Children and war

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Ellen Policinski and Kristolawa Krotiuk

Testimonies of former child soldiers in the Democratic Republic of Congo
"This is my story": Children’s war memoirs and challenging protectionist discourses
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Established in 1869, the International Review of the Red Cross is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The Review offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the Review informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the International Red Cross and Red Crescent Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Movement.

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Cover Photo: A refugee girl sits in a classroom at a Lebanese public school where only Syrian students attend classes in the afternoon. 29 May 2014. Credit: Hussein Malla/AP/Keystone.
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I just want to go back to a normal life, resume my training and become a builder one day, like my father.

Testimony by I. N., former child soldier

Eglantyne Jebb, drafter of the Declaration on the Rights of the Child and founder of Save the Children, said: “All wars, just or unjust … are waged against children.”

During armed conflict and other situations of violence, children are especially vulnerable to a myriad of risks that deprive them of the opportunity to fully experience childhood. They are often deprived of food, clean water, health care, and access to education; this is particularly troubling given the number of children who die of preventable illnesses, malnutrition, lack of safe shelter, or violence. Moreover, despite the protection afforded by international law, children are all too often drawn into hostilities – directly as fighters, or indirectly, separated from their families, detained, recruited, forcibly driven from their homes, killed, injured, sexually abused or exploited in other ways. In circumstances where survival becomes a daily struggle, children often lose any opportunity to study. Fortunately, children rarely give up their sense of hope, and their resilience should not be underestimated.

Children have been affected by war throughout history, and this is still true in today’s conflicts, where we continue to see terribly high levels of suffering. Gender, age, ethnic and cultural background, disability, beliefs and other factors can exacerbate specific vulnerabilities in a given context. In light of this, more research is needed on the consequences that armed conflict has for children, as well as on the most suitable responses to their various needs and the challenges they face during and after armed conflict. For this reason, and as we have just marked the 30th anniversary of the Convention on the Rights of the Child (CRC), the Review has chosen to dedicate this issue to children and war.

* Thanks to Helen Durham, Monique Nanchen, Vanessa Murphy, Sai Sathyanarayanan Venkatesh, Mariana Citrinovitz, Siobhan Foran, Nicole Martins-Maag and Indu Nepal for their valuable feedback on an earlier draft.
Challenges faced by children in armed conflict: Children are not “miniature adults”

There is a fundamental fact underlying the experience of children in armed conflict that is perhaps not as obvious as aid workers engaged in this area might assume: Children are not small grown-ups. They have their own particular needs, capacities and vulnerabilities during armed conflict. The International Committee of the Red Cross (ICRC) recognized this nearly two decades ago, stating:

[I]t cannot be denied that the needs of children are radically different from those of women, men and the elderly. Today children are still often regarded as miniature adults and are frequently at the mercy of a society or an environment which is not always willing to grant them the status they require: that of future adults. Showing better understanding of children merely means providing them with aid that is more consistent with their needs as developing individuals.6

In addition to providing children with adequate aid, it is crucial to respond to their current needs and to enable them to experience childhood.

In this issue of the Review, Monique Nanchen, the ICRC’s Global Adviser on Children, emphasizes the need to involve children themselves in the design of humanitarian programming and outlines four priority issues of the ICRC’s protection strategy on children: “children in detention, child recruitment [by armed forces and armed groups], the impact of conflict and violence on children’s access to education, and family separation”. She also mentions other issues such as sexual violence against children.7

Also in this issue, Dyan Mazurana, Anastasia Marshak and Kinsey Spears look at child marriage as one type of sexual and gender-based violence that occurs in humanitarian settings such as natural disasters and armed conflict. They advocate for common data collection tools to gather more information on

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1 See “Testimonies of Former Child Soldiers in the Democratic Republic of the Congo” in this issue of the Review.


7 See “Q&A: The ICRC’s Engagement on Children in Armed Conflict and Other Situations of Violence: In conversation with Monique Nanchen, Global Adviser on Children, ICRC” in this issue of the Review.
“the prevalence, incidence, trends, drivers, push and pull factors, decision-making processes and consequences” of child marriage, as well as children born of child marriages, in order to better tailor responses to each context.8

Children who are born during war know no other life. In addition to growing up amidst armed conflict, those born as a result of sexual violence face stigma and rejection in their communities, even as they grow into adulthood. In the words of one child born after her mother survived sexual violence during the conflict in Bosnia and Herzegovina, “twenty-six years later, both my mother and I still live with the stigma”.9 Local organizations sometimes play a significant role in addressing this stigma. For example, Foundation Rwanda provides funding for children born from rape during the 1994 Rwandan genocide and refers their mothers to psychological and medical services, as well as raising awareness about the ongoing consequences of the genocide.10

