right to education as well as violations of rights protecting physical integrity. What is the necessary nexus with education? Is it enough that they be teachers or students or do they have to be present in educational facilities of some form? Is it automatic that abduction or recruitment of individuals when they are coming from, at, or on their way to a school or other educational facility amounts to a violation of the right to education?

In the practice of the human rights treaty bodies, the study looked especially at the international legal basis for addressing attacks on civilian infrastructure during armed conflict, which traditionally was not considered under human rights law. The study also considers broader practice relating to the impact of armed conflict and the application of the right to education.

PRINCIPAL CONCLUSIONS AND FINDINGS

Conclusion 1. Positive international legal obligations to respect, protect, and provide education continue to apply in situations of armed conflict. The precise extent of these legal obligations under customary international human rights law requires further study.

¹ Human rights treaty bodies and non-conventional human rights machinery, namely UN Human Rights Council resolutions and documentation relating to the Universal Periodic Review and the Special Procedures (country and thematic mandates), as well as non-governmental organization (NGO) reports, Fact-Finding Missions and Commissions of Inquiry, and UN Security Council resolutions and mechanisms.

States are obliged to implement the right to education even in situations of armed conflict. This involves the allocation of significant resources to that end in order to provide and ensure education. These findings are corroborated by state practice in its reporting and the views of treaty bodies and political organs of the UN. Importantly, not only do states not challenge the relevance of these obligations in situations of conflict; as a general trend, they do report on measures taken to ensure that education is provided (and where necessary in alternative forms).² In the same vein, the Committee on the Rights of the Child confirmed in its General Discussion Day³ that the duty to provide education remains unaffected even in times of emergency such as conflict situations. The UN Special Procedures and other Human Rights Council mechanisms, such as fact-finding missions, have arrived at similar conclusions. This question is paramount since lack of resources to access education may be a starting point for child exploitation, including their recruitment and involvement in armed conflict.

The right to education has been reaffirmed consistently by the UN human rights mechanisms as a ‘basic’ or ‘fundamental’ right. Moreover, this study reiterates that customary international law elements of the right to education include not only negative obligations of respect (what not to do, i.e., not to impede enjoyment of the right, or to interfere with parental choice, academic freedom, etc.), but also require positive obligations of fulfilment, namely to *provide compulsory primary education free for all*. The position that seems to be sustained by all treaty bodies and states cooperating with the mechanisms is that the core of the right to education is not to be denied throughout any armed conflict.

Conclusion 2. Targeted attacks against educational staff, students, and facilities, whether by armed forces or armed non-state actors, violate the right to education.

While the protection of human rights in armed conflict has long been recognized and reaffirmed in theory and practice, particular aspects of the right to education merit further clarification. One of the conclusions of the present study is that the targeted use of force (e.g. military action) against subjects of the right to education (students, teachers) and material determinants of the right (i.e. education facilities) are violations of the right to education. This determination can even be made in a situation of armed conflict without reference to the specific prohibitions and restrictions in international humanitarian law (IHL).

Indeed, the treaty bodies have largely framed the protection of education in armed conflict as a distinct human rights issue. In one case, the Committee on Economic, Social and Cultural Rights (ESCR Committee) even qualified attacks on schoolchildren and educational facilities as ‘serious violations’ of the right to education.⁴ In the context of Colombia, the ESCR Committee asked the state party to provide information about ‘measures the State party has taken to protect school premises from occupation by armed groups and the consequent interruption of classes’.⁵ On

2 For example, in its report Sri Lanka reported that it ‘has taken measures to ensure that children affected by conflict are not denied their right to education throughout the entire period of the conflict. Non-formal and “catch-up” education programmes have also been conducted’. See Committee on the Rights of the Child (CRC Committee), Third and fourth Periodic Reports: Sri Lanka, UN doc. CRC/C/LKA/3-4, 20 January 2010, §§352, 354 (§ indicates paragraph number); CRC Committee, Initial Report/OPAC: Sri Lanka, UN doc. CRC/C/OPAC/LKA/1, 15 February 2010, §56. Sudan was asked by the CRC Committee to ‘include information of any preventive measures taken to address the social and other reasons which render certain children in the State party vulnerable to recruitment by armed groups’ and the reporting state included a number of educational measures. See CRC Committee, ‘Written replies by the Government of the Sudan concerning the list of issues related to the consideration of the initial report of the Sudan under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child (CRC) on the involvement of children in armed conflict’, UN doc. CRC/C/OPAC/SDN/Q/1/Add.1, 24 August 2010, §9(d). For other examples, see: CRC Committee, ‘Initial report: Afghanistan’, UN doc. CRC/C/AFG/1, 13 June 2010, §53; Committee on the Elimination of Discrimination against Women (CEDAW Committee), ‘Responses to the list of issues and questions: Chad’, UN doc. CEDAW/C/TCD/Q/4/Add.1, 15 September 2010, §79.

3 CRC Committee, ‘Day of General Discussion on the Right of the Child to Education in Emergency Situations: Recommendations’, 49th Session, 19 September 2008.

4 Committee on Economic, Social and Cultural Rights (ESCR Committee), ‘List of issues to be taken up in connection with the consideration of the third periodic reports of Israel’, UN doc. E/C.12/ISR/Q/3, 9 December 2010, §36.

5 ESCR Committee, ‘List of issues to be taken up in connection with the consideration of the fifth periodic report of Colombia’, UN doc. E/C.12/COL/Q/5, 19 June 2009, §38.

another occasion, the Committee expressed its concern ‘about the increase in the number of child victims of attacks against schools by insurgents and the throwing of acid to prevent girls and female teachers from going to school’.⁶

This approach is evidenced by all types of UN human rights mechanisms considered by the study. The UN Fact-Finding Mission to the Gaza Conflict, for instance, discussed the situation in the Occupied Palestinian Territory (OPT) as impacting on the *right to education*.⁷ Even the UN Security Council and its Monitoring and Reporting Mechanism (MRM) seem to have moved towards a rights-based approach to attacks on schools during armed conflict, albeit less systematically and sometimes without explicitly referring to human rights.

Conclusion 3. While there is no unequivocal international legal prohibition on the military use of educational facilities in situations of armed conflict, the trend in law and policy is firmly towards greater restriction on such use.

Whether on the basis of the right to education or protection of children in armed conflict, the prevailing approach of the human rights treaty bodies is to expect states to protect educational premises from use by both armed groups as well as armed forces. Thus, treaty bodies and special procedures have approached the question either as an infringement of the right to education or, at a minimum, a practice to be precluded as a matter of policy.⁸

The UN Security Council-led mechanisms and the Commissions of Inquiry generally assess cases of occupation of schools in light of applicable IHL, which contains no explicit prohibition on armed forces or groups using educational buildings for military purposes.⁹ This is despite the fact that military use of schools makes students, teachers, and their school buildings vulnerable to attack from opposition forces.¹⁰ In accordance with IHL, the Syrian Commission of Inquiry’s February 2013 report stated that ‘[a]nti-Government armed groups frequently use schools as barracks or offices. These occupations *are not always justified by military necessity*, and have spread the belief that schools are not safe’.¹¹ The MRM currently monitors military use of schools as ‘situations of concern’ but the UN Secretary-General’s report clarifies that occupation of schools does not constitute a trigger for listing of the relevant party to conflict as a perpetrator of grave violations against children.¹²

The Global Coalition to Protect Education from Attack (GCPEA)¹³ has been drafting guidelines for protecting schools and universities from military use during armed conflict. Once completed, GCPEA will seek explicit endorsement of the guidelines from states and other relevant actors.

Conclusion 4. There is a need for greater clarity of obligations under the right to education where a state loses control over part of its national territory.

The present study investigated situations where the state loses control of parts of its national territory and is therefore impeded in exercising its control in order to effectively fulfil its human rights obligations. These include,

6 ESCR Committee, ‘Concluding Observations: Afghanistan’, UN doc. E/C.12/AFG/CO/2-4, 7 June 2010, §43.

7 *Ibid.*, §§1662 et seq.

8 For instance, the CRC Committee has recommended to a state party that it ‘immediately discontinue’ occupation of school and repair damage caused by the occupying forces. The ESCR Committee also raised occupation of schools as an issue in its dialogue with states parties. Similarly, the Special Rapporteur on the right to education communicated an allegation of occupation of schools to the state concerned referring to the facts of occupation as the possible breach of the obligation of the state to realize the right of children to education.

9 See, e.g., ‘Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict’, GCPEA, May 2013.

10 GCPEA, *Lessons in War: Military Use of Schools and Other Education Institutions During Conflict*, GCPEA, New York, November 2012.

11 ‘Report of the independent international commission of inquiry on the Syrian Arab Republic’, 5 February 2013, §116. Emphasis added.

12 UN Secretary-General, Children and Armed Conflict, UN doc. A/66/782-S/2012/261, 26 April 2012, §227.

13 <http://www.protectingeducation.org/restricting-military-use-and-occupation>. See ‘Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict’, GCPEA, May 2013.

in particular, situations where lack of control by a state over part of its own national territory results from foreign occupation or the actions of armed non-state actors. These questions have or have had serious practical implications in certain regions, e.g. South Ossetia and Abkhazia in Georgia, the north of Cyprus, Nagorno-Karabakh (Azerbaijan), Taliban-influenced areas in Afghanistan, or areas in Syria controlled by the Free Syrian Army and al-Nusra.

Although there has been limited practice on specific measures the state should take in order to comply with its international obligations, our research found that UN mechanisms suggest in general terms that the state has a duty to cooperate not only with the international community but also with the authorities governing the concerned territory for the benefit of the population living therein. This latter obligation is often politically difficult to implement. Arguably, in such situations other states and at least certain non-state actors also have international legal obligations to respect the right to education.

Conclusion 5. There is a trend towards holding armed non-state actors responsible for violations of human rights, either where they exercise effective territorial control or where they violate *jus cogens* norms.

Contemporary practice of international institutions shows clearly that there is increasing political will to hold armed non-state actors accountable for human rights *violations*. This supports the idea that human rights law and the obligation to respect the right to education could be applicable to armed non-state actors in specific circumstances, in particular, but not exclusively, when they exercise elements of governmental functions and have *de facto* authority over a population, or where it concerns *jus cogens* (peremptory) norms.¹⁴

In its General Comment No. 16 (2013) on state obligations regarding the impact of the business sector on children's rights, the Committee on the Rights of the Child stated that it

recognizes that duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises. Therefore, all businesses must meet their responsibilities regarding children's rights and States must ensure they do so. In addition, business enterprises should not undermine the States' ability to meet their obligations towards children under the Convention and the Optional Protocols thereto.¹⁵

A General Comment on the obligations of armed non-state actors under the CRC and customary international law, including with respect to the right to education, could usefully be elaborated.

Conclusion 6. The impact of disability on access to education in insecurity and armed conflict has received insufficient attention in the practice of UN human rights mechanisms.

As stated by the Special Rapporteur on the right to education, armed conflicts 'impair or violate the right to education, impede its development and hold back its realisation' and 'put people's health and lives at risk and threaten or destroy public and private assets, limiting the capacity and resources to guarantee rights and uphold social responsibilities'.¹⁶ As the Special Rapporteur points out '[p]eople with disabilities, of either sex and of all ages, and in most parts of the world suffer from a pervasive and disproportionate denial of their right to education. In emergencies, however, particularly during conflicts and the post-conflict period, their right to receive special support and care is not always recognized by communities or States'.¹⁷

This observation is shared and reaffirmed by practice of UN human rights bodies. But the inter-relationship between disability and access to education in situations of insecurity and armed conflict has, to date, received inadequate

¹⁴ These are customary norms of international law that are so fundamental that they cannot be overridden by treaty.

¹⁵ CRC Committee, General Comment No. 16, 'State obligations regarding the impact of the business sector on children's rights', UN doc. CRC/C/GC/16, 17 April 2013, §8.

¹⁶ Report of the Special Rapporteur on the right to education, Vernor Muñoz, 'Right to Education in Emergency Situations', UN doc. A/HRC/8/10, 20 May 2008, §5.

¹⁷ *Ibid.*, §99.

attention. Human Rights Council Resolution 22/33 calls upon the Office of the UN High Commissioner on Human Rights (OHCHR) to develop a study on the right to education of persons with disabilities. The study is due to be presented to the Human Rights Council in March 2014.

Conclusion 7. The importance of the quality of education in situations of insecurity and armed conflict has received insufficient attention in the practice of UN human rights mechanisms.

The issue of quality of education is receiving increasing attention generally¹⁸ as well as, though to a limited extent, in situations of insecurity and armed conflict.¹⁹ Afghanistan, for instance, received guidance to provide quality education. Similarly, quality was mentioned with regard to internally displaced persons (IDPs).²⁰ The Universal Periodic Review has often heard states advise their peers to pay attention to the provision of quality education. In general, however, while references to the provision of education are made, emphasis on the importance of its quality is often lacking. In particular, there is little guidance to states on how best to operationalize and ensure quality of education in times of armed conflict.²¹

Certainly, students must be given an education that is not only of quality from a universal standpoint but also respectful of their traditions, beliefs, and language(s) if minority and indigenous rights are to be respected. In this regard, there may be particular concerns in areas where a population is under occupation by another state. Thus, to a certain extent the notion of quality should be supplemented by the specifics of the context.

Conclusion 8. Discussion of the protection of education in insecurity and armed conflict in the practice of UN human rights mechanisms does not consistently concern *all* levels of education.

In effect, there is an inconsistency regarding the levels of education that are addressed whether among human rights treaty bodies and UN-Charter-based mechanisms, or enforcement mechanisms with capacity to ensure ongoing monitoring, such as the UN Security Council. UN conventional and non-conventional human rights mechanisms have discussed university education on many occasions.²² Generally, where relevant, the treaty bodies have raised issues or expressed their views on the right to education of both adults and children.²³

Many people, particularly in situations of prolonged armed conflict or insecurity, reach adulthood without receiving a fundamental education. More generally, tertiary education students and facilities are often targeted by governments. Accordingly, it is important in line with the requirements of international human rights treaties to recognize that the right to education exists for adults and deserves protection and promotion.

18 The Millennium Development Goals (MDGs) emphasized access to education not its quality, although it is conceivable that whatever replaces the MDGs in 2015 will also refer to quality.

19 The Special Rapporteur on the right to education has been a leading reference in this area.

20 See, e.g., CRC Committee, 'Concluding Observations: Afghanistan', UN doc. CRC/C/AFG/CO/1, 8 April 2011, §61(e).

21 The CRC Committee and the UN Special Rapporteur on the right to education have referred to the duty to maintain safety and security of schools, school children, and educational staff as forming part of the obligation upon states to ensure quality of education, thus expanding the notion of acceptability of education under human rights law, but such references have been rare in practice. A safe and protective environment as a necessary component of quality of education is not a new concept but has not been explicitly referred to in the elaboration of the content and scope of the right to education.

22 For instance, the Human Rights Committee has asked a state party to report on the number of university students arrested and detained in the framework of consideration of the state report. 'List of issues to be taken up in connection with the consideration of the Third Periodic report of Iran', UN doc. CCPR/C/IRN/Q/3, 17 May 2011, §29. More specifically the Committee requested: 'Please clarify why in the two and a half years prior to the 2009 presidential elections, some 200 students were detained and at least 160 students were suspended or were expelled from universities. Please report on the number of students that have been arrested and detained during and after the 2009 presidential elections.'

23 For example, the CEDAW Committee in its concluding observations, expressed concern that 'the restrictions on movement in the Occupied Territories as well as regular harassment by settlers of both children and teachers on their way to and from school have had a negative impact on Palestinian women and girls' access to education and to their health'. CEDAW Committee, 'Concluding Observations: Israel', UN doc. CEDAW/C/ISR/CO/5, 5 April 2011, §22–3.

The UN Security Council has not raised the right to education of students at levels other than primary and secondary. This is not surprising given that the MRM focuses on ‘children and armed conflict’. Nonetheless, it raises a question of whether, technically, if children below age of 18 are attending higher education they would be excluded from the monitoring and protection afforded by the MRM. Put otherwise, it is suggested that higher education should not be excluded from the monitoring and reporting, as the special protection provided to children is afforded on the basis of age, not the institution. That many participants in primary and secondary education in some countries are over 18 is also relevant.

Conclusion 9. Input by international organizations and non-governmental organizations is critical to ensuring the success of UN human rights mechanisms in the protection of education in situations of insecurity and armed conflict.

UN human rights mechanisms are dependent on high quality information to be able to act effectively. It is obviously tempting for governments to paint an overly rosy picture of the situation in their countries; thus both shadow and public reports by international organizations and NGOs are critical to give a more balanced view of the situation on the ground. While there are normally many human rights priorities and limited time and space for their consideration by the various mechanisms, it is clear that, to put it in the vernacular, the squeaky wheel tends to get the grease. The quantity and quality of international organization and NGO reporting on the right to education will therefore usually be reflected in the conclusions and recommendations of the various human rights mechanisms.

PRINCIPAL RECOMMENDATIONS

1. A study should be conducted of the right to education under customary international law, in particular with respect to situations of insecurity or armed conflict. The results of the study should be broadly disseminated and, among other things, reflected in the online universal human rights index prepared by the Office of the UN High Commissioner for Human Rights.
2. Greater clarity should be sought on the interrelationship between the use of force and respect for the right to education. This notion should be clearly reflected in human rights treaty body reporting guidelines.
3. Greater restrictions should be imposed in law, policy, and practice on the military use of educational facilities.
4. The scope of obligations to respect, protect, and fulfil the right to education in situations where the state loses control of part of its national territory should be clarified.
5. A Statement or General Comment by the Committee on the Rights of the Child on the obligations of armed non-state actors to respect children’s rights, including the right to education, should be seriously considered.
6. In protecting the right to education in insecurity and armed conflict, attention should be paid to all levels of education — not merely primary and secondary education — and the rights of adults to education should be the subject of greater consideration.
7. Far greater attention needs to be paid to the impact of disability on access to education in situations of insecurity and armed conflict. Recourse could be made to the individual complaints mechanism, in particular under the 2006 Convention on the Rights of Persons with Disabilities. In addition, advocacy for a General Comment or Statement by, among others, the Committee on the Rights of Persons with Disabilities, should be considered to raise awareness of this issue.
8. While promoting access to education remains a primary challenge and objective, the importance of quality of education should also be promoted. In a situation of armed conflict, including military occupation, the context should also be taken into account in ensuring that the right to education is fully respected.
9. International organizations and non-governmental organizations should reflect strategically on which mechanisms to target as a matter of priority in order to promote the right to education most effectively. An international conference that brings together human rights lawyers and education practitioners, among others, could usefully elaborate a strategic plan that incorporates consideration of this issue.

Introduction

Attacks resulting in death or injury to children and educators and the destruction or occupation of educational facilities have become almost routine during armed conflict and situations of insecurity. A 2007 report issued by the United Nations Educational, Scientific and Cultural Organization (UNESCO) estimated that the reported number of attacks on students and education staff, and bombings and burnings of school buildings, had risen dramatically in the preceding three years.²⁴ Three years later, an update of the report found that systematic targeting of students, teachers, academics, and educational institutions had been reported in an even greater number of countries since its earlier report.²⁵ The effects of these attacks are felt through the loss of or injury to students, teachers and intellectuals; the flight of students and staff; fear of turning up to class; damage to buildings, materials, and resources; staff recruitment difficulties; shelving of investment; and generalized degradation of the education system.²⁶ In 2011, it was estimated that more than 40% of out-of-school children live in conflict-affected countries, where economic collapse and insecurity mean that many families do not send their children to school.²⁷

The data provided by the 2012 report of the UN Secretary-General on children and armed conflict suggests that schools as conflict battlegrounds are a common feature of many armed conflicts. Attacks targeting or impacting schools, students, and educational staff whether by state armed forces or by non-state armed groups appear widespread in conflicts in Afghanistan, the Central African Republic, Chad, Colombia, the Democratic Republic of Congo (DR Congo), Iraq, Libya, Myanmar, Pakistan, Palestine, Somalia, South Sudan, Syria, as well as in India, the Philippines, Thailand, and Yemen.²⁸ Excessive use of force and the fact that hostilities often take place in urban areas make educational facilities frequent casualties of warfare. At the same time, evidence suggests that education ‘as such’ is not simply the victim of collateral damage but that it has itself become a specific target of attacks.

THE SCOPE OF THE STUDY

Set against this backdrop, the Geneva Academy of International Humanitarian Law and Human Rights was commissioned to study the current use and evaluation of UN human rights mechanisms in the context of the right to, and protection of, education in areas affected by insecurity and conflict. The research has looked at the current use of a wide range of UN mechanisms with a direct or incidental human rights supervisory and enforcement role. The main question put before the study was to assess and analyse coherence, coordination, and clarity within UN

24 *Education under Attack*: 2007, UNESCO, Paris, 2007, p. 13.

25 *Education under Attack*: 2010, UNESCO, Paris, 2010, p. 21.

26 B. O'Malley, 'Education under Attack 2010: A Summary', *Protecting Education from Attack: A State-of-the-Art Review*, UNESCO, 2010, p. 37.

27 EFA Global Monitoring Report Team, *The Hidden Crisis: Armed Conflict and Education*, EFA Global Monitoring Report 2011, UNESCO, Paris, 2011.

28 See generally, UN Secretary-General, Children and Armed Conflict, UN doc. A/66/782-S/2012/261, 26 April 2012, and also UN Assistance Mission in Afghanistan and the Office of the UN High Commissioner for Human Rights, *Annual Report 2012: Protection of Civilians in Armed Conflict*, Kabul, Afghanistan, February 2013, p. 12; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc. A/HRC/22/59, 5 February 2013, p. 18, §116; and pp. 82–3, §18.

human rights mechanisms on their approach to the right to education and its protection in situations of particular risk. This study report is the result of research conducted in July 2012 through March 2013, using as its primary information base practice in 2007 through the end of 2012 (although important developments since that date have been incorporated wherever possible).

The study is thus concerned with the relationship between the right to education in times of insecurity and armed conflict and its application and protection by the conventional and non-treaty-based human rights mechanisms. To this end, the research team systematically reviewed all pertinent documentation of the work of the human rights treaty bodies and non-conventional human rights machinery, namely UN Human Rights Council resolutions and documentation relating to the Universal Periodic Review and the Special Procedures, as well as NGO reports; Fact-Finding Missions and Commissions of Inquiry; and UN Security Council resolutions and mechanisms. The research covers 49 states which are, or which were, at the relevant period, in the throes of an armed conflict or suffering from insecurity.²⁹

STUDY METHODOLOGY

Initially the scope of the research was limited to analysis of the UN human rights bodies only, but it was subsequently decided to expand the scope of inquiry by complementing formal human rights machinery with the UN Security Council's mechanisms for the protection of civilians, particularly children; UN fact-finding missions; and international commissions of inquiry. This is crucial as the work of the UN Special Procedures (see Chapter III) related to socio-economic rights is mostly reflective, whereas that of a Fact-Finding Mission and a Commission of Inquiry is more investigative in nature, seeking to gather evidence to establish or discredit alleged violations of human rights.

The study also assesses the practice of various political and expert bodies within the UN responsible for monitoring the obligations of states in the area of human rights law. For this purpose, the study analysed resolutions adopted by the UN Security Council and the Human Rights Council, and the input of treaty bodies such as through general comments, treaty-reporting guidelines, dialogue with states parties, and concluding observations.

The research looked at the following specific issues: 1) how protection of education and the right to education have been conceptualized by the mechanisms and the extent to which current debates concerning the protection of education in armed conflict have influenced or informed practice (and *vice versa*); and 2) what acts constitute a violation of the right to education in a situation of armed conflict, including as a result of international humanitarian law (IHL) rules. In addition, it has sought to identify trends in the practice of UN human rights mechanisms on the right to education.

For the purposes of the research, references to the right to education had to have a clear focus on or nexus to a situation of armed conflict or insecurity. While information collection focused on all aspects of education in a given context, the criteria for the selection of the relevant material for analysis focused on the following subjects:

Education: all references to education, including access (physical and financial) to education, educational facilities (schools, classrooms, university), enrolment, dropout rates, primary, secondary and tertiary education. Any references to students, education profession, teachers, teachers' unions, etc. were deemed relevant. In addition, any references to financial and other resources necessary for the implementation of the right to education were also collected.

²⁹ Situations of armed conflict and insecurity encompassed the following states: Algeria, Armenia, Azerbaijan, Afghanistan, Bangladesh, Bhutan, Central African Republic, Chad, Colombia, Cyprus, Djibouti, DR Congo, Eritrea, Ethiopia, Georgia, Haiti, Honduras, India, Indonesia, Iran, Iraq, Israel, Kenya, Lebanon, Libya, Mali, Mexico, Moldova, Morocco, Myanmar, Nepal, Niger, Nigeria, North Korea, Pakistan, Peru, Philippines, Russia, Senegal, Somalia, South Korea, South Sudan, Sudan, Syria, Tajikistan, Thailand, Turkey, Uzbekistan, and Yemen.

Children in armed conflict: all references to children affected by armed conflict, including recruitment of children into armed forces by state or non-state armed groups (on the basis that this negatively impacts on their right to education), as well as their rehabilitation and reintegration through education and related measures, were deemed relevant. References to demobilization, disarmament, and reintegration of children, including through education, were also collected.

Charter-based (non-conventional) human rights machinery: mechanisms set up under bodies established under the UN Charter, such as the Human Rights Council, including the Special Procedures.

Conventional human rights machinery: treaty bodies established under human rights treaties.

International humanitarian law: in light of other applicable legal regimes in times of armed conflict, notably IHL and international criminal law (ICL), all such references were included in the research. In this context, any references to the categorizations traditionally associated with IHL have also been included. Further, all references to ‘attacks’ on civilians or on civilian infrastructure were considered relevant.

Loss of control over territory: where the state loses control of parts of its national territory it is typically unable effectively to fulfil its human rights obligations. This raises a number of questions: would the state retain any obligation toward the individuals in that territory? To what extent can it be held accountable? Would its obligation or responsibility differ on the basis of the entity (state or non-state) controlling the area concerned? Lack of territorial control inherently affects the application of human rights treaties and the accountability of the duty-bearers under these instruments. Human rights bodies have consistently raised this issue, in particular in relation to: South Ossetia and Abkhazia in Georgia; the Turkish Republic of Northern Cyprus in Cyprus; Nagorno-Karabakh in Azerbaijan; the former Liberation Tamil Tigers of Eelam (LTTE)-controlled area in Sri Lanka; Chechnya in the Russian Federation; or the Taliban-influenced areas in Afghanistan.

Internally Displaced Persons (IDPs): Armed conflict is one of the primary causes of forced displacement. Human rights bodies have identified the internally displaced as a category of vulnerable group in need of special protection and assistance. Virtually all human rights bodies have addressed IDPs and their access to basic services, including education.

THE LAYOUT OF THE REPORT

The remainder of this report is organized as follows. Chapter 1 describes the ways in which the issue of education in situations of insecurity and armed conflict have been addressed in literature and practice (as well as identifying certain key questions that, we assert, remain to be answered).

Chapter 2 frames the protection of education within a broader human rights discourse, considering the normative content of the right to education as it is expounded in the human rights treaties and as clarified by other expert bodies.

Chapter 3 explains the functions and roles of UN human rights mechanisms for those who are not familiar with their respective mandates and functions.

Chapter 4 considers how in practice the protection of education has been conceptualized by the various bodies within the UN human rights machinery, with particular focus on the use or threat of force against subjects of the right to education and education facilities.

Chapter 5 looks at cross-cutting topics of particular concern, notably non-discrimination and equality; the rights of persons with disabilities; protection of higher education in times of insecurity and armed conflict; and the extraterritorial scope of human rights treaties.

Chapter 6 considers the right to education in the context of the relationship between human rights and IHL.

Chapter 7 addresses international legal obligations of armed non-state actors to respect and protect education.

The study’s principal conclusions and recommendations complete the report.

1

Protection of Education in Situations of Insecurity and Armed Conflict: Framing the Issue

EVOLUTION OF PROTECTION OF EDUCATION IN INSECURITY AND ARMED CONFLICT

In the 1996 Report on the Impact of Armed Conflict on Children by Ms Graça Machel, the UN Secretary-General's appointed expert, the impact on education was highlighted in the following terms:

Schools are targeted during war, in part because they have such high profiles. In rural areas, the school building may be the only substantial permanent structure, making it highly susceptible to shelling, closure or looting.... Often, local teachers are also prime targets because they are important community members and tend to be more than usually politicized.... The destruction of educational infrastructures represents one of the greatest developmental setbacks for countries affected by conflict. Years of lost schooling and vocational skills will take equivalent years to replace and their absence imposes a greater vulnerability on the ability of societies to recover after war.³⁰

More recent analysis resonates with Ms Machel's 1996 report. In effect, concern for the specific protection of education has emerged from the broader desire to improve the protection of civilians, and particularly children. Similar themes to those she observed in the mid-1990s were raised in the 2007 and 2010 *Education under Attack* reports commissioned by UNESCO, and the 2011 Education For All (EFA) Global Monitoring Report dedicated to the theme of *Armed Conflict and Education*. These reports called attention to what has been called a 'hidden crisis'. Already in 2008, the UN Special Rapporteur on the right to education had addressed some of the issues later presented in these reports in a thematic study dedicated to the right to education in emergency situations.³¹ Thematic discussions were held on dedicated days by the Committee on the Rights of the Child (CRC Committee) in 2008 and the UN General Assembly in 2009. These and other reports, publications, and discussions conducted under the aegis of international organizations and non-governmental organizations, attribute attacks on education to political, military, ideological, sectarian, ethnic, religious, and criminal motivations whether those attacks are by state or non-state actors. These attacks are directed against students, educators, education trade unionists, education aid workers, and educational institutions, and at all educational levels notably: primary, secondary, and tertiary education.

Added to concerns over the protection of children, reference is increasingly made to the special value and inherent qualities of education for communities at large in times of conflict. Education can help affected communities to cope better with the violence that may engulf them and is also an effective strategy to recover from conflict. For children, education can provide a protective environment (via a state of relative 'normalcy'), shielding them from some of the traumatic experiences violence brings.³² Furthermore, according to one estimate, the average duration

30 Report of the expert of the Secretary-General, Ms Graça Machel, submitted pursuant to General Assembly resolution 48/157, UN doc. A/51/306, 26 August 1996, §186.

31 Report of the Special Rapporteur on the right to education, Vernor Muñoz, 'Right to Education in Emergency Situations', UN doc. A/HRC/8/10, 20 May 2008.

32 CRC Committee, Day of General Discussion on 'The Right of the Child to Education in Emergency Situations', Recommendations by the CRC Committee, 49th Session, 3 October 2008, §§14–6.

of violent conflict in impoverished countries is 12 years.³³ Education is an example of a vital socio-economic sector where the consequences of armed conflict may be felt long after the fighting is over.³⁴

Subsequently, the links between education and conflict have received a great deal of attention among scholars, practitioners, civil society, and humanitarian organizations. Reports by UN agencies, international NGOs, and advocates have brought to light the extent of the impact of insecurity and armed conflict on education, helping to conceptualize the issues through data gathering and analysis and publications as well as concrete action on the ground. In 2010, certain IGOs and NGOs established the Global Coalition to Protect Education from Attack in order to promote efforts to prevent, respond to, and monitor attacks on education. In 2011, the UN Security Council requested the Secretary-General to include in the annexes to his reports on children and armed conflict those parties to armed conflict that engage, in contravention of international law, in attacks on schools and/or against protected persons related to schools.³⁵

Since then, *attacks on education* have been receiving broader political³⁶ and operational attention.³⁷ The topic in itself is not new; however, the strengthened focus on protection, especially through legal means, is. This has meant, according to the Special Rapporteur on the right to education, that it was no longer possible to leave the issue ‘to a development agenda’: it had to be placed firmly on the human rights agenda.³⁸

Within the issue as a whole, several themes have developed over recent years. One theme focuses on the impact of insecurity and armed conflict on education, and particularly the physical and psychosocial protection of students, and staff and the physical protection of educational facilities.³⁹ For this body of thought the following dimensions of the problem are at the heart of the concern: attacks on education are both a *direct protection* issue for the targets of attack and a broader *obstacle to access to education*. A second theme explores the links between education and violence; in particular, the role education can play in inducing or reproducing violence in societies.⁴⁰ A third, emerging theme is the involvement of education in counter-terrorism and counter-insurgency strategies in insecurity and armed conflict, and the associated risks of implicating ‘education’ in security and political agendas.⁴¹

33 *The Hidden Crisis: Armed Conflict and Education*, EFA Global Monitoring Report 2011, UNESCO, Paris, 2011, p. 138. According to the report, over the ten years to 2008, 35 countries were affected by armed conflict, of which 30 were classed as low-income.

34 ‘The function of education as an engine of positive change is lost, not only for promoting human dignity and fundamental rights but *even* in the most practical terms of providing technological and industrial competencies. Society becomes risk-averse, creation-averse, discovery-averse. It atrophies, making future development and recovery much more difficult.’ R. Quinn, ‘Attacks on Higher Education Communities: A Holistic, Human Rights Approach to Protection’, in *The Hidden Crisis: Armed Conflict and Education*, EFA Global Monitoring Report 2011, UNESCO, Paris, 2010, p. 109.

35 UN Security Council Resolution 1998 (2011), ‘Children and Armed Conflict’, 12 July 2011, §3.

36 During the UN General Assembly’s thematic debate on education in emergencies, the then Assembly President, Miguel D’Escoto Brockmann, urged the development of ‘clear policies to protect schools and make them safe havens, especially in the most difficult situations’. Concluding Remarks of the UN General Assembly President, Closing Session of the Interactive Thematic Dialogue on Access to Education in Emergency, Post-Crisis and Transition Situations Caused by Man-Made Conflicts or Natural Disasters, New York, 18 March 2009.

37 Inter-Agency Network for Education in Emergencies, *Minimum Standards for Education: Preparedness, Response, Recovery*, Second Edn, INEE, New York, 2010.

38 CRC Committee, Day of General Discussion on the Right of the Child to Education in Emergency Situations: Recommendations, 49th Session, 19 September 2008, §10.

39 British Institute of International and Comparative Law (BIICL), *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook*, EAA, 2012.

40 See, e.g., C. Talbot, Education in Conflict Emergencies in Light of the Post-2015 MDGs and EFA Agendas, Paper for Network for International Policies and Cooperation in Education and Training (NORRAG), 2013.

41 S. C. Grover, *Schoolchildren as Propaganda Tools in the War on Terror: Violating the Rights of Afghani Children under International Law*, Springer 2011.

A fourth theme concerns the potential contribution of education to conflict mitigation including through developing life skills, conflict resolution, and peace-building.⁴²

POSSIBLE PROBLEMS AND CHALLENGES IN CURRENT APPROACHES

Any study of the practice of UN human rights mechanisms presupposes a clear definition of the term ‘attacks on education’, or at least a set of indicators for identifying its content, as this is the basis on which such practice is to be assessed. As will be seen, however, certain conceptual ambiguities related to the definitions, terminology, and legal methods employed exist in the broad range of studies, reports, and analyses on the topic as published by UN bodies, civil society, and academia. Indeed, the interplay of analytical sources has been surprisingly uneven both with respect to the basic parameters of the problem of ‘attacks on education’ as well as on the methodologies used to assess such attacks. Such a state of affairs is not surprising, as in many respects protection of education as a self-standing topic is the product of quite recent study. Nonetheless, it is necessary at the outset to clearly define the topic as we see it, with a description of core principles and concepts.

The definition of an ‘attack on education’

What, exactly, is an ‘attack’ on education? The term (and other associated terms)⁴³ is not a term of art. Currently used primarily for broad advocacy and policy purposes, these terms are not defined by any of the traditional sources of international law. Similarly, international practice does not reveal an agreed definition of either ‘attacks on education’ or ‘attacks on the right to education’. The question of definitions has thus often been raised as a challenge in the context of data collection.⁴⁴ It is important, therefore, to try to disentangle different strands of the assumptions and elements of the concept since it not only helps to define the parameters but also serves as an essential background to identifying relevant practice of UN human rights mechanisms.

Humanitarian, human rights, and child protection literature seemingly include in the definition of an attack on education a number of facts and conditions that directly or indirectly implicate education, sometimes but not always targeted deliberately toward education. Examples include: mass or multiple killings or injuries and assassinations or attempted assassinations resulting from explosions, rocket and mortar attacks, and gunfire; injuries and beatings

42 The Special Rapporteur on the right to education specifies: ‘Lastly, education provides the knowledge and skills to survive in a crisis through the dissemination of lifesaving information about landmine and cluster bomb safety, HIV/AIDS prevention, conflict resolution mechanisms and peacebuilding.’ Report of the Special Rapporteur on the right to education, Vernor Muñoz, ‘Right to Education in Emergency Situations’, UN doc. A/HRC/8/10, 20 May 2008, §35. UNESCO, *Protecting Education from Attack: A State-of-the-Art Review*, UNESCO, 2010, p. 40.

43 The BIICL/EAA *Handbook on Education in Insecurity and Armed Conflict* introduces the notion of *education-related violations* understood as ‘those acts which attack and undermine the conditions necessary for education’ (defined as including ‘physical protection of students and education staff, and the protection of educational facilities’), including ‘engaging in torture, systemic attacks on students or education staff, recruiting children into the armed forces or shelling educational facilities’. Thus, ‘the laws that prohibit these education-related violations are essential to protecting education’. BIICL, *Education in Insecurity and Armed Conflict: An International Law Handbook*, EAA, 2012, pp. 5–6.

44 There seem to be serious challenges to accuracy of data collection and reporting as well as analysis of attacks on education. Indeed, there is no common data set. At the global level, no single database or uniform baseline for data collection exists. All relevant literature seems to concur on this point. As a consequence, ‘any increase in the number of reported incidents may represent one or more of several trends: a real increase in the problem of attacks; a growth in the number of media outlets and human rights organizations reporting on such incidents; or improved access to media and NGO reporting on previously underreported conflicts due to growth in niche-interest Internet sites.’ See *The Hidden Crisis: Armed Conflict and Education*, EFA Global Monitoring Report 2011, UNESCO, 2011, p. 50; *Education under Attack: 2007*; *Education under Attack: 2010*; *Protecting Education from Attack: A State-of-the-Art Review*, UNESCO, 2010. See also BIICL, *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook*, EAA, pp. 4–5. Another reason of scarcity of data is the armed conflict itself, the reality of which makes data collection extremely challenging. See, e.g., Save the Children, *Childhood under Fire: The impact of two years of conflict in Syria*, Save the Children, London, 2013.

of targeted individuals; abductions, kidnappings, forced disappearances, illegal imprisonment, and torture; sexual violence by armed groups, government soldiers, or security forces against schoolchildren and/or teachers; forced or voluntary recruitment and use of children under 15 years old as soldiers or suicide bombers, including abduction and recruitment from or on the way to school, or recruitment that denies access to education; destruction of education facilities by remotely detonated explosions, mortar, and rocket fire, aerial bombing, burning, looting, and ransacking; occupation or use of educational facilities by the military, security forces, armed police, or armed groups; and threats of any of the above attacks.⁴⁵

The wide range of acts potentially encompassed is remarkable. The key dimension uniting them seems to be that these incidents involve deliberate use of force in ways that disrupt and deter the *provision of* and *access to education*.⁴⁶ Such a characterization does not always necessarily combine readily with established legal concepts. For example, the military occupation of schools is often identified as an attack on education. But from a strictly legal point of view, under IHL occupation of schools cannot be read (at least not automatically) into the definition of a '*deliberate attack*'. Nor is occupation of an educational facility strictly prohibited under this branch of law. On the other hand, these issues are not explicitly dealt with by international human rights law (IHRL).

In this regard, it is worth recalling the UN Security Council's approach to the topic. The Council-led initiative embodied in the Monitoring and Reporting Mechanism structures most of the issues discussed above as 'violations against children'.⁴⁷ This mechanism has addressed six grave violations against children in situations of armed conflict, which it identifies as the killing or maiming of children; recruitment or use of children as soldiers; rape and other grave sexual abuse of children; abduction of children; attacks against schools or hospitals; and denial of humanitarian access for children.⁴⁸ One can observe significant overlap between the content of the six grave violations of children's rights and concerns that have been classified as protection of education issues.

The focus of concern is clearly on deliberate attacks as opposed to collateral damage.⁴⁹ However, even where data is available, it is not always clear whether the data identifies the deliberateness of attacks, i.e. it is not always possible to distinguish a deliberate attack from incidental damage.⁵⁰ In any event, in the words of the Special Rapporteur on the right to education, '[s]tatistics are not always useful in showing the degradation and destruction of education systems when an emergency arises, particularly in the case of armed conflict'.⁵¹

45 The list is taken as an example from UNESCO, *Protecting Education from Attack: A State-of-the-Art Review*, UNESCO, 2010, pp. 39–40.

46 UNESCO, *Education under Attack*: 2010, p. 24. Also the 2007 UNESCO makes the same point (at p. 12).

47 The MRM is the Security Council's most significant institutional involvement to address the behaviour and responsibilities of parties to conflict. It effectively began with Security Council Resolution 1612 (2005), which created a monitoring and reporting mechanism at country level and the Council Working Group on Children and Armed Conflict. The Working Group, which consists of all members of the Council, was mandated to review reports on violations against children affected by armed conflict committed by parties that are listed in the annexes to the Secretary-General's report on children and armed conflict. See UN Security Council Resolution 1612, 26 July 2005, §3; see also Resolutions 1882 (2009) and 1998 (2011).

48 Report of the Secretary-General, 'Children and Armed Conflict', UN doc. A/59/695-S/2005/72, 9 February 2005, §68; UNSC Resolution 1612, §2.

49 *Ibid.*, p. 18, where it is stated that: 'The terms of the study do not include collateral damage, for example, where teachers are killed or schools damaged accidentally by general military violence rather than by attacks deliberately targeted against them'.

50 *Education under Attack*: 2010, UNESCO, p. 103. The Special Rapporteur on the right to education lamented fragmented and often 'disturbingly vague' and imprecise statistics. Report of the Special Rapporteur on the right to education, Vernor Muñoz, 'Right to Education in Emergency Situations', UN doc. A/HRC/8/10, 20 May 2008, §21–4.

51 Report of the Special Rapporteur on the right to education, Vernor Muñoz, 'Right to Education in Emergency Situations', UN doc. A/HRC/8/10, 20 May 2008, §29.

The interplay of different branches of law and ‘attacks on education’

In international discourse on the impact of armed conflict on education, the view has occasionally been expressed that attacks on education are ‘strictly forbidden under international law’.⁵² This raises a question about the foundations of obligations related to the protection of education. There are two overlapping questions that lie at the heart of the debates: protection of civilians and/or civilian objects dedicated to education and the right of the individual to education in times of armed conflict. These two formulations should not be confused. The two bodies of international law primarily involved — IHL in the first case and IHRL in the second — address different elements of the issue that may overlap, but which may not be the same.

According to the 2010 *Education under Attack* report, such attacks ‘appear to be a significant and growing problem internationally, putting the lives of students, teachers and education staff at risk and undermining attempts to fulfil the right to education for all.’⁵³ Likewise, it is asserted that ‘[t]he international community should promote respect for schools and other education institutions as sanctuaries and zones of peace in order to protect the right to education.’⁵⁴ The 2011 Global EFA Report stresses that ‘[t]here is an extensive body of international human rights laws, rules and norms that should protect children and other civilians caught up in armed conflict. They should also protect the buildings in which children learn.’⁵⁵

As noted in the preceding section, the UN Security Council has developed ‘protection of children’ as a unifying framework. Its reading of circumstances, as will be seen, is often expressed in terms of the protection of civilians and civilian objects, and particularly in relation to a specific group: children, and in cases involving girls, also the protection of women. As a logical consequence, it is not always clear whether the practice of the Council-led mechanisms can be qualified as the protection of civilians and civilian objects in their *education function*. Furthermore, the focus of the MRM on grave violations against children means that the circle of subjects addressed by the mechanism is limited: it only covers schoolchildren (those below the age of 18), thereby leaving outside its ambit students, academics, and staff in higher education.

For obvious reasons, human rights bodies approach the topic, by and large, by applying the international legal framework of human rights. In situations of armed conflict, they may also draw on other legal regimes, notably IHL. Under IHL, education facilities are protected based on their civilian status – i.e. the presence of civilians (or the non-presence of military personnel or materiel).⁵⁶ In contrast, IHRL deals with the questions of provision and access, as the right to receive an education is one of its core components. Cases of targeted killings, injury, and torture, for example, are addressed by human rights law under the right to life and the right to be free from torture, in particular. Depending on the circumstances, if students of higher education are targeted for exercising, for example, their civil and political rights, the relevant legal framework may also involve rights such as to freedom of expression, to freedom of assembly, and so on. ICL’s reach extends to accountability for war crimes or crimes against humanity committed against civilians and civilian objects, including objects dedicated to education.⁵⁷ Perhaps the most contentious legal issue in the discourse is the use and occupation of schools by armed forces or armed groups. This is so, as the two bodies of international law most relevant (IHRL and IHL) do not necessarily have the same judgment of legality on this issue.

52 According to the Global Education Cluster, a body co-led by a UN agency and an NGO (UNICEF and Save the Children) that coordinates and guides education responses in situations of conflict and emergencies, ‘[a]ttacks on education and the occupation of schools are strictly forbidden under international law, including UN Security Council Resolutions 1612 and 1998’. Global Education Cluster Unit, Briefing Note Occupation of Schools by Armed Forces: South Sudan, 2012, p. 1.

53 UNESCO, *Education under Attack: 2010*, UNESCO, 2010, p. 36.

54 *Ibid.*

55 UNESCO, *The Hidden Crisis: Armed Conflict and Education*, *op. cit.*, p. 126.

56 For an excellent overview, see G. Raymond Bart, ‘Ambiguous Protection of Schools under the Law of War: Time for Parity with Hospitals and Religious Buildings’, UNESCO, *Protecting Education from Attack: A State-of-the-Art-Review*, *op. cit.*, p. 195.

57 Art. 8(2)(b)(ix) and (e)(iv) of the 1998 Rome Statute of the International Criminal Court.

DEFINING KEY TERMS

The 2010 *Education under Attack* report, commenting on the challenges of data collection and causality for the purposes of determining an existence of an ‘attack’, makes the following point:

[I]nformation may not exist to determine whether particular individuals are killed because they are teachers or students going to school, or for multiple other possible reasons. It raises questions about whether the categorization of *the violation is defined by motive or effect*. This study takes a rights-based approach: if the violent political or military act is intentional and disrupts education, to which every individual has a right, it is an attack on education, even if the motive cannot be clearly established.⁵⁸

The approach taken by the UN Security Council has been to request the Secretary-General to include in the annexes to his reports on children and armed conflict those parties to conflict that engage: a) in recurrent attacks on schools, and b) in recurrent attacks or threats of attacks against protected persons in relation to schools in situations of armed conflict.⁵⁹ Subsequently, the Secretary-General stated that ‘[t]he references to “recurrent” attacks on schools and/or hospitals and “recurrent” attacks or threats of attacks against protected persons in relation to schools and/or hospitals suggest that such attacks or threats of attacks have been committed several times, which, as such, excludes single, isolated incidents or the random conduct of an individual acting alone’.⁶⁰

In April 2012, the UN Secretary-General issued his annual report for the previous calendar year on children and armed conflict, which tried to further instil some clarifications on the parameters of the definitions involved.⁶¹ It states that ‘attacks on schools [for the purposes of listing and delisting] and/or hospitals include direct attacks against them as well as indiscriminate attacks, resulting in damage to or destruction of these facilities or which have the effect of impeding the ability of a school or hospital to function and/or placing children at risk, and acts of looting of these protected facilities’.⁶² As regards military occupation of schools, the report qualified it as ‘other concerns’, stating that ‘[t]he country task forces on monitoring and reporting will continue to monitor and report on other concerns, including the military use of schools, although it does not constitute a trigger for listing’.⁶³ The Secretary-General’s definitions are subject, however, to an important caveat for the purposes of the present study. They are designed for monitoring and reporting on *grave violations* of children’s rights focusing on parties within country specific situations.

Other attempts to circumscribe the scope of the term *attacks on education* for the purposes of data collection come from NGOs. One major report suggested that ‘[a]n attack on education comprises intentional threats or uses of physical or coercive force against the members or infrastructures of an education community’.⁶⁴ The report clarifies that it departs from the rights-based approach and hence only focuses on acts and events that involve physical and coercive force, or ‘whose resulting harm, intimidation or damage to educational community’ is reasonably foreseeable’.⁶⁵ Thus, ‘a state’s failure to meet its obligation to provide appropriate access to quality education within its territory despite available resources may be a violation of the right to education, but would not be

58 *Education under Attack: 2010*, UNESCO, p. 53.

59 UNSC Resolution 1998 (2011), Children and Armed Conflict, 12 July 2011, §3.

60 UN doc. A/66/782-S/2012/261, 26 April 2012, §230.

61 See *Ibid.*

62 *Ibid.*, §227.

63 *Ibid.*

64 This is a shorter version of a more elaborate definition, which reads as follows: ‘any deliberate threat or use of force, including coercive or physical force, carried out for political, military, ideological, sectarian, ethnic, religious or criminal reasons, with the intention or reasonably foreseeable effect of harming or intimidating any individual in their capacity as a member of an education community (including service personnel, and security personnel protecting infrastructure, and students and staff whether on the premises or en route) or gravely damaging or creating risk of grave damage to any educational buildings, resources, materials or facilities, including transport.’ EAA/Child Protection in Crisis, ‘Feasibility Study for Improved Global Monitoring of Attacks on Education’, October 2011, pp. 18–9.

65 *Ibid.*

included in our definition of an attack on education'. Similarly, 'a state's failure to provide adequate security to protect educational communities under threat or attack from a third party may be a violation of the right to education, but would not itself be included as an attack on education...'.⁶⁶

In light of the absence of a consensus on the definition of attack on education, this study adopted a broad-based definition of the right to education as understood in international law (see further Chapter 2). This includes analysis of the issues of targeting and attacks against students of all ages and against all educational buildings, including through the occupation of schools.

THE NORMATIVE VALUE OF OUTPUTS OF UN HUMAN RIGHTS MONITORING MECHANISMS

What use can be made of the study of the practice of UN human rights mechanisms? A logical question arises as to the legal significance of the different materials they produce, since they do not easily fit into the traditional framework of the sources of international law. While comprehensive assessment of this question falls outside the scope of the present research, we offer some clarification on the significance of various bodies' views and recommendations, and their decisions and interpretations. These various outputs represent a rich source of material for the assessment of state practice concerning protection of, and the right to, education in times of insecurity and armed conflict.

Individual complaints

Many human rights treaties offer the possibility of individual complaints. Many states have accepted the individual complaints procedure under the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). As of writing, the number of states that have accepted the individual complaints mechanism under the ICCPR is 114 while for CEDAW it is 104. A significant number of states also have accepted the treaty body-based complaint mechanisms under the 1965 Convention on the Elimination of Racial Discrimination (CERD) (104), the 1984 Convention Against Torture (CAT) (63), the 2006 Convention on the Rights of Persons with Disabilities (CRPD) (67), and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) (10).⁶⁷ In pursuing the right to a remedy for a violation, individual victims can use the various supervisory mechanisms, depending on the circumstances, to enforce their right to education. Through 2013, accountability mechanisms under the ICESCR and the CRC, the two main international instruments on the right to education *per se*, remained undeveloped. However, as discussed in Chapter 2, with the entry into force of the Optional Protocol to the ICESCR in May 2013,⁶⁸ this state of affairs may change, and greater normative clarity on the realization of the right to education in insecurity and armed conflict may be finally achieved.

⁶⁶ *Ibid.*, p. 19. The authors of the report suggest two reasons for departing from the rights-based approach: 'First, because a pure right-to-education approach, including duties to provide and protect education, would pose even greater data collection issues and broaden an already broad definition beyond any reasonable hope of identifying, classifying and monitoring attacks on a global scale. Second, and more importantly, adopting a pure right-to-education approach to include non-coercive acts or unforeseeable consequences would potentially distort the inherent power — semantic and emotional — of the concept of an "attack".' *Ibid.*, pp. 19–20.

⁶⁷ When compared with the number of states that have accepted the compulsory jurisdiction of the International Court of Justice or the International Criminal Court, these numbers are not insignificant.

⁶⁸ The Optional Protocol was adopted by UN General Assembly Resolution 63/117 on 10 December 2008. The Protocol entered into force on 5 May 2013, in accordance with its Article 18(1).

The legal significance of treaty bodies' General Comments and Concluding Observations

General Comments are not binding as such. In the view of Boyle and Chinkin, they are part of a process of soft law formation, whose strength depends on levels of consistency and persuasiveness.⁶⁹ They are often referred to as an interpretive device. Nonetheless, they still have persuasive authority owing to the expertise of the members of the treaty bodies and to their experience in examining state party reports over decades, which tend to apply the criteria developed therein on a voluntary basis.⁷⁰

The General Comments of the ESCR Committee are often approached as a significant source of interpretive guidance in the absence of individual complaint mechanisms (until recently) under the Covenant. The International Law Commission (ILC) has referred to the pronouncements of the ESCR Committee on the impact of sanctions on the enjoyment of the economic, social, and cultural (ESC) rights.⁷¹ In light of the present study, it is also noteworthy that General Comment No. 13 on the right to education is the most detailed and comprehensive interpretation of that right. It elucidates the different dimensions of the right, giving examples of what constitutes a violation of the right and describing the role of non-state actors in its promotion and realization.

Given the nature of state reporting itself, it is generally considered that Concluding Observations are only hortatory in character. This emerges also from the content of the Observations, including, *inter alia*, consideration of matters 'extraneous to the actual treaty obligations of the State Parties, such as ratification of other treaties, and additional protocols, withdrawal of reservations, and implementation of the declarations and plans of action adopted at world conferences'.⁷² Despite these important points, legal commentary suggests placing this general assumption of the legal authority of Concluding Observations in a 'proper' context. More specifically, the treaty reporting procedure itself gradually evolved from 'constructive dialogue' (avoiding critical evaluation at all costs) to a fully-fledged monitoring mechanism of compliance by states parties with their substantive treaty obligations.⁷³

Thus, Concluding Observations have legal weight by virtue of the role assigned by treaties to expert bodies to supervise their implementation. This covers situations where the treaty bodies pronounce on a violation of a treaty⁷⁴ and where they otherwise purport to interpret treaty provisions.⁷⁵ This latter aspect was examined by the

69 A. Boyle and C. Chinkin, *The Making of International Law*, Oxford University Press, OUP, 2007, pp. 154–7.

70 As with most of the General Comments issued by monitoring treaty bodies, they are based on the body's review of state party reports on their implementation of the provisions under the Covenant. P. Alston, 'The Historical Origins of "General Comments" in Human Rights Law', in L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum*, Georges Abi-Saab, Martinus Nijhoff, The Hague, 2001, pp. 257–75.

71 The ILC discussed to a certain degree the ESCR Committee's General Comment on the effect of economic sanctions on ESC rights in its commentary on Article 50(1)(b) on Obligations not affected by countermeasures of the ILC Draft Articles on State Responsibility. Paragraph 1 reads as follows: 'Countermeasures shall not affect: ... b) obligations for the protection of fundamental human rights.'

72 M. O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies', *Human Rights Law Review* Vol. 27, No. 6 (2006), p. 33. The author also observes that such was the understanding of the state representatives, such as Norway, citing ILA, 'Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Treaty Bodies', Berlin, 2004, at note 19.

73 On this point see W. Kälin, 'Examination of State Reports', in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press (CUP), 2012, p. 37. See also discussion by T. Opsahl, 'Human Rights Committee', in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, Clarendon Press, Oxford, p. 383.

74 Scheinin's view is that 'The absence of specific provisions on the legally binding nature of the findings by the pertinent expert body in other human rights treaties does not mean that such findings are merely "recommendations". The treaty obligations themselves are, naturally, legally binding, and the international expert body established by the treaty is the most authoritative interpreter of the treaty in question. Therefore, a finding of a violation by a UN human rights treaty body may be understood as an indication of the State party being under a legal obligation to remedy the situation.' M. Scheinin, 'International Mechanisms and Procedures for Implementation', in Hanski and Suksi (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, Abo Akademi, Turku/Abo, 1997, p. 369.

75 M. O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies', *op. cit.*, pp. 27–51.

International Law Association (ILA), in particular the question of whether Concluding Observations can amount to ‘subsequent practice in the application of the treaty’ within the meaning of Article 31(3) of the 1969 Vienna Convention on the Law of Treaties (VCLT). The ILA asserted that while this was not the case, reactions of states to observations can be so interpreted. The ILA also stated that practice extends beyond purely ‘state’ practice.⁷⁶

According to Walter Kälin, ‘[w]here standards based on a certain interpretation of the convention in question are consistently reiterated in Concluding Observations, they may even acquire soft law quality’.⁷⁷ Relevant in this context is the example of reference to the concluding observations made by the Committee on Economic, Social and Cultural Rights (ESCR Committee) and referred to by the International Court of Justice (ICJ) in its *Wall Advisory Opinion*.⁷⁸ In other cases, particularly where treaty bodies provide general advice on ‘strategies for enhanced implementation of a treaty and when they opine on matters which seem to have little or nothing to do with the actual treaty obligations of the State Party’, in general the authority of their Concluding Observations is less clear.⁷⁹ Arguably, however, standing Concluding Observations that are given to almost all states parties might have almost the same weight as a General Comment.

Contribution of Human Rights Council Special Procedures to legal interpretation of human rights

The contribution of special procedures to the legal interpretation or even the progressive development of international human rights law is not insignificant.⁸⁰ This task has been performed through for example ‘enlarging the scope of human rights norms with authoritative interpretations’.⁸¹ In particular, the role of the special procedures on economic, social and cultural rights has been considerable.⁸² The former Special Rapporteur on the right to education, Katarina Tomaševski, is one of the prominent examples of the way special procedures contributed to the normative development of economic, social and cultural rights. Her early reports proposed the ‘4A’ scheme to define the obligations of states to make education ‘available’, ‘accessible’, ‘acceptable’, and ‘adaptable’. This analytical framework was since adopted by the ESCR Committee in defining the content of the right to education and other rights.

The interpretative value of the contribution of special procedures to the development of IHRL can be enhanced if their work (or interpretation) is endorsed by the resolutions of the Human Rights Council (which then represent *opinio juris* of states). For example, the Special Rapporteur on the right to education’s report on the right to

76 According to the ILA: ‘The reference in article 31 ... as with so many other provisions in the VCLT, is written as if no monitoring body had been established by a treaty, as if no third-party interests existed, and as if it were only for other States to monitor each other’s compliance and to react to noncompliance. Human rights treaties are different in some important respects from the presumed ideal type of a multilateral treaty which underpins the formulation of the individual provisions of the VCLT. Given these differences, it appears arguable that in interpreting these types of treaties (with third party beneficiaries and an independent monitoring mechanism), relevant subsequent practice might be broader than subsequent State practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties.’ ILA, ‘Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Treaty Bodies’, *op. cit.*, §22.

77 W. Kälin, ‘Examination of State Reports’, in *op. cit.*, p. 31.

78 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, §§111–2.

79 M. O’Flaherty, ‘The Concluding Observations of United Nations Human Rights Treaty Bodies’, *op. cit.*, p. 36. O’Flaherty also reviews different arguments against the binding nature of concluding observations. In particular, ‘concluding observations emerge from a necessarily cursory exchange of documentation and views between a State Party and a treaty body, with the oral component often lasting less than one working day.... For present purposes it is sufficient to query the appropriateness of according binding status to the outputs of so limited, hurried and wide-ranging a process.’ *Ibid.*, p. 37.

80 I. Nifosi, *The UN Special Procedures in the Field of Human Rights*, Intersentia, Antwerp, 2005, pp. 64 et seq.

81 *Ibid.*

82 See, e.g., G. Golay, C. Mahon, and I. Cismas, ‘The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights’, *International Journal of Human Rights*, Vol. 15, No. 2, pp. 299–318.

education in emergency situations recommended that donor states and international agencies make education activities part of humanitarian response and assistance, and called for greater allocation of resources.⁸³ The Rapporteur further recommended a shift in focus from quantifiable ('but often inaccurate, figures on school enrolment and dropout rates') to qualitative methodologies in order to determine 'the degree of psychosocial care during emergencies'.⁸⁴ The Human Rights Council subsequently adopted Resolution 8/4 urging all states:

To ensure that the right to education is respected in emergency situations and, in this regard, underlines the importance of this right being realized by States to the maximum of their available resources, and, where necessary, by international organizations, to the extent possible, and based, *inter alia*, on assessed need by the State concerned, as an integral part of their humanitarian response to emergency situations.⁸⁵

In defining the normative content of ESC rights, the relevant special procedures largely focus on the structural issues that have always been at the heart of ESC rights violations.⁸⁶

Findings of Fact-Finding Missions and Commissions of Inquiry

The fact-finding missions and commissions of inquiry are proving to be a valuable mechanism for identifying the responsibility of states and individuals for violations of international law. They are certainly not to be equated to a proper process of adjudication. However, in the absence of a compulsory adjudicatory body at the universal level, these missions perform the important function of determining whether violations of IHRL and IHL norms have taken place, and who are suspected to have been the perpetrators. These mechanisms are a means for the international community to obtain a detailed examination of legal issues, the legal classification of conduct, and a legal discussion on the scope and meaning of IHL, human rights law, and criminal responsibility, as well as the respective responsibilities of states and non-state actors. The mechanisms often make determinations of the applicable law with respect to the factual circumstances they are mandated to investigate. For instance, they decide on the classification of situations as being international armed conflicts (IACs) or non-international armed conflicts (NIACs), or not armed conflicts at all; identify which IHL rules apply (where there is an armed conflict); and set out the scope of the legal norms at issue. In other words, they engage in discussion of whether particular acts amount to violations of IHL or IHRL. Most importantly, they can also lead to prosecutions under international criminal law and/or result in UN Security Council resolutions.

Other actors

The views of civil society and advocates who focus on the protection of children and of education do not constitute international law. However, their opinions and actions certainly contribute to shaping the content and interpretation of the law. In large part due to the activities of civil society and academia at national and international levels, the issue of attacks on education and education in emergency situations has been steadily integrated in the agenda of the international community. Many UN human rights mechanisms have been able to formulate their views, concerns, and recommendations on the basis of NGO reporting. In the context of treaty reporting under human rights treaties, where a state party fails to provide a comprehensive assessment of its performance under the relevant treaty, credible and reliable information from NGOs and international bodies provide the treaty bodies with additional material to diagnose the situation on the ground. While this report will not generally discuss details of NGO reporting on attacks on education, specific instances where their contributions have fed into the assessment by the UN human rights bodies are included in the relevant analysis.

83 Report of the Special Rapporteur on the right to education, Vernor Muñoz, 'Right to Education in Emergency Situations', UN doc. A/HRC/8/10 20 May 2008, §69.

84 *Ibid.*, §145.

85 Human Rights Council Resolution 8/4 on the right to education, §7(p).

86 G. Golay, C. Mahon, and I. Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights', *op. cit.*, p. 300. See further Chapter 2 of this report.

ARMED CONFLICTS AND SITUATIONS OF INSECURITY

The contextual scope of this study is broad. Armed conflicts and other situations of insecurity encompass a large spectrum of situations, ranging from mere civil unrest or protest, which can involve armed violence, and other forms of internal disturbances and tensions, to higher levels of violence amounting to an armed conflict. From a legal point of view, the relevant indicia to define armed conflict are found in IHL, which establishes a distinction between the two categories: IAC and NIAC.⁸⁷ The existence of a situation amounting to an armed conflict is considered a precondition for the general application of IHL, and criteria are supposed to make it largely an objective determination, not one left to the opinion of concerned states on the matter.

The term ‘armed conflict’, which is neither defined in the four 1949 Geneva Conventions nor in their two 1977 Additional Protocols,⁸⁸ was defined by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* decision which held that ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’⁸⁹ However, other situations of armed violence do not have a meaning fixed by any source of positive international law. The 1977 Additional Protocol II refers to ‘internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’, as not being armed conflicts.⁹⁰ These situations would include, for instance, large-scale arrests of people for their activities or opinions, suspension of fundamental judicial guarantees, or ill-treatment.⁹¹ As such, these situations are not *per se* a technical characterization.⁹²

87 The pertinence of the different categories of armed conflict has been criticized by some scholars. See, e.g., J. Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict’, *IRRC*, Vol. 85, No. 850 (2003), pp. 313–50; See also R. Kolb, *Ius in bello. Le droit international des conflits armés*, 2003, pp. 71 et seq.

88 IHL treaties do not set out in detail the elements necessary to determine that a situation has reached the threshold of a NIAC.

89 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadic*, (Appeals Chamber) (Case No. IT-94-1-A72), 2 October 1995, §70. A similar definition was adopted by the ILC in Article 2 of its Draft articles on the effects of armed conflicts on treaties, 2011. As the ILC Commentary explains, the words ‘or between such groups within a State’ were left out in the definition since draft articles apply only to situations involving at least one state party to the treaty. Adopted by the ILC at its sixty-third session, in 2011, and submitted to the UN General Assembly as a part of the Commission’s report covering the work of that session ([UN doc.] A/66/10, §100), Article 2, §4. See also the different definition adopted by the Institute of International Law (IIL), where the term ‘armed conflict’ is held to mean ‘a state of war or an international conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.’ (Article 1). 1985 IIL Resolution on ‘The Effects of Armed Conflicts on Treaties’, adopted on 28 August 1985, Session of Helsinki, 1985.

90 Additional Protocol II, Article 1(2). This is equally valid for Common Article 3.

91 C. Pilloud et al. (eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, §4474. On the one hand, internal disturbance involves situations when the state uses armed force to maintain order within its territory and where violence has not degenerated into an ‘open struggle’ between the authorities in power and ‘more or less’ organized groups. On the other hand, internal tensions are said to include political, religious, racial, social, and economic tensions that may require force as a preventive measure to maintain respect for law and order. They are characterized, by large-scale arrests, suspension of fundamental judicial guarantees, ill-treatment, and disappearances. *Ibid.*, §4473–8.

92 The notion of ‘conflict’ remains open to diverse approaches and interpretations, found in other disciplines like the social sciences, international relations, or economics. It is not the purpose here to engage into discussion on the different classifications of conflict according to different variables. In social sciences, international relations, or economics different and at times overlapping definitions are adopted that do not necessarily coincide with international humanitarian law. The World Bank uses a definition of conflict, which is based on battle-deaths per year: ‘Under this methodology, events resulting in more than 25 battle-deaths per year are defined as minor conflicts. Events resulting in more than 1,000 battle-deaths are defined as major conflicts. Research such as the Armed Conflict Database also differentiates between international conflicts, intrastate conflicts (civil wars) and one-sided violence by state and non-state actors. Under political science, “conflict” can be defined as being an internal conflict with at least 1000 combatant-related deaths per year due to national government or military action.’ World Bank Report, ‘Conflict, Security, and Development’, *World Development Report 2011*. See also International Peace Research Institute of Oslo (PRIO) and Uppsala University’s Armed Conflict Database.

The point here is that circumstances of actual or potential violence may present a number of legal challenges to the application and implementation of human rights law and socio-economic rights obligations more specifically. It is not 'armed conflict' understood as a threshold that matters so much as the circumstances related to it that are wide and diverse, where the various actions and security measures undertaken by a state can affect the enjoyment of the ESC rights generally, and the right to education in particular.

2

Protection of Education as a Human Rights Issue

Identifying and defining the components of the right to education is critical if that right is to be effectively respected, protected, and fulfilled in the context of armed conflict and situations of insecurity. This means identifying not only obstacles to the realization of the right to education in such situations but also existing and possible forms of violation. This is also, of course, essential background to analysis of the practice of UN human rights mechanisms, broadly defined.

EDUCATION AS A HUMAN RIGHT: SUBSTANTIVE TREATY OBLIGATIONS

This chapter examines the nature of the right to education and also states' general obligations to respect, protect, and fulfil ESC rights. It reviews the content of Article 2(1) of the ICESCR, which calls for progressive realization of ESC rights.⁹³ Naturally, the existing legal framework regarding ESC rights in general, and the right to education in particular, has been the subject of considerable comment, from academia, institutions, and states.

This report sets out the principal parameters of the right, situating it within the broader discourse on the nature and implications of ESC rights. At the same time, we compare and contrast general understandings with the practice of UN human rights bodies examined. We do not go into the specifics of how UN monitoring mechanisms have treated 'attacks' on education, which are discussed in subsequent chapters, but describe important elements raised by expert bodies in the context of insecurity and armed conflict.

In detailing the content of the right to education the focus is primarily on the ICESCR as a source, since this treaty guarantees the right to education for *all individuals*. The treaties addressing rights of particular groups such as the CRC, CEDAW, and CERD all contain substantive provisions and important statements on the right to education of children, women, and other groups. For reasons of space, references to these treaties are made only where there is a distinct normative content that relates to education, and where the relevant treaty bodies have detailed particular aspects of the right in situations of insecurity and armed conflict. Furthermore, a wide spectrum of other instruments underpin the right to education or have a bearing on it, ranging from universal and regional instruments to political declarations, global non-binding commitments, and other soft law instruments. This network of instruments, important as they are, will not be discussed in any detail.

The concept of education under human rights treaties

In the introduction we enquired into the precise meaning of the term 'attack on education'. This term is not found in international law. Accordingly, we start by defining the term education, particularly as it is understood in human rights treaties.

⁹³ 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

In fact, there is a perception that human rights treaties define education narrowly, confining it to *formal instruction* or *teaching* as the basis for what is protected by the right to education.⁹⁴ This understanding is based on the definition of education found in the 1960 UNESCO Convention against Discrimination in Education, which defines education as ‘all types and levels of education, access to education, the standard and quality of education, and the conditions under which it is given’. All the elements of this definition can be found in one interpretation of the right to education.⁹⁵ It is, therefore, often presumed that ‘the type of education that is protected under most international, regional and national laws is *formal* instruction at the primary, secondary, vocational and tertiary levels’.⁹⁶ Consequently, education construed as *institutions and processes of formal instructions at different levels* would seem to constitute the subject of protection by the right to education.⁹⁷ The right *to* education; the rights *in* education; and the rights *through* education is one of the ways in which Articles 28 and 29 of the CRC have been categorized.

That said, from a human rights law point of view, the case for a more expansive definition of *forms* of education protected by human rights treaties can be made. More specifically, human rights treaties leave references to the *aims* and *objectives* of education fairly broad and very much in line with the spirit of a comprehensive definition of education. Article 26(2) of the 1948 Universal Declaration of Human Rights (UDHR) and Article 13(1) of the ICESCR stipulate that ‘education shall be directed to the *full development* of the human personality’.⁹⁸ Article 29 of the CRC provides an even more elaborate bearing on the aims of education, i.e. the ‘development of the child’s personality, talents and mental and physical abilities to their fullest potential’. In addition, the ESCR Committee and the CRC Committee have clarified in their practice that the right to education encompasses both pre-school and non-formal education.⁹⁹

Likewise, the ESCR Committee states that ‘[w]hen considering the appropriate application of these [e.g. availability, acceptability, accessibility, and adaptability] “interrelated and essential features” the best interests of the student shall be a primary consideration’.¹⁰⁰ Thus, ‘the best interest of the student’ principle serves as a tool to determine even the content and form of education that meets an individual’s needs. In light of the foregoing, it is possible to conclude that human rights law does not prescribe a fixed content and forms of education; rather the notion of education as prescribed in the ICESCR and the CRC is open-ended and oriented first and foremost towards the *full development* of the human person.¹⁰¹ As the ESCR Committee explains, ‘education has to be flexible so it can

94 J. Bourke Martignoni, *Echoes from a Distant Shore: The Right to Education in International Development: With Special Reference to the Role of the World Bank*, Schulthess, 2012, p. 42. See also European Court of Human Rights (ECtHR), *Campbell and Cosans v. UK*, where the Court, applying Article 2 of the First Protocol to the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), drew a distinction between instruction and broader notion of ‘education’, which refers to ‘the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.’ ECtHR, *Campbell and Cosans v. UK*, Judgment (Merits), Series A, Vol. 48 (1982), §33.

95 General Comment No. 13, ‘The right to education (Article 13)’, UN doc. E/C.12/1999/10, 8 December 1999; General Comment No. 14, ‘The right to the highest attainable standard of health (Article 12)’, UN doc. E/C.12/2000/4, 11 August 2000.

96 J. Bourke Martignoni, *Echoes from a Distant Shore: The Right to Education in International Development*, op. cit., p. 42.

97 *Ibid.*

98 Emphasis added.

99 ESCR Committee, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, UN doc. E/1995/22, §276; CRC, General Comment No. 7, ‘Implementing Child Rights in Early Childhood’, UN doc. CRC/C/GC/7/Rev.1, 2005, §30. See CRC, Day of General Discussion on the Right of the Child to Education in Emergency Situations: Recommendations, 49th Session, 19 September 2008, §19.

100 ESCR Committee, General Comment No. 13, ‘The Right to Education’, UN doc. E/C.12/1999/10, §7.

101 See K. D. Bieter, *The Protection of the Right to Education by International Law*, Martinus Nijhoff, Leiden, 2006, pp. 460–3.

adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.¹⁰²

The question of the definition of *form* and *content* of education may have a bearing on the practical issues on the ground. It becomes vital, for example, to determine *what* is protected in times of armed conflict: formal instruction or all types of education such as pre-school education and adult learning (defined as fundamental education in the ICESCR)¹⁰³, including facilities that are designed for the education of adults. And if it is only the formal process of instruction that is implicated, is it only schools or all education facilities which are/or need be protected?

Despite the lack of a specific definition, the diversity of form and content of education is confirmed by the practice of human rights bodies. Human rights bodies monitor non-formal forms of education¹⁰⁴ and also alternative forms and measures designed to meet the needs of students in the context of insecurity and armed conflict. The CRC Committee, for instance, has recommended that a Government ensure that 'children affected by the conflict can be reintegrated into the education system, including through non-formal education programmes and by prioritizing the restoration of school[s]'.¹⁰⁵ Along similar lines, the CEDAW Committee has suggested that the reporting state '[i]dentify measures to reduce and prevent dropouts among girls, and consider developing accredited non-formal education programmes for girls who drop out'.¹⁰⁶ As a general trend, states do often report on measures they have taken to ensure that education is provided even in times of armed conflict.¹⁰⁷

102 ESCR Committee, General Comment No. 13, §6(d). See also the CRC Committee's General Comment identifying the aims of education: 'The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. "Education" in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.' CRC Committee, General Comment No. 1, 'The Aims of Education', UN doc. CRC/GC/2001/1, 17 April 2001, §2.

103 Article 13(2)(d) of the ICESCR; CESCR, General Comment No. 13: 'The Right to Education (Art. 13)', UN doc. E/C.12/1999/10, 8 December 1999, §§21–4.

104 States are required to provide data on the enrolment of students. CRC Committee, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child, (Adopted by the Committee at its fifty-fifth session (13 September–1 October 2010 2010), Guidelines on the inclusion of statistical information and data in periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention', §22(f). CEDAW Committee, 'List of Issues raised in relation to the fifth periodic report: Israel', UN doc. CEDAW/C/ISR/Q/5, 14 September 2010, §35. See also Annual Report of the Special Representative of the Secretary-General on Children and Armed Conflict, UN doc. A/67/256, 6 August 2012, §50; and Report of the Special Representative of the Secretary-General on Children and Armed Conflict to the Human Rights Council, UN doc. A/HRC/21/38, 28 June 2012, §46.

105 CRC Committee, 'Concluding Observations: Myanmar', UN doc. CRC/C/MMR/CO/3-4, 14 March 2012, §84.

106 CEDAW Committee, 'Concluding observations: Chad', UN doc. CEDAW/C/TCD/CO/1-4, 4 November 2011, §31.

107 See, e.g., Sri Lanka report to the CRC Committee, where the Government reported that it 'has taken measures to ensure that children affected by conflict are not denied their right to education throughout the entire period of the conflict. Non-formal and "catch-up" education programmes have also been conducted.' CRC Committee, 'Third and fourth Periodic Reports: Sri Lanka', UN doc. CRC/C/LKA/3-4, 20 January 2010, §§352, 354; CRC Committee, 'Initial Report/OPAC: Sri Lanka', UN doc. CRC/C/OPAC/LKA/1, 15 February 2010, §56, where the reporting state informed the Committee that it was undertaking, together with the ILO IPEC, 'formal centre-based training, informal rural skills training at the community level, mobile training, placement in apprenticeships and on-the-job-training. Simultaneously, children were also exposed to life skills training, provided with vocational and career guidance, and business start-up knowledge to enable them to explore their potential for self-employment and entrepreneurial business opportunities.' Sudan was asked by the CRC Committee to 'include information of any preventive measures taken to address the social and other reasons which render certain children in the State party vulnerable to recruitment by armed groups', and as a consequence the reporting state included a number of educational measures. See CRC Committee, 'Written replies by the Government of the Sudan concerning the list of issues (CRC/C/OPAC/SDN/Q/1) related to the consideration of the initial report of the Sudan under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC/C/OPAC/SDN/1)', UN doc. CRC/C/OPAC/SDN/Q/1/Add.1, 24 August 2010, §9(d). Other examples: CRC Committee, 'Initial report: Afghanistan', UN doc. CRC/C/AFG/1, 13 June 2010, §53. CEDAW Committee, 'Responses to the list of issues and questions: Chad', UN doc. CEDAW/C/TCD/Q/4/Add.1, 15 September 2010, §79.

General aspects of obligations under the ICESCR

The right to education is linked with Article 2(1) of the ICESCR, which determines the nature of state obligations to realize the rights set out under the treaty. This provision states that:

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

While this provision sets out the general obligation of progressive achievement, the ESCR Committee and scholars have pointed out that not every aspect of a particular right is subject to the progressive qualifier. The state has a continuous general obligation to realize the right to education, which has to be discharged through a series of specific obligations that are of a varying nature. A right can thus be translated into a series of obligations, some of which are of an immediate nature while others are of progressive nature.¹⁰⁸ The Committee, in its general comment on the nature of state party obligations, gave an indicative list of the provisions ‘capable of immediate application by judicial and other organs in many national legal systems’.¹⁰⁹ These include Article 10(3) on the obligation to take special measures of protection and assistance on behalf of children and young persons; Article 13(2)(a) on the provision of free and compulsory primary education to all; and Article 13(3) on the freedom of parents to choose the type of education for their children.¹¹⁰

These obligations continue to apply even in times of economic crisis or in situations of armed conflict. It is, though, necessary to note a number of caveats regarding the immediacy of application of these provisions. For instance, the immediate application of the right to free primary education depends on whether an educational system with infrastructure, equipment, and resources pre-existed, but such a system may not, or no longer, be available in a situation of armed conflict.¹¹¹ In such a case, states would arguably have the immediate positive duty to ensure the educational system is maintained and improved, and, if and when it is attacked, repaired as soon as possible in light of the reasonableness standard.¹¹²

Although certain provisions have been identified as being of immediate application, the obligation ‘to take steps’ has been interpreted as imposing obligations of immediate effect to take deliberate and targeted steps and use all

108 A consensus opinion on provisions capable of immediate application and enforcement by judicial and other organs in many domestic legal systems include the absolute guarantee against non-discrimination set forth in Article 2(2); and the principle of equality between women and men (Article 3).

109 ESCR Committee, General Comment No. 3, ‘The Nature of States Parties Obligations’, UN doc. E/1991/23, 14 December 1990, at §5.

110 Reference is made to their self-executing nature. Klerk, for example, argues that even in times of economic crisis, ‘the introduction or the continuation of discriminatory practices can never be ‘compatible with the nature of these rights.’ Y. Klerk, ‘Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol. 9 (1987), p. 263. See M. Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development*, Clarendon Press, Oxford, 1998, pp. 181–2 and 192–3. See, further, A. R. Chapman and S. Russell, ‘Introduction’ in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002, p. 5; ESCR Committee, General Comment No. 3, *op. cit.*, §5.

111 In recognition of this reality, the Committee stated the following in its General Comment No. 11 concerning the implementation of the requirements of Article 13(2)(a): ‘The plan of action must be aimed at securing the *progressive implementation* of the right to compulsory primary education, free of charge.’ (Emphasis added.)

112 See the discussion on Sri Lanka by the CRC Committee in Chapter IV of the present report (The right to education in armed conflict and situations of insecurity: the practice of UN human rights bodies). See also UNESCO, *Protecting Education from Attack: A State-of-the-Art Review*, UNESCO, 2010, p. 165. Noteworthy is that the Optional Protocol to the ICESCR is the first complaints mechanism to specify the standard of reasonableness to be used in the evaluation of alleged violations. See Article 8(4), OP ICESCR. On the reasonableness concept, see, e.g., S. Liebenberg, ‘Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review’, in J. Squires, M. Langford, B. Thiele, *The Road To A Remedy. Current Issues in the Litigation of Economic, Social and Cultural Rights*, UNSW Press, Sydney, 2005, pp. 73–88.

appropriate means.¹¹³ These include, among others, legislative measures such as the incorporation of the ICESCR into domestic law and provision of judicial remedies. But it also includes other means such as administrative, financial, educational, or social measures.¹¹⁴ For instance, adopting and implementing a national strategy and plan of action in the field of education can be related to the immediate obligation to ‘take steps’.¹¹⁵ Arguably, this extends also to the prohibition on discrimination and other negative obligations of the state (i.e. not to interfere with education).

The differentiated approach with regards to the implementation of the right to education is stipulated by Article 13(2) of the ICESCR. While Article 13(2)(a) stipulates that ‘primary education shall be compulsory and available free for all’, paragraphs 2(b) and (c), in relation to the secondary and higher education, stipulate that these forms of education ‘shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education’, which is an expression of a progressive nature of the obligations incumbent upon states.

As noted by Bourke Martignoni, ‘drafters of the provision were pragmatic enough to acknowledge that material and non-material resources, as well as the socio-economic context, play a crucial role in the implementation of the right to education’.¹¹⁶ Nonetheless, states are required to move as expeditiously as possible towards the realization of the right.¹¹⁷ In so doing, generally the ICESCR does not accept any measure that may imply a step back in the enjoyment of ESC rights.¹¹⁸ The ESCR Committee has coined the term ‘retrogressive measures’ to refer to certain state practices that undermine the protection afforded by the Covenant.¹¹⁹ As a general rule, any adoption of deliberately retrogressive measures through the direct action of states (or other entities insufficiently regulated by states) and that affect any ESC rights would likely violate the ICESCR.¹²⁰ Thus, a failure of a state to ‘take steps’ to implement the right to education as well as any retrogressive measures (be it in terms of resource allocation or implementation of other measures to ensure its realization) can be considered *prima facie* a violation. The Report of the UN Fact-Finding Mission on the Gaza Conflict assessed the various negative effects of restrictions imposed by the blockade on the right to education, such as decline in attendance and performance at public schools caused, *inter alia*, by lack of teaching material and equipment. It found that the occupying power, the State of Israel, was in violation of its obligation under the ICESCR, including the obligation not to take deliberately retrogressive measures.¹²¹

113 ESCR Committee, General Comment No. 3, *op. cit.*, §2.

114 *Ibid.*, §§3 and 5–7.

115 See, e.g., ICESCR, Article 14.

116 J. Bourke Martignoni, *Echoes from a Distant Shore: The Right to Education in International Development*, *op. cit.*, p. 53.

117 See the Limburg Principles on the Implementation of the ICESCR, June 1986, §21. As the ESCR Committee explains, the notion of progressive realization is ‘recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time [...] reflecting the realities of the real world and the difficulties involved for any country in ensuring [their] full realization.’ ESCR Committee, General Comment No. 3, *op. cit.*, §9.

118 *Ibid.*

119 The notion is derived originally from General Comment No. 3, which emphasizes that any such measures ‘would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.’ ESCR Committee, General Comment No. 3, *op. cit.*, §9; ESCR Committee, General Comment No. 13, ‘The Right to Education’, *op. cit.*, 1999, §45; ESCR Committee, General Comment No. 14, ‘The Right to the Highest Attainable Standard of Health’, *op. cit.*, §32; ESCR Committee, General Comment No. 15, ‘The Right to Water’, 2002, §19; ESCR Committee, General Comment No. 19, ‘The Right to Social Security’, 2008 §42. For guidance on the meaning of retrogressive measures see ESCR Committee, General Comment No. 4, ‘The Right to Adequate Housing’, 1991, §11.

120 See, e.g., Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997.

121 Report of the UN Fact-Finding Mission on the Gaza Conflict, UN doc. A/HRC/12/48, 25 September 2009, §1268. See the details in the discussion of the practice of Fact-Finding Missions and Commissions of Inquiry in Chapter 4 of the present report.

It should be noted that there is little guidance from the ESCR Committee on how expeditious and effective the obligation of progressive achievement should be. In this respect, ongoing developments concern the elaboration of indicators and benchmarks as a means of monitoring and evaluating specific state obligations.¹²² In detailing the core obligations in relation to substantive rights, the ESCR Committee has started calling upon states parties to identify appropriate and pragmatic indicators and benchmarks.¹²³ There is also a need to further explore the implications of these indicators in insecurity and armed conflict contexts.

Minimum core obligations related to the right to education

Another set of immediate obligations concerns the *minimum core content* of the right to education protected under the ICESCR. This minimum core content is an ‘intangible nucleus’ that is of immediate application.¹²⁴ This provision creates a fundamental minimum level of obligations that includes the negative duty of states not to arbitrarily interfere with the exercise by individuals of their human rights.

Over the years, the Committee has attempted to identify this minimum core by referring, for instance, to the most basic forms of education. Reference was made to the ‘non-derogable’ nature of the minimum core.¹²⁵ While the Committee occasionally states that non-compliance with core obligations — considered as ‘non-derogable’ — cannot be justified ‘under any circumstances’¹²⁶, it nonetheless asserts that ‘any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned’.¹²⁷ This interpretation to take into account the resources of the state is in line with the text of Article 2(1), ICESCR on the progressive implementation of ESC rights.

With regard to the right to education, the ESCR Committee has specified that the minimum core content would include ‘the most basic forms of education’.¹²⁸ The issue is: what is included in this notion? Scholars have sought to offer a response.¹²⁹ Agreement seems to coalesce around the following dimensions as constituting the most basic forms of education: the right to **receive** education, the right **freely to choose appropriate forms** of education; and the right of **equal access** to education.¹³⁰ In paragraph 57 of its General Comment, the ESCR Committee generally endorsed these parameters, defining the core content of the right to education in the following terms:

In its General Comment 3, the Committee confirmed that States parties have ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels’ of each of the rights enunciated in the Covenant, including ‘the most basic forms of education’. In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to

122 On indicators and benchmarks, see generally E. Riedel, ‘New Bearings to the State Reporting Procedure: Practical Ways to Operationalize Economic, Social and Cultural Rights, the Example of the Right to Health’, in S. von Schorlemer (ed.), *Praxishandbuch UNO*, Springer, Heidelberg, 2003, pp. 345–58.

123 This interaction between an internationally defined minimum core content developed by the ESCR Committee, with a pragmatic minimum threshold to be defined at the national level, is an attempt to provide a basis for quantitative clarification of states parties’ obligations. See ESCR Committee, General Comment No. 14, *op. cit.*, §57.

124 ESCR Committee, ‘General Discussion Day: The Right to Education (Articles 13 and 14 of the Covenant)’, UN doc. E/C.12/1998/SR.49, 2 December 1998, §54.

125 ESCR Committee, General Comment No. 14, *op. cit.*, §47; General Comment No. 15, *op. cit.*, §40; ESCR Committee, *Poverty and the ICESCR: Statement by the Committee to the Third United Nations Conference on Least Developed Countries*, *op. cit.*, §§16 and 18.

126 ESCR Committee, General Comment No. 14, *op. cit.*, §47; ESCR Committee, General Comment No. 15, *op. cit.*, §37.

127 ESCR Committee, General Comment No. 3, *op. cit.*, §10. Compare, for instance, Principles 25 and 28 of the 1997 Maastricht Guidelines, *op. cit.*

128 *Ibid.*, §10.

129 The early example is the piece by F. Coomans: *Identifying the Key Elements of the Right to Education: A Focus on Its Core Content*, 1998. See also K. D. Bieter, *The Protection of the Right to Education by International Law*, *op. cit.*

130 See, e.g., ESCR Committee, ‘General Discussion Day: The Right to Education (Articles 13 and 14 of the Covenant)’, UN doc. E/C.12/1998/SR.49, 2 December 1998.

provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with ‘minimum educational standards’ (art. 13(3) and (4)).¹³¹

States have the primary obligation to guarantee education, even if they lack the necessary capacity to do so.¹³² In situations of considerable difficulty, such as armed conflict (and in certain situations coupled with poverty, as is the case in Afghanistan or DR Congo) a heavy onus still falls on the state to demonstrate that every effort has been made to use all resources at its disposition to satisfy minimum core obligations, including through international cooperation and assistance.¹³³ The CRC Committee, for example, considering the state party report of the DR Congo, urged the Government ‘to ensure that children complete their compulsory schooling, taking concrete action to address the reasons behind non-completion of schooling, including, *inter alia*, persisting zones of insecurity, displacement of families, lack of transport, destruction of school infrastructures and poverty’.¹³⁴

STRUCTURAL REQUIREMENTS OF THE RIGHT TO EDUCATION

Maximum available resources

The obligation to devote ‘maximum available resources’ to ESC rights is one of the most difficult and ambiguous aspects of the ICESCR. The use of resources is one of the principal means for a state to fulfil its obligation to progressively realize ESC rights.¹³⁵ Generally, the ESCR Committee, respecting the autonomy of states on these issues,¹³⁶ has refrained from delineating the precise scope of what are the ‘maximum available resources’. Academic commentators have similarly not (or not yet) agreed on a coherent and clear conceptual framework on how to address the economic determinants of the obligations.

Therefore, there is no settled view on whether the phrase ‘maximum available resources’ connotes the broad economic capacity of the state or is limited to resources *per se* as traditionally understood by academics, and even to a narrow notion of ‘budgetary allocations’. The predominant view is that resources are to be understood as meaning government spending.¹³⁷ There is a view among commentators that available resources should be read broadly so as to include the economic capacity of the state measured by macro-economic parameters: ‘or (top of page 24) or legal provisions protecting these rights [ESC rights] to be truly effective a pre-existing foundation of effective socio-economic management and inclusive economic expansion is required’.¹³⁸

131 ESCR Committee, General Comment No. 13, ‘The Right to Education’, 1999, §57. See also CRC Committee, Day of General Discussion on the Right of the Child to Education in Emergency Situations: Recommendations, 49th Session, 19 September 2008, where the Committee confirmed that provision of basic education forms part of the immediate obligations.

132 Report of the Special Rapporteur on the right to education, Vernor Muñoz, ‘Right to Education in Emergency Situations’, UN doc. A/HRC/8/10, 20 May 2008.

133 ESCR Committee, General Comment No. 3, *op. cit.*, §10; ESCR Committee, General Comment No. 12, *op. cit.*, §17.

134 CRC Committee, ‘Concluding Observations: DRC’, UN doc. CRC/C/COD/CO/2, 10 February 2009, §67.

135 However, civil and political rights also require positive and sometimes very costly measures, such as the rights to a fair trial or to free and fair elections.

136 ESCR Committee, ‘Statement on “An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ under An Optional protocol to the Covenant”’, E/C.12/2007/1, 10 May 1997, §2.

137 P. Alston and G. Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol. 9 (1987), p. 181; M. Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development*, *op. cit.*, pp. 136–44.

138 M. Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural rights: Assessing the Economic Deficit*, Martinus Nijhoff, Leiden, 2004, pp. 7, 47–8. However, Alston and Quinn many years ago raised the central issue that ‘[i]t is the state of a country’s economy that most vitally determines the level of its obligations’ and this gives an understanding of ‘state’s abilities and from this may be determined the threshold it must meet in discharging its obligations’ without though further developing the issue. P. Alston and G. Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’, *op. cit.*, p. 177.

The issue of economic contingency of rights becomes even more relevant in the context of insecurity and armed conflict. An example of the importance of macro factors such as the state of the economy in implementation of socio-economic rights can be seen in the armed conflict in Syria, which has had a severe deterioration and regression in levels of realization of ESC rights. According to the report of the Commission of Inquiry:

The crisis precipitated a rapid decline in the State's economy. It has exacerbated pre-existing levels of poverty and unemployment driven by a decade-long drought in rural agricultural areas, which led to the displacement of farmers to cities.... According to the International Monetary Fund, the economy of the Syrian Arab Republic will contract significantly in 2012, primarily because of sanctions. The sharp drop in economic growth has been accompanied by alarming indicators, such as the devaluation of the Syrian pound, which has lost 30 per cent of its value since the onset of events, and inflation that soared to over 50 per cent....¹³⁹

In its February 2013 report, the Commission of Inquiry's assessment of the situation was particularly grim: 'the conflict has wrought havoc on the economic, social and cultural rights of Syrians. The destruction of infrastructure, housing, medical facilities, schools, power and water utilities exacerbates pre-existing hardships, pushing whole communities to the brink of collapse.'¹⁴⁰

Factors in and impediments to compliance by states with their obligations

Although Article 2(1) of the ICESCR recognizes the economic contingency of ESC rights, it puts more emphasis on the material capacity of the state than on a large spectrum of other negative and positive factors of an internal and external nature that would impact the capacity of the state to comply with its obligations. That said, a series of factors have been elaborated by the ESCR Committee to assess a state's level of compliance with its obligation to take steps to the maximum of available resources when the Committee examines future communications (under the Optional Protocol) concerning this general obligation of progressive realization. These factors include:

- a. The state's *level of development*;
- b. The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
- c. The state's *current economic situation*, in particular whether it was in a period of economic recession;
- d. The existence of other serious claims on the state party's limited resources; for example, resulting from a recent natural disaster or *from recent internal or international armed conflict*;
- e. Whether the state party had sought to identify low-cost options; and
- f. Whether the state party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.¹⁴¹

¹³⁹ Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/21/50, 16 August 2012, §§32, 34.