While stigma affects the lives of both children and their mothers, the role of fathers is often ignored. Recent research demonstrates that in exceptional circumstances, men who have fathered such children may wish to keep contact with the child and the woman, and may even try to reunite with them.11 Some authors argue that in particular circumstances, the father’s involvement may help to secure a child’s well-being.12

Children who are born in territory controlled by non-State armed groups can face additional hardships. In this issue, Kathryn Hampton examines the consequences of the failure to recognize birth certificates issued by non-State groups to children born in areas outside State control, calling on States to ensure recognition of these birth certificates under their obligation to ensure the right to recognition as a person before the law.13

Another aspect of children’s lives that is disrupted by armed conflicts is education. As a fundamental element of a functioning society, education is an essential service, akin to electricity and clean water. It is considered as such by most children living in conflict-affected areas. Increasingly, protracted conflicts lead to a prolonged lack of access to education, raising questions about how to protect children and ensure that they have the possibility of continuing their education both during and after the conflict.14 Previously in the Review, Geoff Loane and Ricardo Fal-Dutra Santos looked at humanitarian responses aimed at re-establishing

10 See the Foundation Rwanda website, available at: https://foundationrwanda.org/.
12 Ibid. It should be noted that Oliveira and Baines’s research focused on the Acholi clan in Northern Uganda, where there is a particularly strong cultural identity of clanship on the parental side.
13 See Kathryn Hampton, “Born in the Twilight Zone: Birth Registration in Insurgent Areas”, in this issue of the Review.
14 See ICRC, IHL and the Challenges of Contemporary Armed Conflicts, Geneva, 2019, Chap. 3, section 3 on “Access to Education”, available in the “Reports and Documents” section of this issue of the Review.
education services in conflict-affected areas and at the protection of education through programmatic responses with the participation of affected communities.\textsuperscript{15}

Children are often separated from their families during armed conflict, leaving many of them unaccompanied. There are numerous examples of efforts to restore family links severed by war by ever-evolving means, from posters featuring photographs of family members to use of the media and the development of a centralized database, among other measures.\textsuperscript{16} Technologies designed to aid in restoring contact between separated family members and reuniting families continue to evolve today.\textsuperscript{17}

A broad range of children’s experiences during armed conflict can cause trauma, and humanitarians are increasingly aware of the need to address these “invisible wounds”. In one article in this issue, the authors write about Rohingya communities in Myanmar and Bangladesh in order to examine the psychosocial consequences of armed conflict for children and youth, as well as some of the ongoing humanitarian responses promoting children’s psychological and mental well-being.\textsuperscript{18}

\section*{The vulnerability–resilience paradigm}

Children might be particularly vulnerable in wartime, but there are also many examples of children’s resilience when faced with armed conflict, both in developing survival strategies during and after conflict and in overcoming the traumas they experience. It has been argued that “[t]he notion of resiliency in children could easily become a new form of denial of trauma among children, whereby political systems evade responsibility for helping war-traumatized children”.\textsuperscript{19} Contributions in this issue uncover the complex and ambivalent nature of children’s experience that finds strength and resilience during traumatic events.

Children are not always victims of collateral damage – sometimes they are intentionally targeted. In her article in a recent issue of the Review examining the

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\textsuperscript{17} For more on this, see the upcoming issue of the Review on “Digital Technologies and War”.

\textsuperscript{18} See Rochelle L. Frounfelker, Nargis Islam, Joseph Falcone, Jordan Farrar, Chekufa Ra, Cara Antonaccio, Ngozi Enelamah and Theresa S. Betancourt, “Living through War: Mental Health of Children and Youth in Conflict-Affected Areas”, in this issue of the Review.

\end{flushleft}
accounts of children who survived the genocide against the Tutsi in Rwanda, Hélène Dumas observes that

in Rwanda, as during the genocides of Armenians and of European Jews, the intention to exterminate became apparent as soon as the systematic mass murder of women and children began. Their deaths sever the line of descent forever, breaking the link between generations. Children are the primary targets of any genocide.  

On the one hand, the voices of child survivors portray children’s vulnerability in being exposed to violence and lack of food and shelter. On the other hand, one sees a sense of resilience in survivors developed by forming a “micro-society” and taking responsibility for other children amid horrendous suffering.

The concept of resilience can be understood in different ways. For example, French neuropsychiatrist Boris Cyrulnik speaks about resilience from an angle of post-war (post-traumatic) experience:

Resilience is not a case of returning to a previous state, because returning to a previous state is healing, whereas resilience is a matter of getting back on the right track, although you can’t refer to it as “normal” development, because you never forget the trauma. When you’ve been a child caught up in war … you don’t ever forget. However, you are no longer a slave to your memories because you’ve managed to make something out of those experiences, and that’s the next chapter.

How does law protect children?

Over time, norms of international law have arisen to address some of the cruelties visited upon children, both in peacetime and in wartime. A number of branches of international law include rules aimed at protecting children, including international human rights law, international refugee law and international humanitarian law (IHL). Indeed, the historical importance of the contribution of the 1949 Geneva Conventions and their Additional Protocols to the protection of children in armed conflict is often forgotten. The Geneva Conventions contained the first universally ratified protection for children, and the Additional Protocols set out the first prohibition on child recruitment, prior to the CRC and its Optional Protocol on the Involvement of Children in Armed Conflict.

Under IHL, children benefit from special respect and protection as a way to respond to their specific needs, including access to education, food and health care, reunification with their families when they have been separated, and separation from adults while deprived of liberty, as well as age-appropriate treatment

20 H. Dumas, above note 19, p. 39.
22 Geneva Convention IV (GC IV), Arts 24, 50.
23 Additional Protocol I (AP I), Art. 77; Additional Protocol II (AP II), Art. 4(3).
while detained. This is true in both international armed conflicts (IACs)\textsuperscript{24} and non-international armed conflicts (NIACs),\textsuperscript{25} and this special protection afforded to children has been recognized as customary international law.\textsuperscript{26} These specific rules complement the general protections that children benefit from as civilians, including protection from direct attack.\textsuperscript{27} Additionally, children are protected under IHL from being recruited into armed forces or armed groups\textsuperscript{28} (although the minimum age of recruitment is dependent on the treaties to which a given State is party) and must not be allowed to take part in hostilities.\textsuperscript{29} Even if children do take part in hostilities, they still benefit from special protections.\textsuperscript{30} All in all, more than twenty-five articles of the four Geneva Conventions and their Additional Protocols specifically concern children.\textsuperscript{31}

The roots for these protections can be found in older bodies of law, including religious legal systems. These legal systems can play a significant role in influencing the behaviour of parties to armed conflict today. In particular, a number of parties to current armed conflicts have expertise in and look to the rules of the Islamic law of war as they fight. In this issue of the \textit{Review}, Ahmed Al-Dawoody and Vanessa Murphy accordingly set out and compare how IHL rules and Islamic law rules protect children in armed conflict, “bridging the discourses between Islamic law and IHL protections of children in order to find mutual reinforcement”.\textsuperscript{32}

International human rights law complements IHL norms protecting children, in particular the CRC and its Optional Protocol on the Involvement of Children in Armed Conflict.\textsuperscript{33} The \textit{Review} has followed these legal developments closely, publishing several articles on legal protections for children in armed conflict.\textsuperscript{34} When the Optional Protocol to the CRC was adopted in 2000, Daniel Helle detailed the background of the negotiations in the journal, calling it a

24 GC IV, Arts 14, 17, 23, 24, 38(5), 50, 82, 89, 94, 132; AP I, Art. 70(1).
25 AP II, Art. 4(3).
28 AP I, Art. 77(2); AP II, Art. 4(3)(c); ICRC Customary Law Study, above note 26, Rule 136.
29 AP I, Art. 77(2); AP II, Art. 4(3)(c); ICRC Customary Law Study, above note 26, Rule 137.
30 Article 77 of AP I and Article 4(3)(d) of AP II affirm that captured children who have taken part in hostilities continue to benefit from entitlement to special care, such as age-appropriate food, health care, and access to education. In addition, the 2007 Paris Principles on Children Associated with Armed Forces and Armed Groups (available at: www.refworld.org/docid/465198442.html) set out important standards on support and reintegration for these children.
31 See also “Children and War”, above note 6, p. 1165.
32 See Ahmed Al-Dawoody and Vanessa Murphy, “International Humanitarian Law, Islamic Law and the Protection of Children in Armed Conflict”, in this issue of the \textit{Review}.
“welcome initiative” in line with the policies of the International Red Cross and Red Crescent Movement.35

Similarly, this issue follows recent developments related to international legal protections for children. Diane Marie Amann describes the process that led to the International Criminal Court (ICC) Office of the Prosecutor’s Policy on Children, showing the Office of the Prosecutor’s focus on crimes against children. After detailing the policy, Amann concludes that “States, international organizations and civil society must also work for prevention in spheres other than the ICC, and by means other than criminal prosecution”.36