¹⁴⁰ Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/22/59, 5 February 2013, pp. 8, 42.

¹⁴¹ ESCR Committee, Statement on 'An Evaluation of the Obligations 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, §10. (Emphasis added.)

In most cases, all such *internal and external* factors are relevant for conflict-affected states. The point here is that armed conflicts have many overall effects on a nation far beyond the area surrounding the actual conduct of hostilities or other armed violence. And the majority of the states in armed conflict are not developed states, but low-income countries with already difficult economic situations. The fact that deprivation and other indirect causes kill more civilians than combat does, for instance in conflicts in Afghanistan, DR Congo, or Sudan (Darfur), has been well documented.¹⁴²

Existing political science and economic literature fundamentally agree that conflict retards economic growth and development in a variety of ways.¹⁴³ This is not limited to internal armed conflict and other situations of armed violence; occupation by a foreign state also impedes the necessary conditions for the realization of ESC rights.¹⁴⁴ Thus, depending on the situation, armed conflict may mean economic and social crisis, implying that available resources might be minimal.

This raises important questions as to what ESC rights obligations realistically mean in such situations, and whether the ESCR Committee can meaningfully contribute to such understanding, beyond the simple acknowledgment of ‘factors and difficulties’ impeding the implementation of the Covenant.¹⁴⁵ In line with its constructive dialogue with states parties, the ESCR Committee has recognized the adverse impact of conflict situations on the state’s ability to fulfil its obligations under the Covenant and has often used terms such as ‘obstacle’ or ‘impediment’. The Committee on the Rights of the Child similarly made the following observations on Pakistan:

The Committee recognizes the difficulties facing the State party, namely serious economic challenges due to soaring increases in food and oil prices and inflationary pressures, catastrophic drought conditions and natural disasters hampering the economy and threatening the right to survival and development of the child, the armed conflict and terrorist activities that are taking place in some regions and have displaced large populations, and the high number of refugees hosted by the State party, which all seriously impede progress towards full realization of children’s rights enshrined in the Convention.¹⁴⁶

In principle, even when public order cannot be restored and when available resources are demonstrably inadequate, the burden of proof falls on the state to prove that it has done everything it can to comply with its obligations. Human rights treaties are binding international instruments and states parties must perform their obligations in good faith. As the ESCR Committee has stated,

142 According to a 2010 UN report, poverty deprives two-thirds of the Afghan population from living a decent and dignified life: this includes the inability to enjoy their most basic and fundamental rights, such as getting an education or having access to health services. Some 9 million Afghans — 36% of the population — are believed to live in absolute poverty and a further 37% live only slightly above the poverty line, despite an estimated injection of some \$35 billion during the period 2002–9. OHCHR, *Human Rights Dimension of Poverty in Afghanistan*, Kabul, March 2010, p. 2.

143 P. Collier & A. Hoeffler, ‘On economic causes of civil war’, *Oxford Economic Papers*, Vol. 50, No. 4 (1998), pp. 563–73; J. Murdoch & T. Sandler, ‘Economic Growth, Civil Wars, and Spatial Spillovers’, *Journal of Conflict Resolution*, Vol. 46 (2002), pp. 91–110. K. Ballentine & J. Sherman (eds.), *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, Lynne Rienner, Boulder, pp. 259–83.

144 G. Giacca, *Economic, Social and Cultural Rights in Armed Conflict and other Situations of Armed Violence*, PhD thesis, IHEID, Geneva, Chapter IV.

145 ESCR Committee, ‘Concluding Observations: Nepal’, UN doc. E/C.12/NPL/CO/2, 16 January 2008, §10: ‘The Committee takes note that the State party’s efforts to comply with some of its obligations under the Covenant are impeded by the consequences of the divisive and violent conflict, namely a large numbers of victims and families of victims, a large numbers of displaced persons, and a severely damaged physical infrastructure that hinders the mobility of persons, goods and essential public services.’

146 CRC Committee, ‘Concluding observations: Pakistan’, UN doc. CRC/C/PAK/CO/4, 15 October 2009, §5.

it is precisely in situations of crisis, that the Covenant requires the protection and promotion of all economic, social and cultural rights, in particular of the most marginalized and disadvantaged groups of the society, to the best of its ability under the prevailing adverse conditions.¹⁴⁷

Despite an inevitable level of abstraction of the minimum standard, Kälin noted that armed conflict may indeed reduce available resources so that the guarantees of the ICESCR may only apply ‘to a limited extent’, but these must not, without proper justification, fall below the minimum core.¹⁴⁸

SPECIFIC OBLIGATIONS OF STATES REGARDING THE RIGHT TO EDUCATION

The implication of the distinction between immediate obligations and obligations of progressive realization can usefully be examined within the tripartite typology of obligations to respect, to protect, and to fulfil. This conceptual framework has developed based on recognition that all human rights impose these three types of obligation on states.¹⁴⁹ It has entered the doctrine of human rights law in general, and helps to demonstrate that ESC rights are not only justiciable in the way civil and political rights are, but also that they can be operationalized in all contexts, including insecurity and armed conflict.

The ESCR Committee initially adopted the typology of obligations of conduct and result, following the ILC’s work on the issue.¹⁵⁰ It has, though, subsequently preferred the tripartite typology of respect, protect, and fulfil as a more useful framework with which to develop and clarify the content of states’ human rights obligations. At this point, it is useful to indicate the relationship between the respect, protect and fulfil framework with the discussions on due diligence in the framework of the present topic.

In international law, due diligence concerning acts that impact on other states is a general principle of law, although practice has developed more precise rules on due diligence in certain areas.¹⁵¹ Historically, due diligence had its

147 ESCR Committee, ‘Concluding Observations: Colombia’, UN doc. E/C.12/COL/CO/5, 21 May 2010, §7. In 2001, the ESCR Committee strongly recommended that Colombia ‘reduce inequality and put an end to conflict by political negotiation, which is the only way effectively to guarantee ESC rights of all citizens’. ESCR Committee, ‘Concluding Observations: Colombia’, UN doc. E/C.12/1/Add.74, 6 December 2001, §30.

148 ‘Report on the situation of human rights in Kuwait under Iraqi occupation, Walter Kälin’, UN Commission on Human Rights, UN doc. E/CN.4/1992/26, 16 January 1992, §52.

149 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *op. cit.*, §6, B. The typology finds its origins in the views espoused by Henry Shue, who distinguished between duties to ‘avoid depriving’; duties to ‘protect from deprivation’; and duties to ‘aid the deprived’. H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, Princeton University Press, Princeton, 1980. The typology was further developed within the framework of a study on the normative content of the right to adequate food by the former UN Special Rapporteur on the right to food, Asbjorn Eide. See Report of the Special Rapporteur on the right to adequate food as a human right, Asbjorn Eide, UN doc. C/CN.4/Sub.2/1987/23, 7 July 1987. ESCR Committee, General Comments No. 12: ‘The right to adequate food (Art. 11 of the Covenant)’, 1999; No. 13: ‘The right to education (Art. 13 of the Covenant)’, No. 15: ‘The right to water (Arts. 11 and 12 of the Covenant)’, 2002.

150 ESCR Committee, General Comment No. 3, ‘The Nature of State Parties Obligations’, UN doc. E/1991/23, 14 December 1990, §1.

151 The famous *Trail Smelter* Arbitral Decision held that states were not allowed ‘to use or permit the use of [their] territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.’ (*Trail Smelter Arbitration, United States v. Canada, UN Reports of International Arbitral Awards* (UNRIAA), 16 April 1938 and 11 March 1941, Vol. III, pp. 1905–82; or *American Journal of International Law*, Vol. 33 (1939), p. 182, and Vol. 35 (1941), p. 684.) In effect, the principle enshrined in *Trail Smelter* case and reaffirmed in the *Nuclear Weapons* Advisory Opinion as well as the Rio Declaration, is believed to have attained the status of customary law in the field of environmental protection. In its *Nuclear Weapons* Advisory Opinion, the ICJ reaffirmed the general obligation of States ‘to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.’ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, §29.

main bearing on the responsibility of states for the acts of private actors towards foreigners, which included preventive measures by the state when international law was breached by private persons. Thus, put differently, due diligence comprises duties of prevention. In simple terms, the function of due diligence in human rights analysis is now covered by the obligations of ‘respect’ and ‘protect’ and covers not only foreigners but also a state’s nationals as well as stateless persons.

The obligations of prevention in the field of human rights have been elaborated in more detail by the Human Rights Committee:

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.¹⁵²

The obligation of due diligence was extensively elaborated within the scope of the right to life, but also in relation to, *inter alia*, the prohibition of torture and inhuman and degrading treatment,¹⁵³ the rights to liberty and security of person,¹⁵⁴ the right to respect for private and family life, and the right to safe environment,¹⁵⁵ protection of children,¹⁵⁶ and the freedom of expression and of assembly.¹⁵⁷

The text of the ICESCR does not incorporate the general obligation to *ensure* all rights enshrined in the Covenant as is the case with the ICCPR. In contrast, the CRC and the CRPD encompass both civil and political rights and ESC rights and both instruments require states parties to ‘ensure’ the rights enshrined therein.¹⁵⁸ Notwithstanding the quality of ‘progressive realization’ attached to socio-economic rights generally, the ESCR Committee has iterated the obligations of prevention and protection in its interpretations of various rights.¹⁵⁹ Some examples of the Committee’s approach are discussed below under the obligation to protect the right to education.

¹⁵² Human Rights Committee, General Comment No. 31, §8; see also General Comment No. 6: ‘The Right to Life’, 1982, §§3–4.

¹⁵³ Examples of jurisprudence include: ECtHR, *Zet al. v. UK*, Judgment, 10 May 2001, §73; *Mahmut Kaya v. Turkey*, Judgment, 28 March 2000, §115; *Ilascu et al. v. Moldova and Russia*, Judgment, 8 July 2004, §§313, 331. From the case law of the Inter-American Court of Human Rights, examples include: *Velásquez Rodríguez v. Honduras*, Judgment, 29 July 1988, Ser. C, No. 4, §187; *Godínez Cruz v. Honduras*, Judgment, 20 January 1989, Ser. C, No. 5, §197; *Tibi v. Ecuador*, Judgment, 7 September 2004, Ser. C, No. 114, §§142–62; *The “Juvenile Reeducation Institute” v. Paraguay*, Judgment, 2 September 2004, Ser. C, No. 112, §§151 et seq.

¹⁵⁴ ECtHR, *Kurt v. Turkey*, Judgment, 25 May 1998; *Angelova v. Bulgaria*, Judgment, 13 June 2002; *Orhan v. Turkey*, Judgment, 18 June 2002; *Kurt v. Turkey*, Judgment, 25 May 1998, §124. Human Rights Committee, *Delgado Páez v. Colombia*, Decision (Comm. No. 195/1985), 12 July 1990, §5.5.

¹⁵⁵ ECtHR, *Powell and Rayner v. UK*, Judgment, 21 February 1990; *López Ostra v. Spain*, Judgment, 19 December 1994; *Hatton et al. v. UK*, Judgment, 2 October 2001, §97.

¹⁵⁶ Human Rights Committee, *Mónaco de Gallicchio v. Argentina*, Decision (Comm. No. 400/1990), 3 April 1995, §10.5; *Thomas v. Jamaica*, Decision (Comm. No. 800/1998), 8 April 1999, §6.6.

¹⁵⁷ ECtHR, *Özgür Gündem v. Turkey*, Judgment, 16 March 2000, §43; *Plattform “Ärzte für das Leben” v. Austria*, Judgment, 21 June 1988, §32.

¹⁵⁸ Article 1 of the CRPD states that the purpose of the Convention ‘is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.’

¹⁵⁹ E.g., ESCR Committee, General Comments No. 15, ‘The Right to Water’, UN doc. E/C.12/2002/11, 20 January 2003, §31; General Comment No. 12, ‘The Right to Adequate Food’, UN doc. E/CN.12/1999/5, 12 May 1999; and General Comment No. 14, ‘The Right to the Highest Attainable Standard of Health’, UN doc. E/C.12/2000/4, 11 August 2000, §39.

Obligation to *respect* the right to education

The obligation to *respect* the right to education is understood as an obligation to refrain from acts or omissions that directly or indirectly hinder enjoyment of the right.¹⁶⁰ For example, a state must respect the availability of education by not closing private schools. States are to abstain from infringing *the right of parents to freely choose the appropriate forms of education* for their children. Similarly, states parties to the relevant human rights treaties are under the obligation not to impede access to education. The obligation of respect is not simply a negative obligation it is also a positive one. To respect the right to education, abstention from acts is not sufficient; states are also positively required to ensure their activities do not have harmful effects on the right to education.

In the context of insecurity and armed conflict, an example of the obligation to respect would be to abstain from acts that disrupt the process of education. For example, the CRC Committee addressed the question of military occupation of schools by state armed forces. It recommended to one state party to '[i]mmediately discontinue military occupation and use of the schools and strictly ensure compliance with humanitarian law and the principle of distinction and to cease utilizing [the school] ... to host separatists'.¹⁶¹ In Syria, the state through its military and security forces is under an obligation not to arbitrarily restrict the socio-economic rights of the civilian population. However, blockades were imposed by the state on areas with a significant presence of anti-government armed groups and as a consequence, medicine, food and other essential supplies were not allowed to pass. Furthermore, state agents arbitrarily arrested and assaulted individuals who tried to bring in such supplies.¹⁶²

Obligation to *protect* the right to education

The ESCR Committee provides in broad terms that 'the obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education'.¹⁶³ Generally, obligations to *protect* require legislative measures, as well as measures to prevent, investigate, and punish actions by third parties that deprive individuals of their access to education. The ESCR Committee by way of illustration indicated that states have to ensure that third parties, including parents and employers, do not stop girls from going to school.¹⁶⁴

Review of the practice of UN human rights mechanisms in subsequent chapters will further exemplify the content of preventive measures recommended by the different bodies in order to protect education from attacks. In this regard, however, the obligation to 'protect' in the context of armed conflict has been especially articulated in the practice of the CRC Committee. Thus, for example, the Committee expressed its 'grave' concern that the state party, 'through its armed forces, bears direct responsibility for violations and that the State party has failed to protect children and prevent violations of children's rights by non-State groups', thus exacerbating already weak services for children in areas such as education among others.¹⁶⁵

Another example of the obligation to protect is the obligation under the CRC-OP-AC to legislate to prohibit the forced recruitment of children by armed groups and to criminalize such behaviour, which complements the right to education provisions in the ICESCR. In certain contexts, the CRC Committee has recommended concrete measures to operationalize the obligation to protect. Sudan was called upon, for example, to 'protect children from human rights violations committed by armed groups operating in the region and in the context of inter-tribal armed clashes, including through the *deployment of additional police personnel*, the thorough *investigation of human rights violations* and the *effective prosecution of perpetrators*'.¹⁶⁶

160 See Art. 13(4), ICESCR; and Art. 29(1), CRC.

161 CRC Committee, 'Concluding Observations: Sri Lanka', UN doc. CRC/C/OPAC/LKA/CO/1, 1 October 2010, §25.

162 'Report of the independent international commission of inquiry on the Syrian Arab Republic', Human Rights Council, UN doc. A/HRC/19/69, 22 February 2012.

163 ESCR Committee, 'General Comment No. 13, 'The right to education'', UN doc. E/C.12/1999/10, 1999, §47.

164 *Ibid.*, §50.

165 CRC Committee, 'Concluding Observations: DRC', UN doc. CRC/C/COD/CO/2, 10 February 2009, §67.

166 CRC Committee, 'Concluding Observations: Sudan', UN doc. CRC/C/SDN/CO/3-4, 1 October 2010, §73. Emphasis added.

A more detailed assessment of these issues occurs in Chapter 7 when discussing the obligations of non-state actors.

Obligation to *fulfil* the right to education

The obligation to fulfil the right to education, among others, requires the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers, and paying them reasonable salaries.¹⁶⁷ The closure of educational facilities is common in armed conflict and situations of insecurity. For instance, public universities in Côte d'Ivoire were closed by the government for almost two years after the violent 2010 post-electoral unrest and the question arose as to whether such prolonged closure was reasonable.¹⁶⁸ Temporary closure of educational facilities due to high security threats to children and students may be deemed reasonable under certain circumstances, but the measures should be proportionate to the legitimate aim and the state deciding on such closure has to find appropriate alternatives or arrangements within a reasonable time.¹⁶⁹

CONCLUDING REMARKS

This chapter has examined broadly the content of the right to education and challenges embedded in the right itself as well as external negative factors that impact the right during insecurity and armed conflict. By adhering to human rights treaties a state is legally bound to commit its resources as a priority to the realization of this right. And even in times of insecurity and armed conflict, as long as there is a governmental authority, the state is bound as a matter of law to do the maximum possible to secure rights for everyone under its jurisdiction. This includes the obligation not to unlawfully interfere with the right to education enjoyed by individuals or to allow third parties to do so.

167 With regard to the right to education, the state is obviously under the continuing obligation to do all it can to provide the minimum core of the right (e.g. universal primary education). This implies the duty to take active measures to guarantee access and availability to education through a variety of measures.

168 Marthe Rubio, 'L'université de Cocody, à Abidjan, rouvre ses portes', *Le Monde*, 3 September 2012.

169 In *Free Legal Assistance Group and others v. Zaire* case, the African Commission found that the closures of universities and secondary schools for two years constituted a violation of the right to education (Article 17, ACHPR). AComHPR, *Free Legal Assistance Group and Others v. Zaire*, *African Commission on Human and Peoples' Rights*, Decision (Comm. Nos. 25/89, 47/90, 56/91, 100/93), October 1995, §48.

3

The Functions and Roles of UN Human Rights Mechanisms

Broadly speaking, the UN has two types of dedicated human rights mechanisms: those established under a human rights treaty and those set up under the Human Rights Council, often called ‘non-conventional mechanisms’, ‘Charter-based mechanisms’, or ‘non-treaty procedures’. The mechanisms established under the Human Rights Council may be divided into procedures at the level of the Council itself and the special procedures. This chapter provides an overview of the different mechanisms.

HUMAN RIGHTS TREATY BODIES

The basic function of the treaty bodies is to monitor the implementation of human rights instruments. As observed by the UN High Commissioner on Human Rights the treaty bodies ‘are custodians of legal norms established by the human rights treaties’.¹⁷⁰ At universal level there are currently ten functioning treaty bodies, each of which relates to a specific human rights treaty.¹⁷¹ The treaty-based human rights institutions are also connected with the UN Charter-based human rights bodies, such as the Human Rights Council, and their work is supported by the Office of the High Commissioner on Human Rights (OHCHR). The two systems — the treaty bodies and the Charter-based bodies — are also interconnected for the purposes of procedures, reporting, resources, and administrative support.

Each treaty body conducts up to four types of activities. The first activity, a core function that concerns all treaty bodies, is the examination of initial/periodic reports submitted by states parties. Monitoring the implementation of each treaty is primarily performed through this examination. Such a role, however, depends on the quality of information available to the treaty bodies.

The second activity involves three treaty bodies, namely the CERD Committee, the Human Rights Committee, and the Committee Against Torture, which are mandated to consider inter-state complaints.¹⁷² To date, there has been no relevant practice regarding the right to education in inter-state complaints under these treaties.

The third and potentially most important type of activity of treaty bodies involves considering individual complaints, which is optional upon consent of a state party. The possibility of receiving individual communications is obviously a very important, if not the most effective, ingredient in human rights protection. It is when assessing an individual case that the relevant competent bodies can determine the existence of a violation of a right. Currently,

170 ‘Strengthening the United Nations Human Rights Treaty Body System: a Report by the United Nations High Commissioner for Human Rights’, OHCHR, June 2012, p. 8.

171 Human Rights Committee (ICCPR); Committee on Economic, Social and Cultural Rights (ICESCR); Committee on the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination against Women (CEDAW); Committee against Torture (CAT); Subcommittee on Prevention of Torture (CAT OP); Committee on the Rights of the Child (CRC); Committee on Migrant Workers (CMW); Committee on the Rights of Persons with Disabilities (CRPD); and the Committee on Enforced Disappearances (CED).

172 CERD: Arts. 11–13; ICCPR: Arts. 41–43; and CAT: Art. 21.

six individual complaints procedures are active.¹⁷³ The Optional Protocol to the ICESCR entered into force on 5 May 2013 while entry into force of the Optional Protocol to the CRC is awaiting the tenth ratification by a state. Under the current mechanisms, to date, *there has been no specific case addressing the protection of the right to education, in times of insecurity and armed conflict*. It is to be hoped that cases involving protection of the right to education will be brought before the competent bodies as their underlying instruments provide a comprehensive framework of protection for the right to education. To date, the main contribution of the ESCR Committee and the CRC Committee to the topic of the right to education has been through formulation of general guidelines on treaty reporting, advice in treaty implementation through the provision of general comments, and the actual treaty reporting process.

Finally, the fourth type of activity is on-the-spot fact-finding. Such a possibility is envisaged in the Optional Protocol to CEDAW, CAT (Article 20), and the Optional Protocol to the ICESCR. These treaty bodies may initiate their own enquiry where they receive reliable information indicating grave or systematic violation of the rights guaranteed by their respective treaties.¹⁷⁴

Since the present study draws heavily on the treaty reporting procedure under human rights treaties it is useful to present briefly the main features of the various procedures.

State party reporting procedure

The nine core international human rights treaties¹⁷⁵ and two optional protocols to the CRC provide for a mandatory state reporting procedure.¹⁷⁶ States parties are required to submit reports to the respective treaty bodies on the realization of rights guaranteed under the treaties and the steps they have taken to implement them.¹⁷⁷ The reporting procedure is considered a 'truly universal monitoring' system since all UN members have ratified at least one of the core human rights treaties.¹⁷⁸ In light of this, state reporting can be considered as one of the principal mechanisms to monitor implementation of treaty obligations.¹⁷⁹ Discussion of the function and purposes of the treaty reporting could benefit from more elaborate analysis than we have space for here, particularly as regards its

173 CERD Committee: CERD, Art. 14; Human Rights Committee: OP ICCPR; CEDAW Committee: OP CEDAW; CAT Committee: CAT, Art. 22; CRPD Committee: OP CRPD; and Committee on Enforced Disappearances (CED): International Convention for the Protection of All Persons from Enforced Disappearance, Art. 31.

174 For example, Art. 11(2) stipulates that: 'If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.'

175 ICCPR; ICESCR; CERD; CEDAW; CAT; CRC; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPRMW); CRPD; and the International Convention for the Protection of All Persons from Enforced Disappearance.

176 In contrast, the individual complaints mechanism is optional.

177 Kälin details a series of obligations incumbent on states parties pursuant to treaty reporting. These include obligations: to submit an initial report within the timeframe set out by the respective convention; to participate in the examination of the report; to answer the questions addressed to them in the list of issues; to provide information on implementation/follow-up to the recommendations. See Kälin, 'Examination of State Reports', *op. cit.*, p. 31.

178 W. Kälin, 'Examination of State Reports', *op. cit.*, p. 16. As of 2012, for nine core instruments and three optional protocols (two OPs for the CRC and one OP for CAT) there were 1,586 ratifications. See 'Strengthening the United Nations Human Rights Treaty Body System, A Report by the United Nations High Commissioner for Human Rights', *op. cit.*, p. 17.

179 The treaty reporting procedures are said to suffer from a number of shortcomings. It should be reiterated, however, that '[t]reaty bodies do not have judicial powers and none of them have been empowered to determine violations of the treaties by States Parties.' M. O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies', *op. cit.*, July 2012, p. 33. The main weakness of monitoring is said to be the nature of the outcomes of treaty reporting, i.e. concluding observations and recommendations. Other criticisms include, among others, the burden on states to comply with treaty reporting. See for an overview, 'Strengthening the United Nations Human Rights Treaty Body System', *op. cit.* Also, see 'Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body', UN doc. HRI/MC/2006/CRP.1, 14 March 2004.

historical evolution, but for the purposes of the present report it suffices to repeat the description provided in the 2006 Harmonized Guidelines, according to which:

The reporting process constitutes an essential element in the continuing commitment of a State to respect, protect and fulfil the rights set out in the treaties to which it is party. This commitment should be viewed within the wider context of the obligation of all States to promote respect for the rights and freedoms, set out in the Universal Declaration of Human Rights and international human rights instruments, by measures, national and international, to secure their universal and effective recognition and observance.¹⁸⁰

In simple terms, the treaty reporting cycle is comprised of the following stages: 1) preparation of the report by the state party; 2) pre-examination of the report and drawing up of a list of issues or questions; 3) dialogue between the relevant treaty body and the state party; 4) adoption of concluding observations; and 5) follow-up to recommendations made by the treaty body. The ESCR Committee has set out an elaborate understanding of the functions of the treaty reporting procedure in a General Comment.¹⁸¹

The different treaty bodies have developed a more or less standardized approach on the process and modalities of preparation of lists of issues.¹⁸² Lists of issues are usually drawn up from the information available to the treaty bodies, which consist of the state reports proper; the outcome of treaty reporting, i.e. concluding observations issued by other treaty bodies; shadow (parallel) reports by NGOs and national human rights institutions; reports by UN Special Rapporteurs; and other supporting documents. The examination of the report in a session with the participation of the state party consists of exchange between members of the relevant expert body and the state reporting. The structure of dialogue differs depending on the treaty body. The ESCR Committee, for example, structures its dialogue around clusters of issues, which are: discrimination and equality of women and men in the enjoyment of their rights; labour rights; subsistence rights; and cultural rights. Representatives of the UN specialized agencies may also participate in the dialogue.

Adoption of concluding observations is the stage following dialogue between the treaty body and the reporting state. To a large degree, the concluding observations of treaty bodies share a common structure¹⁸³ and, as a rule, they require state parties to provide information on steps taken to follow up on recommendations. In the case of the Human Rights Committee, the state party may be required to provide additional information on issues that the Committee has identified as urgent. With respect to subsequent reporting, some treaty bodies, such as the Human Rights Committee and the CAT Committee, have introduced the practice of sending out the list of issues, referred to as ‘List of issues prior to reporting’ on which the reporting state should focus.

Prior to the face-to-face dialogue between the state party and human rights treaty body, the relevant body identifies the list of issues or topics they wish to discuss with the state delegation in the form of specific questions. In essence, the list of issues aims at partially redressing gaps in information submitted by the state party concerned and also at facilitating examination of the situation of enjoyment of human rights ‘on the ground’ (e.g. implementation of

180 ‘Report of the Secretary-General, Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties’, UN doc. HRI/GEN/2/Rev.6 3 June 2009, §8. See also ‘Third Inter-Committee Meeting, Guidelines on an Expanded Core Document and Treaty Specific Targeted Reports and Harmonized Guidelines on Reporting under the International Human Rights Treaties’, UN doc. HRI/MC/2004/3, 9 June 2004, §§17–8, setting out the main four purposes of the treaty reporting procedure.

181 See ESCR Committee, General Comment No. 1: ‘Reporting by States Parties’, UN doc. E/1989/22, 24 February 1989, §§2–9.

182 Some variations exist, however. For example, the CAT Committee prepares lists of issues for periodic reports, while the CRC Committee prepares lists of issues for reports under the Optional Protocols. The CERD Committee as of recently has been using a ‘list of themes’ approach equivalent to the list of issues method it used before.

183 These, as a rule, include information on the documents considered, the list of issues, replies to the list of issues, and dates when those issues were examined, positive aspects in implementation of the treaty, principal areas of concern, and recommendations directed to states parties. See M. O’Flaherty, ‘The Concluding Observations of United Nations Human Rights Treaty Bodies’, *op. cit.*, p. 31.

treaty provisions). In practice, human rights bodies are provided with a breadth of information by the OHCHR Secretariat to be prepared for dialogue with the state party. The problem arises, however, ‘in the case of countries where little information is available, because they are largely neglected by international opinion for reasons of inaccessibility or size, or being very small’.¹⁸⁴ When this occurs, the treaty bodies draw up a list of issues on the basis of available information ‘which will form the basic agenda for consideration of the report’.¹⁸⁵

UNIVERSAL PERIODIC REVIEW UNDER THE HUMAN RIGHTS COUNCIL

The Universal Periodic Review (UPR) is a unique process which involves a periodic review of the human rights records of all 193 UN member states. The UPR is an innovation of the Human Rights Council which provides an opportunity for all states to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The UPR is a peer-review mechanism, which includes a sharing of best human rights practices around the globe.¹⁸⁶ It is also a mechanism that seeks to identify needs for capacity-building and to provide technical assistance to states.¹⁸⁷ One of the advantages of the UPR process is that it covers a broad range of human rights and involves review of the human rights records of *all* UN member states. Human rights obligations that are reviewed comprise the Universal Declaration of Human Rights and human rights instruments to which the state under review is a party.¹⁸⁸

The scope of review involves obligations under IHRL and applicable IHL.¹⁸⁹ Three types of sources comprise the basis of the review: the state report (i.e. the state’s own assessment of the situation); ‘other stakeholders’ reports (essentially a compilation of the views of NGOs made by the OHCHR); and the UN compilation, also compiled by the OHCHR, which draws on the work of the treaty bodies and the Special Procedures, among others.

SPECIAL PROCEDURES OF THE UN HUMAN RIGHTS COUNCIL

Special Procedures are commissioned by the Human Rights Council and examine human rights situations in all parts of the world (irrespective of adherence of the state to a human rights treaty). Initially they developed as ad hoc mechanisms but over the years have developed into a system known as ‘Special Procedures’.¹⁹⁰ Special Procedures are considered a prompt and flexible mechanism to respond to allegations of human rights violations and to monitor state compliance with human rights. Compared to thematic special procedures on civil and political rights, procedures focusing on ESC rights did not emerge until relatively recently.¹⁹¹

184 W. Kälin, ‘Examination of State Reports’, *op. cit.*, p. 61.

185 *Ibid.*, p. 24.

186 During the first cycle, which began in 2008, all UN member states were reviewed, with 48 states reviewed each year. The second cycle officially started in May 2012. The reviews take place during the sessions of the UPR Working Group, which meets three times a year.

187 See the UPR Voluntary Fund for Financial and Technical Assistance.

188 See Human Rights Council Resolution 5/1, Annex.

189 *Ibid.*

190 See Vienna Declaration and Programme of Action: ‘The World Conference on Human Rights underlines the importance of preserving and strengthening the system of special procedures, rapporteurs, representatives, experts and working groups of the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in order to enable them to carry out their mandates in all countries throughout the world, providing them with the necessary human and financial resources. The procedures and mechanisms should be enabled to harmonize and rationalize their work through periodic meetings. All States are asked to cooperate fully with these procedures and mechanisms.’ Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, 12 July 1993, §95.

191 The first mandate that concerned ESC rights, the Special Rapporteur on the right to education, was established in 1998.

As of 1 January 2013, there were 36 thematic and 12 country mandates.¹⁹² The legal basis for the mandates of Special Procedures can be found in a Human Rights Council resolution establishing the mandate.¹⁹³ Mandate-holders of special procedures serve in their personal capacity.¹⁹⁴ The quality of their outputs depends as a result on the personal engagement of mandate-holders and the support received from the Secretariat.

Methods of work

Each Special Procedure functions on the basis of a specific mandate, but there are features common to all mandates. Their basic functions can be summarized as monitoring, investigating, and reporting. According to the Manual of Operations of the Special Procedures, Special Procedures are to analyse, advise, alert, advocate, and activate on a specific human rights issue and/or situations. More specifically, Special Procedures a) analyse a thematic issue or country situation, including through on-site missions; b) advise governments concerned and relevant actors on measures to be taken; c) provide early warning to UN organs and agencies and the international community in general on the need to address a specific issue or situation; d) take measures such as requesting urgent actions by relevant states and calling upon states to react to specific allegations of human rights violations and provide redress; e) mobilize the international and national community to respond to particular human rights issues and encourage cooperation among states and inter-governmental and civil society organizations; and f) follow up on the recommendations.

The working methods of Special Procedures differ substantively from the work of the treaty bodies. Special Procedures may investigate of their own volition. Their methods of work involve communications, urgent appeals, country visits, and follow-up and normative work. One description defines Special Procedures as largely fact-finding in nature.¹⁹⁵ Unlike treaty bodies they may avail themselves of all sources of information which they consider *credible* and *relevant*.¹⁹⁶ They may take account of information from governments, inter-governmental organizations, international and national non-governmental organizations, national human rights institutions, the academic community, the survivors of alleged human rights abuses, other victims, and witnesses.¹⁹⁷

Country visits

Country visits are a central feature of Special Procedures' working methods. It allows them to access information on human rights violations directly and impact on the improvement of the situation on the ground.¹⁹⁸ Country visits facilitate 'an intensive' dialogue with state authorities (its executive, legislative, and judicial branches) as well as contacts with victims, witnesses, national human rights institutions, international governmental and non-governmental organizations, other civil society organizations, and academia. They represent an opportunity to raise awareness of specific problems under consideration.¹⁹⁹ It is an important stage in mobilizing the various actors at national, regional, and international levels.

192 The term 'Special Procedures' encompasses individuals variously designated as 'Special Rapporteurs, or 'Independent Experts', Working Groups (usually composed of five independent experts), 'Special Representative of the Secretary-General' and 'Representative of the Secretary-General'. Manual of Operations of the Special Procedures of the Human Rights Council, August 2008, p. 6.

193 The Human Rights Council itself is mandated by the UN General Assembly Resolution 60/251, 15 March 2006, and the overall basis for the human rights actions of the UN organs is the UN Charter (in particular Article 1(3)).

194 See Manual of Operations of the Special Procedures of the Human Rights Council, August 2008, §§8–10. By Resolution 5/2, the Human Rights Council endorsed a set of standards of behaviour in form of a Code of Conduct for holders of a special procedures mandate. The Code of Conduct is part of the Manual of Operations of the Special Procedures.

195 'Special Rapporteurs of Human Rights Bodies', *Max Planck Encyclopedia of Public International Law*, at www.mpepil.com.

196 See Manual of Operations, *op. cit.*, §23, for the basic standards of information gathering.

197 *Ibid.*

198 *Ibid.*, §52.

199 *Ibid.*, §54.

Country visits are only possible on the basis of an invitation either extended by the government or solicited at the initiative of mandate-holders. Several considerations might lead a mandate-holder to request to visit a country, such as human rights developments at the national level (whether positive or negative); the availability of reliable information regarding human rights violations falling within the mandate; or a wish to pursue a particular thematic interest. As the Manual of Operations of the Special Procedures instructs, other factors which might be taken into account in determining which visits to undertake at any particular time include considerations of geographical balance; the expected impact of the visit and the willingness of national actors to cooperate with the mandate-holder; the likelihood of follow-up on any recommendations made; the recent adoption by one or more treaty bodies of relevant concluding observations; the upcoming examination of the situation by one or more treaty bodies; recent or proposed visits by other Special Procedure mandate-holders; the list of countries scheduled for consideration under the Council's UPR mechanism; follow up to the recommendations and conclusions of the UPR mechanism; and the priorities reflected in the OHCHR's country engagement strategy.²⁰⁰

Communications

Special Procedures may receive information from diverse sources and can send communications to the concerned governments. These communications may address cases concerning individuals, groups, or collectives, including general trends and patterns of human rights violations in a particular country or more generally. The purpose of communications is 'to obtain clarification in response to allegations of violations and to promote measures designed to protect human rights'.²⁰¹

Special Procedures have at their disposal the procedure known as a letter of allegations, which communicates information about a situation. Another type of action available to the Special Procedures is urgent appeals. The function of urgent appeals is currently unique to the Special Procedures. Its aim is to prevent or to stop any violation. The alleged violations are 'time sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims that cannot be addressed in a timely manner by the procedure under letters of allegations'.²⁰² The relationship of the Special Procedures mandate-holder with the different actors on the ground is critical if the outcome of the country visit is to be positive.

UN SECURITY COUNCIL-LED MECHANISM ON PROTECTION OF CHILDREN IN ARMED CONFLICT

The protection of civilians in armed conflicts generally, as well as of women and children in particular, has been on the agenda of the UN Security Council since the end of the 1990s through a number of thematic resolutions. In 2005, the Security Council requested the UN Secretary-General in Resolution 1612 to establish a monitoring and reporting mechanism (MRM),²⁰³ managed by country-based task forces co-led by UNICEF and the highest UN representative in the country. The MRM provides information on six grave violations of children's rights: the killing or maiming of children; recruitment or use of children by armed forces or armed groups; attacks on schools or hospitals; rape or other sexual violence against children; abduction of children; and denial of humanitarian access to children.²⁰⁴

The MRM is established when parties in a conflict-affected state are listed in the annexes of the Secretary-General's annual report on children and armed conflict. The UN country teams are then formally notified to launch monitoring

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*, §29.

²⁰² *Ibid.*, §43.

²⁰³ UN Security Council Resolution 1612, 26 July 2005, §3; See also Resolutions 1882 (2009) and 1998 (2011).

²⁰⁴ Report of the Secretary-General, Children and Armed Conflict, UN doc. A/59/695-S/2005/72, 9 February 2005, §68; UN Security Council Resolution 1612, §2.

and reporting efforts.²⁰⁵ The MRM Country Task Force (CTFMR) represents the main coordinating structure at the country level. It is generally composed of: the UN Department of Peacekeeping Operations (DPKO), UNICEF, the UN Office for the Coordination of Humanitarian Affairs (OCHA), UNHCR, OHCHR, UNDP, and UNFPA/UNIFEM. The MRM cycle involves listing of violators; establishment of a CTFMR; establishment of an action plan; and possible delisting.

NGOs, both international and local, contribute information to the MRM at country level. They may be associated either as formal members to the work of the CTFMR, or informally. However, the information provided by NGOs remains confidential. The information gathered is included in the annual report of the Secretary-General on children and armed conflict and country-specific reports to the Security Council and the parties concerned. This forms the basis of the UN Secretary-General's country and annual reports. The information can, in addition, be used for further advocacy action, accountability, and response by being shared with other reporting mechanisms as appropriate, such as the Special Procedures, human rights treaty bodies, the UPR, as well as regional and sub-regional organizations. For instance, the CTFMR can share information with the OHCHR, the Special Procedures carrying out a specific country visit, or for follow-up to the Country Task Force's recommendations.

Among the treaty bodies, the CRC Committee, the Human Rights Committee, the CAT Committee, and the CEDAW Committee are of particular relevance to the MRM. So far, the CRC has been a privileged avenue for the MRM concerning legislative reform and recommendations in the reporting process under the 2000 Optional Protocol to the 1989 Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OP-AC). There has not been adequate discussion or legal analysis of the Security Council's contribution to the topic of the right to education in armed conflict. Nonetheless, the Security Council has referred directly or indirectly to the protection of the right to education in several ways, including condemning in strong terms violations/abuses by non-state armed groups.

FACT-FINDING MISSIONS AND COMMISSIONS OF INQUIRY

Fact-finding missions and commissions of inquiry are mandated, in most cases by the Human Rights Council, to investigate human rights situations and/or IHL implications. There is no single format for these bodies to follow. Historically, however, fact-finding missions and commissions of inquiry have had a broad range of mandates and have been established to investigate both an individual incident as well as ongoing situations.

The common objectives of any commission of inquiry are numerous and include: to establish impartially whether violations of IHRL and/or IHL have occurred; to investigate whether or not violations are systematic and widespread; to report on a state's ability to deal with the violations; to highlight the root causes of the situation; to suggest ways of moving forward; and to produce a historical record of events that have occurred. Arguably, the commission of inquiry's primary objective should be to promote accountability for violations that have taken place, helping to ensure that those responsible for violations are brought to justice.

An important task of any commission of inquiry is to analyse facts on the ground with regard to applicable law. Thus, it is crucial that a commission can independently and freely conduct investigations on the ground to establish the facts for itself. It has been said to be essential to a commission's ability to carry out such investigations that it is given a sufficient timeframe to work in.²⁰⁶ With regard to whether a commission will look at either IHRL or IHL, or both, it is clear that it would be hard in a situation of armed conflict to look at one and not the other. Thus, most commissions of inquiry will look at both, although the mandate, which is key, may dictate what should specifically be assessed.

²⁰⁵ According to the MRM Field Manual, grave violations fall into three different categories: 1) Incident involving one child; 2) Incident involving a number of children; and 3) Impersonal violations (i.e. attack on a school or hospital). MRM on Grave Violations Against Children in Situations of Armed Conflict, UN doc. O/SRSG-CAAC-UNICEF-DPKO, 2010, p. 19.

²⁰⁶ See generally, S. Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva Academy of International Humanitarian Law and Human Rights, available at www.geneva-academy.ch.

Fact-finding missions and commissions of inquiry have been able to conduct investigations and consequently make recommendations through on-the-spot visits. Generally, the capacity of commissions of inquiry to mobilize resources and expertise far outweighs that of other human rights enforcement mechanisms. They are the venues where the use of the relevant legal framework has been far more advanced as a response to a concrete situation, since the reports of the commissions look at the entire corpus of international law. In addition to the detail contained in their reports, the precision and weight of the legal analysis and the consequent power of the final product tend to inform the international agenda for further action.

4

The Right to Education in Insecurity and Armed Conflict: Practice of UN Human Rights Bodies

This chapter provides an overall assessment of how the UN human rights mechanisms address the right to education, concentrating first on the way the different treaty bodies, organs of the UN (particularly the Human Rights Council), and Special Procedures have addressed the right to education in states facing armed conflict and situations of insecurity. In this regard, since the central question of the study is the review of the right to education in times of armed conflict, we will not discuss the wealth of material provided by states on the general status of the realization of their human rights obligations to respect, protect, and fulfil education for individuals under their jurisdiction.

Similarly, the treaty bodies' practice reflected in documents such as lists of issues, records of constructive dialogue with states parties, and concluding observations issued will be discussed to the extent they provide concrete and relevant information on the topic of the present research. The present section discusses the practice of the Human Rights Committee, the ESCR Committee, the CERD Committee, the CRC Committee, and the CEDAW Committee. Although, the Committee against Torture and the CRPD Committee formed part of the research, their practice did not contain relevant information for the period covered by the study.

TREATY BODIES

General overview of the scope of state reports

Written reports of states submitted pursuant to the treaty reporting requirements under human rights treaties can be very detailed. Although reports vary in detail and quality, they typically offer information, albeit in general terms, on the status of the right to education in states facing insecurity and armed conflict. In the main, states describe, to a varying degree, the education system and provide specific information on women's access to education as well as the extent to which children, detainees, and minorities enjoy their rights to education. This provides an overview of the education system with general statistics on access, accessibility, availability, and acceptability of education services by the population at large and by vulnerable groups in particular, disaggregated by age, gender, region, and other relevant education indicators; state policies on combating the root causes and obstacles to education such as child labour and other socio-economic factors causing obstacles in accessing education; dropout rates; and learning attainment of students. Some states indicate in their reports targeted measures they undertake to ensure protection of children and their educational development.²⁰⁷

However, reporting on the status of realization of the right to education containing a clear indication of how armed conflict impairs or violates the right, impedes or holds back its realization is uneven. Armed conflict is frequently identified as a major obstacle to the implementation of state obligations. State reports often cite adverse impacts of armed conflict on basic infrastructure and their economic capacity as creating 'obstacles' or 'impediments' to fulfilling their obligations and setting challenges for the respective government to ensure rights.²⁰⁸ This justification

207 See, e.g., Combined second, third and fourth periodic reports of the Philippines to the ESCR Committee, UN doc. E/C.12/PHL/4, 7 September 2007, §942.

208 Second Periodic State Report of Nepal to the ESCR Committee, UN doc. E/C.12/NPL/2, 7 August 2006, §122.

has been provided by a number of states parties to the ICESCR.²⁰⁹ Nepal, for example, pointed out that the Maoist insurgency had affected the implementation of rights in the Covenant, such as ‘educational rights’ or ‘had created *obstruction* on right to education by kidnapping students and teachers from schools, forceful collection of donations, conducting political programmes, creating bunkers, storing weapons ... at school compounds.’²¹⁰

Long-term armed conflicts create particular obstacles and challenges that are difficult to address. In the Nepal case, the state report enumerated diverse ways the education sector has been impacted by prolonged armed conflict: denial of access to schooling; impact on psychology and study environment;²¹¹ overcrowding of schools as a result of influx of students from insecure areas; loss of schooling due to forced closures of schools, and general shutdowns;²¹² obstruction to supervision and monitoring of schools; etc. Notably, the state report also indicates information on the measures to monitor and investigate ‘bombing at schools ... and creation of bunkers in schools’.²¹³

Afghanistan similarly reported the heavy toll of the armed conflict on its education infrastructure.²¹⁴ According to the Government, ‘[s]chool attendance is severely influenced by violent incidents against school teachers, staff at provincial departments of education, and sometimes children, which terrorises parents and refrain from sending their children to schools.’²¹⁵ Similarly, Sri Lanka indicated in its report that ‘the security situation makes it harder to maintain normalcy in schooling’ and that security concerns, particularly in relation to travelling to and from schools, have resulted in some children dropping out of school.²¹⁶ But these are by no means the only impact of armed conflict on education. The lack of teaching staff, particularly female teachers, impacts negatively on the access to and provision of education.²¹⁷ The real challenges to enjoying the right to education may involve, in addition to the rebuilding of damaged infrastructure, the macro-economic context of the state such as the ongoing economic problems of the state, external debt,²¹⁸ and unemployment.²¹⁹

The standard approach of the ESCR Committee in response to the devastating impact of armed conflicts is to acknowledge factors and difficulties impeding the implementation of the Covenant. For example, the Committee took note of the fact that in Nepal the ‘State party’s efforts to comply with some of its obligations under the Covenant are impeded by the consequences of the divisive and violent conflict, namely a large numbers of victims and families of victims, a large numbers of displaced persons, and a severely damaged physical infrastructure

209 Fifth periodic report of Colombia to the ESCR Committee, UN doc. E/C.12/COL/5, 22 January 2008, §52; Second to fourth periodic reports of Afghanistan to the ESCR Committee, UN doc. E/C.12/AFG/2-4, 9 July 2009, §§25–6, 88.

210 Second Periodic State Report of Nepal to the ESCR Committee, UN doc. E/C.12/NPL/2, 7 August 2006, §116. (Emphasis added.) It needs to be noted that the state of realization of the right to education in Nepal was covered by NGO reports such as by IDMC and Human Rights Treaty Monitoring Coordination Committee submissions to the ESCR Committee.

211 *Ibid.*, §258.

212 *Ibid.*, §259.

213 *Ibid.*, §81.

214 Second to fourth periodic reports of Afghanistan to the ESCR Committee, UN doc. E/C.12/AFG/2-4, 9 July 2009, §§172, 178.

215 *Ibid.* See, in a similar vein, Second Periodic Report of DR Congo to the CRC Committee, UN doc. CRC/C/COD/2, 24 July 2008, §172.

216 Third and fourth Periodic Reports of Sri Lanka to the CRC Committee, UN doc. CRC/C/LKA/3-4, 20 January 2010, §363.

217 According to the report, the ‘majority of teachers and trained professionals have either migrated out of the country or have died from the war [and] there are only a few numbers of female teachers existing in the country.’ *Ibid.*

218 Report of the Special Rapporteur on the right to education: ‘Mission to Indonesia’, UN doc. E/CN.4/2003/9/Add.1, 4 November 2002, §47; Conclusions and recommendations of the Expert Seminar on indigenous peoples and education (Paris, 18 to 20 October 2004), UN doc. E/CN.4/2005/88/Add.4, 15 December 2004, §16; ‘Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country’, UN doc. A/HRC/10/59, 5 March 2009, §20.

219 Combined initial to fourth periodic reports of Chad to the CEDAW Committee, UN doc. CEDAW/C/TCD/1-4, 20 October 2010, §331.

that hinders the mobility of persons, goods and essential public services'.²²⁰ Similar observations were made in relation to Chad, stating that for 'some 30 years that State party has been beset by institutional and political crises characterized by armed uprising and intercommunal conflict, which have and continue to have disastrous consequences for the situation in the country in general and for enjoyment of the economic, social, cultural, civil and political rights in particular'.²²¹

Although these accounts were not present in all state reports reviewed for the present study, they can be said to apply to the majority of situations of insecurity and armed conflict. Of course, the economic capacity of the state plays a role in the level of implementation of obligations as well as the capacity of the state to take measures to effectively address the consequences of armed conflict, such as destruction of school infrastructure, providing sufficient human resources to carry out education services and provide necessary and adequate support to families in need.

Human Rights Committee

The Human Rights Committee examines education and related aspects within the scope of Article 2 on non-discrimination, Article 3 on equality between men and women, Article 10 on humane treatment, Article 24 on children, and Article 27 on minority rights.²²² Under these provisions, all state reports provide information on the education system, and in particular in relation to the right to education of women, children, detainees, and minorities, which is fairly detailed and indicative of broader educational arrangements in a given jurisdiction (general statistics by gender, age, region; accessibility and availability of education services by population at large and vulnerable groups in particular; and state policies with regard to combating child labour).²²³

As far as attacks on education are concerned, the Committee raised the issue directly and indirectly only in a very few instances. The only existing example *specifically* addressing attacks on education concerns Israel. The Committee raised a set of concrete questions in its list of issues requesting the reporting state to provide information/comments on: a) attacks against educational facilities and schools in the Occupied Palestinian Territory (OPT) by the Israeli military and settlers; b) restrictions on school development; c) a shortage of classrooms in East Jerusalem; and d) restricted access to schools in many locations due to the Wall and other movement restrictions.²²⁴ One reason for the Committee to address this situation can be said to be the shadow reports provided by civil society on the facts and events surrounding the situation in the OPT with regard to education.²²⁵ The Committee raised all the questions cited above within the scope of Article 24 of the ICCPR, which entitles every child 'to such

220 ESCR Committee, 'Concluding Observations: Nepal', UN doc. E/C.12/NPL/CO/2, 16 May 2007, §10. ESCR Committee, 'Concluding Observations: Afghanistan', UN doc. E/C.12/AFG/CO/2-4, 7 June 2010, §12.

221 ESCR Committee, 'Concluding Observations: Chad', UN doc. E/C.12/TCD/CO/3, 16 December 2009, §7.

222 For example, the Committee requested Chad to provide statistics on enrolment of children and particularly girls. On the basis of NGO reports the Committee in its concluding observations recommended that the state promote women's rights including through education. Human Rights Committee, 'Concluding Observations: Chad', UN doc. CCPR/C/TCD/CO/1, 11 August 2009, §17; see, similarly, Human Rights Committee, 'Concluding Observations: Sudan', UN doc. CCPR/C/SDN/CO/3, 29 August 2007, §13.

223 This and other related information is based on the General Guidance and Requirements for Reporting on the ICCPR, which includes the following education related question/information (Guidelines for the treaty-specific document to be submitted by states parties under Art. 40 of the ICCPR), UN doc. CCPR/C/2009/1, July 2010, §§38, 52, 64, 67, 72, 83, and 95.

224 Human Rights Committee, List of issues to be taken up in connection with the consideration of the Third Periodic Report, UN doc. CCPR/C/ISR/Q/3, 17 November 2009, §29.

225 Amnesty International, Submission to the Human Rights Committee on Israel, 2008; Amnesty International, Submission to the Human Rights Committee, on Israel, 2008; Al-Haq, Israel's violations of the Covenant on Civil and Political Rights with respect to freedom of Movement in the Occupied Palestinian Territory, June 2010; Badil Resource Centre, Relevant Information for the compilation of the List of Issues Submitted 30 September 2009; and Human Rights Watch Submission, June 2010, with extensive coverage of attacks against school facilities and impact of restrictions on school development.

measures of protection as are required by his status.²²⁶ The reporting state did not comment on these issues and the Committee's Concluding Observations do not contain any further assessment of the situation.

Nonetheless, the Human Rights Committee indirectly discussed schools in the context of reports on facts of demolition of schools in the OPT on the basis of lack of construction permit. The Committee developed its analysis within the legal scope of the protection of rights of minorities and prohibition of discrimination.²²⁷ It recommended to the reporting state, *inter alia*, that the state party cease its practice of collective punitive home and property demolition and 'review its housing policy and issuance of construction permits with a view to implementing the principle of non-discrimination regarding minorities'.²²⁸

In another context, the Human Rights Committee examined respect for civil and political rights in an educational setting. The Committee, examining the report of Iran, requested the state to explain circumstances surrounding the detention of some 200 students and suspension or expulsion of at least 160 students from universities prior to the 2009 presidential elections.²²⁹ The Committee also inquired about the fate of students that were arrested and detained after elections for their political activism and participation in the protests. In its Concluding Observations, the Committee expressed its concern that the right to freedom of assembly and association was severely limited. The Committee recommended that the state party 'should ensure that the right to freedom of assembly and association is guaranteed to all individuals without discrimination' and that it 'release immediately and unconditionally anyone held solely for the peaceful exercise of this right', including students and teachers.²³⁰

Committee on Economic, Social and Cultural Rights

Predictably for a body that oversees a Covenant with an extensive normative articulation of the right to education, the ESCR Committee practice in the area is substantially more developed. Education and related aspects are covered as part of the normative content of Article 2(2), i.e. discrimination on the grounds of race, colour or sex and Article 3 on equality between men and women, as well as Articles 13 and 14, which are specifically dedicated to the right to education. Although reporting guidelines detail the various parameters of the right discussed in previous chapters, the guidelines make no reference to an additional reporting requirement in the event of a situation of emergency/insecurity or armed conflict. Nevertheless, in paragraph 3 of the updated version, states are required to indicate '[s]tructural or other significant obstacles arising from factors beyond the State party's control which impede the full realization of the Covenant rights', which could potentially provide an opportunity to raise any armed-conflict-related obstacles in implementing rights.²³¹ Additionally, states parties are to provide information on the adoption of a plan of action to make compulsory and free primary education a reality. In this context, states are required to include information on 'any particular difficulties' encountered in the implementation of such an action plan as well as measures to overcome those difficulties.²³² Although cast more broadly, these measures should nonetheless be capable of capturing basic information on incidents of 'attacks' on education when appropriately reported by the relevant state.

While having at its disposal a wealth of material to assess the overall state of implementation of the right to education in armed conflict, the Committee has in addition been able to raise concrete questions pertaining to conflict contexts. The Committee has requested information on a) how ESC rights were considered in the

226 Article 24(1), ICCPR, which reads as follows: 'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State'.

227 Human Rights Committee, 'Concluding Observations: Israel', UN doc. CCPR/C/ISR/CO/3, 3 September 2010, §§17–24.

228 *Ibid.* Similarly, the Human Rights Committee invoked the principle of non-discrimination with regard to the access to education, among others, of the Bedouin population in Israel, living in town unrecognized by the state party.

229 Human Rights Committee, List of issues to be taken up in connection with the consideration of the Third Periodic report of Iran, UN doc. CCPR/C/IRN/Q/3, 17 May 2011, §29.

230 Human Rights Committee, 'Concluding Observations: Iran', UN doc. CCPR/C/IRN/CO/3, 29 November 2011, §26.

231 ICESCR Reporting Guidelines, UN doc. E/C.12/2008/2, 24 March 2009.

232 *Ibid.*, §66.

context of peace agreements;²³³ b) access to education by IDPs;²³⁴ c) implementation of the right to education ‘protecting the continuity and quality of education ... and ensuring academic freedom and the safety of teachers and schoolchildren’.²³⁵ In the context of Colombia, the Committee requested the state party to provide information about measures it has taken ‘to protect school premises from occupation by armed groups and the consequent interruption of classes’.²³⁶

Where there is not sufficient information to allow the Committee to assess the ‘actual’ implementation of ESC rights in light of armed conflict, the Committee has asked the state party ‘to provide detailed information on the implementation of its obligations, as required by the Covenant, in relation to all economic, social and cultural rights of the civilian populations affected by the internal armed conflict.’²³⁷ According to the Committee, ‘it is precisely in situations of crisis that the Covenant requires the protection and promotion of all economic, social and cultural rights, in particular of the most marginalized and disadvantaged groups of the society, to the best of its ability under the prevailing adverse conditions’.²³⁸

The practice of the ESCR Committee seems to generally circumscribe examination of facts of obstruction of school attendance within the framework of Articles 13 and 14 (i.e. the right to education).²³⁹ Perhaps the most interesting treatment of the right to education in armed conflict has been made by the Committee in the context of the implementation of the Covenant in the OPT. In the framework of its list of issues, the ESCR Committee raised the following issue with the reporting state, Israel:

Please indicate the measures taken to ensure the right to education for Palestinian children living in the Occupied Palestinian Territories. Please also indicate the measures taken to address serious violations thereof, including attacks by the Israeli military and settlers on school children and educational facilities.²⁴⁰

The importance of the passage rests with the ‘qualification’ of attacks on school children and education facilities as ‘serious violations’ of the right to education. It is not clear whether such an interpretation of the facts and determination of the violation of the right to education is due to the context at hand or can be considered to represent a general view of the Committee that can be applied to all situations of armed conflict.

233 ESCR Committee, ‘List of issues to be taken up in connection with the consideration of the second periodic report of Nepal and Replies by the Government of Nepal’, UN doc. E/C.12/NPL/Q/2 Add. 1, 20 April 2007, §4.

234 *Ibid.*, §10.

235 ESCR Committee, ‘List of issues to be taken up in connection with the consideration of the second periodic report of Nepal and Replies by the Government of Nepal’, UN doc. E/C.12/NPL/Q/2 Add. 1, 20 April 2007, §29.

236 ESCR Committee, ‘List of issues to be taken up in connection with the consideration of the fifth periodic report of Colombia’, UN doc. E/C.12/COL/Q/5, 19 June 2009, §38.

237 ESCR Committee, ‘Concluding Observations: Colombia’, UN doc. E/C.12/COL/CO/5, 21 May 2010, §7.

238 *Ibid.*

239 In particular, ‘the Committee is deeply concerned about the increase in the number of child victims of attacks against schools by insurgents and the throwing of acid to prevent girls and female teachers from going to school’ in ESCR Committee, ‘Concluding Observations: Afghanistan’, UN doc. E/C.12/AFG/CO/2-4, 7 June 2010, §43.

240 ESCR Committee, ‘List of issues to be taken up in connection with the consideration of the third periodic reports of Israel’, UN doc. E/C.12/ISR/Q/3, 9 December 2010, §36. (Emphasis added.)

Despite the argument of the reporting state in that case denying the applicability of human rights treaties in the OPT, the ESCR Committee provided a detailed observation of the situation.²⁴¹ It is worth quoting here in full the assessment of the Committee on the alleged attacks on children and educational facilities:

The Committee is concerned that Palestinian children living in the Occupied Palestinian Territory are not able to enjoy their right to education, as a consequence of restrictions on their movement, regular harassment by settlers of children and teachers on their way to and from school, attacks on educational facilities, and sub-standard school infrastructure. The Committee also notes with concern that there are as many as 10,000 unregistered children in East Jerusalem, out of which around 5,500 are of school age but do not attend school due to their lack of registration. (Arts. 13 and 14)

The Committee recommends that the State party take measures so as to enable the Palestinian Authority to exercise its functions and powers emanating from the 1995 Interim Agreement, ensuring the right to education for Palestinian children living in the Occupied Palestinian Territory. The Committee also urges the State party to address *violations of the right to education, including those stemming from restriction on movement, incidents of harassment and attacks by the Israeli military and settlers on school children and educational facilities, as well as non-attendance caused by a lack of registration*.²⁴²

The ESCR Committee again applies the concept of violation of the right to education to specific acts such as restriction on movement, harassment and attacks on schoolchildren and educational facilities, as well as lack of registration. There is, however, a nuance in the formulation of the Concluding Observations compared to that used in its List of Issues. Namely, the Committee speaks of those violations of the right *stemming from* acts enumerated above. This precision can certainly be a matter of semantics. Or perhaps the wording is not unintended and it means that those allegations do not automatically qualify as violations of the right to education. Another question is how the interplay of international human rights norms with the norms of IHL can be factored into the determination of existence of violations, a question addressed in the following chapters.

In certain contexts, the Committee has also offered its views on possible measures to address protection of access to and provision of education. The approach of the ESCR Committee seems to be context specific. For example, it gave advice to Afghanistan on how to operationalize its plan of action on the right to education and, within its broad-based approach, it also recommended that the government ‘improve security for children in school as well as on their way to and from school, and raise awareness of the value of girls’ education’.²⁴³ As regards child recruitment, while the impact of this phenomenon is often directly related to the educational development of children, the Committee has identified child recruitment as an obstacle to the enjoyment of economic, social, and cultural rights overall.²⁴⁴

Committee on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of All Forms of Racial Discrimination belongs to a category of group rights conventions. In this context, states parties are called upon to report in significant detail on the implementation of

241 The ESCR Committee had a significant amount of information from reporting by NGOs on the (non) enjoyment of socio-economic rights. Some NGO submissions included great detail on the ways the different policies of the state of Israel impacted directly or indirectly on the right to education. The sheer quantity of information on the right to education of Palestinians outnumbers any other reporting on the issue to date. The assessment of the situation in the OPT thus benefited from the reporting and analysis of NGOs such as the Palestinian Centre for Human Rights, Amnesty International, Al-Haq, the Women’s Centre for Legal Aid and Counselling, the BADIL Resource Centre, and the IDMC. These reports examined the right to education from the variety of perspectives: children, women, minorities, and IDPs, among others.

242 ESCR Committee, ‘Concluding observations: Israel’, UN doc. E/C.12/ISR/CO/3, 16 December 2011, §36. Emphasis added.

243 ESCR Committee, ‘Concluding Observations: Afghanistan’, UN doc. E/C.12/AFG/CO/2-4, 9 July 2009, §43.

244 The Concluding Observation reads as follows: ‘The Committee is deeply concerned that children continue to be forcibly recruited by illegal armed groups, notably by FARC-EP and ELN, including through recruitment campaigns in schools, as well as by new paramilitary groups, thus preventing them from enjoying their economic, social and cultural rights.’ ESCR Committee, ‘Concluding Observations: Colombia’, UN doc. E/C.12/COL/CO/5, 21 May 2010, §16.

the right to education.²⁴⁵ Obviously, the issues brought before the Committee would have to be presented from the equality and non-discrimination angle. As with the ICCPR and ICESCR, CERD does not contain ‘insecurity and armed conflict’-specific guidelines for state reporting.²⁴⁶

The CERD Committee has addressed discrimination in education in a number of insecurity and armed conflict contexts, such as the Dalits in India,²⁴⁷ IDPs in Azerbaijan,²⁴⁸ ethnic minorities in conflict-affected regions of Colombia,²⁴⁹ and the situation of human rights in the OPT.²⁵⁰

The CERD Committee, similar to other treaty bodies, has examined in detail attacks on education in the framework of Israel’s state report. However, compared to other treaty bodies, the CERD Committee had to review the issues before it much earlier.²⁵¹ NGOs brought the attention of the Committee to almost identical issues raised under other human rights treaties, such as restrictions on movement, and violence perpetrated by the settlers against the Palestinians.²⁵²

The Committee expressed its concerns over the impact of the Wall, checkpoints, and the permit system, deeming their impact detrimental on the enjoyment of all human rights of Palestinians, in particular their right to freedom of movement, family life, work, education, and health.²⁵³ In its constructive dialogue, a member of the Committee stated that, ‘[a]lthough restrictions on the right to freedom of movement could be justified on the basis of national security, the many and severe restrictions on movement, particularly for Palestinians in the occupied territories, must be critically examined for their compliance with requirements of proportionality and necessity’.²⁵⁴ In its more recent review of Israel’s reporting, the Committee reiterated its previous observations and included references to the right to education more forcefully.²⁵⁵ It is not clear whether the change of the Committee to now link restrictions on movement with the right to education stems from accumulated practice of the other treaty bodies.

245 Article 7 of CERD; see also: Guidelines for the CERD-specific Document to be Submitted by States Parties under Article 9, Paragraph 1, of the Convention, UN doc. CERD/C/2007/1, 13 June 2008, on Article 7.

246 Guidelines for the CERD-specific Document to be Submitted by States Parties under Article 9, Paragraph 1, of the Convention, UN doc. CERD/C/2007/1, 13 June 2008.

247 CERD Committee, ‘Concluding Observations: India’, UN doc. CERD/C/IND/CO/19, 5 May 2007, §25.

248 CERD Committee, ‘Concluding Observations: Azerbaijan’, UN doc. CERD/C/AZE/CO/6, 7 September 2009, §5.

249 CERD Committee, ‘Lista de Preguntas’, UN doc. CERD/C/COL/Q/14/CRP.1, 16 June 2009, §§12, 14; CERD Committee, ‘Concluding Observations: Colombia’, UN doc. CERD/C/COL/CO/14, 28 August 2009, §12, and Summary Record of the 1948th Session, UN doc. CERD/C/SR.1948, 21 August 2009, §§26–7.

250 CERD Committee, ‘Concluding Observations: Republic of Moldova’, UN doc. CERD/C/MDA/CO/8-9, 6 April 2011, §3; CERD Committee, ‘Concluding Observations: Georgia’, UN doc. CERD/C/GEO/CO/4-5, 2 September 2011, §8-9.

251 The Committee examined the reports submitted in 2005 and 2006.

252 NGO Joint Submission, OMCT, Violence against Palestinian Women: A report submitted to the Committee on the Elimination of Discrimination against Women, 33rd session - July 2005 [*sic*]; ACRI, Additional Information Concerning Violations of the ICERD in Israel and the Occupied Territories, February 2007; Amnesty International, ‘Israel/Occupied Palestinian Territories, 70th Session of the UN Committee on the Elimination of Racial Discrimination (CERD)’, 19 February to 9 March 2007: Update to Comments by Amnesty International on Israel’s compliance with its obligations under the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).

253 CERD Committee, ‘Concluding Observations: Israel’, UN doc. CERD/C/ISR/CO/13, 14 June 2007, §§34, 37.

254 CERD Committee, Summary records of the 1794th meeting, UN doc. CERD/C/SR.1794, 1 March 2007, §26.

255 More specifically, the Committee stated that it was ‘also concerned about the impact of settler violence on the right of women and girls to access basic services such as the right to education (Articles 4 and 5 of the Convention)’. CERD Committee, ‘Concluding Observations: Israel’, UN doc. CERD/C/ISR/CO/14-16, 9 March 2012, §28 and also see §26.

COMMITTEE ON THE RIGHTS OF THE CHILD

State Reporting

The CRC provides a comprehensive framework to monitor the rights of children in times of armed conflict. Under treaty-specific guidelines regarding the form and content of periodic reports to be submitted by states parties,²⁵⁶ under the cluster of rights related to the protection of children, states parties are requested to provide relevant information on measures taken to protect a) children outside their country of origin seeking refugee protection (Article 22), unaccompanied asylum-seeking children, internally displaced children, migrant children, and children affected by migration; and b) children in armed conflicts (Article 38), including physical and psychological recovery and social reintegration (Article 39). Article 38 deals specifically with the protection of children in armed conflict. States should report on aspects of the right to education relevant to situations of armed conflict. The resulting opportunity to solicit relevant information on the protection of children is extensive in its reach.

Reporting under Article 38 of the Convention requires the submission of information on the number and percentage of persons under 18 who are recruited or enlisted voluntarily in the armed forces and the proportion of those who participate in hostilities and the number and percentage of child casualties due to armed conflict. States parties to the Optional Protocol on the Involvement of Children in Armed Conflict should also provide information on the minimum age for military conscription; the minimum age for voluntary recruitment; any major developments concerning legal and policy measures undertaken for the implementation of the Optional Protocol, and whether jurisdiction over such crimes has been exercised, including extraterritorially; whether children have taken direct part in hostilities; measures taken to provide for the physical and psychological recovery of children who have been recruited or used in hostilities, through, *inter alia*, technical cooperation and financial assistance; whether child asylum seekers and migrants are screened to identify children affected by armed conflict and whether children so identified are provided with adequate assistance for their physical and psychological recovery; and whether children have been charged for war crimes committed while recruited or used in hostilities.²⁵⁷

Importantly, state reports, should, where applicable, give details on measures to prevent recruitment of children by non-state armed groups. For this purpose, the state report should endeavour to report among other issues on a) armed groups operating on or from the territory of the state concerned- b) the updated status of negotiations of the state party with armed groups and whether ongoing negotiations contemplate any forms of amnesties for war crimes- and (c) any written or oral commitment made by armed groups not to recruit and use children under the age of 18 in hostilities.²⁵⁸

Revised guidelines regarding reports to be submitted pursuant to the CRC-OP-AC require states parties to report on methods used to identify those children vulnerable to practice identified as contrary to the Optional Protocol, such as children living in poverty, those living in remote areas, and, if applicable, refugee, internally displaced, minority, and indigenous children.²⁵⁹ If applicable, the state report 'should contain information on measures taken to prevent attacks on civilian objects protected under international humanitarian law and other international instruments, including places that generally have a significant presence of children, such as *schools* and *hospitals*'.²⁶⁰

256 OPAC: Revised Guidelines Regarding Initial Reports to be submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child On Involvement of Children in Armed Conflict, UN doc. CRC/C/OPAC/2 19 October 2007.

257 *Ibid.*

258 *Ibid.*, §14.

259 *Ibid.*, §15.

260 *Ibid.*, §16.

The guidelines also require states to report on measures taken to criminalize compulsory recruitment and use of children in hostilities and define what constitutes direct participation in hostilities. States are also required to submit information on whether — if they are not party to 1977 Additional Protocols I and II, the 1998 Rome Statute, and International Labour Organization Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) — they have considered becoming parties to them.²⁶¹ The guidelines also specify the procedural obligations imposed upon third states. States are to report not only on criminalization of acts and offenses stipulated in the Optional Protocol, but also on domestic laws that provide for ‘extraterritorial jurisdiction over serious violations of international humanitarian law and whether to date the state party has exercised its jurisdiction over child recruitment as a war crime’,²⁶² an issue that the CRC has addressed in its recommendations to the states parties.²⁶³

Finally, state reports should contain information on ‘existing remedies and reparations that may be sought by child victims of recruitment and in particular on the role of the State in enforcing such measures. States parties are encouraged to describe efforts made to promote and implement the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the General Assembly in 2006 in its resolution 60/147’.²⁶⁴

By extension (and logically), information before the CRC Committee is capable of being more comprehensive and potentially useful for the purpose of examining the right to education in the context of armed conflict and other situations of violence. Particularly this is the case in relation to the reporting under the CRC-OP-AC. As we have seen, states are required to report on measures they have taken to prevent attacks on civilian objects such as schools protected under IHL and other relevant instruments. In the practice of the Committee, such specific cases of attacks on schools were reported in particular in Afghanistan, Colombia, DR Congo, Myanmar, Sri Lanka, and Thailand.

In relation to Colombia’s state report, the Committee provided a set of targeted questions on attacks on and occupation of schools. The request for relevant information was worded in the following terms: ‘Please inform the Committee what specific measures have been taken to prevent attacks on schools by non-State armed groups? Furthermore, please provide information on measures to prevent and sanction the occupation of schools by non-State armed groups as well as the armed forces’.²⁶⁵ In its constructive dialogue with Colombia, the Committee further broadened the question, asking about measures taken to maintain a safe school environment and discourage children from dropping out of school.²⁶⁶ The response of Colombia was fairly detailed, describing measures it had taken including through the Intersectoral Commission in charge of prevention of recruitment and involvement of children in armed conflict. The Government noted in particular its intention to include in the mandate of the Commission the other five grave violations against children as promoted by the UN Security Council-led mechanism.²⁶⁷ The Colombian response also included references to attacks on and occupation of schools (and measures to address it) within the scope of protection afforded by the right to education.²⁶⁸

261 *Ibid.*, §23.

262 *Ibid.*, §25.

263 CRC, ‘Concluding Observations: Kyrgyzstan’, UN doc. CRC/C/OPAC/KGZ/CO/1, 7 May 2007, §7; ‘Concluding Observations: Syrian Arab Republic’, UN doc. CRC/C/OPAC/SYR/CO/1, 17 October 2007, §9.

264 OPAC, Revised Guidelines Regarding Initial Reports to be submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child On Involvement of Children in Armed Conflict, UN doc. CRC/C/OPAC/2 19 October 2007, §32.

265 CRC Committee, ‘List of Issues: Colombia’, UN doc. CRC/C/OPAC/COL/Q/1, 10 February 2010, §8. In similar terms, Sri Lanka was asked to provide information on the number of schools that remained under ‘military control’ to host IDPs. See Summary record of the 1567th (Chamber A) meeting, UN doc. CRC/C/SR.1567 6 October 2010, §24.

266 CRC/OPAC, Summary record of the 1528th (Chamber A) meeting, UN doc. CRC/C/SR.1528, 22 June 2010, §21.

267 Full details of the response can be found in CRC, Written Replies: Colombia, 30 April 2010, §§85–90.

268 *Ibid.*

Although attacks on schools are included in treaty reporting under the Optional Protocol, the Committee also raises questions in the examinations of reports submitted pursuant to the CRC. In its review of Afghanistan's report the Committee expressed its 'extreme' concern over attacks on school facilities as well as over the fact that in 'prevailing conditions of conflict' schools have been used as polling stations during elections and occupied by international and national military forces. Among a wide-ranging list of measures, the Committee urged the state party to '[u]se all means to protect schools, teachers and children from attacks, and include communities, in particular parents and children, in the development of measures to better protect schools against attacks and violence'.²⁶⁹ A similar recommendation was made to the Government of Myanmar in response to the reports of attacks on schools.²⁷⁰ In the context of Thailand, the CRC Committee was concerned that access to school had been 'disrupted by the targeting of government schools and teachers by non-State armed groups and by the presence of government military and paramilitary units near the school'.²⁷¹

Sri Lanka reported the cases of non-state armed groups (the LTTE) using schools, 'to indoctrinate school going children to join LTTE and become child combatants'. It also acknowledged the temporary closure of schools as well as their use for the purposes of IDP accommodation.²⁷² The CRC Committee drew the attention of the Government to its 'serious concern that insufficient efforts have been made by the State party to investigate the death of hundreds of children during the five last months of the conflict as a result of notably alleged shelling and aerial bombardments of civilians, hospitals, schools...'.²⁷³ It recommended that the Sri Lankan Government undertake prompt, independent, and impartial investigations of these incidents. Obviously the scope of monitoring under the Convention is broad. Therefore, the Committee provided very detailed guidance on how to bring the policy of the reporting state on education closer to the requirements of the treaty. The recommendations of the Committee ranged from ensuring compliance with the aims of education to abolition of school fees and corruption in schools.²⁷⁴ Another example of comprehensive review of education pursuant to Articles 28, 29, and 31 of the CRC Committee is the assessment of Sudan's state report.²⁷⁵ Notwithstanding a challenging context that included insecurity and armed conflict, the Committee recommended as a priority a set of measures which included provision of free primary education and equal access of all to secondary education; rebuilding of damaged school infrastructure; provision of additional staff and resources; and education of vulnerable groups such as IDPs.²⁷⁶

In contrast to the broad-based approach of the Committee under the CRC, the prohibition of the recruitment of children is one of the fundamental norms in the legal construct of the CRC-OP-AC. The Committee, pursuant to its mandate and in light of the treaty reporting requirement, raises the issue consistently and systematically with states parties.²⁷⁷ For example, in relation to Sri Lanka, the main points raised by the Committee concerned recruitment and its prevention as well as measures to protect, withdraw, and rehabilitate children and a request for data on casualties among children as a result of hostilities, recalling the responsibility of the government to investigate allegations of child recruitment and prosecute those responsible.²⁷⁸ In addition, the Committee specifically

269 CRC Committee, 'Concluding Observations: Afghanistan', UN doc. CRC/C/AFG/CO/1, 8 April 2011, §61 (i).

270 CRC Committee, 'Concluding Observations: Myanmar', UN doc. CRC/C/MMR/CO/3-4, 14 March 2012, §§83-4.

271 CRC Committee, 'Concluding Observations: Thailand', UN doc. CRC/C/THA/CO/3-4, 17 February 2012, §§84-5.

272 'The study revealed that a number of schools were temporarily closed and some others were occupied by displaced persons, interrupting the education of thousands of children and causing the relocation of hundreds of teachers from their original schools. With the Government taking control of the East measures were quickly put in place with the assistance of INGOs to bring normalcy to the lives of the displaced. In several affected administrative Divisions children are back in schools with furniture, books and uniforms provided by the Ministry of Education' Third and fourth Periodic Reports of Sri Lanka to the CRC Committee, UN doc. CRC/C/LKA/3-4, 20 January 2010, §361.

273 CRC Committee, 'Concluding Observations: Sri Lanka', UN doc. CRC/C/LKA/CO/3-4, 1 October 2010, §62.

274 *Ibid.*, §62-63.

275 CRC Committee, 'Concluding Observations: Sudan', UN doc. CRC/C/SDN/CO/3-4, 1 October 2010, §§64-5.

276 *Ibid.*, §65.

277 CRC Committee, 'Concluding Observations: Syrian Arab Republic', UN doc. CRC/C/OPAC/SYR/CO/1, 17 October 2007, §9.

278 CRC Committee, 'Lists of Issues and Written Replies: Sri Lanka', UN doc. CRC/C/OPAC/LKA/Q/1/Add.1, 6 September 2010; and CRC Committee, 'Concluding Observations: Sri Lanka', UN doc. CRC/C/OPAC/LKA/CO/1, 1 October 2010.

addressed the question of military occupation of schools by state armed forces. It recommended that the state party '[i]mmediately discontinue military occupation and use of the schools and strictly ensure compliance with humanitarian law and the principle of distinction and to cease utilizing [the school] ... to host separatists'. In this regard, the Committee also recommended the state to '[e]nsure that school infrastructures damaged as a result of military occupation are promptly and fully restored'.²⁷⁹ Recommendations to ensure compliance with IHL and the principle of distinction have been also made to Syria in the context of use of schools as detention centres.²⁸⁰

As alluded to in the introductory section, the root causes of child recruitment are complex. The CRC Committee often acknowledges that children join armed groups (both pro-government and other non-state opposition groups) for multiple reasons, i.e. poverty, indoctrination, manipulation, neglect, or absence of opportunities.²⁸¹ States therefore are to take 'all feasible measures' to eliminate the root causes of child recruitment. Such a recommendation was made to two states (the Philippines and Sudan) undergoing the examination of their reports.²⁸²

The Committee even went as far as expressing its concern about small arms and light weapons. In a review of the state report of Kyrgyzstan, the Committee was concerned that small arms and light weapons 'may be exported to countries where persons who have not attained the age of 18 take a direct part in hostilities as members of their armed forces or armed groups that are distinct from the armed forces of a State'.²⁸³ Consequently, the state party was recommended to 'review its domestic law with a view to abolishing trade of small arms and light weapons to countries with current or recent armed conflict that may involve children ... [and] indicate, in its next periodic report, what changes to the domestic law have been made and how the implementation of these changes has contributed to halting sales of small arms to those countries'.²⁸⁴ Concerns about training in small arms in schools were raised by the CRC Committee in its dialogue with Sri Lanka.²⁸⁵ Another issue consistently raised by the Committee includes the legal age to enter military schools and the handling of firearms by children.²⁸⁶ The overall position of the Committee is that training in and use of firearms should not be provided to children. The Committee has also indicated a number of safeguards concerning education of children in military schools. Its position was elaborated in recommendations to Mexico, where that state party was advised to adopt concrete measures to ensure that the provision of education in military schools complies with the Optional Protocol.²⁸⁷

CRC Committee's General Discussion Day

Although the treaty bodies have provided guidance on implementing the right to education generally, the specific contexts of insecurity and armed conflict have been discussed in a more systematic manner in the framework of the General Discussion Day organized in 2008 by the CRC Committee.²⁸⁸ This thematic discussion is particularly useful for understanding the general approach of the Committee to the right to education in insecurity and armed conflict. The Committee sought to provide guidance to states and other actors on how to operationalize the right

²⁷⁹ *Ibid.*, §25.

²⁸⁰ CRC Committee, 'Concluding Observations: Syrian Arab Republic', UN doc. CRC/C/SYR/CO/3-4, 8 February 2012, §§51-52.

²⁸¹ CRC Committee, 'Concluding observations: Philippines (OPAC)', UN doc. CRC/C/OPAC/PHL/CO/1, 15 July 2008, §20. See also, CRC Committee, 'Concluding Observations: Pakistan', UN doc. CRC/C/PAK/CO/4, 15 October 2009, §87.

²⁸² CRC Committee, 'Concluding observations: Philippines (OPAC)', UN doc. CRC/C/OPAC/PHL/CO/1, 15 July 2008, §21. See also CRC Committee, 'Lists of Issues and Written Replies: Sudan', UN doc. CRC/C/OPAC/SDN/Q/1/Add.1, §3.

²⁸³ CRC Committee, 'Concluding Observations: Kyrgyzstan (OPAC)', UN doc. CRC/C/OPAC/KGZ/CO/1, 4 May 2007, §§8-9.

²⁸⁴ *Ibid.*

²⁸⁵ See CRC Committee, Summary record of the 1567th (Chamber A) meeting, UN doc. CRC/C/SR.1567 6 October 2010; Summary record of the 1571st (Chamber A) meeting, UN doc. CRC/C/SR.1571, 7 April 2011, §46. A similar concern was raised in the context of state reporting under OPAC: see CRC Committee, 'Concluding Observations: Sri Lanka (OPAC)', UN doc. CRC/C/OPAC/LKA/CO/1, 1 October 2010, §26.

²⁸⁶ CRC Committee, 'Concluding Observations: Niger', UN doc. CRC/C/NER/CO/2, 18 June 2009, §8.

²⁸⁷ CRC Committee, 'Concluding Observations: Mexico', UN doc. CRC/C/OPAC/MEX/CO/1, 7 April 2011, §§17-8.

²⁸⁸ CRC Committee, Day of General Discussion on the Right of the Child to Education in Emergency Situations: Recommendations, 49th Session, 19 September 2008.

in emergency situations, defined as man-made or natural disasters which destroy, 'within a short period of time, the usual conditions of life, care and education facilities for children and therefore disrupt, deny, hinder progress or delay the realisation of the right to education'.²⁸⁹ Situations of insecurity and armed conflict are covered by the notion.

It is useful to glance at the types of issues that were raised in the General Discussion. Two broad issues were identified as requiring attention: a) continuation and/or reconstruction of the education system; and b) content and quality of education provided for children.²⁹⁰ For the most part, discussions concentrated on protection *by* education, rather than protection *of* education. More specifically, the main concern seemed to be how to ensure prompt access to education, which functioned as 'physical, psychological and cognitive protection' for children. Education was thus depicted as both life-sustaining and life-saving for children.²⁹¹ The main question was therefore how to ensure the quality of education in emergency situations. In contrast, there was no detailed discussion of how to ensure that education is protected from attacks or that subjects of the right to education are duly protected from violence.

Other issues raised concerned how to provide education in emergencies. Topics included inclusive curricula, a need for certification of schooling, attention to the quality of education rather than focusing only on education infrastructure, monitoring mechanisms of compliance, and a call for preference in emergencies to be given to long-term responses rather than just in the 'high-media phase'. It was also noted (though without elaboration) that 'security and safety of schools, school children and education workers, is part of quality education'.

The output of the discussion day was a set of detailed conclusions and guidelines with regard to ensuring the right to education in emergencies. These included that: a) provisions on education remained in force without limitation; b) education was a 'protection' measure for children; c) education had to be included in humanitarian responses and emergency preparedness; d) the state had to develop emergency preparedness;²⁹² and e) international assistance and funding.²⁹³ Monitoring commitments were outlined in the recommendations of the General Discussion.²⁹⁴ A set of measures was elaborated, grouped by emergency stage: prior to, during, and after emergency situations.

As part of *preparedness* for an emergency, states parties were urged 'to prepare a plan of action for the provision of the right to education in emergency situations' in areas likely to be affected by armed conflict.²⁹⁵ This should include among others a focal point in charge of coordination; the *allocation of adequate sustained resources to ensure the fulfilment of the right to education should an emergency occur*; adaptation of curricula; and the training of teachers to enable them to cope with emergencies.

During emergencies, '[w]ith reference to the obligation under international law for States to protect civil institutions, including schools, the Committee urges States parties to fulfill their obligation therein to ensure schools as zones of peace and places where intellectual curiosity and respect for universal human rights is fostered; and to ensure

289 *Ibid.*, §2.

290 *Ibid.*, §§11 et seq.

291 *Ibid.*, §§13–5. See Report of the Special Rapporteur on the right to education, Vernor Muñoz, 'Right to Education in Emergency Situations', UN doc. A/HRC/8/10, 20 May 2008, §34.

292 CRC Committee, Day of General Discussion on the Right of the Child to Education in Emergency Situations: Recommendations, 49th Session, 19 September 2008. Recommendation No. 33 specified 'strengthen national systems of education, the legal framework for protection, and health and basic social services to increase their ability to withstand emergencies'.

293 *Ibid.*, §§51–3. In effect, the responsibilities of the international community, especially the donor community, to fund education in emergencies was highlighted throughout the document. *Ibid.*, Recommendation No. 31. The Committee further recommended that the donor community and humanitarian agencies when undertaking efforts to ensure the right to education should apply a rights-based approach and take into account four principles: the right to non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, survival, and development (Article 6); and the right to be heard (Article 12). *Ibid.*, Recommendation No. 32.

294 *Ibid.*, §§54–6.

295 *Ibid.*, Recommendation No. 34.

that schools are protected from military attacks or seizure by militants; or use as centres for recruitment. The Committee urges States parties to criminalize attacks on schools as war crimes in accordance with article 8(2)(b) (ix) of the Rome Statute of the International Criminal Court and to prevent and combat impunity.²⁹⁶

In *reconstruction and post-emergency* situations, issues such as inclusion of education in peace agreements, accreditation of education received during emergencies, and respect for the rights of refugees, asylum seekers, and IDPs were elaborated.

Committee on the Elimination of Discrimination against Women

Education of women is one of the central obligations of states arising from CEDAW. The obligation is set out in Articles 2 and Article 10 of the Convention. In light of the centrality of girls' and women's right to education, state reporting extensively deals with all aspects of education and particularly looks at the root causes and obstacles of girls' and women's right to education.

Despite the absence of armed conflict-specific guidelines on implementation of the provisions of CEDAW, the Committee has developed a certain practice on protection of women's right to education in armed conflict over time. The CEDAW Committee has raised in general terms the impact of armed conflict on women,²⁹⁷ including the right to education of internally displaced and refugee women.²⁹⁸

The issue of *attacks* on education was dealt with by the Committee when considering the report of Israel.²⁹⁹ As with other treaty bodies, the Committee received detailed alternative information from NGOs, which reported on cases of demolition of schools; the impact of the Wall and closure policies on students separating them from educational institutions; and violence by settlers against girls and women on their way to and from education facilities, particularly affecting girls' access to education.³⁰⁰ The Committee in its Concluding Observations noted with deep concern that 'that Palestinian women and girls continue to suffer from violent attacks from

296 *Ibid.*, Recommendation No. 35.

297 For example, in the framework of Nepal's periodic treaty reporting, the CEDAW Committee requested the state to report on how the draft Truth and Reconciliation Commission bill adequately provided justice to women victims of the conflict, particularly of sexual violence, as well as whether it included provisions for victim witness protection, for the formation of a special committee for women to investigate crimes against women, including sexual violence, and whether it provided measures for ensuring that women are fully and equally represented in the Truth and Reconciliation Commission. See CEDAW Committee, 'List of Issues in relation to the periodic report of Nepal', UN doc. CEDAW/C/NPL/Q/4-5, 4 November 2010, §13. See also CEDAW Committee, 'List of issues and questions for the consideration of periodic reports: Colombia', UN doc. CEDAW/C/COL/Q/6, 14 August 2006, §26.

298 CEDAW Committee, 'Concluding Observations: Colombia', UN doc. CEDAW/C/COL/CO/6, 2 February 2007, §13; CEDAW Committee, 'List of issues and questions with regard to the consideration of periodic reports: Lebanon', UN doc. CEDAW/C/LBN/Q/3, 16 August 2007, §27; CEDAW Committee, 'Concluding Observations: Kenya', UN doc. CEDAW/C/KEN/CO/7, 5 April 2011, §44-45. CEDAW Committee, 'List of Issues: Nepal', UN doc. CEDAW/C/NPL/Q/4-5, 4 November 2010, §32. See also the list of measures recommended on the topic of women and armed conflict in relation to the Sri Lanka state report, and CEDAW Committee, 'Concluding Observations: Nepal', UN doc. CEDAW/C/NPL/CO/4-5, 11 August 2011, §§35-6; and CEDAW Committee, 'Concluding Observations: Chad', UN doc. CEDAW/C/TCD/CO/1-4, 4 November 2011, §41.

299 In its list of issues, the Committee requested details of 'measures taken by the State party to make sure that the blockade imposed on the Gaza Strip following the events of June 2007 did not disproportionately impact the access to education of women in Gaza. Please also provide information regarding how the Entrance to Israel Order (Interim Order), 2005 and its subsequent extensions have affected female students seeking higher education and also provide information regarding the closure regime and related restrictions on movement in West Bank, and what impact they have on women living in rural areas of the West Bank and their ability to enjoy the rights provided by the Convention, in particular those provided for under article 14. This information is particularly relevant with regard to the access of women to adequate health care, formal and non-formal education, adequate living conditions and empowerment, equality with respect to economic life and also their right to enjoy family life'. See CEDAW Committee, 'List of Issues raised in relation to the fifth periodic report: Israel', UN doc. CEDAW/C/ISR/Q/5, 14 September 2010, §§24, 35.

300 The NGO reports included submissions from WCLAC (Women's Centre for Legal Aid and Counselling) and Badil Resource Centre for Palestinian Residency and Refugee Rights

both State (Israeli soldiers) and non-State (inter alia settlers) actors, as well as all other forms of violence within their communities, including violations of the right to life, physical, psychological and verbal abuse, and sexual harassment'.³⁰¹ It also noted that 'such cases are rarely documented, prosecuted and punished'.³⁰²

As far as restrictions on movement in the OPT were concerned, the Committee noted that these restrictions, as well as regular harassment by settlers of both children and teachers on their way to and from school, have had a negative impact on Palestinian women and girls' access to education.³⁰³ The Committee in this regard recommended that cases of human rights abuses and violations against women and girls be investigated promptly and perpetrators brought to justice 'regardless of whether they are State or non-State actors'.³⁰⁴ It has also recommended among others that surviving victims are provided with 'adequate compensation and, where appropriate, reparation' and that the state takes 'necessary measures to ensure that Palestinian women and girls can enjoy their right to education ... including safe and unhindered access to schools'.³⁰⁵

The Committee recently issued its Concluding Observations on Pakistan's latest state report, which pointed to the cases of 'on-going violent attacks and public threats on female students, teachers and professors by various non-State actors, as well as the escalating number of attacks on educational institutions, in particular a large number of girls-only schools, which has disproportionately affected girls' and women's access to education', including also the recent attacks on school buses targeting children, including girls. The Committee also alluded to the attack on Malala Yousufzai, a girl student who was attacked in October 2012 for her activities advocating girls' education. The Committee provided Pakistan with a set of measures on how to address the situation and eliminate discrimination broadly and ensure the rights of girls and women to education. The recommendations of the Committee to the state party to address the attacks were as follows:

- a) Improve the literacy rate of women and girls, reduce and prevent dropouts among girls, especially at the secondary level, formulate re-entry policies enabling young women to return to school after pregnancy, and organize programmes for girls affected by conflict who leave school/university prematurely;
- b) Improve the quality of education by providing systematic and gender sensitive training to all teachers and by conducting a revision of the curriculum and textbooks;
- c) Take the necessary measures to prevent the occurrence of attacks and threats against educational institutions which undermine women's and girls' fundamental rights, in particular, the right to education, and to ensure that perpetrators of such acts of violence are promptly investigated, prosecuted, and punished; and
- d) Consider the establishment of a rapid response system whenever there are attacks on educational institutions to promptly repair and rebuild them and replace educational materials so that women and girls can be reintegrated into school/universities as soon as possible.³⁰⁶

The CEDAW Committee has adopted a structural/preventive approach as well as one that focuses on accountability measured by prosecutions and convictions of the perpetrators in addressing attacks on education. The attacks on girls in Pakistan prompted the Committee to issue a general statement entitled *Protection of Girls' Right to Education*. In this statement, the Committee called on states to eliminate the root causes of discrimination and also 'to denounce and punish such acts of violence and to continue to take all necessary action, including the dismantling of patriarchal barriers and entrenched gender stereotypes, to guarantee and to ensure that girls are able to enjoy their basic human right to education in every region of the world'.³⁰⁷

301 CEDAW Committee, 'Concluding Observations: Israel', UN doc. CEDAW/C/ISR/CO/5, 5 April 2011, §22.

302 *Ibid.*

303 *Ibid.*

304 *Ibid.*, §23.

305 *Ibid.* This recommendation was also made but rather in general terms in relation to the freedom of movement.

306 CEDAW Committee, 'Concluding Observations: Pakistan', UN doc. CEDAW/C/PAK/CO/4, 1 March 2013, §§27–8.

307 CEDAW Committee, 'Statement on Protection of Girls' Right to Education', 19 October 2012, available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/statements/CEDAWstatementGirlsEducationAsAdopted.pdf>.

Assessment of the practice of treaty bodies

Naturally, the treaty bodies constellate all aspects of education around the respective legal architecture of protective regimes established by the human rights treaties. Where the respective provisions may differ, broadly the same issues are examined by the treaty bodies from different legal angles. Accordingly, various aspects of the right to education and/or issues related to it are examined under different normative provisions. The practice of the Human Rights Committee, the CERD Committee, and the CEDAW Committee are instructive examples in this regard. While attacks on schools were examined by the Human Rights Committee under the provisions on protection of children, the impact of broader policies were analysed from the perspective of non-discrimination. Equally the CERD Committee and the CEDAW Committee have dealt with such cases from the non-discrimination point of view.

The ICCPR, ICESCR, CERD, CRC, CEDAW, and CPRD all cover the right to education. The treaty bodies have very often addressed the application and implementation of the right to education in insecurity and armed conflict. This interest is reflected in their guidelines for submission of reports and their written and oral questions to reporting states. The question may be raised as to the difference in frequency of discussion on the topic between the bodies. To formulate the question more simply: why is the discussion of ‘attacks’ on education significantly more concentrated on certain reporting states than others? For example, while the issue of attacks on education came before the Committee on the Rights of the Child regarding several states, such as Afghanistan, Colombia, DR Congo, Myanmar, Nepal, Sri Lanka, and Thailand, the Committee on Economic, Social and Cultural Rights reviewed the situation of education only with regard to Afghanistan, Colombia, and Israel.

It appears that the ability of the treaty bodies to truly appreciate the scale of the threat to education depends on a number of factors. First, it may depend on the extent to which human rights treaty bodies are provided with information about the incidence of attacks against the right to education. Based on a review of treaty reporting guidelines it would appear that the Committee on the Rights of the Child has a developed mechanism targeting the problem of identifying acts and offences against children that indirectly also protects their right to education. This is mainly due to a direct link set in Article 38 of the CRC between children’s rights and armed conflict. In a similar vein, guidelines under the CRC-OP-AC require information on attacks on *schools*. This may partially explain a higher volume of reporting under the CRC-OP-AC’s monitoring of treaty implementation.

Second, the absence of reference to situations of armed conflict in the reporting guidelines does not necessarily mean that human rights treaty bodies lack the means to monitor implementation of the right to education in areas affected by insecurity and armed conflict. In any event, the treaty bodies may, on the basis of credible information, raise such an issue in its dialogue with the state party undergoing the reporting process. As the preceding analysis has shown, four treaty bodies, namely, the Human Rights Committee, the ESCR Committee, the CERD Committee, and the CEDAW Committee, which do not specifically require reporting on the incidence of attacks on schools (as the CRC Committee does) either requested clarifications from concerned states parties on attacks on schools or attempted to diagnose the situation as precisely as possible in their concluding observations. One can suggest that the reason these bodies were able to pronounce on the issues is the information received from various sources, specifically from NGOs.

Third, the process of the treaty reporting procedure gives relatively little time to go through all substantive rights in depth. There are practical limits on the length of concluding observations as well as a need to focus on implementation of previously made recommendations which can impact the quality and degree of elaboration of legal argumentation. Periodicity of state reporting poses challenges to the timeliness of the assessment of the situation and formulation of appropriate measures to address them.

The work of the treaty bodies on the protection, and the right to, education has also produced a number of substantive interpretations on the way the right should be implemented and protected in armed conflict. These aspects are discussed together with the findings and observations of other UN human rights mechanisms in the concluding remarks to this chapter. It suffices now to note that physical attacks on students, teachers, and educational facilities are only one aspect of the challenge to the protection of education in times of armed conflict.

THEMATIC AND COUNTRY SPECIAL PROCEDURES

The Special Procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. The system of Special Procedures is a central element of the UN human rights machinery and covers all human rights: civil, cultural, economic, political, and social. As of 1 April 2013, there are 36 thematic and 13 country mandates.

Special Rapporteur on the right to education

General

The Special Rapporteur on the right to education was, in 1998, the time the Human Rights Council had mandated a special rapporteur for socio-economic rights. The Special Rapporteur has made a significant contribution to the protection of the right to education in insecurity and armed conflict, especially through work on ‘education in emergencies’.

The early work of the Special Rapporteur on the right to education focused on reporting the effects of armed conflict on the enjoyment of the right to education and the interface of the right with different factual realities of violence. For example, in her reports, the former Special Rapporteur, Katarina Tomaševski, reported child recruitment and attacks on schools and schoolchildren as one of the obstacles to enjoyment of a child’s right to education, since these situations resulted in lower school enrolments and dropouts.³⁰⁸ In this context, the need to clearly separate schools from conflict has been voiced. It was recommended in particular that schools should be identified and protected as ‘zones of peace’.³⁰⁹

In her analysis of the scope of the legal protection provided by the right to education, the Special Rapporteur also noted that the right cannot be protected without effective protection of teaching staff. She elaborated this issue in particular in the context of armed conflict in Colombia: ‘[t]he right to education cannot be imagined without the protection of the human, professional, trade union and academic rights of teachers’.³¹⁰ This particular aspect, although not entirely absent in the legal framework of the right to education, is rarely discussed in human rights analysis of education. The Special Rapporteur stressed the need for investigation of the circumstances surrounding the murder of teaching staff.³¹¹

Other aspects conceptually developed by the Special Rapporteur on the right to education in armed conflict included: a) the interrelationship between violence and education in particular how the school curriculum that is not conducive to the respect of human rights can contribute to violence;³¹² b) the need to integrate education in

308 Special Rapporteur on the right to education: ‘Mission to Uganda’, UN doc. E/CN.4/2000/6/Add.1, 9 August 1999, §§70–1.

309 Special Rapporteur on the right to education: ‘Mission to Colombia’, UN doc. E/CN.4/2004/45/Add.2, 17 February 2004, §48. The concept of schools as ‘zones of peace’ also figured in the Secretary-General’s Report on Children and Armed Conflict and is systematically raised by his Special Representative on Children and Armed Conflict. See Report of the Secretary-General on children and armed conflict in Afghanistan, UN doc. S/2008/695, 10 November 2008, §67; Annual Report of the Special Representative on Children and Armed Conflict, UN doc. A/64/254, 6 August 2009, §25; Annual Report of the Special Representative on Children and Armed Conflict, UN doc. A/65/219, 4 August 2010, §§18, 76; Annual Report of the Special Representative, UN doc. A/67/256, 6 August 2012, §49. In her 2011 report, the Special Representative on Children and Armed Conflict proposed protection of schools as ‘zones of peace’ as part of suggested Standard Operating Procedures for the Protection of Children in the Conduct of Military Operations. See Annual Report of the UN Secretary-General’s Special Representative on Children and Armed Conflict, UN doc. A/66/256, 3 August 2011, Annex.

310 *Ibid.*, §41.

311 *Ibid.*, §40.

312 Annual Report of the Special Rapporteur on the right to education, Katarina Tomaševski, submitted in accordance with Commission on Human Rights Resolution 2000/9, UN doc. E/CN.4/2001/52, 11 January 2001, §47; Special Rapporteur on the right to education: ‘Mission to Colombia’, 2004, §49.

humanitarian assistance;³¹³ and c) respect for civil and political rights such as the right to freedom of expression, freedom of assembly, and the right to participate in the political life of society in the process of education.³¹⁴

Perhaps the first systematic articulation of the problem appeared in the Report of the Special Rapporteur to the Commission on Human Rights in 2004. The Special Rapporteur dedicated a section in his report entitled ‘Security and the Right to Education in Emergency Situations’.³¹⁵ In his contribution, Special Rapporteur Munoz Villalobos, clarified two aspects of the right to education in times of armed conflict. First, that ‘security in schools forms part of the human right to education’, and that security means ‘not only physical, psychological and moral safety but also a right to be educated without interruption in conditions conducive to formation of knowledge and character development’.³¹⁶ Second, the Special Rapporteur reaffirmed that special attention should be paid to girls’ education in armed conflict. To this effect, girls who have been ‘uprooted because of war or other social conflict or emergencies’ must be offered preferential educational opportunities.³¹⁷

The Special Rapporteur on the right to education dedicated a special thematic report on the right to education in emergencies. Discussed below, this report developed some of the parameters of the right to education in times of insecurity and armed conflict and identified persisting challenges that require individual and collective efforts by states and international community.

The Special Rapporteur has also sent communications to two UN member states involving protection of the right to education in armed conflict. The first concerned conflict in India’s Bihar and Jharkhand States between the Maoist rebels (Naxalites) and the conduct of Government security forces. The communication drew the attention of the concerned government to disruption of education following combat between insurgents and the police and other security forces. This disruption was caused by: a) occupation of school buildings by government’s police and security forces for a few days or even for periods lasting years; b) targeting by insurgents of schools, even those that were not used by security forces; c) lack of prior notification (of school principals, teachers, parents and students) on the intention to occupy schools; and d) generalized fear and insecurity causing the dropout of students.³¹⁸

According to the Special Rapporteur’s report, he had received allegations that ‘the presence of heavily armed police and paramilitaries living and working in the same buildings where children were studying has detrimental impacts on children’s studies and frequently puts the authorities in breach of their obligations to realize children’s right to education’.³¹⁹ The Government of India responded that ‘according to the concerned State authorities, no breach of the right to education of children had been reported in Bihar’. In any event, ‘the concerned authorities had been sensitized to provide adequate protection in this regard, so as to enable prompt and suitable action in the event of an instance of such a breach’.³²⁰ It is not clear whether the response of the Government was based on its view that sufficient factual basis for the allegations was lacking or it did not recognize those acts and omissions as a breach of the right to education. Judging by the second sentence of the response, it can be suggested that in principle the Government did not deny that those actions may violate the right to education.

313 *Ibid.*, §§48–50.

314 Annual Report of the Special Rapporteur on the right to education, Katarina Tomaševski, submitted pursuant to Commission on Human Rights Resolution 2001/29, UN doc. E/CN.4/2002/60, 7 January 2002, §§52–7.

315 Report to the UN Commission on Human Rights by Special Rapporteur on the right to education, Munoz Villalobos, UN doc. E/CN.4/2005/50, 17 December 2004.

316 *Ibid.*, §119.

317 *Ibid.*, §§114–20, 137.

318 Communications Sent and Received by the Special Rapporteur on the right to education contained in UN doc. A/HRC/14/25/Add.1, 17 May 2010, §§84–9.

319 *Ibid.*, §87.

320 *Ibid.*, §90.

Finally, the second communication sent by the Special Rapporteur in the period under examination concerned the impact of the blockade imposed by Israel on the school system in the OPT. He drew attention to the impact of the blockade on the realization of the right to education, which impeded creation of school infrastructure, adversely impacted the quality of education with a cumulative effect on students' access to education and their educational achievements, as well as created pressure on existing school facilities.³²¹ This communication remained without response by the Government of the concerned state.

It needs to be stressed that the Special Rapporteur on the right to education has been particularly influential on the development of law. Although some of the Rapporteur's analysis has been taken up and has contributed to the emerging area of 'attacks on education', other points raised regarding the intersection with insecurity and armed conflict, such as the content of curricula, quality of education, and girls' education in times of armed conflict and the concomitant responsibility of the international community, have received less attention.

The Special Rapporteur's contribution to the content of the right to education in emergencies

The Special Rapporteur on the right to education dedicated a thematic report on *Right to Education in Emergency Situations* which also sought to detail questions on the right to education in emergencies.³²² The notion of emergency was defined as including international armed conflicts (including military occupation) or non-international armed conflicts, as defined by IHL (alongside other man-made or natural disasters). These situations 'impair or violate the right to education, impede its development and hold back its realisation' and 'put people's health and lives at risk and threaten or destroy public and private assets, limiting the capacity and resources to guarantee rights and uphold social responsibilities'.³²³ This quote is interesting as it casts the impact of armed conflict more broadly than merely disruption of the provision of, and access to, education.

The report offered a number of recommendations to states and intergovernmental and non-governmental organizations for better protection of the right to education in emergencies and outlined challenges in its promotion. Significant attention was paid to the need to integrate quality education in humanitarian response, including the need to reflect the Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction developed in 2004 by the Inter-Agency Network for Education in Emergencies (INEE). In this respect, the role of coordination between a 'plethora of actors ... each with its own expertise, agenda and distinct priorities, mandates, capacities and spheres of influence, field presence and financial bases' was stressed.³²⁴ Attention, according to the Special Rapporteur, should also be paid to the curriculum³²⁵ and the quality of teaching materials.³²⁶ A point brought up in the Committee on the Rights of the Child's General Discussion Day in 2008 was that security in schools constituted an integral part of the quality, i.e. acceptability, of education in insecurity and armed conflict.

The report called for political attention and financial support to guarantee protection of the right to education. Another disquieting tendency noted in the report is the focus of humanitarian response only on primary education to the prejudice of secondary and tertiary education.³²⁷ Topics that are rarely analysed but which were flagged by the Special Rapporteur included the interrelationship between education and conflict (particularly the contribution

321 Special Rapporteur on the right to education, Communication to Israel, contained in UN doc. A/HRC/17/29/Add.1, 13 May 2011, §§73–9.

322 Report of the Special Rapporteur on the right to education, Vernor Muñoz, 'Right to Education in Emergency Situations', UN doc. A/HRC/8/10, 20 May 2008.

323 *Ibid.*, §5.

324 *Ibid.*, §75.

325 The Special Rapporteur devoted special attention to this topic in his report in §§110–8.

326 *Ibid.*, §§91 and 94.

327 *Ibid.*, §79.

of education in generating conflict),³²⁸ the imperative of assessing the *educational needs* in conflicts,³²⁹ and the right to education of vulnerable groups.³³⁰

An update to the report on the right to education in emergencies³³¹ reiterated the need to include education as an integral element of humanitarian assistance and response, for adequate funding of education within humanitarian response and post-conflict situations,³³² for financial aid to fragile states to help them support functioning of education systems, for access to education³³³ by girls and marginalized groups, and for efforts to ensure quality at all levels of education.³³⁴

The updated report also discussed in some detail ‘attacks on schools’ and touched upon issues on the protection of the right to education provided by IHL. According to the Special Rapporteur, ‘targeted efforts are also required to prevent the occurrence of attacks against schools and other education institutions and to prepare them for situations of insecurity in order to minimize the damage armed conflict may cause’.³³⁵

Both reports include important statements on the obligations of the international community to provide international assistance and cooperation.³³⁶ It was asserted that, ‘[g]iven the fragility of some States affected by emergencies, and the central role of international assistance and cooperation in that context, it is important to recall that the obligation to provide assistance is established in human rights law’.³³⁷ In this context, the political commitments reflected in the development and education agendas as set out in the Millennium Development Goals and Dakar Framework of Action on Education for All have been stressed throughout.

Other thematic procedures

No relevant information on the topic of the present study was found in the work of the Special Rapporteur on violence against women, its causes and consequences,³³⁸ the Special Rapporteur in the field of cultural rights, or the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence. In contrast, the Special Rapporteur on the rights of indigenous people had generally dealt with education of indigenous people in an extensive manner.³³⁹ These issues in the context of insecurity and armed conflict were discussed in the Special Rapporteur’s report on the mission to Colombia. Discussing the effects of internal armed conflict on indigenous people, the Special Rapporteur drew attention to the fact that ‘[i]ndigenous children are more exposed to recruitment by illegal armed groups and face difficult humanitarian conditions, including killing and maiming,

328 *Ibid.*, §15.

329 *Ibid.*, §38.

330 *Ibid.*, §§48–51.

331 Interim report of the Special Rapporteur on the right to education, Kishore Singh, UN doc. A/66/269, 5 August 2011.

332 *Ibid.*, §§62–3.

333 *Ibid.*, §§78–82.

334 *Ibid.*, §§83–8.

335 Interim report of the Special Rapporteur on the right to education, Kishore Singh, UN doc. A/66/269, 5 August 2011, §73.

336 Report of the Special Rapporteur on the right to education, Vernor Muñoz, Right to Education in Emergency Situations, UN doc. A/HRC/8/10, 20 May 2008, §§57–61, in particular addressing the role of donors in §§68–73.

337 *Ibid.*, §68.

338 The work of the Special Rapporteur on violence against women contained passing references on the violation of women’s rights in Afghanistan and noted that women face threats of harm ‘if they go to school or to work, leave their home, speak to non-family men, or call radio stations with music requests.’ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, UN doc. A/HRC/20/16, 23 May 2012, §54. The Special Rapporteur also addressed broadly questions of armed conflict and their impact on civilians as well as the question of accountability in her mission to DR Congo. See Special Rapporteur on violence against women, ‘Mission to DR Congo’, UN doc. A/HRC/7/6/Add.4, 28 February 2008, §§108–10.

339 Conclusions and recommendations of the Expert Seminar on indigenous peoples and education (Paris, 18 to 20 October 2004), UN doc. E/CN.4/2005/88/Add.4, 15 December 2004.

recruitment by and use in armed forces and groups, abduction, sexual violence, attacks on schools and hospitals, and denial of humanitarian access'. To address the situation, the Rapporteur recommended that Colombia should, as a matter of urgency, implement the recommendations of the Secretary-General contained in that report [report of the Secretary-General on children and armed conflict in Colombia, drawn up pursuant to Security Council resolution 1612 (2005)], especially those intended to prevent the recruitment of children'.³⁴⁰ The Rapporteur further addressed the content of the school curricula and recommended that the state provide indigenous peoples with the power and budgetary resources they require to independently implement the bilingual and intercultural education programme in indigenous areas and ensure that vulnerable indigenous groups — particularly ones that have been displaced — have access to education.³⁴¹

The Special Rapporteur on torture and other cruel, inhuman and degrading treatment has submitted three individual cases to the concerned governments involving persons associated with education. The first communication concerned abduction of a teacher and member of the Ethiopian Teachers' Association (ETA), who had been detained by the police and possibly mistreated. The same fate awaited another teacher, also a member of the ETA, whose whereabouts remained unknown.³⁴² The second communication, also sent to the Government of Ethiopia, concerned detention of a USAID advisor on education and two students as well as the arrest by the police of 'hundreds of persons, including students' during peaceful demonstrations. The three persons named remained in detention while the two students were tortured.³⁴³ The third case was communicated to Pakistan on the grounds of allegations of a 13-year-old student being beaten by his teacher. The student died from his injuries. Despite the demands of relatives of the victim to bring the perpetrator to justice, neither the police nor the education department took any action.³⁴⁴

The Special Rapporteur on the human rights of internally displaced persons has systematically and consistently addressed the question of education of IDPs. Since this topic has been addressed by virtually all UN human rights mechanisms and essentially represents an issue cutting across most of the situations of armed conflict, the work of the Special Rapporteur on the human rights of internally displaced persons together with other bodies is discussed below.

Country mandates

The right to education has been assessed by the special procedures mandated to assess the situation of human rights in specific states. The present study reviewed the outputs of all country mandates functioning in 2007 to 2012. The reports of the country mandates discuss the right to education in several contextual settings: post-election violence, humanitarian disasters, human rights of students in higher education, the protection of education in situations of military occupation and in prolonged armed conflict, such as in Somalia, where decades of armed conflict have led to generations of children and adults being deprived of their right to education.

Some country mandates provide a wealth of factual information on the state of implementation of the right to education and in particular the use of force or threat of it against persons associated with education and education buildings. For example, the Independent Expert on the Situation of Human Rights in Côte d'Ivoire reported that '[t]he post-election crisis had caused the departure of students, teachers and school authorities in some regions, the closing of schools for several months in most of the country, and more than 200 cases of looting or destruction of schools. At the height of the crisis at least a million children were deprived of schooling, while 150 schools need

³⁴⁰ The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur, UN doc. A/HRC/15/37/Add.3, 25 May 2010, §15.

³⁴¹ *Ibid.*, §82.

³⁴² Summary of information, including individual cases, transmitted to Governments and replies received, UN doc. A/HRC/4/33/Add.1, 20 March 2007.

³⁴³ *Ibid.*

³⁴⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak - Addendum - Summary of information, including individual cases, transmitted to Governments and replies received, UN doc. A/HRC/10/44/Add.4, 17 February 2009.

to be renovated and re-equipped'.³⁴⁵ According to the report, the lack of identity documents as well as the unsafe conditions and populations movements resulted in denial of the right to education to 'thousands of children'.³⁴⁶ The report of the Independent Expert on the Situation of Human Rights in Haiti similarly contained factual circumstances of kidnappings of schoolchildren³⁴⁷ and mass displacement of population, as a result of which a very large number of children have been compelled to interrupt their schooling *indefinitely*.³⁴⁸

The Special Rapporteur on the situation of human rights in the Islamic Republic of Iran provided detailed accounts of violations of civil and political rights of the students and student activists in Iran. He particularly noted his concern that students' rights to freedom of expression, association, and assembly had been violated.³⁴⁹ The report included reports on individual cases of arrest and detention, as well as punitive university or Government action against students defending students and human rights. The Special Rapporteur reported cases of 436 arrests, 254 convictions, and 364 cases of deprivation of education, 144 cases of students being summoned before judiciary, and closure of 13 student publications. Furthermore, the Special Rapporteur conducted three interviews with student activists who faced arrests, intimidation, and at times were subjected to beatings and torture.³⁵⁰

The reports of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 are detailed in their analysis of the enjoyment of the right to education. Seven reports in the period covered by this study included facts and cases involving attacks on education. It is possible on the basis of the various reports of the Special Rapporteur to draw patterns of alleged violations in OPT. These include: restrictions on freedom of movement;³⁵¹ military incursions/attacks on schools; closure and destruction of schools;³⁵² destruction of public and charitable property such as schools;³⁵³ attacks by private persons;³⁵⁴ the longer term impact of conflict, such as regression in the education sector; and obstructing access to education.³⁵⁵

345 Report of the independent expert on the situation of human rights in Côte d'Ivoire, Doudou Diène, UN doc. A/HRC/19/72, 9 January 2012, §§78–80.

346 *Ibid.*

347 The relevant passage states: 'Targeted kidnappings of schoolchildren: in December, more than 30 schoolchildren were kidnapped. While most of them were released, two were executed: Farah Dessources, 17 years old, who was shot several times by her kidnappers even though her family had paid \$4,000 of the \$30,000 demanded, and Carl Rubens Francillon, 6 years old, kidnapped on 8 November in front of his school and found strangled despite the fact that a ransom of around \$3,400 had been paid.' Situation of human rights in Haiti, Report prepared by the independent expert, Louis Joinet, UN doc. A/HRC/4/3, 2 February 2007, §33.

348 Report of the independent expert on the situation of human rights in Haiti, Michel Forst, UN doc. A/HRC/14/44, 3 May 2010, §33.

349 Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, UN doc. A/HRC/19/66, 6 March 2012, §§56–8.

350 Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, contained in 'Note by Secretary-General, The situation of human rights in the Islamic Republic of Iran', UN doc. A/66/374, 23 September 2011, §§38–42.

351 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN doc. A/62/275, 17 August 2007, §40.

352 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard, UN doc. A/HRC/4/17, 29 January 2007, §10.

353 Situation of human rights in the Palestinian territories occupied since 1967, UN doc. A/63/326, 25 August 2008, §21.

354 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, UN doc. A/65/331, 30 August 2010, §13. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard, UN doc. A/HRC/4/17, 29 January 2007, §34. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, UN doc. A/HRC/20/32, 25 May 2012, §30.

355 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard, UN doc. A/HRC/7/17, 21 January 2008, §§23, 38.

According to the Special Rapporteur, '[t]he confinement of 1.5 million Gazans without granting exit permits except in rare instances denies the people of Gaza basic rights of health and education'.³⁵⁶ The Special Rapporteur made a number of conclusions and recommendations. First, he stated that '[a]lleged crimes associated with battlefield operations and command policy, such as the targeting of schools ... should be investigated to the extent possible, including evidence pertaining to the existence of deliberate intent or gross negligence'.³⁵⁷ Furthermore, '[e]xtenuating circumstances should be taken into account, including allegations that buildings and their near surroundings were being used for combat purposes. It is important that this evidence be gathered quickly, and that the cooperation of the parties be solicited to the extent that the investigation establishes a prima facie case with respect to war crimes, and the responsible perpetrators can be identified.... It is quite likely that the investigation will be able to establish that certain practices and incidents have the characteristics of war crimes, but that it will be impossible to identify the supposed perpetrator(s), at least not without the cooperation of the parties engaged in combat'.³⁵⁸

The assessment of the Independent Expert on the Situation of Human Rights in Somalia on the status of implementation of the right to education in that country is also remarkable. Like other country mandate holders, his reports contained information on cases of 'indiscriminate attacks' on schools,³⁵⁹ recruitment of children,³⁶⁰ effects of hostilities on education,³⁶¹ among others, some of which the Independent Expert qualified as 'serious violations of international humanitarian law and human rights law'.³⁶² His distinct approach on the topic related to the examination of the relevant structural, legal, institutional and administrative aspects of the enjoyment of the right to education in Somalia.³⁶³ More specifically, his assessment of the situation included careful analysis of different factors such as poverty, lack of capacity of the authorities to provide basic services such as education, pre-existing socio-economic and cultural conditions,³⁶⁴ the general well-being of children and civilians at large,³⁶⁵ and lack of accountability,³⁶⁶ all of which impacted the enjoyment of right to education in Somalia. The Independent

356 *Ibid.*, §16.

357 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, UN doc. A/HRC/10/20, 11 February 2009, §33.

358 *Ibid.*, §33.

359 Report of the independent expert appointed by the Secretary-General on the situation of human rights in Somalia (Mr Ghanim Alnajjar), UN doc. A/HRC/7/26, 17 March 2008, §19.

360 *Ibid.*, §39. See also Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari, UN doc. A/HRC/12/44, 17 September 2009, §58.

361 More specifically, the Independent Expert reported that: 'The recent fighting has also severely affected school enrolment; with enrolment numbers decreased by 50 per cent from the previous year. Most Somali children have very limited chances of accessing formal education and the conflicts of the past months have only exacerbated this situation. When not in school, children were more likely to be recruited, killed or severely injured, forced into child labour and were more vulnerable to trauma and attacks. Young girls in Somalia were the most disadvantaged in accessing what little education there is available'. *Ibid.*, §41.

362 Report of Shamsul Bari, independent expert appointed by the Human Rights Council on the situation of human rights in Somalia, UN doc. A/HRC/10/85, 24 February 2009, §30.

363 Report of the independent expert appointed by the Secretary-General on the situation of human rights in Somalia (Mr Ghanim Alnajjar), UN doc. A/HRC/7/26, 17 March 2008, §44, 52. In one of his reports the Independent Expert noted that: 'After two decades of conflict, almost two generations of young Somali boys and girls have been denied the benefit of a full education. Existing education systems, already limited in their scope, have been badly affected by the conflict. Somalis have nevertheless managed to organize strong networks of independent and private schooling in many parts of the country, and Government efforts are focused on extending schooling, albeit with extremely limited funding, especially in the case of secondary education.' Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari, UN doc. A/HRC/12/44, 17 September 2009, §60.

364 Report of the independent expert appointed by the Secretary-General on the situation of human rights in Somalia (Mr Ghanim Alnajjar), UN doc. A/HRC/7/26, 17 March 2008, §29.

365 *Ibid.*, §40.

366 More specifically, 'The lack of accountability for past and current violations and abuses of human rights and international humanitarian law has further exacerbated the situation. A culture of impunity, although not new, prevails, especially in those cases where the traditional clan structure does not provide adequate protection, and most acutely in cases where the victims belong to a minority.' Report of Shamsul Bari, independent expert appointed by the Human Rights Council on the situation of human rights in Somalia, UN doc. A/HRC/10/85, 24 February 2009, §30.

Expert concluded that despite international and domestic legal commitments, implementation of these normative provisions ‘was severely lacking’.³⁶⁷

The Independent Expert proposed concrete steps to the Government of Somalia in relation to education, such as to endeavour to reopen educational institutions³⁶⁸ that were shut down for various reasons, improvement of the law and order in the areas under its control,³⁶⁹ provision of specific education programmes that could help to prevent child recruitment,³⁷⁰ as well as recommendations of a broader and structural nature, including ‘making human rights as the foundation of the transition, making the peace process as inclusive as possible, ensure the material support to the police and focusing on ‘protecting lives’.³⁷¹ In terms of concrete measures, the Independent Expert suggested programmes of cash transfers for education, vocational training, refresher courses and training for teachers, and higher education for youth. His recommendations also extended to the international community who were requested to take urgent and prompt action to provide basic ESC rights, including the right to education.³⁷² Most importantly, he suggested that international organizations extend education facilities beyond high-school level, as Somalia after two decades of armed conflict was in a serious need of trained people to fill Government posts.³⁷³

Finally, the Independent Expert on the Situation of Human Rights in South Sudan addressed the question of education in her reports focusing in particular on the structural aspects of the right to education. Noting that widespread poverty, corruption, lack of transparency, insecurity, and marginalization seriously inhibit the delivery of basic social rights such as education, the Independent Expert recommended among others that the state ensure that resources (budget) are distributed adequately to key sectors such as education, health, social services, law enforcement, and rule of law institutions.³⁷⁴

Assessment of the work of the Human Rights Council’s Special Procedures

Compared to the thematic Special Procedures, the country mandates have a significantly more detailed assessment of the situation on the ground with respect to education. Country mandates’ reports contain more details of specific incidents or situations and contextual information, not particularly surprising given that while thematic procedures study the human rights situation from a specific angle, country mandates deal with a specific context. Country mandates also have an opportunity to monitor a given situation over time and thus are in a better position to appreciate the situation as well as formulate concrete and context-specific measures to the concerned government and the international community at large. Compared to treaty bodies or the Human Rights Council’s Universal Periodic Review, the Special Procedures have been more proactive in shaping the protection of education

367 Report of the independent expert appointed by the Secretary-General on the situation of human rights in Somalia (Mr Ghanim Alnajjar), UN doc. A/HRC/7/26, 17 March 2008, §52.

368 Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari, UN doc. A/HRC/13/65, 23 March 2010, §95.

369 Report of Shamsul Bari, independent expert appointed by the Human Rights Council on the situation of human rights in Somalia, UN doc. A/HRC/10/85, 24 February 2009, §§68–9.

370 *Ibid.*, §83.

371 *Ibid.*, §§68–9.

372 In particular, ‘[w]hile commending the above-mentioned efforts, the independent expert believes that the United Nations as a whole should do more in Somalia. He recommends that UNDP, UNHCR, UNICEF and UNESCO also consider strengthening their presence in Somalia, including in Puntland and Somaliland. They could share the tasks of training law enforcements officials, corrections/judicial officials, civil society organizations, education officials, teachers, students, doctors, nurses and so on, from all regions of Somalia. Their strengthened presence in the field will make a difference and send a strong message to the authorities in Somalia about the commitment and dedication of the United Nations to the cause of human rights in that country.’ *Ibid.*, §104. See also Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari, UN doc. A/HRC/13/65, 23 March 2010, §§99 and 104; Report of the Independent Expert on the situation of human rights in Somalia, Shamsul Bari, UN doc. A/HRC/21/61, 22 August 2012.

373 *Ibid.*

374 Report of the Special Rapporteur on the situation of human rights in the Sudan, Sima Samar, UN doc. A/HRC/9/13, 2 September 2008, §73; Report of the independent expert on the situation of human rights in the Sudan, Mohammed Chande Othman, UN doc. A/HRC/14/41, 26 May 2010, §83.

agenda. The Special Rapporteur on the right to education played an important role in clarifying aspects of the right to education in light of insecurity and armed conflict challenges. Again, as observed earlier, special procedures by their nature are flexible and responsive mechanisms capable of identifying new challenges and alerting the international community of a situation giving rise to concern.³⁷⁵

THE UN SECURITY COUNCIL AND THE MRM

UN Security Council resolutions

The Security Council appears to be gradually moving towards an expanded protection of education in armed conflict. In one example, the Council referred to ‘violations and abuses committed against children in situations of armed conflict, in particular attacks against schools, education ... facilities’.³⁷⁶ In Resolution 1998 (2011) entitled *Children and Armed Conflict*,³⁷⁷ the Council expressed its concern about persistent commission of ‘violations and abuses against children in situations of armed conflict in open disregard of its resolutions on the matter’³⁷⁸ as well as ‘other violations of international humanitarian law and human rights law against children’.³⁷⁹

It noted also ‘attacks as well as threats of attacks in contravention of applicable international law *against schools* and/or hospitals, and *protected persons in relation to them* as well as the *closure of schools* and hospitals in situations of armed conflict as a result of attacks and threats of attacks’. In this context, the Security Council recalls the General Assembly Resolution on ‘The right to education in emergency situations’³⁸⁰ related to children in armed conflict and notes that ‘Article 28 of the Convention on the Rights of the Child recognizes the right of the child to education and sets forth obligations for State parties to the Convention, with a view to progressively achieving this right on the basis of equal opportunity’.³⁸¹

In this resolution, the Council requested the UN Secretary-General to include in his reports on children and armed conflict those that engage, in a situation of armed conflict and in contravention of applicable international law:

- a) in recurrent attacks on schools;
- b) in recurrent attacks or threats of attacks against protected persons in relation to schools ... in situations of armed conflict (i.e. when the situation is in the agenda of the Security Council or is brought to attention of the Council in accordance with Article 99 of the Charter of the United Nations, which in his opinion may threaten the maintenance of international peace and security).³⁸²

This resolution is notable as it moves beyond merely the protection of schools as a means to protect civilians (e.g. *children and protection of persons in relation to schools*) towards a broader conception of the protection of, and the right to, education in armed conflict. Consider, for example, when the Council urges ‘parties to armed conflict to refrain from actions that impede *children’s access to education* ... requests the Secretary-General to continue to monitor and report, inter alia, on the *military use of schools* ... in contravention of international humanitarian law, as well as on *attacks against, and/or kidnapping of teachers*’.³⁸³ Clearly, protection of education facilities and their use, as well as protection of *persons in relation to schools*, are aimed to protect not only children against ‘violations and abuses’ but also to protect their right to education.

375 F. Hampson, ‘An Overview of the Reform of the UN Human Rights Machinery’, *Human Rights Law Review*, Vol. 7, No. 1 (2007), p. 11.

376 UN Security Council Resolution 1974 (2011), ‘Afghanistan’, 22 March 2011, §22.

377 UN Security Council Resolution 1998 (2011), ‘Children and Armed Conflict’, 12 July 2011.

378 UN Security Council Resolution 2068 (2012), ‘Children and Armed Conflict’, 19 December 2012.

379 UN Security Council Resolution 2063 (2012), ‘Sudan’, 31 July 2012.

380 UN General Assembly Resolution 64/290.

381 *Ibid.*

382 UN Security Council Resolution 1998 (2011), ‘Children and Armed Conflict’, 12 July 2011, §3.

383 *Ibid.*, §4.

The UN Security Council-led mechanism

In terms of accountability, the Monitoring and Reporting Mechanism seems to provide a potentially valuable avenue to enhance the accountability of state and armed non-state actors on attacks on education. This is done predominantly through the Action Plans, which directly engage the parties concerned. They are intended to provide concrete and verifiable agreements to foster accountability, respond to, and prevent, future attacks on schools and protected persons in relation to schools. The annual reports of the Secretary-General have identified incidents as well as clear trends or patterns of violations against education committed by the parties concerned.³⁸⁴ This has included: a) the effect of general armed violence on the closure of schools; b) the conduct of hostilities under IHL (including ‘collateral damage’); c) the types of weapons used (e.g. tear gas, cluster munitions, explosive weapons in populated areas);³⁸⁵ d) the abduction or enrolment of children in armed forces; e) occupation of schools; f) use of children as suicide bombers; g) restrictions on freedom of movement, impairing access to education;³⁸⁶ and h) the impediment in humanitarian access/blockades and impact on schools (e.g. shortages of educational supplies).³⁸⁷

The reports also address the question of impunity for perpetrators through investigations, convictions, or sanctions of those responsible for grave crimes against children. The trends for particular countries from one year to another can be established, both in terms of type of violations and the identities of the parties involved (state or non-state actors), through the listing in the Annex of the reports on the basis of the types of grave violations. In 2011, of 22 situations reported, 15 referred to attacks on schools and hospitals including direct and physical damage to schools and hospitals, incidents of closure of schools and hospitals as a result of threats and intimidation, as well as the military use of these civilian institutions and the use of schools as recruiting grounds for children.³⁸⁸ The country-specific reports of the UN Secretary-General provide additional information on the follow-up and programmatic response to attacks on education as well as specific recommendations to the parties.³⁸⁹

Recommendations include the following: the full reintegration of former child soldiers; an end to impunity through the prosecution of perpetrators; to engage the UN Country Team with the relevant Government; to recognize and maintain the neutrality and safety of schools as ‘zones of peace’; to publicly declare an end to such practices; to devise standard operating procedures to ensure that children are protected in the course of military operations; and to relocate any military barracks in proximity to school areas to appropriate sites.

Generally, attacks on schools and hospitals by the parties listed in the Annex during the reporting period occur in conjunction with other types of grave violations, such as killing and maiming of children or sexual violence. Important as it is, however, the MRM mechanism is focused mainly on *children*. The context is the concern for protection and care of children as the most vulnerable segment of civilian population in times of armed conflict. As stated, children ‘continue to account for the vast majority of victims of acts of violence’, including as a result of

384 On the notion of a ‘pattern’, it is stated that, ‘The threshold for inclusion therefore revolves around the notion of a “pattern”’. Based on the use of the notion in similar contexts, a “pattern” denotes a “methodical plan”, “a system” and a collectivity of victims. It is a “multiple commission of acts” which, as such, excludes a single, isolated incident or the random conduct of an individual acting alone and presumes intentional, wilful conduct. In proving the acts to be systematic, it would also be necessary to show that all such acts in contravention of applicable international law involving killing and maiming, or sexual violence, are being perpetrated in the same context and, from that perspective, are considered “linked”.’ UN doc. A/64/742-S/2010/181, 13 April 2010, §175.

385 For instance, in most of the 23 country situations reflected in the 2011 report, explosive weapons were used in direct physical attacks against schools and hospitals. UN doc. A/66/782-S/2012/261 (26 April 2012). See also Annual Reports of the UN Secretary-General on children and armed conflict, UN doc. A/62/609-S/2007/757, 21 December 2007, §85; and UN doc. A/63/785-S/2009/158, 26 March 2009, §70.

386 UN doc. A/64/742-S/2010/181, 13 April 2010, §107.

387 *Ibid.*

388 UN doc. A/65/820-S/2011/250, 11 May 2011.

389 The report also emphasizes situations where no attack on schools or hospitals by Government forces or armed groups is reported during the period under review. Report of the UN Secretary-General on children and armed conflict in Burundi, UN doc. S/2007/686, 28 November 2007, §33; Report of the Secretary-General on children and armed conflict in Myanmar, UN doc. S/2007/666, 16 November 2007, §37.

deliberate targeting, indiscriminate or excessive use of force. The key to understanding this issue is the preamble to the CRC-OP-AC, which condemned:

the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places that *generally have a significant presence of children, such as schools and hospitals*.

Consequently, the range of the right to education issues that are dealt with by the mechanism is limited, since the mechanism: 1) focuses strictly on the formal process of instruction, i.e. institutionalized forms of education; and 2) does not deal with tertiary or other forms of education at other levels.

This does not detract from the potential value of the MRM to address violations of the right to education and ending impunity of perpetrators. The Security Council, recognizing the need for robust action, developed over time the regime of sanctions against individuals persistently committing violations against children in armed conflict. These sanctions include arms embargoes, asset freezes, and travel bans. Security Council Resolution 1539 (2004) expressed the intention of the Council to consider imposing targeted and graduated measures against parties to conflict violating the rights of children.³⁹⁰ This commitment was reaffirmed in Resolutions 1612 (2005), 1882 (2009), and 1998 (2011).

The enforcement tools employed by the Security Council are important not only for the purposes of accountability but they also aim to perform an important function of deterring future violations of the rights of children. Thus, parties to the conflict in the existing action plans and which have since been listed for multiple violations are to prepare and implement separate action plans in order to ‘halt the killing and maiming of children, recurrent attacks on schools ... recurrent attacks or threats of attacks against protected persons in relation to schools, in violation of applicable international law’.³⁹¹ Finally, Resolution 1998 (2011) called upon member states concerned to ‘take decisive and immediate action against persistent perpetrators of violations and abuses committed against children in situations of armed conflict’ and ‘to bring to justice those responsible for such violations that are prohibited under applicable international law, including with regard to recruitment and use of children, ... *attacks on schools and/or hospitals, attacks or threats of attacks against protected persons in relation to schools* ... through national justice systems, and where applicable, international justice mechanisms and mixed criminal courts and tribunals, with a view to ending impunity for those committing crimes against children’.³⁹² Furthermore,

An attack on a school or hospital that has retained its civilian character constitutes a violation of international humanitarian law. In addition, *even in cases where attacks on schools and/or hospitals may not result in child casualties, they may affect children through the disruption of educational and/or medical service* [emphasis added].³⁹³

Thus, the Secretary-General’s report, in line with the rules of IHL, recalls that attacks against schools that have not lost their status as a civilian object are prohibited. The passage emphasized in the quote above is also interesting as it introduces elements of human rights standards where the question of access to education is a fundamental core of the right. The definition of ‘schools’ provided by the Secretary-General’s report is much broader in scope as it includes not ‘schools’ in the strict sense of the word but *all* educational facilities.³⁹⁴ ‘[t]he concepts of ‘school’ and ‘hospital’ include all educational and medical facilities, determined by the local context, including informal facilities of education and health care’.

390 List of Individuals and Entities Subject to the Measures Imposed by Paragraphs 13 and 15 of Security Council Resolution 1596 (2005), as Renewed by Paragraph 3 of Resolution 2078 (2012).

391 UN Security Council Resolution 1998 (2011), Children and Armed Conflict, 12 July 2011, §6.

392 *Ibid.*, §11.

393 *Ibid.*, §226.

394 It defers, however, the question of what is defined as ‘schools’ to the domestic order (‘determined by the local context’, as it states). Nonetheless, reference to ‘children’ seems to restrict the concept of ‘schools’ (no matter how broad) to primary and secondary levels of education, thereby potentially excluding universities.

The Secretary-General's report further attempts to provide definitions (and their constitutive criteria) of terms related to attacks on education for the purposes of listing. Threats of attacks against protected persons in relation to schools would consist of (among others) declaration of intention or determination to inflict harm, whether physical or moral, related to the provision of education. For the purposes of listing, these threats need to be credible and the consequences plausible.³⁹⁵

The protected persons in relation to schools include schoolchildren, teachers, and any civilian involved in education, unless and for such time that such persons directly participate in hostilities. Interestingly, the report clarifies that the attacks to be considered as attacks on protected persons 'need to have a link with the act of teaching'.³⁹⁶ Finally, another important definition provided by the Secretary-General's report is the concept of recurrent attacks on schools. The references to 'recurrent' attacks on schools or threats of attacks against protected persons in relation to schools suggest that such attacks or threats of attacks have been committed several times, which, as such, excludes single, isolated incidents or the random conduct of an individual acting alone.³⁹⁷ The concept of an attack, thus, would be premised on a notion of a pattern. The violations therefore need to be 'systematic, wilful and intentional'.³⁹⁸

These definitions provide a set of criteria that may help to identify what may constitute an attack on education. As the passages above make clear, attacks on education, to be qualified as such, need to have a clear link with education. The definition of protected persons in relation to school is explicit in this regard by making reference to the 'act of teaching'. It is possible that these concretizations of the concept of attacks on education 'focus on the role of education in conflict by developing a conceptualization of "attacks" as *tactical targeting of schools*'.³⁹⁹

The report of the Secretary-General neatly summarizes trends that appear in the practice of the MRM. First, if initially targeting of schools fell within the ambit of concern due to the presence of children (mainly), over time, education itself is clearly becoming a special subject of concern independently from the presence of civilians. Second, the definitions proposed in the Secretary-General's report set a certain threshold/criteria for what can be qualified as an attack on schools. It is not yet clear how future reporting on children and armed conflict will correlate with these definitions.

General assessment of the approach of the UN Security Council-led mechanism

The Security Council has been actively engaged in protection of education in armed conflict, although it has still to use the full extent of its powers in tackling abuses. Education is addressed as part of broader thematic areas such as 'children and armed conflict', 'protection of civilians in armed conflict', and 'women and peace and security'. Education-related references are also found when the Security Council addresses situations in states facing armed conflict and violence. Overall, it is not possible to conclude clearly that the work of the UN Security Council-led initiatives has systematically engaged with the protection of the *right to education* as opposed to a special focus on objects protected under IHL, where there is a significant presence of children, such as schools. It gives little priority to adult education or university education. Taken as a whole, however, recent developments, such as definitions provided by the UN Secretary-General, point towards developments in a different direction. As noted above, it has been asserted that 'even in cases where attacks on schools ... may not result in child casualties, they may affect children through the disruption of educational and/or medical services'. Perhaps, gradually, the practice of the Council-led monitoring mechanisms is moving towards embracing the main function of the right to education, i.e. its provision, which is at the heart of the human rights law concept.

395 *Ibid.*, §228.

396 *Ibid.*, §229.

397 *Ibid.*, §230.

398 R. Coomaraswamy, 'The Security Council and Children and Armed Conflict: An Experiment in the Making', Public lecture delivered at the Centre on Human Rights, University of East London School of Law, 12 April 2010.

399 M. van Wessel and R. van Hirtum, 'Schools as tactical targets in conflict: What the case of Nepal can teach us', *Comparative Education Review*, Vol. 57, No. 1 (2013), p. 2.

FACT-FINDING MISSIONS AND COMMISSIONS OF INQUIRY

The present study analysed the work of the Fact-Finding Mission headed by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (2006-2007), the High-Level Mission on the situation of human rights in Darfur (2007), the High-Level Fact-Finding Mission to Beit Hanoun (2008), the UN Fact-Finding Mission to the Gaza Conflict (2009), the International Commission of Inquiry to investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed in Côte d'Ivoire following the presidential election of 28 November 2010 (2011), the UN Independent Commission of Inquiry on Libya (2011 and 2012), and the Independent International Commission of Inquiry on the Syrian Arab Republic (2011-13).

Some of these *ad hoc* bodies have limited their remarks on education to making findings, including cases of military action against schools as well as the impact of a siege;⁴⁰⁰ facts of arrest of teachers and university students;⁴⁰¹ and disruption of schooling.⁴⁰² In other cases, investigation of facts is followed by analysis and legal findings. The International Commission of Inquiry for Côte d'Ivoire found the Government had failed to take specific measures to maintain and ensure enjoyment of ESC rights and in the area of education in particular.⁴⁰³ According to the Commission, the post-electoral crisis had almost paralysed the education system and thus deprived children of enjoyment of their right to education.⁴⁰⁴

In terms of scope and analysis on the present topic, the 2009 Report of the UN Fact-Finding Mission to the Gaza Conflict, known also as the Goldstone Report, is significant.⁴⁰⁵ The report provides a detailed assessment of the impact of military operations and blockade on the state of the education sector. The blockade has had a negative effect on the education sector in many different ways. The lack of construction material due to the blockade halted construction of schools and postponed repairs to educational infrastructure, and the lack of education material as well as equipment in turn hampered maintenance of the teaching standards. All in all, the situation caused deterioration of school attendance and performance.⁴⁰⁶ Restrictions on freedom of movement, in the form of a ban on movement of people through crossing points, hampered students' access to education abroad as well as academics' and scholars' possibilities to travel on academic exchanges.⁴⁰⁷ The report of the Mission provided other details of the number of schools damaged and of students and teachers killed and injured during military operations; the use of schools as shelters for IDPs; closure of schools for the duration of hostilities; lack of safety on roads to schools; the human rights content of curricula;⁴⁰⁸ psychological trauma of students and impact on their

400 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard, on the non-implementation of Human Rights Council resolution S-1/1, UN doc. A/HRC/4/116, 20 December 2006; *Ibid.*, UN doc. A/HRC/5/11, 8 June 2007, §§7 and 9.

401 Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101, UN doc. A/HRC/4/80, 9 March 2007, §41.

402 Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1, UN doc. A/HRC/9/26, 1 September 2008, §19.

403 Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, UN doc. A/HRC/17/48, 14 June 2011.

404 The original text in French reads as follows: 'La Commission a constaté que la crise post-électorale a quasiment paralysé le système éducatif de ce pays, privant par conséquent des centaines de milliers d'enfants pendant plusieurs mois, de la jouissance du droit à l'éducation'.

405 Report of the UN Fact-Finding Mission on the Gaza Conflict, UN doc. A/HRC/12/48, 25 September 2009, §1268.

406 *Ibid.*, §1269.

407 *Ibid.*, §1270.

408 *Ibid.*, §§1271-3. In the conclusions the Mission noted that it: 'was struck by the resilience and dignity shown by people in the face of dire circumstances. UNRWA Director of Operations, John Ging, relayed to the Mission the answer of a Gaza teacher during a discussion after the end of the Israeli military operations about strengthening human rights education in schools. Rather than expressing scepticism at the relevance of teaching human rights in a context of renewed denial of rights, the teacher unhesitatingly supported the resumption of human rights education: "This is a war of values, and we are not going to lose it". *Ibid.*, §1898.

learning capacity;⁴⁰⁹ and the diverse ways insecurity caused or created an environment for student dropouts. The UN Fact-Finding Mission to the Gaza Conflict characterized these facts as impacting on the *right to education*.⁴¹⁰

According to the Mission, in addition to the relevant customary international law provisions, as codified in 1949 Geneva Convention IV and 1977 Additional Protocol I, particularly Articles 51 and 52 (which prohibit attacks on civilians and civilian objects), human rights treaties also applied. Among the relevant provisions, references were made to the right to education as provided for by the ICESCR and the CRC. Discussing the nature of the ESC rights, the Mission cautioned that deliberate retrogressive measures on these rights were permitted only under 'stringent conditions':

Again, reference is made to the blockade and Israel's obligation to respect, protect, facilitate or provide, to the extent possible, for the enjoyment of the whole range of economic, social and cultural rights in the Gaza Strip. At the very least, Israel is 'under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities'. Israel's actions have led to a severe deterioration and regression in the levels of realization of those rights. Consequently, the Mission finds that Israel has failed to comply with those obligations.⁴¹¹

The Independent International Commission of Inquiry on the Syrian Arab Republic has received reports on the use of schools as detention facilities, on the deployment of snipers on the roofs of schools, and the fact that children were prevented from continuing their education which it discussed under the rubric of violations of children's rights.⁴¹² The Commission has also listed looting, vandalizing, burning of schools in response to student protests, use of schools by government forces as military staging grounds and temporary bases as violation of children's rights.⁴¹³ The Commission, having established the facts of attacks on protected persons and objects, such as schools, recalled the provisions of IHL that 'not only prohibits attacks on civilians and civilian objects but also requires their protection'.⁴¹⁴ Attacks on schools had 'disrupted' and in many cases 'curtailed' children's ability to access education.⁴¹⁵

Interestingly, in relation to the occupation of schools by government forces for various purposes enumerated above, the Commission of Inquiry on Syria did not make any reference to the relevant provision of IHL, but only noted that '[t]he Government's occupation of ... schools infringes the right to education'.⁴¹⁶ This is perhaps not fortuitous, as under IHL there is no general prohibition against armed forces using educational buildings for military purposes. It is in line with IHL provisions that the recent report of the Commission of Inquiry stated that '[a]nti-Government armed groups frequently use schools as barracks or offices. These occupations *are not always justified by military necessity*, and have spread the belief that schools are not safe'.⁴¹⁷ The most recent report of the Commission of Inquiry on Syria stated:

Education continues to suffer in the conflict. In December 2012, the Syrian Ministry of Education reported that 1,468 schools were being used as collective centres, while another 2,362 (10 per cent of the total number of schools) had been damaged or looted.⁴¹⁸

409 The Conclusions of the Mission state in this regard: 'Reports of the trauma suffered during the attacks, the stress due to the uncertainty about the future, the hardship of life and the fear of further attacks, pointed to less tangible but not less real long-term effects' in *Ibid.*, §1881.

410 *Ibid.*, §§1662 et seq.

411 *Ibid.*, §1312.

412 Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/S-17/2/Add.1, 23 November 2011, p. 15, §74; and p. 18, §110.

413 *Ibid.*, and also p. 19, §116.

414 *Ibid.*, p. 19, §117.

415 *Ibid.*, p. 97, §19.

416 *Ibid.*, p. 19, §124. See also the recent report, Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/22/59, 5 February 2013, §116.

417 Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/22/59, 5 February 2013, §116. Emphasis added.

418 *Ibid.*, §33.

CONCLUDING REMARKS

As stated by the Special Rapporteur on the right to education, armed conflicts ‘impair or violate the right to education, impede its development and hold back its realisation’ and ‘put people’s health and lives at risk and threaten or destroy public and private assets, limiting the capacity and resources to guarantee rights and uphold social responsibilities’.⁴¹⁹ This observation is shared and reaffirmed by the practice of UN human rights bodies. Armed conflict and situations of insecurity impact the right to education in various ways. The deliberate use of force or threat of the use of force against students or teachers or education buildings that *obstructs* access to or provision of education is only one of the ‘direct’ impacts of armed conflict on the right to education, but by no means the sole one. The practice of UN bodies indicates that poverty, lack of capacity of the authorities to provide basic services such as education, pre-existing socio-economic and cultural conditions, the general well-being of children and civilians at large, and lack of accountability should be factored into the assessment of the status of the realization of the right to education and in particular two fundamental aspects of it: access and provision. The very fact of hostilities creates conditions for the interruption of schooling, outflow of teaching staff, higher risks of dropouts particularly for girls, and so on.

Various UN bodies have contributed to a nuanced understanding of the parameters of the right to education in the context of insecurity and armed conflict. For example, on a few occasions, the Committee on the Rights of the Child and the Special Rapporteur on the right to education considered that security and safety in schools was an integral part of quality of education, which is in itself a nuanced understanding of the concept of acceptability of education. The need for school curricula to integrate peace and human rights education was reaffirmed on several occasions. Furthermore, another important aspect unanimously recommended including integration of the education component in all humanitarian activities and with equal attention to all levels of education (not only primary).

On the basis of review of practice of UN human rights bodies the following preliminary conclusions can be formulated:

- All UN human rights mechanisms uniformly affirm, without limitation, that education should be provided in times of insecurity and armed conflict. This is consistent with the interpretation of the Committee on Economic, Social and Cultural Rights on the issue.
- Access to and the right to receive education is regarded as a basic and fundamental human right. With the exception of the UN Security Council and its monitoring and reporting mechanism, attacks on education facilities, students, and education staff and the occupation of schools (as well as presence of military) were formulated as a human rights issue. They significantly impeded access to education and hence were qualified as an infringement, obstacle, or impediment to enjoyment of the right to education.

In contrast, the Security Council and some of the Commissions of Inquiry qualified the acts of occupation and use of schools as well as use of force and targeting of children and education staff (that prevented children from accessing education) as a violation of children’s rights. The practice in UN Security Council resolutions as well as the reports of the Secretary-General are particularly prominent. However, when it comes to the qualification of the occupation of schools, the Commission of Inquiry on Syria, for example, employs human rights language, qualifying it as an infringement of the right to education. As stated earlier in this report, this is not surprising as the right to education can accommodate such an interpretation.

Less attention was paid, however, to the attacks on teachers. This issue, although reported widely, was only discussed marginally. According to the Special Rapporteur on the right to education: ‘[t]he right to education involves five key players: the Government, as the provider and/or sustainer of public education; the individual, as the possessor of the right to education; children, who must undergo compulsory education; parents, as first educators; and lastly professional educators, i.e. teaching staff’. She further added that ‘the right to education lacks

⁴¹⁹ Report of the Special Rapporteur on the right to education, Vernor Muñoz, ‘Right to Education in Emergency Situations’, UN doc. A/HRC/8/10, 20 May 2008, §5.

a proper legal context in which the rights of all key stakeholders can be protected'.⁴²⁰ One reading of this could be that it is not always obvious that the right to education *per se* is a legal framework for the protection of teachers, and this aspect needs clarification. This means that other human rights are at stake, including rights to life, liberty, and security, or freedom of torture and other ill-treatment, as well as labour laws.

It is also important to summarize the measures the UN human rights mechanisms recommended in addressing the right to education. Although the predominant approach is context-specific, in most of the cases involving attacks and targeting of schools and persons associated with schools the human rights bodies have made some or all of the following recommendations: a) provision of security to children on their way to school; b) provision of a safe environment in schools; c) taking of preventive measures; d) investigation (of indiscriminate targeting), persecution and sanction (for attacks, occupation of schools); and e) provision of adequate compensation for victims.

⁴²⁰ Special Rapporteur on the right to education: 'Mission to Colombia', UN doc. E/CN.4/2004/45/Add.2, 17 February 2004, §39.

5

Topics of Special Concern

This chapter looks at what are termed ‘topics of special concern’, notably non-discrimination and equality, protection of higher education in times of insecurity and armed conflict, and the extraterritorial scope of human rights treaties. These topics have been discussed separately not only due to the volume of the practice available but also because they cut across all the issues discussed in the previous sections. Furthermore, these issues warrant further sustained attention owing to the challenges they pose in contexts such as armed conflict and violence.

Non-discrimination and equality

Non-discrimination is a fundamental human rights principle.⁴²¹ The UN has made considerable progress toward the appreciation and observance of this principle. In the Preambles and provisions of the International Bill of Rights, namely the UDHR, the ICESCR and the ICCPR, reference is made to all-inclusive language that determines who is entitled to the rights provided by the instruments: ‘all members of the human family’ or ‘all individuals’.⁴²² Thus, equal treatment and non-discrimination are critical components in securing the right to education, as well as other socio-economic rights, to all. As such, human rights mechanisms have considered discrimination as a central concern.⁴²³

Everyone within a state’s jurisdiction is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴²⁴ The term ‘other status’ in ESCR, Article 2(2) may be interpreted to prevent discrimination on other grounds, such as nationality, age, health status, sexual orientation or even migratory status.⁴²⁵ The ESCR Committee has explicitly included additional grounds, such as disability,⁴²⁶ age,⁴²⁷ nationality,⁴²⁸ marital and family

421 See, e.g., ICCPR, Art. 2(1); ICESCR, Art. 2(2); CEDAW; and CERD.

422 UDHR, Arts. 1, 2, ICESCR, Arts. 6, 7, 8, 9, 11, 12, 13, and 15; ICCPR, Arts. 9, 12, 14, 16, 17, 18, 19, and 22. The word ‘everyone’ is also included in both Covenants’ preamble.

423 This is reaffirmed in international treaties such as CERD, CEDAW, CRC, the ICMW, or the CRPD, which all include socio-economic rights. In addition to the common provision on equality and non-discrimination in both international Covenants, Article 26 of the ICCPR contains an independent guarantee of equal and effective protection before and of the law.

424 See UDHR, Arts. 2 and 7; ICCPR, Arts. 2(1), 3, 26 and 27; ICESCR, Arts. 2(2) and 3; CERD, Arts. 2 and 5; CEDAW, Arts. 2 and 15(1); CRC, Art. 2; Refugee Convention, Art. 3; ITPC, Art. 3; and ACHPR, Arts. 2–3 and 19.

425 M. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its own Development*, Clarendon Press, OUP, 1998, pp. 164–8. See also the Limburg Principles (an authoritative interpretation of the Covenant), ‘The grounds of discrimination mentioned in article 2(2) are not exhaustive.’ 1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, §36.

426 ESCR Committee, General Comment No. 20, ‘Non-discrimination in economic, social and cultural rights (art. 2, §2, of the International Covenant on Economic, Social and Cultural Rights)’, §28.

427 *Ibid.*, §29.

428 *Ibid.*, §30.

status,⁴²⁹ sexual orientation and gender identity,⁴³⁰ health status,⁴³¹ place of residence (including for IDPs),⁴³² as well as economic and social situation.⁴³³

The ESCR Committee has stated that, ‘the principle of nondiscrimination mentioned in Article 2(2), of the Covenant operates immediately and is neither subject to progressive implementation nor dependent on available resources.’⁴³⁴ The ESCR Committee reaffirmed the importance of this fundamental principle in relation to the full realization of the right to education, which is understood as imposing an ‘immediate obligation’ to undertake targeted measures.⁴³⁵ The ESCR Committee has specifically stated that educational institutions and programmes have to be accessible to everyone, without discrimination. Access to education has three overlapping dimensions:

- a) Non-discrimination: education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds;
- b) Physical accessibility: education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a ‘distance learning’ programme);
- c) Economic accessibility: education has to be affordable to all. This dimension of accessibility is subject to the differential wording of Article 13(2) in relation to primary, secondary, and higher education: whereas primary education shall be available ‘free to all’, states parties are required to progressively introduce free secondary and higher education.

In practice, all human rights bodies have addressed the question of non-discrimination and access to basic services, including education. The treaty bodies regularly require states parties to provide disaggregated information on the composition of society based by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.⁴³⁶ For instance, CERD belongs to the category of conventions that address the rights of particular groups. It deals extensively with a range of rights, including the right to education of ethnic minorities and groups who suffer discrimination. As the text of the Convention itself as well as the Reporting Guidelines indicate, states parties are to report in detail on all aspects of education.

The centrality of the right to education to the protection of persons from discrimination is highlighted in Article 7, which provides that:

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups....

As the UN Special Rapporteur on the right to education has noted, ‘[o]pportunities for education are, even in times of peace, frequently unequal and discriminatory’.⁴³⁷ In times of emergency, as he points out, ‘inequality and

⁴²⁹ *Ibid.*, §31.

⁴³⁰ *Ibid.*, §32.

⁴³¹ *Ibid.*, §33.

⁴³² *Ibid.*, §34.

⁴³³ *Ibid.*, §35.

⁴³⁴ ESCR Committee, General Comment No. 18: ‘The Right to Work’, UN doc. E/C.12/GC/18 (2005), §33. See also, in this sense: General Comment No. 3: ‘The nature of States parties’ obligations’, 1990, §1; General Comment No. 9: ‘The domestic application of the Covenant’, UN doc. E/C.12/1998/24 (1998), §9.

⁴³⁵ ESCR Committee, General Comment No. 13, §§31–7.

⁴³⁶ See, e.g., Articles 2(1), 3, and 26, General Guidance and Requirements for Reporting on ICCPR includes the following education related question/information (Guidelines for the treaty-specific document to be submitted by States parties under Article 40 of the ICCPR, UN doc. CCPR/C/2009/1 adopted July 2010), §§33–8.

⁴³⁷ Report of the Special Rapporteur on the right to education, Vernor Muñoz, ‘Right to Education in Emergency Situations’, UN doc. A/HRC/8/10, 20 May 2008, §88.

discrimination increase for marginalized groups, groups such as women and girls, persons with disabilities, persons living with HIV/AIDS, ethnic minorities, and indigenous and migrant communities'.⁴³⁸

As with other bodies and mechanisms, the shadow reports accompanying Israel's treaty reporting provided the Committee with details on the protection of education in the context of armed conflict. Issues related to the impact of the permit regime, restrictions on the movement of Palestinians, the 'separation barrier' (i.e., the construction of the Wall), denial of entry of foreigners working in Palestine (such as university professors or researchers) were drawn to the attention of the CERD Committee in the examination of the state report of Israel. The Committee issued its Concluding Observations calling on Israel to remove the restrictions and to ensure that Palestinians enjoy their human rights, in particular the right to education.⁴³⁹ Similar to the Human Rights Committee, the Committee also recommended that the state under review investigate the incidence of violence against the population of the OPT.⁴⁴⁰

The Committee also enquired into the enjoyment of rights in territories outside the effective control of the Republic of Moldova, and requested details of how Moldova ensured the language of instruction in those territories in accordance with specific linguistic and cultural identities.⁴⁴¹ In addition, the CERD Committee has discussed in detail the armed violence in Colombia and how it affected the rights of the Afro-Colombians and indigenous groups and violations of their human rights.⁴⁴²

The question of gender and armed conflict has also been discussed. As in every country involved in armed conflict or facing situations of insecurity, a heavy burden falls upon women. Discrimination in social life and with regard to the allocation of resources is a crucial contributor to inequality in this regard and impacts on women's enjoyment of a range of human rights, including education.⁴⁴³ In this context, states are required to take the following steps:

- a) Ensure a framework for non-discrimination in national law and policy;
- b) Take steps to eliminate gender (and other) stereotypes and prejudice, for example with respect to appropriate access to education; and
- c) Provide gender disaggregated data and statistics, for example with respect to numbers of girls enrolled in and actually attending schools; or criminal justice statistics including prosecution and conviction rates for gender-based violence.⁴⁴⁴

The issues that have been mainly addressed by UN mechanisms are the question of *access to education* of certain groups of individuals based on their nationality, sex, ethnic origins or place of residence (IDPs) in armed conflict and situations of violence, the inadequate resources dedicated to the education of those individuals, the content and quality of education provided, as well as access to humanitarian services including education.

438 *Ibid.*

439 CERD Committee, 'Concluding Observations: Israel', UN doc. CERD/C/ISR/CO/13, 14 June 2007, §§34, 37.

440 *Ibid.*

441 For the view of the CERD Committee see 'Concluding observations: Moldova', UN doc. CERD/C/MDA/CO/7, 16 May 2008, §3.

442 For example, the CERD Committee asked: 'Refiriéndose al Sistema de Alertas Tempranas (SAT), sírvanse indicar el número de informes de riesgo emitidos con relación a poblaciones indígenas y afrocolombianas, cuántos de ellos se convirtieron en alertas y en cuántas de estas situaciones hubo violaciones de los derechos humanos en el contexto del conflicto armado'. List of issues, UN doc. CERD/C/COL/Q/14/CRP.1, 16 June 2009.

443 Discrimination is defined in Article 1, CEDAW, as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

444 See Arts. 2 and 10, CEDAW.

RIGHTS OF PERSONS WITH DISABILITIES

Challenges posed by insecurity and armed conflict on the right of persons with disabilities to education are particularly serious and complex. In 1994, the Committee on Economic, Social and Cultural Rights in its general comment No. 5 on persons with disabilities stated that “[t]he effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services”.⁴⁴⁵

The impact of insecurity and armed conflict is particularly grave on people with disabilities. Graça Machel’s report ‘Impact of armed conflict on children’ noted that “[m]illions of children are killed by armed conflict, but three times as many are seriously injured or permanently disabled by it”.⁴⁴⁶ The report also noted that armed conflicts and political violence are ‘the leading causes of injury, impairment and physical disability’.⁴⁴⁷ Destructions in health and other vital infrastructure caused by armed conflict further aggravate the care and support for children with disabilities.

According to the UN Special Rapporteur on the right to education, in times of emergency, the levels of inequality and discrimination increase for marginalized groups including persons with disabilities.⁴⁴⁸ He also noted that “[p]eople with disabilities, of either sex and of all ages, and in most parts of the world suffer from a pervasive and disproportionate denial of their right to education’ and ‘[i]n emergencies, however, particularly during conflicts and the post-conflict period, their right to receive special support and care is not always recognized by communities or States’.⁴⁴⁹

No relevant information on disabilities in armed conflict was found within the work of the CRPD Committee or the UN Special Rapporteur on persons with disabilities. This is explained by the fact that the states parties under review were not experiencing a situation of armed conflict or insecurity. Under the Convention on the Rights of the Child, states are requested to report taking into account the CRC Committee’s general comment on the rights of children with disabilities.⁴⁵⁰

In this context, other monitoring mechanisms have dealt with disability in situations of armed violence. For instance, on Pakistan, the CRC Committee, concerned about the vulnerability of displaced children to malnutrition, disease, and harsh weather threatening their health and survival, recommended with the assistance of the United Nations and NGOs, to

Ensure that displaced children are provided with shelter, nutrition, sanitation, health care and education, as well as with physical and psychological recovery, and pay special attention to particularly vulnerable groups, especially unaccompanied and separated children, children with disabilities, and children suffering from malnutrition and diseases.⁴⁵¹

Similarly, on Sri Lanka, the CRC Committee expressed deep concern over the poor living conditions of children, including unaccompanied children and children with disabilities, who have been kept for months in IDP camps.⁴⁵² On Afghanistan, it recommended that the state party ‘[a]llocate increased resources to the education sector in order

445 ESCR Committee, General Comment No. 5 on Persons with disabilities, UN doc. 9 December 1994, §15.

446 Report of the expert of the Secretary-General, Ms Graça Machel, submitted pursuant to General Assembly resolution 48/157, UN doc. A/51/306, 26 August 1996, §145.

447 *Ibid.*

448 Report of the Special Rapporteur on the right to education, Vernor Muñoz, ‘Right to Education in Emergency Situations’, UN doc. A/HRC/8/10, 20 May 2008, §88.

449 *Ibid.*, §99.

450 CRC Committee, General Comment No 9 (2006), The rights of children with disabilities, UN doc. CRC/C/GC/9, 27 February 2007.

451 CRC Committee, ‘Concluding Observations: Pakistan’, UN doc. CRC/C/PAK/CO/4 15 October 2009, §84.

452 CRC Committee, ‘Concluding Observations: Sri Lanka’, UN doc. CRC/C/LKA/CO/3-4, §64.

to expand, build and reconstruct adequate school facilities throughout the State party, and create a truly inclusive educational system welcoming children with disabilities as well as children from all minorities⁴⁵³ The CEDAW Committee has also raised the issue of disability requesting information on the measures taken by the state party ‘to improve particularly the enrolment and literacy rates of girls and young women, including women and girls with disabilities, internally displaced women and girls’.⁴⁵⁴

States have frequently raised the right to education of persons with disabilities in the context of the Universal Periodic Review focusing mainly on improving access to education and prevention of their dropouts from education systems.⁴⁵⁵

The Working Group on Children and Armed Conflict, having examined the first report of the Secretary-General on children and armed conflict in Iraq for the period from 2008 to 2010, has called for ‘an end to recruitment and use of children by armed groups, and in particular called for an immediate stop to use of children with mental disabilities as suicide bombers’.⁴⁵⁶ The Chair of the Working Group subsequently issued a statement ‘[c]ondemning in the strongest possible terms the practice of armed groups, such as Al-Qaida, of recruiting and using children, including those with mental disabilities, as suicide bombers, and calling for the immediate disbandment of its so-called youth wing “Birds of Paradise”’.⁴⁵⁷

Beyond these scant references, however, the right to education of persons with disabilities in the context of armed conflict has not received sufficient attention.

INTERNALLY DISPLACED PERSONS

Armed conflict is one of the primary causes of forced displacement. Human rights bodies have often identified the internally displaced as a vulnerable category in need of special protection and assistance. The protection of IDPs has been on the radar of human rights mechanisms, especially since the adoption of the 1998 Guiding Principles on Internal Displacement, which incorporates in a single document substantive elements of IHL, IHRL, and refugee law.⁴⁵⁸ Virtually all human rights bodies have addressed IDPs and their access to basic services, including education. Displacement often has detrimental effects on the education of children due to the closure of schools, lack of facilities, and the difficult environments in camps and settlements. As stated by a specialized NGO on the protection of IDPs:

Quality is the main issue regarding education of internally displaced children. Displaced children may attend separate or mixed schools.... Some separate schools are in need of repairs, heating, furniture, supplies, playgrounds and additional qualified staff.⁴⁵⁹

453 CRC Committee, ‘Concluding Observations: Afghanistan’, UN doc. CRC/C/AFG/CO/1, §61.

454 CEDAW Committee, List of Issues: Chad, UN doc. CEDAW/C/TCD/Q/4, 30 March 2010, §23.

455 UPR, Report of the Working Group on the Universal Periodic Review: Eritrea, UN doc. A/HRC/13/2, 4 January 2010; Report of the Working Group on the Universal Periodic Review: Tajikistan, UN doc. A/HRC/19/3, 12 December 2011; Report of the Working Group on the Universal Periodic Review: Haiti, UN doc. A/HRC/19/19, 8 December 2011; Report of the Working Group on the Universal Periodic Review: Russian Federation, UN doc. A/HRC/11/19, 5 October 2009.

456 UN SC Working Group on Children and Armed Conflict, Conclusions on children and armed conflict in Iraq, UN doc. S/AC.51/2011/6, 3 October 2011, §6.

457 Public statement issued by the Chair of the Working Group, *ibid.*, §12.

458 UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, UN doc. E/CN.4/1998/53/Add.2.

459 Submission from the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC) for consideration at the 75th session of the Committee for the Elimination of Racial Discrimination (3-28 August 2009), Azerbaijan.

The Special Rapporteur on the human rights of internally displaced persons has addressed mainly the following questions:

- *access to education* of the IDPs in armed conflict and situations of violence,
- inadequate resources dedicated to the education of IDPs,
- content and quality of education provided to IDPs,
- freedom of movement of IDPs,
- access to humanitarian services including education, and
- general humanitarian crisis that affects, among other things, the right of IDPs to education.⁴⁶⁰

For their part, the treaty bodies regularly require states parties to provide disaggregated information on the composition of society, including on IDPs and refugees, as well as information regarding their access to education.⁴⁶¹ In examining a periodic report of Azerbaijan, the CERD Committee enquired about the education of IDPs, and particularly about integrating them into mixed schools.⁴⁶² A similar question was raised in relation to IDPs in Georgia, and their access to basic services, including their access to education.⁴⁶³ The CERD Committee referred to the armed conflict of 2008 in South Ossetia and military activities in Abkhazia as a main factor in difficulties impeding the implementation of the Convention. This resulted in discrimination against people of different ethnic origins, including a large number of IDPs and refugees, which was found to be in contradiction with the UN Security Council adopted resolution 1866 (2009) asking the parties in conflict to facilitate the free movement of refugees and IDPs.⁴⁶⁴ In addition, the Committee recommended, on the basis of its general recommendation No. 22 (1996) on refugees and displaced persons, that the state party continue its efforts to improve the situation of IDPs, including those displaced after the 2008 conflict, in particular with regard to integration and decent durable living conditions.⁴⁶⁵

⁴⁶⁰ Report submitted by the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, UN doc. A/HRC/8/6, 24 April 2008; Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, UN doc. A/HRC/10/13 9 February 2009; Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, UN doc. A/HRC/16/43, 20 December 2010; Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, UN doc. A/HRC/19/54, 26 December 2011; Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Mission to Sri Lanka, (14 to 21 December 2007), UN doc. A/HRC/8/6/Add.4, 21 May 2008; Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Mission to the Central African Republic, UN doc. A/HRC/8/6/Add.1, 18 April 2008; Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Mission to Azerbaijan, UN doc. A/HRC/8/6/Add. 2, 15 April 2008; Report submitted by the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Mission to the Democratic Republic of the Congo, UN doc. A/HRC/8/6/Add.3 16 May 2008; Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Mission to Georgia, UN doc. A/HRC/10/13/Add.2, 13 February 2009.

⁴⁶¹ See, for instance, CRC Committee, Guidelines on the inclusion of statistical information and data in periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention, §§22–5. On the basis of its reporting guidelines, the Human Rights Committee requires states parties to provide information on, ‘The situation of internally displaced persons, if any, and in particular on steps taken to ensure adequate conditions for their return and to address the specific needs of internally displaced persons, in particular their personal security, freedom of movement, and access to personal documents enabling them to seek employment as well as enjoy access to education, health and social services.’ General Guidance and Requirements for Reporting on ICCPR includes the following education related question/information (Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, UN doc. CCPR/C/2009/1 adopted July 2010), §72.

⁴⁶² CERD Committee, List of issues: Azerbaijan, UN doc. CERD/C/AZE/Q/6, 30 June 2009, §18.

⁴⁶³ CERD Committee, List of themes to be taken up in connection with the consideration of the fourth and fifth periodic reports of Georgia, UN doc. CERD/C/GEO/Q/4-5, 2 August 2011, § 5.

⁴⁶⁴ CERD Committee, ‘Concluding observations: Georgia’, UN doc. CERD/C/GEO/CO/4-5, 2 September 2011, §9.

⁴⁶⁵ *Ibid.*, §20.

On Pakistan and Sri Lanka, the CRC Committee recommended the respective state party to pursue efforts to address immediate humanitarian needs and protect the human rights of IDPs, which include international and national humanitarian services having immediate access to IDP camps, transit and resettlement areas.⁴⁶⁶

On women and girls, the CEDAW Committee regularly asks states parties to provide detailed information on the impact of the armed conflict on women, such as the scale and consequences of the displacements.⁴⁶⁷ On Colombia, the Committee was particularly concerned about internally displaced women and children, who continue to be disadvantaged and vulnerable in regard to access to health, education, social services, employment, and other economic opportunities, as well as at risk of all forms of violence. Thus, it recommended in a very generic manner that the Government ‘increase its efforts to meet the specific needs of internally displaced women and children and to ensure their equal access to health, education, social services and employment and other economic opportunities, as well as security and protection from all forms of violence, including domestic violence.’⁴⁶⁸

In a situation of insecurity, pertaining to the post-electoral violence of December 2007 to March 2008 in Kenya, CEDAW Committee reiterated its concern about lack of information provided by the government on refugee women and internally displaced persons in camps in Kenya, where many feared for their safety and continued to experience sexual and gender-based violence and abuse within these camps.⁴⁶⁹

The role of NGOs, such as the Internal Displacement Monitoring Centre (IDMC), has been very important in raising awareness of the challenges faced by IDPs. Most of their reports to the treaty bodies include a section on education.⁴⁷⁰ For instance, with regard to Azerbaijan, IDMC raised several issues of concern, such as free access of internally displaced children to schools; student dropouts from school related to poverty; and the quality of education, such as teaching staff with qualifications of the same standard and school premises and equipment of the same quality as non-displaced girls as outlined in CEDAW 10(b).⁴⁷¹ This prompted CEDAW to raise the issue in its Concluding Comments, although in a general manner,

While welcoming the State Programme on the Settlement of the Problems of Refugees and Internally Displaced Persons, the Committee notes with concern that refugee women and girls and internally displaced women and girls remain in a vulnerable and marginalized situation, in particular with regard to access to education, employment, health and housing.

The Committee urges the State party to implement targeted measures for refugee women and girls and internally displaced women and girls, within specific timetables, to improve access to education, employment, health and housing and to monitor their implementation. The Committee requests the State party to report on the results achieved in improving the situation of these groups of women and girls in its next periodic report.⁴⁷²

466 CRC Committee, ‘Concluding Observations: Sri Lanka’, UN doc. CRC/C/LKA/CO/3-4, §64; ‘Concluding Observations: Pakistan’, UN doc. CRC/C/PAK/CO/4 15 October 2009, §84–85.

467 CEDAW Committee, ‘List of issues and questions for the consideration of periodic reports: Colombia’, UN doc. CEDAW/C/COL/Q/6, 14 August 2006.

468 CEDAW Committee, ‘Concluding observations: Colombia’, UN doc. CEDAW/C/COL/CO/6, 2 February 2007, §§12–3.

469 CEDAW Committee, ‘Concluding Observations: Kenya’, UN doc. CEDAW/C/KEN/CO/7, 5 April 2011, §§43–4.

470 See, e.g., Submission from IDMC of NRC to the ESCR Committee: 40th Session, Economic, Social and Cultural Rights of IDPs in India, April 2008, p. 6; Submission from the IDMC to the ESCR Committee in anticipation of consideration of the combined second, third and fourth periodic report of the Philippines submitted to the Committee under Articles 16 and 17 of the ICESCR on Internal Displacement in the Philippines, October 2007, pp. 10–1; IDMC, Report by the IDMC to the CERD Committee on the occasion of Israel’s 14th, 15th and 16th Periodic Reports, January 2012, p. 3.

471 Submission from IDMC for consideration at the 44th session of the CEDAW Committee (20 July–7 August 2009), 2 June 2009.

472 CEDAW Committee, ‘Concluding Observations: Azerbaijan’, UN doc. CEDAW/C/AZE/CO/3, 2 February 2007, §§31–2.

As seen in this section, the right to education of IDPs in the context of armed conflict has received general attention within the broad concern of their access to basic services. Other relevant issues concerning non-discrimination, persons with disabilities, minorities, and girls are addressed elsewhere in this report.

PROTECTION OF HIGHER EDUCATION IN INSECURITY AND ARMED CONFLICT

The information studied in the present research demonstrates that the UN human rights and enforcement bodies do not always approach the right to, and protection of, education in a holistic way as foreseen by IHRL. The special interest in children in armed conflict, particularly by bodies such as the Committee on the Rights of the Child, the MRM, and the Special Representative of the Secretary-General on Children and Armed Conflict, has concentrated attention on primary and secondary education. The special focus on children, in particular girls, may have led to a minimalist view of education protection in the practice of UN human rights bodies.

Discussion of the protection of education does not always concern *all* levels of education. In effect, there is an inconsistency among human rights treaty bodies and non-conventional mechanisms, on the one hand, and mechanisms with a capacity to conduct effective monitoring, such as the UN Security Council, on the other. The UN Security Council has not raised the right to education of students at levels other than primary/secondary education. This conclusion is derived from research and analysis in this study of the Security Council resolutions and Council-led initiatives to monitor protection of children in armed conflict. This is not itself problematic, because the UN Security Council-led mechanism focuses on ‘children and armed conflict’. However, it raises a question whether children under 18 attending higher education are excluded from the monitoring and protection afforded by the MRM. It is suggested that higher education should not be excluded from the MRM, as special protection provided to children is afforded on the basis of age, not the institution.

In contrast, UN conventional and non-conventional human rights mechanisms have discussed university education on many occasions. Generally, where relevant, treaty bodies have raised issues or expressed their views on the education of both adults and children. For example, the CEDAW Committee in its Concluding Observations to Israel expressed concern that ‘the restrictions on movement in the Occupied Territories as well as regular harassment by settlers of both children and teachers on their way to and from school have had a negative impact on Palestinian women and girls’ access to education and to their health’.⁴⁷³ The Human Rights Committee has asked a state party to report on the number of university students arrested and detained while considering the state report.⁴⁷⁴

Certain Special Procedures have also reported on the situation of university students and staff, particularly their rights to life, liberty, and security, and freedom from torture.⁴⁷⁵ Violations of human rights in higher education establishments have been the subject of study by the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran. The Special Rapporteur addressed a range of issues, particularly the rights of students to freedom of opinion and expression and to peaceful assembly, documenting allegations of persecution of students for their participation in student organizations and defending human rights.⁴⁷⁶

⁴⁷³ CEDAW Committee, ‘Concluding Observations: Israel’, UN doc. CEDAW/C/ISR/CO/5, 5 April 2011, §§22–3.

⁴⁷⁴ ‘List of issues to be taken up in connection with the consideration of the Third Periodic report of Iran to the Human Rights Committee’, UN doc. CCPR/C/IRN/Q/3, 17 May 2011, §29. More specifically the Human Rights Committee requested: ‘Please clarify why in the two and a half years prior to the 2009 presidential elections, some 200 students were detained and at least 160 students were suspended or were expelled from universities. Please report on the number of students that have been arrested and detained during and after the 2009 presidential elections.’

⁴⁷⁵ Special Rapporteur on the right to education, ‘Mission to Colombia’, UN doc. E/CN.4/2004/45/Add.2, 17 February 2004, §40.

⁴⁷⁶ Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, UN doc. A/HRC/19/66, 6 March 2012. For details of individual cases see ‘Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran’, contained in Note by Secretary-General, The situation of human rights in the Islamic Republic of Iran, UN doc. A/66/374, 23 September 2011, §§38–42.

According to the letter brought to the attention of the Special Rapporteur, '[t]he peaceful efforts of students – including the hosting of lectures and the publication of articles – are often met with punitive university or Government measures'.⁴⁷⁷ The Special Rapporteur on the right to education has classified these types of 'attacks' as *human rights violations in education*.⁴⁷⁸ A more recent study has described persecution of students and university teachers for their activities (including but not exclusively political) as content-based attacks on education, which 'more generally aim to *isolate* the target from colleagues, peers, family and other supporters'.⁴⁷⁹

Access to education at the university level has been the subject of concern for special procedures mandated with questions concerning the rights of indigenous people and internally displaced persons.⁴⁸⁰ On one occasion, the Secretary-General's report on children and armed conflict reported on the closure of universities in Somalia because of general insecurity, the presence of government forces in close proximity to education facilities, and an increasing number of deaths of students and teachers.⁴⁸¹

States undergoing treaty reporting have themselves also reported on the destruction of universities and educational materials by non-state armed groups,⁴⁸² denial of access to university due to the high fees, travel restrictions, harassment in checkpoints, recognition of university certificates – all on the basis of discrimination.⁴⁸³ States have also reported the right to education of women at the level of universities⁴⁸⁴ and on the conduciveness of education content to human rights and gender equality at military universities.⁴⁸⁵

To conclude, tertiary education students and facilities are often targeted by governments. Furthermore, many people, particularly in situations of prolonged armed conflict or insecurity, reach adulthood without receiving basic education. Accordingly, it is important in line with the requirements of international human rights treaties to recognize that the right to education exists for adults and that this right requires protection and promotion.

TERRITORIAL SCOPE OF HUMAN RIGHTS TREATIES

States have human rights obligations primarily within their own territory, though exceptions from this principle may arise in certain circumstances. First, there are situations where the territorial state lacks authority and control over part of its own national territory, when control is exercised either by a foreign state or by an armed non-state actor (national group, separatist movement, etc.). Questions then arise as to the scope of human rights obligations of the territorial state in the non-controlled areas.

477 The report also includes: 'Citing statistics on the treatment of student activists based on information gathered from news sources, the Commission maintains that, since March 2009, there have been 436 arrests, 254 convictions, and 364 cases of deprivation of education. Moreover, 144 have been summoned by the judiciary, and 13 student publications have been forcibly closed. The Commission also gave the names of 32 student activists currently in prison for their activities students.' *Ibid.*, §58.

478 Annual report of the Special Rapporteur on the right to education, Katarina Tomaševski, submitted pursuant to Commission on Human Rights resolution 2001/29, UN doc. E/CN.4/2002/60, 7 January 2002, §52.

479 R. Quinn, 'Attacks on Higher Education Communities: A Holistic, Human Rights Approach to Protection', UNESCO, *Protecting Education from Attack: A State-of-the-Art Review*, UNESCO, Paris, 2010, p. 107.

480 'Conclusions and recommendations of the Expert Seminar on indigenous peoples and education (Paris, 18 to 20 October 2004)', UN doc. E/CN.4/2005/88/Add.4, 15 December 2004, §§24, 26; 'Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Mission to Azerbaijan', UN doc. A/HRC/8/6/Add. 2, 15 April 2008, §41.

481 UN Secretary-General, Children and Armed Conflict, UN doc. A/63/785-S/2009/158 (26 March 2009), §98.

482 See 'Second Periodic State Report: Nepal', UN doc. E/C.12/NPL/2, 7 August 2006, §116.

483 'Initial reports of states parties due in 2005: Syria (CRC OPAC)', UN doc. CRC/C/OPAC/SYR/1, 7 February 2006, Part II.

484 'Combined fifth and sixth periodic report of Colombia to CEDAW Committee', UN doc. CEDAW/C/COL/5-6, 11 April 2005.

485 'Combined sixth and seventh periodic reports of Russia to CEDAW Committee', UN doc. CEDAW/C/USR/7, 9 March 2009, §12.

Second, a state may be bound by human rights treaties in situations where its own agents are operating abroad and affecting the enjoyment of human rights of individuals, or when the internal exercise of jurisdiction can have extraterritorial effects in another country (e.g. involving sanctions, embargoes, siege, or trans-boundary harm). These questions are generally referred to as the extraterritorial application of human rights treaties.

These situations raise questions on how the right to education is to be protected in areas where a state loses control over part of its territory, as well as in the context of the occupation of the national territory by foreign states. In the context of the present study, the main question which has been discussed by the UN human rights bodies concerns the first case, i.e. lack of authority and control by a state over part of its own national territory either when they are exercised by a foreign state or an armed non-state actor. In contrast, the second issue, i.e. the extraterritorial application of human rights, has received less attention, both because there have been fewer cases and also because it is more controversial.⁴⁸⁶

State obligations in the event of loss of control over national territory

This section examines situations where the state loses control of part of its national territory and is therefore unable to exercise its control in order to effectively fulfil its human rights obligations. This raises the question as to the legal consequence of a lack of territorial control. What obligation does the state retain towards that territory? To what extent can it be held accountable? Would its obligation or responsibility differ on the basis of the entity (state or non-state) controlling the area concerned? It is clear that the lack of territorial control inherently affects the application of human rights treaties and the accountability of duty-bearers under these instruments. It appears that such a scenario was not taken into account by the drafters when establishing the scope of states' obligations.

These questions have or have had serious practical implications in certain regions, e.g. Tskhinvali region/South Ossetia and Abkhazia in Georgia, the Turkish Republic of Northern Cyprus, Nagorno-Karabakh in Azerbaijan, the former LTTE-controlled area in Sri Lanka, Chechnya in the Russian Federation, or Taliban-influenced areas in Afghanistan. This question is frequently raised by states as a general difficulty for implementing and monitoring their human rights obligations. The presence of rebels, separatist forces, or an insurgency has been often depicted as impediments to the realization of socio-economic rights, including the right to education in Colombia, Moldova, Nepal, and Sri Lanka.⁴⁸⁷

Indeed, the lack of control of parts of its national territory due to armed non-state actors in an internal conflict or due to foreign occupation can create serious impediments for states to implement their human rights obligations. The ability to exercise jurisdiction and control over the national territory determines the extent to which the state can implement its human rights obligations according to the practice of human rights treaty bodies. The CERD has for instance, reiterated that

it acknowledges that Georgia has been confronted with ethnic and political conflicts in Abkhazia, Georgia and South Ossetia, Georgia since independence. The Committee notes that Abkhazia and South Ossetia continue to be outside the effective control of the State party, which made it therefore unable to implement the Convention in these territories.⁴⁸⁸

⁴⁸⁶ See, generally, M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford University Press, Oxford, 2011.

⁴⁸⁷ Second Periodic Report of Georgia to the ESCR Committee, UN doc. E/1990/6/Add.31, 10 August 2001 §16; Second Periodic Report of Georgia to the Human Rights Committee, UN doc. CCPR/C/GEO/2000/2, 26 February 2001, §27; Report of Azerbaijan, (Initial Report) to the ESCR Committee, UN doc. E/1990/5/Add.30, 17 June 1996, §12; Report of Azerbaijan (Third Periodic Report) to the ESCR Committee, UN doc. E/C.12/AZE/3, 29 September 2009, §27; Report of Azerbaijan (Second Periodic Report) to the ESCR Committee, UN doc. E/1990/6/Add.37, 1 December 2003, §30; Report of Moldova (Initial Report) to the ESCR Committee, UN doc. E/1990/5/Add.52, 14 May 2003, §6; Report of Cyprus (Fifth Periodic Report) to the ESCR Committee, UN doc. E/C.12/CYP/5, 6 August 2007, §8; Report of Sri Lanka (Combined second, third and fourth periodic reports) to the ESCR Committee, UN doc. E/C.12/LKA/2-4, 9 June 2008, §§30–1.

⁴⁸⁸ CERD Committee, 'Concluding Observations: Georgia', UN doc. CERD/C/GEO/CO/4-5, 2 September 2011, §8.

One should pay sufficient attention to the fact that such situations can be in a state of flux in terms of territorial control; however, factual control is a matter of degree and it needs to be taken into account in any legal assessment. As such, it might be difficult for monitoring bodies to assess the extent of the situation in a periodic review taking place every four years and on such a level of generality.⁴⁸⁹ At the very least, this is because effective monitoring of the implementation of the right to education either by the government concerned or by the relevant treaty body is impeded in the absence of the collection of appropriate data.

For instance, on the situation of Abkhazia and Tskhinvali region/South Ossetia (Georgia), the government raised the fact that due to the alleged military occupation by the Russian Federation, the central authorities of the Georgian Government have been deprived of practical means for governing the territories and as such, are unable to exercise effective control of them to give effect to the provisions of the human rights treaties.⁴⁹⁰ As such, the government claims that it is not in a position to protect the population living in the territories and those affected by the 2008 Russia-Georgia war, including the IDPs resulting from the conflict, with regard to their access to health care, employment, education, and social security.⁴⁹¹

In light of this, even though lack of territorial control is acknowledged, UN treaty bodies as well as states have recognized their obligation to take all possible measures to implement the provisions of human rights treaties, and prevent possible violations of their obligations. For instance, the Human Rights Committee acknowledged, in relation to the armed conflict in the Kivu region of DR Congo

the difficulties it has faced in relation to communications and those resulting from the fact that the eastern regions of the country ... are not under the effective control of the Government. It reminds the Government, nonetheless, that the provisions of the [ICCPR] and all the obligations there under apply to the territory in its entirety.⁴⁹²

Similarly, concerning the situation in Georgia,

While taking note of the difficulties expressed by the State party in implementing the Covenant in Abkhazia and the Tskhinvali Region/South Ossetia, and acknowledging positive steps taken to ensure protection of the rights under the Covenant of persons living in territories presently not under its control, including encouraging United Nations special procedures mechanisms invited to Georgia to visit such territories and engage in dialogue with de facto authorities, the Committee is concerned that the populations concerned do not fully enjoy the Covenant provisions (arts. 1 and 2).

The State party should continue to take all possible measures, without discrimination, to enhance protection under the Covenant for the population of these regions by the Abkhazia and Tskhinvali Region/South Ossetia de facto authorities. The State party should ensure that international agencies are able to operate without obstacles.⁴⁹³

489 See the discussion in Chapter 3.

490 CERD Committee, 'List of themes to be taken up in connection with the consideration of the fourth and fifth periodic reports of Georgia', UN doc. CERD/C/GEO/Q/4-5, 2 August 2011.

491 *Ibid.* In another situation, Moldova recognized that it has no control over the region of Transnistria, a territory controlled by separatist forces allegedly with the support (military, political, economic, and financial) of the Russian Federation. This situation is claimed to be an impediment to the protection of social rights in the conflict region. CERD Committee, 'Concluding observations: Moldova', UN doc. CERD/C/MDA/CO/7, 16 May 2008, §3. 'Report of Moldova (Second Periodic Report) to the ESCR Committee', UN doc. E/C.12/MDA/2, 27 January 2009, §6. A detailed annex to the report was provided to the state report on the implementation of ESC rights in the Transnistrian region. 'Report of Moldova (Second Periodic Report) to the ESCR Committee, UN doc. E/C.12/MDA/2, 5 September 2008, Annex 2. Second and Third report of Moldova to the CRC Committee, UN doc. CRC/C/MDA/3, §426.

492 Human Rights Committee, 'Concluding Observations: Democratic Republic of Congo', UN doc. CCPR/C/COD/CO/3, 26 April 2006, §4.

493 Human Rights Committee, 'Concluding Observations: Georgia', UN doc. CCPR/C/GEO/CO/3, 15 November 2007, §6.

Another approach by the Committee is seen in the way it has treated the protection of rights guaranteed by the ICCPR in a situation of military occupation. Despite lack of government control in South Ossetia, Georgia was requested to provide information on the extent to which the Covenant is implemented there.⁴⁹⁴ It concluded that the state party ‘should continue to take all possible measures ... to enhance protection under the Covenant for the population by the Abkhazia and Tskhinvali Region/South Ossetia de facto authorities’.⁴⁹⁵

The ESCR Committee has taken a similar approach, but with a nuanced stance on the applicability of the full scope of ESC rights obligations. Generally it has considered the question in a rather general manner in its Concluding Observations to states parties, under the section ‘Factors and difficulties affecting the implementation of the Convention’ in situations of armed violence as in Afghanistan, Azerbaijan, Colombia, DR Congo, Moldova, and Sri Lanka.⁴⁹⁶

Although there are cases of total lack of control, governments tend to retain a certain degree of influence over non-controlled territory. For instance, while Sri Lanka did not formally recognize its lack of territorial control over parts of that country, it declared that it was ‘taking all steps’, with the assistance of the donor community, to provide the essential services that people need in the ‘uncleared areas’, i.e. the LTTE-dominated districts.⁴⁹⁷

As to the reduced scope of obligations relating to the lack of effective territorial control on certain areas, the ESCR Committee has been rather inconclusive. It has affirmed in a few rare cases the continuing international obligations of the territorial state. It has, for instance, ‘strongly recommend[ed] the Sri Lankan Government to seek international assistance, and to establish mechanisms to facilitate the flow of humanitarian assistance to the population in need, including those in the non-controlled areas’.⁴⁹⁸ In this respect, it is important to repeat that under Article 2(1), ICESCR, each state party remains under an obligation to seek international assistance for those territories and population in need, which is not limited to the narrow content of humanitarian assistance governed by IHL rules. Along these lines, the central government has the duty to ensure that international agencies and programmes in the field of cooperation and assistance are able to operate without any administrative obstacles (e.g. deliberately time-consuming bureaucratic procedures for importing supplies; restrictions or delays in issuing visas and travel permits).

For instance, on his visit to Georgia, the Representative of the UN Secretary-General on the human rights of IDPs expressed his concern about the negative impact of a domestic law (Law on the Occupied Territories, adopted on 23 October 2008) concerning the non-controlled areas of Tskhinvali region/South Ossetia and Abkhazia. The law states that any activities of an economic but also humanitarian character ‘that are not of a life-saving character

494 Human Rights Committee, ‘List of issues to be taken up in connection with the consideration of the Third Periodic Report of Georgia’, UN doc. CCPR/C/GEO/Q/3, 15 August 2007, §3.

495 HRC, Concluding observations: Georgia, UN doc. CCPR/C/GEO/CO/3, 15 November 2007, §6.

496 See ESCR Committee, ‘Concluding Observations: Colombia’, UN doc. E/C.12/COL/CO/5, 21 May 2010, §7; ESCR Committee, ‘Concluding Observations: Afghanistan’, UN doc. E/C.12/AFG/CO/2-4, 7 June 2010, §12; ESCR Committee, ‘Concluding Observations: DR Congo’, UN doc. E/C.12/COD/CO/4, 29 December 2009, §6.

497 According to the Sri Lankan government: ‘It is a little known fact that throughout the years of conflict, humanitarian and developmental needs of the civilian population of the North and the East, including in conflict areas were continuously met by the Government of Sri Lanka together with some assistance from the donor community. The administrative machinery including the free national health, education and infrastructure facilities in conflict areas are continuing to be maintained by the Government despite the fact that the LTTE siphons off such funding for its own illegal purposes. State hospitals and State run health-care centres provide a totally free service, both preventative and curative and are funded by the Government. The State meets the recurrent costs of doctors, nurses and minor employees’ salaries, drugs, equipment and maintenance.’ ‘Report of Sri Lanka (Combined second, third and fourth periodic reports) to the ESCR Committee, UN doc. E/C.12/LKA/2-4, 9 June 2008, §§30–1. ‘Third and fourth Periodic Reports to the CRC Committee’, UN doc. CRC/C/LKA/3-4, §353.

498 ESCR Committee, ‘Concluding Observations: Sri Lanka’, *op. cit.*, §22. (‘In particular, the Committee urges the Government to seek further international assistance in its efforts to provide permanent housing to displaced persons who have been living in “temporary” shelters since the war began 15 years ago. It is further recommended that the Government reassess the food assistance programme already in place in affected areas with a view to improving the nutritional standards of the food provided, particularly to children and expectant and nursing mothers.’)

in an emergency situation' are prohibited in those regions, unless they are specifically authorized by the Georgian government. The Special Representative stressed the need for refraining from placing impediments to international assistance to conflict-affected individuals 'without limiting it to emergency assistance.'⁴⁹⁹ It is clear that human rights law may provide for more positive measures with respect to the population living in those territories than the rules governing humanitarian aid under IHL.

Drawing on the practice of monitoring bodies, a number of conclusions can be made. First, there is a general presumption of competence and control over the whole territory of the state, which is bound by human rights treaties it has adhered to. Regardless of the level of authority exercised on its territory, the state remains sovereign, in the sense that it does not lose its title and therefore the contested area is considered to be *de jure* part of the national territory. Second, although the presumption that the state can effectively exercise jurisdiction throughout the entire national territory can be challenged, the monitoring bodies generally require states to take reasonable steps, whenever the threat of violence is an obstacle to enjoying the right to education.⁵⁰⁰

In line with their positive human rights obligations, the engagement of states through cooperation appears to be the most reasonable step. It should be noted, however, that the very limited practice identified does not indicate what specific measures the state should take in order to comply with international obligations. Again, this would depend on the circumstances of the case and it is difficult to provide more detailed guidance beyond the 'best efforts' standard.⁵⁰¹ This includes the following avenues for engagement:

- a) Administrative, economic, and political cooperation;
- b) Infrastructure and transportation (e.g. funding of the administrative machinery and infrastructure facilities);
- c) International assistance;
- d) Documentation and freedom of movement of individuals; and
- e) Cultural heritage.⁵⁰²

At any rate, it would be reasonable to suggest that the territorial state has a *duty to cooperate* not only with the international community but also with the authorities governing the concerned territory for the benefit of the population living therein. In particular, practice suggests that the state has to engage with the non-state entity for the well-being of those within that territory.

Extraterritorial scope of human rights treaties

In light of the treaty bodies' practice, the spatial scope of human rights treaties has developed in the case of one state occupying or having jurisdiction over the territory of another. The rationale is to avoid leaving any territory belonging to one state as a 'grey area' merely because it was occupied by, or under the jurisdiction of, another state, provided that the latter state is also a party to the human rights conventions.

The practice of UN bodies has developed an understanding of their competence to discuss the extraterritorial application of human rights treaties under international law. The extent to which states are bound by human rights law when acting abroad has been examined mainly in the context of civil and political rights through the interpretation and assessment of a number of concepts and tests, mainly in respect to arbitrary deprivation of life

499 'Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Addendum: Follow-up mission to Georgia', 23 December 2010, UN doc. A/HRC/16/43/Add.3, §30.

500 ESCR Committee, 'General Comment No. 13', *op. cit.*, §50: 'By way of illustration, a State must ... protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school'.

501 J. Cerone, 'Out Of Bounds? Considering The Reach of International Human Rights Law', Center for Human Rights and Global Justice, *Working Paper No. 5*, 2006, p. 27.

502 Report of Sri Lanka (Combined second, third and fourth periodic reports) to the ESCR Committee, UN doc. E/C.12/LKA/2-4, 9 June 2008, §§30–1. Third and fourth Periodic Reports to the CRC Committee, UN doc. CRC/C/LKA/3-4, §353. CERD Committee, List of themes to be taken up in connection with the consideration of the fourth and fifth periodic reports of Georgia, UN doc. CERD/C/GEO/Q/4-5, 2 August 2011.

or liberty.⁵⁰³ Conversely, literature and sources available to interpret the extraterritorial scope of application of the ICESCR have been relatively underdeveloped, save for discussions concerning the general obligation imposed on states parties under Article 2(1), ICESCR to engage in international assistance and cooperation to realize human rights universally.⁵⁰⁴

During the period dealt with in this report (2007–12), the sole existing case of extraterritorial obligations relevant to education revolves around Israel, which has consistently objected, vis-à-vis human rights monitoring bodies, to the extraterritorial application of human rights instruments, in order to exclude the OPT from its reporting obligations.⁵⁰⁵

In its 2011 report, Israel provided two main legal reasons and more recently added a practical consideration. It first claims that international law and state practice make a distinction between IHRL and IHL. Accordingly, human rights law is meant to operate in peacetime and thus this body of law cannot be applied in the context of armed conflict inasmuch as it is superseded by IHL.⁵⁰⁶ Second, in the absence of a specific declaration in which it extended the applicability of the ICESCR to the West Bank or the Gaza Strip, human rights instruments do not apply, nor were they intended to apply, to ‘areas that are not subject to its sovereign territory and jurisdiction’.⁵⁰⁷ Third, it contended that in view of disengagement from the Gaza Strip, involving the withdrawal of all military forces and administration, Israel does not have ‘effective control, in the sense envisaged by the Hague Regulations’,⁵⁰⁸ which suggests *a fortiori* that in any case it would not have sufficient control for the purpose of human rights law. Facing the continual position of Israel rejecting the application of human rights treaties in the OPT, the treaty bodies of treaties containing ESC rights have reiterated on several occasions, including in 2013, their interpretation that these instruments are indeed applicable in the OPT.

In this context, as noted above, the ESCR Committee requested more detailed information on the right to education including ‘attacks on education’ in particular by military and settlers on school children and education facilities, which it had referred to as ‘serious violations’ of the right to education.⁵⁰⁹ The Committee had enumerated restrictions on movement of children, regular harassment by settlers of children and teachers on their way to and from school, attacks on educational facilities, and sub-standard school infrastructure as factors contributing to children not being able to enjoy their right to education and qualified these instances, together with non-attendance caused by lack of registration, as *violations of the right to education*.⁵¹⁰

503 This has attracted public attention this last decade, especially in the context of targeted killing of suspected terrorists, or the practice of extraordinary rendition or ill-treatment of detainees.

504 See the 2011 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, available at: http://rapda.org/images/stories/DOC/maastricht_eto_principles.pdf.

505 Israel never referred to the implementation of the ICESCR in the OPT in its three periodic reports presented to the ESCR Committee. Report of Israel (Initial Report) to the ESCR Committee, UN doc. E/1990/5/Add.39(1), 20 January 1998; UN doc. E/1990/6/Add.32, 16 October 2001, §§5–8; Report of Israel, (Third Periodic Report) to the ESCR Committee, UN doc. E/C.12/ISR/3, 12 July 2010, §9. See, e.g., ESCR Committee, ‘Concluding Observations: Israel’, UN doc. E/C.12/1/Add.27, 4 December 1998, §11; ESCR Committee, ‘Concluding Observations: Israel’, UN doc. E/C.12/1/Add.90, 26 June 2003, §10. ESCR Committee, ‘Concluding Observations: Israel’, UN doc. E/C.12/ISR/CO/3, 16 December 2011, §8. See also CEDAW Committee, Responses to the list of issues and questions, UN doc. CEDAW/C/ISR/Q/5/Add.1, 21 December 2010, §§3–8.

506 Report of Israel (Third Periodic Report) to the ESCR Committee, UN doc. E/C.12/ISR/3, 12 July 2010, §5.

507 Report of Israel (Second Periodic report) to the ESCR Committee, UN doc. E/1990/6/Add.32 16 October 2001, §§5–8.

508 Report of Israel (Third Periodic Report/List of Issues and Written Replies) to the ESCR Committee, UN doc. E/C.12/ISR/Q/3/Add.1, pp. 4–5.

509 ESCR Committee, List of issues to be taken up in connection with the consideration of the third periodic reports of Israel concerning articles 1 to 15 of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/C.12/ISR/3, 9 December 2010, §36.

510 ESCR Committee, Concluding observations: Israel, UN doc. E/C.12/ISR/CO/3, 16 December 2011, §36.

Under the ICCPR, research found occasions, however, when the right to education in armed conflict was also addressed, indirectly, in the context of the protection of children (in accordance with Article 24 of the ICCPR).⁵¹¹ Human rights obligations in situations of foreign occupation, primarily in OPT, was brought up before other mechanisms such as the CERD Committee⁵¹² and the CEDAW Committee.⁵¹³

From the treatment by the treaty bodies of the issue of extraterritorial application of the Covenant (ICCPR), one can see that many of the rights and corresponding state obligations are applicable in the OPT, including the obligation to respect, to protect, and possibly also to fulfil. The sustained engagement of the treaty body with the state party on the right to education may be due to significant reporting by NGOs documenting in detail all alleged human rights violations, including the right to education. Conversely, it is important to note that the absence of other instances of dialogue between treaty bodies and states parties under the review concerning extraterritorial obligations in times of armed conflict can be explained by the fact that the treaty bodies did not receive any specific and reliable information (other than from the territorial States concerned)⁵¹⁴ on alleged violations of the respective treaties in contested territories (e.g. Northern Cyprus, Transnistria, Tskhinvali region/South Ossetia, and Abkhazia).⁵¹⁵

Apart from the treaty bodies, other mechanisms likewise confirm the extraterritorial obligations under human rights when factual control is exercised over territory. For instance, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 reported on the destruction and damage to schools, and the impact of restrictions on movement, including blockages on the right to education.⁵¹⁶ Although the fact-finding mission (2006–7) did not provide a detailed account of the situation on the ground, it briefly reported destruction of schools and consequences of the siege for health and education;⁵¹⁷ settler violence; destruction of property (demolitions) including schools; the non-granting of permits thereby denying access to education;⁵¹⁸ and the targeting of schools.⁵¹⁹ Similarly, the High-Level Fact-Finding Mission to Beit Hanoun reported the disruption

511 Pursuant to a detailed analysis of the situation on the ground by NGOs (in this case, with regard to Palestine), the Human Rights Committee has raised issues of a) attacks against educational facilities; b) restrictions on school development; and c) restricted access to schools due to the construction of Wall and other movement restrictions, in the context of additional questions put to the concerned state party. Human Rights Committee, List of issues to be taken up in connection with the consideration of the Third Periodic Report of Israel, UN doc. CCPR/C/ISR/Q/3, 17 November 2009. See also recommendations by the Human Rights Committee in HRC, Concluding observations: Israel, UN doc. CCPR/C/ISR/CO/3, 3 September 2010, §§5, 9; see also §§17 and 24.

512 CERD Committee, ‘Concluding observations: Israel’, UN doc. CERD/C/ISR/CO/13, 14 June 2007, §§34, 37.

513 CEDAW Committee, List of Issues raised in relation to the fifth periodic report of Israel, UN doc. CEDAW/C/ISR/Q/5, 14 September 2010.

514 For instance, under CERD, Georgia claimed that the Russian Federation has been directly participating in and failing to prevent the racial discrimination in the occupied territories through acts perpetrated by its armed forces, security and intelligence services, by its border guards, police forces and civilian administrations, as well as other persons falling under its authority and/or control. List of themes to be taken up in connection with the consideration of the fourth and fifth periodic reports of Georgia, UN doc. CERD/C/GEO/Q/4-5, 2 August 2011. In this context, the Committee limited itself to noting the ‘State party’s position that the obligation for implementing the Convention in South Ossetia and Abkhazia belongs to a neighbouring country which has effective control over those territories. The Committee notes that it has in the past taken the view that States that have effective control over a territory have the responsibility under international law and the spirit of the Convention for implementing the Convention.’ CERD Committee, ‘Concluding Observations: Georgia’, UN doc. CERD/C/GEO/CO/4-5, 2 September 2011, §9.

515 Discussion with the Chairpersons on the Role of Treaty Bodies in the Protection of Education, hosted by the Geneva Academy and PEIC, New York, 22 May 2013.

516 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN doc. A/62/275, 17/08/2007, §13.

517 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard, on the non-implementation of Human Rights Council resolution S-1/1, UN doc. A/HRC/5/11, 8 June 2007, §§7–9.

518 Situation of human rights in the Palestinian territories occupied since 1967, UN doc. A/63/326, 25 August 2008, §§13–4.

519 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, UN doc. A/HRC/10/20, 11 February 2009, §33.

of education services. It noted that ‘Schools operated by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) serving nearly 10,500 pupils were shut down for a week’.⁵²⁰

As noted in Chapter 4, one of the most elaborate assessments of the right to education in an extraterritorial context of armed conflict is the report of the UN Fact-Finding Mission to the Gaza Conflict (Goldstone Report).⁵²¹

In addition to documenting the impact of armed conflict on the right to education,⁵²² the Goldstone Report included findings (with a legal analysis of the relevant legal framework) in the context of the right to education. In particular, it found the applicability of the ICESCR and the CRC, which applied to the actions of Israel, and recalled that, at the very least, Israel was ‘under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities’.⁵²³ In its conclusions the Fact-Finding mission reiterated the destruction of schools, the reports of the trauma and stress suffered as a result of military operations, the impact of ‘severe regime of closures and restrictions’ on daily lives, including as related to schools. It stated that ‘timing of the first Israeli attack, at 11.30 a.m. on a weekday, when children were returning from school and the streets of Gaza were crowded with people going about their daily business, appears to have been calculated to create the greatest disruption and widespread panic among the civilian population’.⁵²⁴

Overall, the UN human rights mechanisms seem to affirm the continuing international obligations of the territorial state in situations of the loss of control over national territory, although there is a need for greater clarity of obligations under the right to education. As far as human rights obligations of states acting abroad are concerned, they have been examined primarily in the context of civil and political rights. But the scant practice that does exist informs us that positive obligations are dependent on the degree of control exercised by the state.

520 Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1, UN doc. A/HRC/9/26, 1 September 2008, §19.

521 Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN doc. A/HRC/12/48, 25 September 2009.

522 The report in detail documented the facts related to the *impact* of the armed conflict on the right to education. In particular, the Mission found a negative impact of the Wall on access to schools and universities; that the blockade and military operations affected educational facilities and activities, which ultimately caused a decline in attendance and performance; an impact of the ban on movement on the development of academia in Gaza, and on access to education abroad; damage to schools and kindergartens; deaths and injuries to teachers and pupils; closure of schools; and indoctrination of the population through education. *Ibid.*, §§201, 1268–74, 1312.

523 *Ibid.*, §1312.

524 *Ibid.*, §§1878–98.

6

Human Rights and Humanitarian Law and the Right to Education

Notwithstanding the constraints of their mandates, human rights treaty bodies have addressed issues of IHL in their work. Accordingly, this chapter is concerned with the question of how human rights and IHL operate together in the practice of the UN human rights bodies.

THE GENERAL APPROACH OF THE TREATY BODIES ON THE INTERRELATIONSHIP BETWEEN IHRL AND IHL

The general approach of human rights treaty bodies in relation to IHL can be found in the respective treaty bodies' General Comments. More specific positions can be found in their Concluding Observations. To date, no references to IHL have yet been made in the context of individual communications.⁵²⁵

Human Rights Committee and the Committee on Economic, Social and Cultural Rights

The position of the Human Rights Committee on IHL is detailed in General Comment 31, where the Committee stated that the ICCPR applies in situations of armed conflict but noted that

in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.⁵²⁶

The Human Rights Committee is said to have recognized the *lex specialis* character of IHL, but 'not in the sense of more specific rules derogating the more general ones of the Covenant but rather as a body of law that with its specific rules for a specific situation – i.e. that of armed conflict – complements the more general and generally applicable human rights guarantees.'⁵²⁷ In other words, 'IHL is *lex specialis complementa* (complementary) and not *derogata* (derogatory) of human rights law.'⁵²⁸

The Committee on Economic, Social and Cultural Rights provided its views on the concomitant applicability of IHL in the context of General Comments dedicated to specific rights. It has, in particular, read IHL into the obligation of states to respect provisions of the ICESCR. More specifically, the Committee held that states are to

⁵²⁵ W. Kälin, 'Universal Human Rights Bodies and International Humanitarian Law', in R. Kolb and G. Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Edgar Publisher, 2013, pp. 441–65.

⁵²⁶ Human Rights Committee, General Comment 31: 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, §11.

⁵²⁷ W. Kälin, 'Universal Human Rights Bodies and International Humanitarian Law', in *op. cit.*, p. 444.

⁵²⁸ University Centre for International Humanitarian Law, Expert Meeting on the Supervision of the Lawfulness of Detention during Armed Conflict, convened at the Graduate Institute of International Studies, Geneva 24–25 July 2004, p. 45, available at http://www.ruig-gian.org/ressources/communication_colloque_rapport04.pdf.

refrain from limiting access to health and water services or destroying infrastructure as a punitive measure during armed conflicts ‘in violation of international humanitarian law.’⁵²⁹ Similarly, concerned about allegations of the deprivation of food, the ESCR Committee stated that:

In light of its general comment No. 12 (1999) on the right to adequate food, the Committee draws the attention of the State party to the fact that the prevention of access to humanitarian food aid in internal conflicts constitutes *a violation of article 11 of the Covenant as well as a grave violation of international humanitarian law*.⁵³⁰

One reading of the Committee’s General Comment is that violations of IHL may also be deemed a failure to respect the provisions of the Covenant. In addition, in relation to the right to water, the Committee has noted

that during armed conflicts, emergency situations and natural disasters, the right to water embraces *those obligations by which States parties are bound under international humanitarian law*. This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.⁵³¹

The ESCR Committee’s approach, parallel to that of the Human Rights Committee, is that IHL norms provide complementary guidance on how to respect and protect the relevant right in times of armed conflict. The relevance of IHL may seem somewhat random in the context of the right to education. Yet, since elements of human rights are also found in IHL and also because violations of IHL can affect human rights ‘the areas of potential overlap are rather important when the protection of civilians is at stake.’⁵³² This rationale becomes even more apparent in the Human Rights Committee’s observation which regarded violations of IHL norms as a human rights issue, noting that:

the Committee regrets that the State party has not yet conducted independent and credible investigations into *serious violations of international human rights law, such as the direct targeting of civilians and civilian infrastructure*, such as waste water plants and sewage facilities, the use of civilians as ‘human shields’, refusal to evacuate the wounded, firing live bullets during demonstrations against the military operation and detention in degrading conditions (arts. 6 and 7).⁵³³

However, important as they are, these references to IHL remain very general without detailed assessment of an IHL provision. Kälin explains this in the following terms: ‘[o]ne reason for this is the fact that, unlike in the case of the European Court of Human Rights, no individual communications have been brought yet to the UN treaty bodies of persons claiming to be victims of violations of their human rights during armed conflict. Such cases would provide the Human Rights Committee and other treaty bodies with an opportunity to explore the relationship between specific human rights and their equivalents in international humanitarian law.’⁵³⁴

529 The precise wording used by the Committee, in relation to the right to health, is ‘limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law’ in ESCR Committee, General Comment No. 14, ‘The right to the highest attainable standard of health’, §34. In its General Comment on the Right to Water, the Committee was more elaborate, specifying that ‘limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law’ in ESCR Committee, General Comment No. 15, ‘The Right to Water’, §21.

530 ESCR Committee, ‘Concluding Observations: Sri Lanka’, UN doc. E/C.12/LKA/CO/2-4, 9 December 2010, §28. Emphasis added.

531 ESCR Committee, General Comment No. 15, §22.

532 W. Kälin, ‘Universal Human Rights Bodies and International Humanitarian Law’, *op. cit.*, p. 445.

533 Human Rights Committee, ‘Concluding observations: Israel’, UN doc. CCPR/C/ISR/CO/3, 3 September 2010, §9.

534 W. Kälin, ‘Universal Human Rights Bodies and International Humanitarian Law’, *op. cit.*, p. 448.

Committee on the Rights of the Child

Certain human rights treaties directly incorporate IHL norms into the scope of state obligations. Article 38 of the CRC mentions obligations of states in IHL terms by requiring them ‘to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child’. It further states that ‘[i]n accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.’⁵³⁵

In the same vein, the Convention on the Rights of Persons with Disabilities requires that:

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.⁵³⁶

Hence, the respective Committees are required to take into consideration the IHL obligations of the reporting state in monitoring implementation of the Convention. Although the CRC Committee did not develop further in its general comments its approach on the ways it will monitor the implementation of IHL within the scope of the Convention, it has added that it will encourage states parties in their constructive dialogue to ratify international instruments and lists main IHL instruments, i.e. the four Geneva Conventions and the Additional Protocols.⁵³⁷ Treaty reporting in accordance with the obligations in the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict requires states parties to report on ‘measures taken to prevent attacks on civilian objects protected under international humanitarian law and other international instruments, including places that generally have a significant presence of children, such as *schools* and *hospitals*’.⁵³⁸ As will be seen more in the discussion of the concluding observations made by the CRC, IHL obligations are frequently raised in the monitoring of the Optional Protocol.

TREATY BODIES’ CONCLUDING OBSERVATIONS

The practice of treaty bodies on the interrelationship between IHL and IHRL in the context of the right to education mainly developed in three treaty bodies namely, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child.⁵³⁹

⁵³⁵ Art. 38(4).

⁵³⁶ Art. 11 (Situations of risk and humanitarian emergencies), CPRD.

⁵³⁷ CRC Committee, General Comment No. 5, ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, §6)’, UN doc. CRC/GC/2003/5 27 November 2003, Annex I.

⁵³⁸ ‘Revised Guidelines Regarding Initial Reports to Be Submitted by States Parties under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict’, UN doc. CRC/C/OPAC/2 19 October 2007, §16.

⁵³⁹ From other treaty bodies examined in the present study, namely CERD Committee, CAT Committee, CEDAW Committee, and CRPD Committee, only the Committee on the Elimination of Racial Discrimination contained a vague reference to the IHRL and IHL. The Committee, referring to the facts of ‘dramatic and disproportionate impact of the blockade and military operation on the right to housing and basic services, recommended that the State party should, ‘fully respect the norms of humanitarian law in the Occupied Palestinian Territory, rescind its blockade policy and urgently allow all construction materials necessary for rebuilding homes and civilian infrastructures into the Gaza Strip so as to ensure respect for Palestinians’ right to housing, education, health, water and sanitation in compliance with the Convention’. CERD Committee, ‘Concluding Observations: Israel’, UN doc. CERD/C/ISR/CO/14-16, 9 March 2012, §26.

Human Rights Committee and the ESCR Committee

Neither the Human Rights Committee nor the ESCR Committee has directly invoked IHL in monitoring the implementation of the right to education in situations of armed conflict during examination of state reports. The Human Rights Committee has made in its Concluding Observations general references to IHL that may cover specific situations involving education-related issues. For example, in examination of the Colombia report, it made a general recommendation that:

The State party must comply with its obligations under the [ICCPR] and other international instruments including the Rome Statute of the International Criminal Court, and investigate and punish serious violations of human rights and international humanitarian law with appropriate penalties which take into account their grave nature.⁵⁴⁰

This means that in the Committee's view the right to remedy includes not only the right to investigation and punishment of serious violations of human rights, but also of serious violations of IHL. This recommendation is in line with the general approach of the Committee stated earlier and 'is justified by the fact that IHL violations usually also violate a corresponding human rights guarantee'.⁵⁴¹ In the previous chapter, we mentioned that the Human Rights Committee raised the issue of attacks against educational facilities and schools in the OPT by military and settlers in the context of consideration of the periodic report of Israel. One may speculate that the Committee was indirectly invoking issues also relevant to IHL.

Similarly, the ESCR Committee did not directly discuss IHL issues in the process of treaty monitoring during the period under review. On one occasion, the Committee made a general reference to humanitarian law, reminding the state party of its primary responsibility to protect its civilians with respect to IHRL and IHL.⁵⁴² Sometimes the Committee uses alternative terms to refer to IHL. For example, it has referred to an 'international humanitarian prohibition' as a legal basis for prohibiting starvation.⁵⁴³ In the context of cultural rights, the ESCR Committee recommended that another state party ensure that individuals exercise their right to take part in cultural and religious life 'without restrictions other than those that are strictly proportionate to security considerations and are non-discriminatory in their application, in accordance with international humanitarian law'.⁵⁴⁴

But despite lack of direct invocation of IHL, the ESCR Committee has drawn IHL benchmarks to monitor the right to education in situations of conflict. For example, the Committee has asked a state party undergoing reporting to 'indicate what measures the State party has taken to protect school premises from occupation by armed groups and the consequent interruption of classes'.⁵⁴⁵ Arguably, the Committee took an IHL approach by alluding to the principles of distinction and the IHL requirement to avoid locating military objects within or near civilians.⁵⁴⁶

Committee on the Rights of the Child

The authority of the CRC Committee to monitor implementation of IHL as part of implementation of the provisions of the CRC has already been noted. The Committee has not as yet conceptualized its general approach on the interrelationship between IHL and the CRC. Commenting on the lack of distinction and disproportionate suffering of civilians, the Committee called upon the state party to '[t]ake prompt measures to comply with the fundamental principles of proportionality and distinction enshrined in humanitarian law', including 1949 Geneva

⁵⁴⁰ Human Rights Committee, 'Concluding Observations: Colombia', UN doc. CCPR/C/COL/CO/6, 4 August 2010, §9.

⁵⁴¹ W. Kälin, Universal Human Rights Bodies and International Humanitarian Law, *op. cit.*, 446.

⁵⁴² ESCR Committee, 'Concluding Observations: DR Congo', UN doc. E/C.12/COD/CO/4, 20 November 2009, §9.

⁵⁴³ ESCR Committee, 'Concluding Observations: Sri Lanka', UN doc. E/C.12/LKA/CO/2-4, 9 December 2010, §28.

⁵⁴⁴ ESCR Committee, 'Concluding Observations: Israel', UN doc. E/C.12/ISR/CO/3, 16 December 2011, §36.

⁵⁴⁵ ESCR Committee, 'List of issues to be taken up in connection with the consideration of the fifth periodic report of Colombia', UN doc. E/C.12/COL/Q/5, 10 June 2009, §38.

⁵⁴⁶ See, for instance, Articles 51 and 58 of 1977 Additional Protocol I.

Convention IV, 'which set out the minimum standards for the protection of civilians in armed conflict'.⁵⁴⁷ The CRC Committee has also urged a state to investigate promptly and impartially violations of IHL, ensuring that those responsible are 'duly prosecuted and sanctioned'.⁵⁴⁸

Unlike the two treaty bodies discussed above, the CRC Committee has discussed to some extent IHL issues in relation to the protection of education. For example, it expressed its concern both that schools remain occupied by armed forces and that school infrastructure is often found to be damaged after use by armed forces. It then went on to call upon the state party to '[i]mmediately discontinue military occupation and use of the schools and strictly ensure compliance with humanitarian law and the principle of distinction and to cease utilizing [schools].' It also recommended ensuring that 'school infrastructures damaged as a result of military occupation are promptly and fully restored'.⁵⁴⁹

In another instance, the Committee, referring to torture and detention of children as well as expressing 'serious concern about consistent reports that some schools have been used by the State party's security forces as detention centres' strongly urged the state party 'to immediately and unconditionally release all children who have been arbitrarily arrested and detained since March 2011 in connection with the protests, to stop using schools as detention centres, and to strictly ensure compliance with humanitarian law and the principle of distinction'.⁵⁵⁰ Again the references to the applicable rules of IHL by the Committee are very general. The relevant humanitarian law standards would seem to include the requirement to, wherever possible, avoid locating military objects within or near civilians.⁵⁵¹

HUMAN RIGHTS COUNCIL

General remarks

The Human Rights Council frequently takes up IHL when dealing with situations of armed conflict. IHL has been addressed generally in the context of protection of civilians, with respect to country situations, and when examining thematic issues.⁵⁵²

In a resolution entitled 'Protection of Human Rights of Civilians in Armed Conflict', the Council sketched broadly the relationship between IHRL and IHL. This resolution is particularly interesting, as it expressed in more explicit terms what treaty bodies have only alluded to, namely that breaches of IHL would amount to violations of IHRL. More specifically it emphasized that 'conduct that violates international humanitarian law, including grave breaches of the Geneva Conventions of 12 August 1949, or of the Protocol Additional thereto of 8 June 1977 relating to the Protection of Victims of International Armed Conflicts (Protocol I), *may also constitute a gross violation of human rights*'.⁵⁵³ Furthermore, in addition to confirming the concomitant operation of both sets of laws in times of armed conflict and the importance of combating impunity, the Council requested the relevant special procedures and *invited* human rights treaty bodies, within their respective mandates, 'to continue to address the relevant aspects of the protection of human rights of civilians in armed conflicts in their work'.⁵⁵⁴

547 CRC Committee, 'Concluding Observations: Israel', UN doc. CRC/C/OPAC/ISR/CO/1, 4 March 2010, §11; In similar terms, recommendations were formulated in relation to Sudan, see CRC Committee, 'Concluding Observations: Sudan', UN doc. CRC/C/SDN/CO/3-4, 1 October 2010, §73.

548 CRC Committee, 'Concluding Observations: Israel', UN doc. CRC/C/OPAC/ISR/CO/1, 4 March 2010, §25.

549 CRC Committee, 'Concluding Observations: Sri Lanka', UN doc. CRC/C/OPAC/LKA/CO/1, 1 October 2010, §73.

550 CRC Committee, 'Concluding Observations: Syrian Arab Republic', UN doc. CRC/C/SYR/CO/3-4, 8 February 2012, §52.

551 See, e.g., D. Weissbrodt, J. C. Hansen, and N.H. Nesbitt, 'The role of the Committee on the Rights of the Child in interpreting and developing international humanitarian law', *Harvard Human Rights Journal*, Summer 2011.

552 For the examination of thematic issues, see W. Kälin, 'Universal Human Rights Bodies and International Humanitarian Law', in *op. cit.*, p. 452.

553 Human Rights Council, Resolution 9/9: 'Protection of the human rights of civilians in armed conflict', 21 September 2008. Emphasis added.

554 *Ibid.*

Some situations of armed conflict have been dealt with by the Council mostly in special sessions. The review of Council resolutions in 2007–12 shows that the Council has consistently invoked IHL, except for a few cases. These exceptions mainly concerned the situation in Syria, where references to the relevance of IHL have been made only implicitly. The Council has discussed the human rights situation in Syria consecutively in four special sessions and in all four cases the Resolutions did not include explicit references to IHL, instead the Council has opted for a formula of ‘violations of international law, including human rights law’.⁵⁵⁵

In other situations, the Council called upon the state facing armed conflict to ‘bring to justice perpetrators of violations of human rights and of international humanitarian law’.⁵⁵⁶ It affirmed ‘the applicability of international human rights law and international humanitarian law’; condemned ‘all targeting of civilians’; and stressed the need to ensure accountability for all violations of IHRL and IHL to prevent further violations.⁵⁵⁷ It has also emphasized that ‘international human rights law and international humanitarian law are complementary and mutually reinforcing’.⁵⁵⁸ The Council has consistently urged all parties concerned ‘to respect the rules of international human rights law and international humanitarian law and to refrain from violence against the civilian population’.⁵⁵⁹ It has also reaffirmed obligations of states to respect IHRL and IHL while countering terrorism.⁵⁶⁰

The Human Rights Council makes references to IHL by using terms such as humanitarian rights⁵⁶¹ or rights of civilians.⁵⁶² These categories are clearly distinct from *human rights*, judging by the context in which they are formulated and separate references to human rights. This raises a question, which cannot be examined in detail here, on whether IHL norms on the protection of civilians are increasingly being seen as ‘rights’ rather than as merely norms governing the conduct of parties.

Another important feature of Human Rights Council resolutions is that in several instances, the Council has established commissions of inquiry or requested a team of special rapporteurs to report on a particular situation. It has requested, for example, a group comprised of the Council’s Special Procedures, to ‘examine the current situation in the east of the Democratic Republic of the Congo with a view to providing a comprehensive report to the Council’.⁵⁶³ Resolution S-9/1 decided ‘to dispatch an urgent, independent international fact-finding mission ... to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory’.

555 See Resolution S-19/1, The deteriorating situation of human rights in the Syrian Arab Republic, and the recent killings in El-Houleh, 4 June 2012; Resolution S-18/1, The human rights situation in the Syrian Arab Republic, 5 December 2011; Resolution S-17/1, Situation of human rights in the Syrian Arab Republic, 18 October 2011. Equally, no reference to IHL was made in relation to conflict in Libya in Resolution S-15/1, Situation of human rights in the Libyan Arab Jamahiriya, 3 March 2011.

556 Resolution S-14/1 on the situation of human rights in Côte d’Ivoire in relation to the conclusion of the 2010 presidential election, 4 January 2011.

557 Resolution 2/1, The human rights situation in the Occupied Palestinian Territory, including East Jerusalem, 21 October 2009; also HRC Resolution S-9/1, The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, UN doc. A/HRC/S-9/L.1, 12 January 2009.

558 HRC Resolution 2/1, The human rights situation in the Occupied Palestinian Territory, including East Jerusalem, UN doc. A/HRC/RES/S-12/1, 21 October 2009; also HRC Resolution S-9/1, The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, 12 January 2009.

559 *Ibid.* Also Resolution S-8/1, Situation of human rights in the east of the Democratic Republic of the Congo, 28 November 2008; similar concerns were expressed in Resolution S-6/1, Human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, 23–24 January 2008.

560 Resolution S-15-11/1, Assistance to Sri Lanka in the promotion and protection of human rights, 27 May 2009.

561 Resolution S-6/1, Human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, 23–24 January 2008.

562 Resolution S-8/1, Situation of human rights in the east of the Democratic Republic of the Congo, 28 November 2008.

563 *Ibid.*

More recent fact-finding and inquiry bodies were set up in response to situation of human rights in Libya⁵⁶⁴ and Syria.⁵⁶⁵ In both of these cases, as outlined before, the Council had only implicitly mandated the relevant monitoring body to inquire into violations of IHL. In both cases, the Council mandated investigation of all alleged violations of IHRL and ‘to establish the facts and circumstances of such violations and of the crimes perpetrated’.⁵⁶⁶ All the investigations carried out inquired into and assessed situations referred to on the basis of both IHRL and IHL.

Universal Periodic Review

In addition to human rights obligations and commitments, the scope of the UPR of UN member states involves obligations under applicable IHL. This is mentioned specifically in the Resolution on Institution-building of the Human Rights Council, which states that ‘given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law’.⁵⁶⁷

Accordingly, views and recommendations of states frequently include references to IHL. These references, however, remain very general. In most cases, where IHL issues were raised, the main concern has been compliance and accountability. The following recommendations illustrate the type of issues concerning IHL that states have raised in the review of their peers:

- a) Accountability of state organs (security, prison and judiciary) and for any violations of IHL;⁵⁶⁸
- b) Respect and promotion of IHL;⁵⁶⁹ as well as adopting measures at guaranteeing respect for IHL;⁵⁷⁰
- c) Halting violations of IHL, in particular deliberate and indiscriminate attacks against civilians;⁵⁷¹
- d) Bringing to justice those responsible for grave IHL violations;⁵⁷²
- e) Compliance with IHL obligations, *with a view to guaranteeing fundamental freedoms and rights to all, and ensuring (among others) the right to education;*⁵⁷³
- f) Independent investigation into reports of war crimes;⁵⁷⁴ and establishing mechanisms to deal with IHL violations committed by all parties;⁵⁷⁵
- g) Adherence to IHL in the fight against terrorism;⁵⁷⁶

⁵⁶⁴ Resolution S-15/1, Situation of human rights in the Libyan Arab Jamahiriya, 3 March 2011.

⁵⁶⁵ Resolution, S-16/1, The current human rights situation in the Syrian Arab Republic, 4 May 2011.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ Resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007, Annex, §1.2.

⁵⁶⁸ UPR of Afghanistan, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/12/9, 20 JULY 2009.

⁵⁶⁹ UPR of Central African Republic, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/12/2, 4 June 2009; UPR of Iraq, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/14/14, 15 March 2010; UPR of Myanmar, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/17/9, 24 March 2011; UPR of Somalia, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/18/6, 11 July 2011.

⁵⁷⁰ UPR of Iraq, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/14/14, 15 March 2010; UPR of Myanmar, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/17/9, 24 March 2011; UPR of Somalia, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/18/6, 11 July 2011.

⁵⁷¹ UPR of Sudan, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/18/16, 11 July 2011.

⁵⁷² UPR of DR Congo, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/13/8, 4 January 2010; UPR of Sudan, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/18/16, 11 July 2011.

⁵⁷³ UPR of Israel, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/10/76, 8 January 2009.

⁵⁷⁴ UPR of Myanmar, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/17/9, 24 March 2011.

⁵⁷⁵ UPR of Somalia, Report of the Working Group on the Universal Periodic Review, UN doc. A /HRC/18/6, 11 July 2011.

⁵⁷⁶ UPR of Pakistan, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/8/42, 4 June 2008.

- h) Compliance with IHL, including the principles of distinction and proportionality;⁵⁷⁷ and ensuring that military engagement is undertaken in a manner consistent with IHL to minimize sufferings of civilians;⁵⁷⁸
- i) Integration of IHL into the training programme of its armed and security forces.⁵⁷⁹

It is worth mentioning that states have not always been receptive to recommendations concerning the repression of violations of human rights law and particularly IHL.

Special Procedures

Strictly speaking IHL does not form the basis of the mandate of special procedures. In practice, however, the mandate-holders have often referred to IHL issues in their reports. As noted by Kälén, the Human Rights Council and member states ‘in general seem to accept this’.⁵⁸⁰

In the context of the present report, the reports of the Special Rapporteur on the right to education are of particular importance. Addressing the question of the realization of the right to education in the context of emergencies, the Special Rapporteur has articulated the role of IHL in relation to education in the following terms:

International humanitarian law establishes a regulatory framework protecting the right to education during armed conflicts. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War states that measures should be taken to ensure that children who are orphaned or separated from their families as a result of a war have access to education.⁵⁸¹

He further states that

Additional Protocol II to the Geneva Conventions, of 1977, applies to non-international conflicts and is therefore of the utmost relevance today, as it covers the actions of non-State armed groups and establishes in article 4, paragraph 3 (a), the obligation to provide children with the care and aid they require, and the right to receive education.⁵⁸²

Thus, the Special Rapporteur has interpreted the obligation of parties to conflict to provide education in terms of a right of an individual to receive education. The second report of the Special Rapporteur containing updates on the topic of education in emergencies emphasized the relevance of IHL in situations of attacks on education and clarified the legal framework of IHL on the protection of schools. More specifically, the report states that ‘[t]he right to education during conflicts is protected by the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949’.⁵⁸³ In his concluding remarks, the Special Rapporteur further recommended that states ‘ensure systematic monitoring, documenting and reporting of violations of international human rights and humanitarian law committed against members of education communities and education institutions and settings’.⁵⁸⁴

577 UPR of Somalia, Report of the Working Group on the Universal Periodic Review, UN doc. A/HRC/18/6, 11 July 2011.

578 *Ibid.*

579 *Ibid.*

580 W. Kälén, ‘Universal Human Rights Bodies and International Humanitarian Law’, *op. cit.*, p. 453.

581 Report of the Special Rapporteur on the right to education, Vernor Muñoz, ‘Right to education in emergency situations’, UN doc. A/HRC/8/10, 20 May 2008, §52.

582 *Ibid.*, §53.

583 Interim report of the Special Rapporteur on the right to education, Kishore Singh, UN doc. A/66/269, 5 August 2011, §69.

584 *Ibid.*, §96.

IHL has been invoked by the Independent Expert on the Situation of Human Rights in Somalia,⁵⁸⁵ the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967,⁵⁸⁶ and the Representative of the Secretary-General on the human rights of internally displaced persons. As is the case with other human rights monitoring bodies, references to IHL do not go beyond generalized statements and often contain little detail or analysis. The standard approaches seem to be to recall that IHL constitutes a relevant legal framework for situations concerned and their violation is also a human rights issue and that humanitarian law provisions constitute the content of human rights in times of armed conflict.

ASSESSMENT: IHL AS *LEX COMPLEMENTA*

The question then is to what extent IHL norms, particularly those protecting civilians and civilian objects, can be taken into account for assessing the obligations to respect the right to education? There is only a presumption that violation of IHL rules (e.g. disproportionate, excessive, or otherwise indiscriminate use of force involving damage and destruction of civilian objects, such as schools, universities) may amount to violation (or even a serious violation) of the right to education.

Most human rights bodies have taken the approach that human rights obligations in times of armed conflict may involve IHL components. Such practice is established across both treaty and non-treaty-based mechanisms. As part of measures to protect children, human rights bodies have recommended adherence to IHL treaties.⁵⁸⁷ The CRC Committee, commenting on the situation of children in the DR Congo, including ‘deliberate attacks of schools ... which continue to be carried out by all parties to the conflict in breach of the Geneva Conventions’ and particularly in relation to the military operations, recommended that ‘the State party should prevent civilian casualties in accordance with the requirements of distinction, discrimination, proportionality, necessity and precaution’.⁵⁸⁸

States are regularly reminded/urged to ‘comply with the fundamental principles of proportionality and distinction established in humanitarian law’ (including the Geneva Conventions’ minimum standards of protection of civilians in armed conflict) in response to alleged attacks on civilians and civilian objects (including children and schools) and destruction of school infrastructure. Such attacks are generally qualified as resulting in ‘denial of access to education’.⁵⁸⁹ The CRC Committee has urged states parties to ensure ‘strict compliance’ with IHL and to promptly and impartially investigate reports of such crimes and ensure that those responsible are duly prosecuted and sanctioned with appropriate penalties.⁵⁹⁰

IHL rules therefore may play the role of ‘explanatory’ variable, and may provide criteria for determining how the right to education should be construed in situations of armed conflict. In view of the preceding evidence, a tentative conclusion could be made that violation of an IHL rule will lead to a violation of ESC rights in most cases. Such a standpoint, however, would mean that should conduct be justified under IHL rules (e.g. military necessity) it would

585 Report of Shamsul Bari, independent expert appointed by the Human Rights Council on the situation of human rights in Somalia, UN doc. A/HRC/10/85, 24 February 2009, §§30–1. IHL is also mentioned in Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari, UN doc. A/HRC/13/65, 23 March 2010.

586 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, UN doc. A/HRC/10/20, 11 February 2009.

587 CRC Committee, ‘Concluding Observations: Turkey’, UN doc. CRC/C/OPAC/TUR/CO/1, 29 October 2009, §16.

588 CRC Committee, ‘Concluding Observations: Thailand’, UN doc. CRC/C/OPAC/THA/CO/1, §§8–9.

589 CRC Committee, ‘Concluding Observations: Israel’, UN doc. CRC/C/OPAC/ISR/CO/1, 4 March 2010, §11. A similar recommendation has been made with regard to incidents of deliberate targeting of civilians or civilian infrastructure in the context of the rights of children. See CRC Committee, ‘Concluding observations: Sudan’, UN doc. CRC/C//SDN/Co/3-4, 1 October 2010, §73; and ‘Concluding Observations: Syria’, UN doc. CRC/C/SYR/CO/3-4, 8 February 2012, §52.

590 CRC Committee, ‘Concluding Observations: Israel’, UN doc. CRC/C/OPAC/ISR/CO/1, 4 March 2010, §25. All these findings were related to the specific context of occupation, and particularly the situation of the OPT, where violations had acquired a systematic and deliberate character and have been abundantly analysed in the work of the Fact-finding missions, Special Procedures, and NGO reporting to most of the treaty bodies.

exclude a violation of a right to education. In practice, however, in most cases, situations can be assessed also and distinctly through human rights law, regarding the impact of restrictions on movement on the right to education. In certain situations the ultimate determination of lawfulness of an action might be governed by the *lex specialis* of relevant IHL rules, or exclusively by human rights law, as suggested by the ICJ in its *Wall* Advisory Opinion.⁵⁹¹

To conclude, a few points should be made on the nature of the relationship between ESC rights and IHL. First, it should be noted that findings concerning violations of human rights have been formulated from a general viewpoint concerning a large group of victims and they cannot be expected to enjoy elaborate legal reasoning. Second, uncertainty as to the existence of an armed conflict for the purpose of IHL may explain the self-restraint on the part of UN mechanism, which might wish to avoid tackling such diplomatically sensitive questions. Third, despite its application, reference to IHL may not be necessary as its application may not lead to substantially different results. Fourth, this process of interpretation is not a mechanical exercise with a preconceived outcome. Each situation should be analysed on a case-by-case basis, having in mind that it may not be possible to articulate a comprehensive theory concerning the interaction between IHL and ESC rights. Fifth, for obvious reasons, international practice differs across judicial and quasi-judicial bodies depending on their mandate or jurisdiction. While there is a potential oscillation between both legal regimes, it should be pointed out that their interplay varies on the basis of the institutional mandate of the enforcement body.

⁵⁹¹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, §106.

7

Obligations of Armed Non-State Actors to Respect and Protect Education

Most armed conflicts and armed violence currently taking place involve, in one way or another, armed non-state actors. According to the Secretary-General's report, the majority of 348 incidents of attacks on schools in 2008 and 613 incidents of attacks in 2009 were perpetrated by groups opposing the respective government. Of course, the recruitment of children by non-state actors is a reality for most contemporary conflicts. The Security Council's condemnation of acts by non-state actors is illustrative:

the high number of civilian casualties in Afghanistan, in particular women and children casualties, the increasingly large majority of which are caused by Taliban, Al-Qaida and other violent and extremist groups and illegal armed groups[;] ...the high number of attacks targeting schools, including their burning and forced closure, their use by armed groups, and the intimidation, abduction and killing of education personnel, particularly those attacks targeting girls' education by armed groups including the Taliban.⁵⁹²

In Colombia, one of the reasons offered for why children do not attend school is the social problems caused by the armed conflict, including the recruitment of children by armed groups.⁵⁹³ In Nepal, the government acknowledged that the protection of human rights is 'a really challenging task for any government in times of armed conflict'.⁵⁹⁴ Nepal further asserted that the insurgency 'had affected the implementation' of the right to education.⁵⁹⁵

It is, therefore, important to understand the extent of obligations of non-state entities in light of concern to enhance protection of education in conflict and other situations of insecurity and how the different types of monitoring mechanism under consideration in this research have dealt with this issue.

GENERAL OBSERVATIONS

To begin, it should be noted that there is no universally agreed definition of 'armed non-state actors' (ANSAs). There are a multitude of terms used such as 'organized armed groups' (taken from Additional Protocol II), 'armed groups', 'armed opposition groups', and insurgents, as well as other terms such as guerrillas, rebels, terrorists, or militias, all of which are often politically loaded.⁵⁹⁶ The number of active ANSAs in contemporary armed conflicts

⁵⁹² UN Security Council Resolution 2069 (2012), Afghanistan, 9 October 2012; See also Resolution 1974 (2011), Afghanistan, 22 March 2011.

⁵⁹³ CRC Committee, Initial reports of States parties due in 2007, UN doc. CRC/C/OPAC/COL/1, §§47 and 184–6.

⁵⁹⁴ 'Report of Sri Lanka (Combined second, third and fourth periodic reports)', ESCR Committee, UN doc. E/C.12/LKA/2-4, 9 June 2008, §115.

⁵⁹⁵ 'Report of Nepal (Second Periodic Reports) to the ESCR Committee', UN doc. E/C.12/NPL/2, 7 August 2006, §116.

⁵⁹⁶ On the basis of current practice, the following working definition of an ANSA is proposed: 'any armed group, distinct from and not operating under the control of the state, which has political, religious, and/or military objectives and lacks legal capacity to become party to relevant international treaties. This conceptually encompasses entities ranging from armed groups, national liberation movements to de facto governing regimes, as well as partially internationally recognized states.' This term would, thus, leave out non-state but pro-government militias and paramilitary groups that could more easily engage the responsibility of states, private military companies, transnational terrorist networks, or purely criminal groups such as drug traffickers that are not party to an armed conflict. See A. Bellal, G. Giacca, and S. Casey-Maslen, 'International law and armed non-state actors in Afghanistan', *International Review of the Red Cross*, No. 881 (2011), p. 48.

makes a clear and useful definition difficult, as the groups differ widely in size, structure, behaviour, motives, goals, and resources. The most prominent groups referred to in the practice of monitoring and enforcement bodies in recent times and at the time of writing are:

- the FARC and the ELN in Colombia,
- the Maoist rebels in India and Nepal,
- a number of rebel movements in DR Congo,
- the Taliban and other insurgent groups in Afghanistan,
- the SPLA in Southern Sudan,
- Justice for Equality Movement (JEM) and the larger Sudan Liberation Army (SLA) in the Darfur region of Sudan,
- GAM in Aceh/Indonesia,
- the LRA in Uganda,
- the PKK in Turkey (and Iraq, Iran and Syria),
- the Hezbollah in Lebanon,
- Hamas and the Palestinian Authority in the Occupied Territory,
- Al Shabaab, Somaliland (or Puntland) in Somalia,
- Transnistria in Moldova,
- Abkhazia and South Ossetia in Georgia,
- Nagorno-Karabakh Republic in Azerbaijan,
- the LTTE in Sri Lanka,
- the Transitional National Council (TNC) in Libya, and
- the Free Syrian Army and others in Syria.

STATE OBLIGATIONS TO PROTECT EDUCATION FROM ATTACKS BY NON-STATE ACTORS

As already stated, in conflict situations the obligation to protect entails the state taking appropriate measures to prevent third parties such as non-state actors, whether individuals, criminal gangs, armed groups, paramilitaries, or private companies from depriving civilians of their rights, from attacking civilians, from using terrorists acts or depriving the population from accessing essential goods and services. For instance, the state has an obligation under the CRC-OP-AC to legislate, to prohibit the forced recruitment of children by armed groups and to criminalize such behaviour, which complements the right to education provisions in the ICESCR.⁵⁹⁷

The CRC Committee has recommended the reporting state ‘to take all measures’ to protect every child from abduction and recruitment, and ensure accountability for perpetrators of the recruitment of child soldiers.⁵⁹⁸ ‘All possible measures’ is a guiding principle for states to comply with their positive obligations to take actions to protect children. It takes into account the enforcement capacities of the government given the armed conflict context. The list of possible actions will depend on the circumstances.

⁵⁹⁷ The CRC Committee routinely raises the question of criminalization of recruitment in domestic legislation, and/or ratification of the Rome Statute of the ICC and last but not least establishing the extraterritorial jurisdiction for the crime of recruitment. The inclusion of the ICC Statute in the reporting system is important as the capacity of the state/government to enforce its laws is often very limited in situations of armed conflict.

⁵⁹⁸ CRC Committee, ‘Concluding observations: Uganda’, UN doc. CRC/C/OPAC/UGA/CO/1, 17 October 2008, §§24, 25.

For instance, the Philippines reported on armed groups in its territory and also on the status of non-state armed groups' commitments not to recruit children.⁵⁹⁹ The CRC Committee, in response, noting the commitment of non-state armed groups to abide by the minimum age requirement, was concerned, nevertheless, 'that children continue to join armed groups, both government linked paramilitary groups and other non-State opposition armed groups, mainly due to poverty, indoctrination, manipulation, neglect or absence of opportunities'.⁶⁰⁰

The Committee then recommended that 'the State party take all feasible measures to eliminate the root causes and prevent recruitment and use of children by armed groups that are distinct from the armed forces of the State'. It also recommended that the state, when entering into negotiation and talks with armed groups, should ensure that special and adequate attention is paid to children who have been recruited or used in hostilities, especially in the area of prevention, physical and psychological recovery, and social reintegration.⁶⁰¹

Furthermore, under the right to education, as noted already earlier, there is an obligation to protect 'accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school'.⁶⁰² Armed violence and attacks can affect educational buildings, but they may also render the travel of students and education staff to and from school more risky.⁶⁰³ The security of students, teachers, education officials, and also humanitarian aid workers providing education has been threatened in many armed conflict situations such as Afghanistan or Iraq, especially by armed non-state actors.⁶⁰⁴ In this respect, physical accessibility in times of conflict may be a serious challenge for the state to discharge its obligations.

The CRC Committee has, for example, recommended that one state party 'ensures that schools are not disrupted by State and paramilitary units and are protected from attacks by non-state armed groups'.⁶⁰⁵ Similarly, the ESCR Committee, in light of reports on attacks on schoolgirls, recommended that: 'The State party should improve security for children in school *as well as on their way to and from school*, and increase awareness of the value of girls' education'.⁶⁰⁶ In the same context, the CRC Committee recommended that the State '[u]se *all means* to protect schools, teachers and children from attacks, and include communities, in particular parents and children, in the development of measures to better protect schools against attacks and violence'.⁶⁰⁷ It is not clear what specific behaviour is expected given the circumstances. The point here is that while it is clear what the obligation of result is (i.e. to provide compulsory primary education at all times) the means to achieve this result remain vague under current practice. To that effect, the omission to comply with this core obligation of provision and protection is difficult to establish.

Another major impediment to the exercise of the obligation to protect is lack of control over national territory (and some of the challenging legal issues accompanying this issue) – a subject discussed above. It suffices here to reiterate that treaty bodies seem to raise with relative consistency a) questions of how and to what extent a reporting state is implementing its human rights obligations in those parts of its national territories outside its

599 The Philippines reported: 'Spokespersons of the non-state actors (NSAs) have issued written and oral commitment at not recruiting and using children below the age of 18 years in hostilities.' 'Initial Report of the Philippines to the CRC Committee', UN doc. CRC/C/OPAC/PHL/1, §46.

600 CRC Committee, 'Concluding observations: the Philippines', UN doc. CRC/C/OPAC/PHL/CO/1, 15 July 2008, §20.

601 *Ibid.*, §21.

602 ESCR Committee, 'General Comment, No. 13: the Right to Education', §50.

603 'Report of the Special Rapporteur on the right to education: Right to education in emergency situations', UN doc. A/HRC/8/10, 20 May 2008, §108: 'children stated that they had to walk long distances to reach school and were afraid of being attacked by armed groups'.

604 *Ibid.*; see also Human Rights Watch, *Schools and Armed Conflict, A Global Survey of Domestic Laws and State Practice Protecting Schools from Attack and Military Use*, HRW, 2011.

605 CRC Committee, 'Concluding Observations: Thailand', UN doc. CRC/C/THA/CO/3-4, 17 February 2012, §85(b).

606 ESCR Committee, 'Concluding Observations: Afghanistan', UN doc. E/C.12/AFG/CO/2-4, 7 June 2010, §43. Emphasis added.

607 CRC Committee, 'Concluding Observations: Afghanistan', UN doc. CRC/C/AFG/CO/1, 8 April 2011, 61.

effective control;⁶⁰⁸ and b) recommendations to ‘take all possible measures’, i.e. exercise its best efforts to enhance protection under the relevant treaty for the population outside its control.⁶⁰⁹

HUMAN RIGHTS OBLIGATIONS BINDING ON NON-STATE ACTORS

The treaty bodies’ approach

While it is largely uncontested that international humanitarian law imposes certain obligations on non-state armed groups, the application of other bodies of international law — particularly human rights law — is controversial, mainly on the basis that treaties are applicable only to states in their vertical relationship with individuals and, it is argued, that body of law is therefore ill-suited to governing the acts of non-state actors.

Conceptual and practical difficulties regarding the application of human rights law to ANSAs arise considering that most human rights treaties do not explicitly address ANSAs, in contrast to certain IHL instruments. Thus, because of the wording and scope of application of those treaties, quasi-judicial organs, such as the UN human rights treaty monitoring bodies, have exercised jurisdiction only with regard to states’ behaviour.⁶¹⁰

Although they may not have the full extent of obligations as states, armed non-state actors can clearly promote, impede, or even violate civil and political rights as well as ESC rights through their conduct.⁶¹¹ For example, in

608 List of issues to be taken up in connection with the consideration of Third Periodic Report, UN doc. CCPR/C/GEO/Q/3, 15 August 2007, §3.

609 Human Rights Committee, ‘Concluding Observations: Georgia’, UN doc. CCPR/C/GEO/CO/3, 15 November 2007, §6. See also the CRC Committee, in assessing the implementation of the CRC in the Republic of Moldova, which stated that ‘The Committee further encourages the State party to pursue cooperation with the Transnistrian authorities in other areas with a view to improving the situation of children in the territory’ in CRC, ‘Concluding Observations: Republic of Moldova’, UN doc. CRC/C/MDA/CO/3 20 February 2009, §30.

610 It should be noted that the *Optional Protocol to the Convention on the Rights of the Child* expands beyond the behaviour of the state and its agent and specifically address the actions of armed groups. Article 4 of the CRC-OP-AC states that:

1. Armed groups that are distinct from the armed forces of a State *should not, under any circumstances*, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict.

In this context, the age limit of recruitment of children by an ANSA is set at 18 years, and not 15, which is the standard in 1977 Additional Protocols I and II (Article 77(2), Additional Protocol I, and Article 4(3)(c), Additional Protocol II). Looking at the wording of that article, there is a difference in the scope of obligation between states and non-state actors. Direct legal obligation is imposed, through paragraph 2, CRC-OP-AC, on States Parties and not on armed groups, to ensure that children under 18 are not recruited by armed groups. However, Clapham notes that in spite of the use of the word ‘should’, which would express a desire rather than a command, the wording ‘under any circumstances’ can be interpreted as a clear indication a meaningful international obligation on ANSAs. This argument must, though, be considered in light of the recent practice of the UN Security Council in relation to the situations of children in armed conflict, which seems to point toward a direct imposition of that obligation on non-state armed groups.

611 For instance, the Government of Nepal asserted that the Maoist insurgency ‘had affected the implementation’ of ESC rights and ‘obstructed’ ESC rights. The Maoist insurgents allegedly ‘obstructed’ the right to health by barring water supply, hindering transportation services, looting medicine, locking the home of health workers, killing the health workers and burning ambulances, etc. and also obstructed the right to food and residence by blockade, halting transportation of food in remote areas [...]. The right to development was also obstructed by removing telephone facilities, except in barracks and Telecommunication office, and work for food programme and food for education undertaken by UNDP were also obstructed. Destruction of the government offices caused the people suffered lack of services. The Maoist insurgents had obstructed the right to property by taking under control of individual’s properties, locking the doors at homes, taking under control of commodities, inspiring stringent fines on various cases, collecting levy on monthly basis, exploding bombs at private homes and vehicles of people, looting the harvest, preventing the sale of property and collecting so-called tax etc. Likewise, some of the properties of the people were destroyed in counter attack made by security forces.’ (emphasis added). ‘Report of Nepal (Second Periodic Report) to the ESCR Committee, UN doc. E/C.12/NPL/2, 7 August 2006, §116.

the context of the Afghanistan conflict, attacks on schools were condemned as an attack on education and led the Human Rights Council to adopt a resolution that urged ‘*all parties* in Afghanistan to take appropriate measures to protect children and uphold their rights’.⁶¹²

In situations of armed violence that fall below the threshold of armed conflict, where IHL is not applicable, international law imposes the responsibility on the state to prevent or repress human rights violations committed by a non-state actor. It may well be, however, that the state is either not in a position to exercise such a duty as discussed above (in the case of a failed state for example), or is unwilling to do so. Moreover, in prolonged situations of violence related to separatist movements as in the above-mentioned Moldovan case, when ANSAs have a relatively stable control over the territory and population, IHL rules have a limited reach in terms of protection, in particular when it comes to socio-economic rights.

In this respect, the issue raises complex conceptual difficulties in situations where an ANSA controls part of a territory and especially when it administers it by maintaining security and public order and delivering basic services. However, as noted above, the actual practice of monitoring treaty bodies does not tackle this question, relying rather on the obligations of the sovereign states as the sole duty-bearers even though they may lack the control to implement their obligations.

The approach of other UN bodies

In contrast, other organs and mechanisms of the UN have, on numerous occasions, demanded that ANSAs respect international law, including human rights law, such as the UN Security Council, Special Procedures, and Fact-Finding Missions and Commissions of Inquiry, some of which were established by the Human Rights Council.

The UN Security Council has increasingly called on ANSAs — whether or not in control of territory — to respect international law by either directly referring to them or indirectly by addressing ‘all parties’, while generally combining reference to both IHL and human rights law.⁶¹³ Yet, the Security Council’s contemporary practice is not consistent in dealing with armed non-state actors in terms of the language used. On the one hand, it often denounces and condemns harmful acts or abuses committed by ANSAs in some countries, whereas in other situations it has been more assertive in considering them *per se* as human rights violations.

In fact, the Security Council has been using both the terminology of ‘abuses’ and ‘violations’ in its resolutions and presidential statements.⁶¹⁴ The qualification of particular acts as human rights violations, instead of abuses, would imply that these actors have human rights obligations. But it could be submitted that this is rather a semantic distinction that does not affect the recognition by the Security Council of ANSAs as having the capacity to assume international obligations to respect human rights. In addition to country resolutions, the protection of civilians

612 Human Rights Council Resolution 14/15: Addressing attacks on school children in Afghanistan, 23 June 2010 (emphasis added).

613 See UN Security Resolutions 1193, 1213, 1214, 1216, 1471, 1479, 1509, and 1528, discussed in A. Clapham, ‘Human Rights Obligations of Non-state Actors in Conflict Situations’, 2006, *op. cit.*, pp. 499–504. See also the analysis of C. Tomuschat, ‘The Applicability of Human Rights Law to Insurgent Movements’, in *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection. Festschrift für Dieter Fleck*, eds. Horst, Fischer et al., Berliner Wissenschafts-Verlag, Berlin, 2004, pp. 573–91; and A. Constantinides, ‘Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council’, *Human Rights and International Legal Discourse*, 4, 2010, pp. 89–110.

614 For instance, on the situation in the DR Congo, the Council first demands that all armed groups ‘immediately cease all forms of violence and *human rights abuses* against the civilian population’ and then encourages to pursue the efforts to combat impunity against ‘all perpetrators of *human rights and international humanitarian law violations*, including those committed by any illegal armed groups or elements of the Congolese security forces’. UN Security Council Resolution 1991, 28 June 2011, §§13 and 18 (emphasis added). On Afghanistan, the UN Security Council has expressed ‘its concern over the harmful consequences of the insurgency on the capacity of the Afghan Government to provide security and basic services to the Afghan people, and to secure the full enjoyment of their human rights and fundamental freedoms’ and called ‘for full respect for human rights and international humanitarian law throughout Afghanistan’. See, for example, UN Security Resolutions 1890 (8 October 2009). Conversely, the Council has been more far-reaching in its statement when it ‘*call[ed] upon* all parties to uphold international humanitarian and human rights law and to ensure the protection of civilian life’. Resolution 1746 (23 March 2007), §25.

generally, as well as of women and children in particular, in armed conflicts has been on the agenda of the Security Council since the end of the 1990s through a number of thematic resolutions.⁶¹⁵ The UN Security Council has devoted considerable attention to the protection and respect of the rights of children in armed conflicts through the MRM mechanism. The Action Plans designed in the framework of the MRM is another mechanism directly engaging the parties concerned.

Turning now to the practice of the UN Special Procedures, a number of reports by Special Rapporteurs and experts support the applicability of human rights law to these entities, regardless of their control of territory.⁶¹⁶ In this respect, they represent important accountability mechanisms. The combined report of nine special rapporteurs on the situation in Gaza stated with respect to Hamas, that 'non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.'⁶¹⁷ Other examples include the engagement of special procedures with non-state actors, in particular in the context of the right to education of internally displaced persons.⁶¹⁸

It is also interesting to note the recent practice of commissions of inquiry and other fact-finding mechanisms charged with determining violations of international law by the relevant actors, such as in the context of Israel and

615 Between 1999 and 2012, the Secretary-General has presented nine reports to the Security Council on the protection of civilians in armed conflict, which contain more than 100 recommendations that address such issues as the ratification of international instruments, protection of specific groups, humanitarian access, sexual violence, impunity, small arms and the role of peacekeeping missions and regional organizations. Several of these issues were reflected in landmark Security Council resolutions on the protection of civilians in armed conflict: Resolution 1265 (17 September 1999); Resolution 1296 (19 April 2000); or Resolution 1674 (28 April 2006).

616 For instance, the Representative of the Secretary-General on IDPs on the basis of the Guiding Principles on IDPs, which noted that 'without prejudice to their legal status, those who do hold de facto control are obliged to respect the rights of IDPs and secure their protection'. The Guiding Principles 'provide guidance to [...] all other authorities, groups and persons in their relations with internally displaced persons'. The Representative also relied on the declaration made by the LTTE: 'The Charter of the North-East Secretariat for Human Rights 'recogniz[es] the Universal Declaration of Human Rights and other United Nations Human Rights instruments' and states as its objective, 'promot[ing] recognition and respect for the human rights and the basic freedoms of the people of the Northeast of this Island' according to [the UDHR and the major human rights conventions to which Sri Lanka is party.' 'Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin: addendum: mission to Sri Lanka (14 to 21 December 2007)', UN Human Rights Council, UN doc. A/HRC/8/6/Add.4, 21 May 2008, §10.

617 Combined report, under Resolution S-9/1, of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Representative of the Secretary-General for Children and Armed Conflict, the Special Rapporteur on violence against women, its causes and consequences, the Representative of the Secretary-General on the human rights of internally displaced persons, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, the Special Rapporteur on the right to food, the Special Rapporteur on extrajudicial, arbitrary or summary executions, the Special Rapporteur on the right to education, and the Independent Expert on the question of human rights and extreme poverty, UN doc. A/HRC/10/22, 20 March 2009, §22.

618 Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin Follow-up mission to Georgia, UN doc. A/HRC/16/43/Add.3, 23 December 2010, §24: 'Following his 2005 visit, the Representative called on the authorities in control in Abkhazia to respect the right of returning IDPs to use their own language, including in educational institutions, as enshrined in principle 23 of the Guiding Principles on Internal Displacement (see E/CN.4/2006/71/Add.7, §49 (c)). When visiting a school in the Gali district, the Representative was informed that the language of education was Russian, upon the instruction of the de facto Ministry of Education. Some parents were not opposed to the use of Russian in local schools, as they saw this as facilitating the integration of their children into the wider society. Nonetheless, they felt uneasy about their children being taught solely in Russian from their very first year in school, considering that this is a totally unfamiliar language for them. More generally, IDPs should not face difficulties in maintaining their cultural traditions.'

the OPT,⁶¹⁹ or, more recently, Libya⁶²⁰ and Syria.⁶²¹ There has been a steady development in the approach taken in these reports on the threshold for the applicability of human rights law and in the way recommendations have been addressed.

In the Goldstone Report, emphasis was placed on the exercise of government-like functions over a territory by ANSAs. As to the legal nature of their obligations, the mission referred essentially to the public undertakings, unilateral declarations, and international agreements (as well as the Basic Palestinian Law applicable in the Gaza Strip) made by the non-state entity to support the view that it is bound by human rights law.⁶²²

On the 2011 armed conflict in Libya, the Commission of Inquiry looked into both violations of international human rights law and relevant IHL provisions. In examining allegations of human rights violations committed by the National Transitional Council (NTC) fighting against Gaddafi's regime, the Commission noted that 'it is increasingly accepted that where non-state groups exercise de facto control over territory, they must respect fundamental human rights of persons in that territory', and therefore it took the view that since the NTC was exercising 'de facto control over territory akin to that of a Governmental authority' it bore human rights obligations.⁶²³ It should be noted that the Commission held them accountable also on the basis that the group made unilateral declarations, in which it committed to

build a constitutional democratic civil state based on the rule of law, respect for human rights and the guarantee of equal rights and opportunities for all its citizens including full political participations by all citizens and equal opportunities between men and women and the promotion of women empowerment.⁶²⁴

With regard to Syria, the first period reported on by the Commission of Inquiry was generally not considered to have reached the threshold of a non-international armed conflict, especially as to the level of organization of such armed groups as the FSA.⁶²⁵ Thus, the Commission was entitled to investigate only alleged violations of international human rights law. It noted that

at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified.⁶²⁶

619 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict, Human Rights in Palestine and Other Occupied Arab Territories', Human Rights Council, UN doc. A/HRC/12/48, 25 September 2009.

620 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya', Human Rights Council, UN doc. A/HRC/17/44, 1 June 2011.

621 See 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', Human Rights Council, UN doc. A/HRC/S-17/2/Add.1, 23 November 2011. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Human Rights Council, UN doc. A/HRC/19/69, 22 February 2012.

622 Report of the United Nations Fact-Finding Mission on the Gaza Conflict, *op. cit.*, §§305–7.

623 Report of the International Commission of Inquiry on Libya, *op. cit.*, §72.

624 *Ibid.*

625 The Commission noted that while the violence may have reached the requisite level of intensity in certain areas, it was unable to verify that the FSA and other local armed had reached the necessary level of organization. Commission of Inquiry on Syria, 23 November 2011, *op. cit.*, §13.

626 Commission of Inquiry on Syria, Human Rights Council, UN doc. A/HRC/19/69, 22 February 2012, §106. In a recent study, the International Law Association reached the conclusion that even though 'the consensus appears to be that currently NSAs [non state actors] do not incur direct human rights obligations enforceable under international law', armed non-state actors would still be bound by *ius cogens* norms. International Law Association, The Hague Conference 2010, *Non State Actors*, First Report of the Committee: Non-State Actors in International Law: Aims, Approach and scope of project and Legal issues, §3.2.

No mention of a degree of control of territory or level of *de facto* authority over a population is included, which could mean that *every* armed non-state group would be bound by core human rights norms which are *jus cogens*.⁶²⁷ In this respect, certain substantive norms, such as those comprising contemporary international criminal law (including prohibitions of intentional attacks against buildings dedicated to education) and several civil and political rights (as well as ESC rights, at least through the non-discrimination principle) seem to have achieved the status of peremptory norms.⁶²⁸

The UN Human Rights Committee has identified the following as acts that would violate *jus cogens* norms: arbitrary deprivations of life, torture and inhuman or degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivations of liberty, or deviating from fundamental principles of fair trial, including the presumption of innocence. Other potential candidates for future recognition as peremptory norms of international law are the application of the death penalty to juveniles and the prohibition of *refoulement* (the transfer of persons to another jurisdiction where they face torture or arbitrary deprivation of life).⁶²⁹ The Commission of Inquiry on Syria then recommended that the armed groups, in particular the FSA and its local groups, should:

- a) Adopt and publicly announce rules of conduct that are in accordance with international human rights law and other applicable international standards, including those reflected in the Declaration of Minimum Humanitarian Standards;
- b) Publicly pledge not to torture or execute captured soldiers, Shabbiha members or civilians, not to target people who take no part in the clashes, and not to take hostages, whether civilian or military;
- c) Instruct FSA members to abide by these commitments and hold perpetrators of abuses within their ranks accountable;
- d) Take care to minimize the risk of civilians coming under Government fire or facing reprisals as a result of the deployment of FSA members in specific places;
- e) Provide relevant humanitarian and human rights institutions with all available information on the fate of persons it has captured, and give such actors full and unimpeded access to detainees.⁶³⁰

627 Norms of *jus cogens* — peremptory norms of international law — are defined by Article 53 of the 1969 *Vienna Convention on the Law of Treaties* as norms ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ The ILC Draft Articles foresee superior means of enforcement for *jus cogens* norms, by including special regulation of both the responsible State and for all other States in the case of violations. C. J. Tams, ‘Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?’, *European Journal of International Law*, Vol. 13 (2002), pp. 1161–80.

628 Holding non-state armed groups accountable for the violation of these core human rights norms seems also in line with the development of ICL, which assesses the criminal responsibility of individual members of armed groups when certain international crimes have been committed, not necessarily in relation to an armed conflict, and thus outside of the ambit of IHL. This is the case of the crime of genocide and crimes against humanity, both of which criminalize human rights violations. See Articles 6 and 7 of the ICC statute. J. A. Hessbruegge, ‘Human Rights Violations Arising from Conduct of Non-State Actors’, *Buffalo Human Rights Law Review*, Vol. 11, No. 21 (2005), pp. 41–44. See also P. Curat, *Les crimes contre l’humanité dans le Statut de la Cour pénale internationale*, Bruylant, Schulthess, 2006.

629 Human Rights Committee, ‘General Comment No. 29: States of Emergency (Article 4)’, UN doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, pp. 4–5. The International Law Commission in its commentary on the Draft Articles on State Responsibility has identified as peremptory norms of international law the ‘prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.’ This list is, though, exemplary rather than definitive. Commentary of Article 26, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 85.

630 Commission of Inquiry on Syria, UN doc. A/HRC/19/69, 22 February 2012, §133.

Like the Libya inquiry, the Commission relied in part on the declarations made by the FSA indicating their willingness to be bound by international norms to support the application of human rights law to this group.⁶³¹ In the recent report, the Commission recommended that anti-government armed groups:

- a) Abide by human rights law and humanitarian law, commit effectively to rules of conduct in line with international standards, and participate in the peace process;
- b) Recall that indiscriminate attacks on the civilian population are forbidden;
- c) Ensure the accountability of those who violate international human rights and humanitarian law, and provide effective redress for victims based on international standards;
- d) Detach themselves from the foreign fighters, particularly extreme elements that fail to comply with international human rights and humanitarian law.⁶³²

One can see clearly the change of language between the previous and current formulations used by the International Commission of Inquiry on Syria, which is geared towards broader recognition of the obligations of anti-government groups under international law. It also recommended that the anti-government groups detach themselves from fighters/elements that fail to comply with *both* international human rights and humanitarian law. These sets of obligations discussed by fact-finding missions and commissions of inquiry are relevant in the context of attacks on education, as they clarify international norms of protection of educational staff, students, and facilities.

Another interesting finding of the Syrian Commission of Inquiry, in its recent report, is the finding of a violation of Article 4 of the Optional Protocol to CRC on the Involvement of Children in Armed Conflict. The said provision stipulates that:

Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

The wording of the provision ‘should’ rather than ‘shall’ is traditionally read as falling short of creating a legal obligation binding on armed groups. Attention should be paid, however, to the formula ‘under any circumstances’ in the text, which seems to suggest a legally binding obligation. The Commission’s finding may lend support to such a conclusion, as the Commission held that ‘[a]nti-Government armed groups are also responsible for using children under the age of 18 in hostilities in violation of the CRC-OP-AC, which by its terms applies to non-State actors. Where those children are under the age of 15, those recruiting them may be liable under international criminal law’.⁶³³

631 The Commission stated that: ‘FSA leaders abroad also assured the commission that the FSA was committed to conducting its operations in accordance with human rights and international law. They requested guidance in shaping rules of engagement consistent with this undertaking. The FSA leadership indicated to the commission that commanders in the field currently made their own rules of engagement in accordance with the training received in the Syrian Armed Forces.’ Commission of Inquiry on Syria, A/HRC/19/69, 22 February 2012, §§106–7.

632 Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A /HRC/22/59, 5 February 2013, §177.

633 Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A /HRC/22/59, 5 February 2013, p. 86, §44.

Scope of obligations binding on non-state actors

In the review of practice, a variety of legal sources are relied upon to identify the human rights obligations of ANSAs, which at times overlap with each other: these include peremptory norms of international law (*jus cogens*), international customary law, 'principles or demands' deriving from the UDHR, international standards (as reflected for instance in the 1998 UN Guiding Principles on IDPs or the Turku Declaration of Minimum Humanitarian Standards), special agreements entered into by the ANSAs (e.g. peace agreements; plans of action within the framework of the UNSC Working Group on children and armed conflict), as well as unilateral declarations.⁶³⁴

In determining the ANSAs' scope of obligations it could be argued that as a minimum, the armed group should *refrain* from interfering directly or indirectly with the enjoyment of rights by every individual under its control (obligation to respect). We might, for instance, mention the 1990 Turku Declaration on Minimum Humanitarian Standards recalled by the Syria Commission of Inquiry in its final recommendations discussed above.⁶³⁵ The principles contained in the Declaration apply in all situations, without derogation 'to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.'⁶³⁶

A number of rules reflect IHL norms and principles:

- a) Prohibition on attacks against non-combatants;
- b) Proportionality in the use of force;
- c) Prohibition on the use of illegal means and methods of warfare;
- d) Prohibition on spreading terror throughout the population;
- e) Special protection for the sick, wounded, and medical and religious personnel; and
- f) Special respect/protection for the dead; and free access to humanitarian organizations.

Further rules in the declaration are derived from civil and political rights aiming to secure the physical security of individuals (while also reflecting, where relevant, applicable IHL):

- a) Recognition of persons before the law;
- b) Respect for the person, honour, and convictions of any person;
- c) Freedom of thought, conscience, and religion;
- d) Right to humane treatment;
- e) Prohibition on acts that are illegal under general international law such as murder, torture, rape, collective punishments, hostage-taking, looting, enforced disappearance, and deliberate deprivation of food and health care;
- f) Upholding the fundamental rights of detainees;
- g) Right to life;
- h) Right to fair trial;
- i) Upholding norms applicable in cases of forced population displacement, including the right to remain in one's country;
- j) Legal guarantees in situations of house arrest, internment, or deprivation of liberty due to administrative detention;

634 For further discussions on a typology of instruments, P. Bongard and J. Somer, 'Monitoring Armed Non-state Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment', *International Review of the Red Cross*, No. 883 (2011), pp. 673–706; R. Grace and C. Bruderlein, 'Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms', *HPCR Draft Working Paper*, April 2012, available at SSRN: <http://ssrn.com/abstract=2038854>.

635 The declaration was drafted by authoritative experts such as Theodor Meron and Hans-Peter Gasser. It also included Francoise Hampson, Asbjorn Eide, Luigi Condorelli, Allan Rosas, and Theo van Boven. T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', 77 *AJIL* 589, 1983; A. Eide, A. Rosas and T. Meron, 'Combating Lawlessness through Gray Zone Conflicts through Minimum Humanitarian Standards', *AJIL* Vol. 89, 215, 1995.

636 Article 2, Turku Declaration on Minimum Humanitarian Standards.

- k) Protection of children, including the prohibition on recruiting children under a certain age, as well as forcing them to commit acts of violence; and
- l) Protection of the rights of groups, minorities, and peoples.⁶³⁷

These rules may well be essential for the protection of individuals, services, and infrastructure. All these norms are *relevant* for protecting essential components of socio-economic rights, such as schools and education more generally.

As emphasized throughout this report, the UN Security Council has established an MRM through Resolution 1612 to monitor six grave violations against children, which includes attacks on education. During the period of 2007 to 2012, the UN Security Council adopted a standard formula calling all parties to conflict to cease '*all violations and abuses against children in violation of applicable international law*' including attacks against schools.⁶³⁸ It has also, *inter alia*, urged:

- (a) The parties to the conflict to *refrain* from actions that impede children's access to education;⁶³⁹
- (b) Strict compliance by parties to armed conflict with applicable international humanitarian law and human rights law relating to children affected by armed conflict;⁶⁴⁰
- (c) Those parties that have existing action plans and have since been listed for multiple violations to prepare and implement separate action plans, as appropriate, to halt ... recurrent attacks on schools ..., recurrent attacks or threats of attacks against protected persons in relation to schools ..., in violation of applicable international law;⁶⁴¹ and
- (d) To prepare without delay, concrete time-bound action plans to halt those violations and abuses.⁶⁴²

Among actions that impede children's access to education, the Security Council has enumerated attacks or threats of attack on school children or teachers, the use of schools for military operations, and attacks on schools that are prohibited by applicable international law.⁶⁴³

Finally, it is noteworthy that the Human Rights Council has, on a few occasions, also referred to the obligations of non-state actors in the context of the right to education. For example in its resolution on the right to education, it urged states and other relevant stakeholders 'to pay enhanced attention to education in emergency situations by, *inter alia*, enhancing the protection of schools from attacks and strengthening safety and disaster risk reduction.'⁶⁴⁴ Furthermore, the resolution addressing attacks on school children in Afghanistan, although reiterating that it is the primary obligations of the state to protect its citizens, urged, nevertheless, '*all parties* in Afghanistan to take appropriate measures to protect children and uphold their rights.'⁶⁴⁵

637 J.-D. Vigny and C. Thompson, 'Fundamental Standards of Humanity: What Future?', *Netherlands Quarterly of Human Rights*, Vol. 20, No. 185 (2002), pp. 188–9.

638 UN Security Council Resolution 2069 (2012), Afghanistan, 9 October 2012; Resolution 2041 (2012), Afghanistan, 22 March 2012; Resolution 1998 (2011), Children and Armed Conflict, 12 July 2011.

639 UN Security Council Resolution 1998 (2011), Children and Armed Conflict, 12 July 2011, §4.

640 Statement by the President of the Security Council, Protection of Civilians in Armed Conflict, UN doc. S/PRST/2009/1, 19 January 2009.

641 *Ibid.*, §6.

642 *Ibid.*, §6(c).

643 Statement by the President of the Security Council, Children and Armed Conflict, UN doc. S/PRST/2009/9, 29 April 2009.

644 Human Rights Council Resolution 20/7: The right to education: follow-up to Human Rights Council resolution 8/4, 20th Session, 2012.

645 Resolution 14/15, Addressing attacks on school children in Afghanistan, 23 June 2010, §3.

Concluding remarks

Contemporary practice of international institutions shows clearly that there is a political will to hold non-state actors accountable for human rights violations. It supports the ideas that human rights law and the obligation to implement the right to education could be applicable to ANSAs in specific circumstances, in particular, but not exclusively, when they exercise elements of governmental functions and have *de facto* authority over a population.

It is clear, however, that whatever standards are applicable or are agreed upon, monitoring will be an essential element in supporting their implementation. Such monitoring should build on the work of the UN, human rights and humanitarian NGOs, and initiatives that engage the ANSAs actively. During his visits in Afghanistan, the Special Rapporteur on extrajudicial, summary or arbitrary executions regretted that he did not speak with any formal representatives of the Taliban. Recognizing the political and security obstacles to engaging directly with the Taliban, the Special Rapporteur emphasized that ‘there is no reason to assume that the Taliban could never be persuaded to modify its conduct in ways that would improve its respect for human rights.’⁶⁴⁶

This approach could well be applied to more stable entities, akin to *de facto* regimes, such as Abkhazia, Hamas, Hezbollah, Nagorno-Karabakh, Puntland, Somaliland, South Ossetia, and Transnistria to name but a few. What is needed is greater engagement on the protection of education with these entities, which cannot be disregarded simply because they have no official status or legitimacy. The international community thus faces diverse challenges when dealing with ANSAs. Some of these have a legal dimension, but other aspects of a broad approach to reducing the impact of conflict on civilians on the one hand, and enhancing their socio-economic rights on the other, demand programmes, advocacy, and, especially, direct engagement with ANSAs.

In its General Comment No. 16 (2013) on state obligations regarding the impact of the business sector on children’s rights, the Committee on the Rights of the Child stated that it ‘recognizes that duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises. Therefore, all businesses must meet their responsibilities regarding children’s rights and States must ensure they do so. In addition, business enterprises should not undermine the States’ ability to meet their obligations towards children under the Convention and the Optional Protocols thereto.’⁶⁴⁷ Consideration could usefully be given to a General Comment on the obligations of non-state actors under the CRC and customary international law, including with respect to the right to education.

⁶⁴⁶ ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Afghanistan’, UN doc. A/HRC/11/2/Add.4, §42.

⁶⁴⁷ CRC Committee, General comment No. 16, ‘State obligations regarding the impact of the business sector on children’s rights’, UN doc. CRC/C/GC/16, 17 April 2013, §8.

STUDY PRINCIPAL CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

1. Positive international legal obligations to respect, protect, and provide education continue to apply in situations of armed conflict. The precise extent to which these obligations exist under customary international human rights law merits further study.
2. Targeted attacks against educational staff, students, and facilities, whether by armed forces or armed non-state actors, violate the right to education.
3. While there is no comprehensive international legal prohibition on the military use of educational facilities in situations of armed conflict, the trend in law and policy is firmly towards greater restriction on such use.
4. There is a need for greater clarity of obligations under the right to education where a state loses control over part of its national territory.
5. There is a trend towards holding armed non-state actors accountable for violations (or ‘abuses’) of human rights, either where they exercise effective territorial control or where they violate *jus cogens* norms.
6. The impact of disability on access to education in insecurity and armed conflict has received insufficient attention in the practice of UN human rights mechanisms.
7. The importance of the quality of education in situations of insecurity and armed conflict has received insufficient attention in the practice of UN human rights mechanisms.
8. Discussion of the protection of education in insecurity and armed conflict in the practice of UN human rights mechanisms does not consistently concern all levels of education.
9. Input by international organizations and non-governmental organizations is critical to ensuring the success of UN human rights mechanisms in the protection of education in situations of insecurity and armed conflict.

RECOMMENDATIONS

1. A study should be conducted into the right to education under customary international law and as a general principle of law, in particular with respect to situations of armed conflict or insecurity. The results of the study should be broadly disseminated and could be referenced on the online universal human rights index prepared by the Office of the UN High Commissioner for Human Rights.
2. Greater clarity should be sought as to the relationship between the use of force against students, teachers, and educational facilities and the right to education. This notion should be clearly reflected in human rights treaty body reporting guidelines.
3. Greater restrictions should be imposed in law, policy, and practice on the military use of schools.
4. The scope of obligations to respect, protect, and fulfil the right to education in situations where the state loses control of part of its national territory should be clarified.
5. A Statement or General Comment by the Committee on the Rights of the Child on the obligations of armed non-state actors to respect children's rights should be seriously considered.
6. In protecting the right to education in insecurity and armed conflict, attention should be paid to all levels of education, not merely primary and secondary education, and the rights of adults to education generally should be the subject of greater consideration.
7. Far greater attention needs to be paid to the impact of disability on access to education in situations of insecurity and armed conflict. Recourse could be made to the individual complaints mechanism, in particular under the 2006 Convention on the Rights of Persons with Disabilities. In addition, advocacy for a General Comment or Statement by, among others, the Committee on the Rights of Persons with Disabilities, should be considered to raise awareness of this issue.
8. While promoting access to education remains a primary challenge and objective, the importance of quality of education should not be forgotten. In a situation of armed conflict, including military occupation, the context should also be taken into account in ensuring that the right to education is fully respected.
9. International organizations and non-governmental organizations should reflect strategically on which mechanisms to target as a matter of priority in order to promote the right to education most effectively. An international conference that brings together human rights lawyers and education practitioners, among others, could usefully elaborate a strategic plan that incorporates consideration of this issue.

It is a sad reality that educational facilities as battlegrounds are a common feature of many situations of insecurity and armed conflict. Excessive use of force by state forces or by non-state armed groups, combined with the fact that hostilities often take place in urban areas, make educational facilities, students and educators frequent casualties. Moreover, evidence suggests that education 'as such' is not simply the victim of collateral damage but has become a specific target of attack. The effect is felt through the loss of teachers and intellectuals; the flight of students and staff; the destruction of buildings; the shelving of investment; and the generalized degradation of education systems.

This publication, *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed Conflict*, identifies trends in the practice and contribution of UN human rights mechanisms to the protection of education in times of insecurity and armed conflict and offers recommendations on how such protection might be strengthened. These include a call for greater attention to the impact of disability on access to education in insecurity and armed conflict and advocates that protection should consistently concern all levels of education to ensure the right of adults as well as those of children to high quality education are respected, protected, and fulfilled.

The report examines the treatment of 49 states for the period 2007-2012 by UN human rights mechanisms, and considers how they have conceptualized the right to education. It concludes that positive international legal obligations to respect, protect, and provide education continue to apply during insecurity and armed conflict and that targeted attacks against educational staff, students, and facilities, whether by armed forces or armed non-state actors, violate the right to education. Further, while there is no comprehensive international legal prohibition on the now almost routine military use of educational facilities in situations of armed conflict, the trend in law and policy is firmly towards greater restriction on such use.

"The well-researched and thought-provoking study by the Geneva Academy is a welcome and up-to-date addition to the still relatively limited literature on the right to education at the international level. It undoubtedly will assist governments and education authorities, researchers, practitioners, non-governmental organizations and national human rights institutions alike in their monitoring practice."

Professor Eibe Riedel

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