While the current multilateral environment might not be conducive for consensus on new treaties, we continue to see meaningful advocacy and policy efforts that are strengthening protection of children in armed conflict, such as the Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict, among other soft-law instruments.37 Bede Sheppard looks at why such efforts to deter military use of schools are important, pointing out that military use of schools may “place students at risk of attack and interfere with their education”.38

Protections for children are also enshrined in law at the regional level. An important example of this is the African Charter on the Rights and Welfare of the Child, adopted by the Organization of African Unity (now the African Union) in 1990, which covers a wide range of civil, political, economic, social and cultural rights for children.39 Benyam Dawit Mezmur explores the monitoring and implementation of the Charter in this issue, observing:

The efforts to create a world fit for children, including for those affected by armed conflict, remain a work in progress. Increasingly, regional organizations, prime among them the African Union and its organs, are being asked to play a more meaningful role in pushing for the realization of the rights and protections of children in armed conflict.40

Domestic law is also an important way of ensuring compliance with international norms. For an in-depth look at developments in national legislation and jurisprudence implementing norms aimed at strengthening the protection of

38 See Bede Sheppard, “Keeping Schools Safe from the Battlefield: Why Global Legal and Policy Efforts to Deter the Military Use of Schools Matter”, in this issue of the Review.
children in armed conflict both regionally and domestically over the past five years, readers can consult the thematic update on national implementation of IHL, prepared by the ICRC’s Advisory Service on IHL.41

Despite legal prohibitions on children’s participation in hostilities at the international, regional and domestic levels, children continue to be used in various capacities during armed conflict by States and armed groups alike. Many authors have examined various aspects of this phenomenon in previous issues of the Review. For example, in her article looking at the motivations of adolescents who have volunteered to join armed forces or armed groups based on research conducted by the Quaker United Nations Office and the International Labour Organization, Rachel Brett argued that “[t]o counter the problem of child recruitment with any hope of lasting success, it is necessary to address the root causes in terms of … war, poverty, education, employment and the family”, noting that “this presents a challenge of monumental proportions”.42

Elsewhere in past issues, María Teresa Dutli provided insights into the legal status and treatment of captured children associated with armed forces or armed groups in both IACs and NIACs,43 and Naïri Arzoumanian and Francesca Pizzutelli questioned the criminal responsibility of children associated with armed forces once captured, particularly in Liberia, the Democratic Republic of the Congo (DRC), Rwanda and Sierra Leone.44

In this issue, Pascal Bongard and Ezequiel Heffes explore some of the challenges of working with non-State armed groups to ensure compliance with IHL norms protecting children. They point out that “violations against children do not simply happen; they are the result of complex mechanisms entailing a variety of explanations”, going on to explore some of the possible factors driving behaviour that violates international norms protecting children via examples from Geneva Call’s experience in different conflict contexts.45

Passive victims, agents of change, and child “terrorists”: How do we see children in armed conflict?

Historically, and even today, children have been portrayed as passive victims in war. We can see this reflected in the pages of the Review itself. In the early twentieth

century, the Review simply described the plight of children caught up in war and recounted humanitarian activities on behalf of children. A 2001 article in the Review states: “All too often children are helpless, first-hand witnesses of atrocities committed against their parents or other family members.” Overall, children were portrayed as victims of war and passive recipients of humanitarian aid.

As the Review has evolved, we can see more in-depth examination of the cruelty children suffer in war, and how it drives humanitarian action. This has included the plight of children separated from their families by the Rwandan genocide; the human cost exacted on civilians by the wars in Iraq, including the distinct suffering of women and children; the impacts of the Boer War in South Africa, which disproportionately fell upon children; and more recently the heavy costs borne by family members of detainees, including children. The journal has also explored the humanitarian response to the suffering of children, such as the British Red Cross response to young migrants in the Calais “jungle.”

Perhaps as a consequence of the perception of children as inexperienced, innocent and dependent, inhumanity directed at children tends to inspire more humanitarian sentiment than the same cruelty directed at adults. Humanitarian organizations have even sometimes taken advantage of the perception of children as innocent victims, in some cases intentionally using their images in campaigns to pull at the heartstrings of potential donors and others.

In contrast, there are prominent examples of children, far from being only passive victims, who are telling their own wartime stories. Perhaps the best known of these is the diary of Anne Frank, written while her family was in hiding during World War II. More recent examples include Zlata Filipović and Malala Yousafzai, who demonstrate how children can also be inspiring agents of

46 See, for example, Joseph Jakobkiewicz, “L’odyssée des enfants perdu en Sibérie”, Revue Internationale de la Croix-Rouge, Vol. 7, No. 73, 1925.
48 “Children and War”, above note 6, p. 1164.
54 See, for example, Neide Fehrenbach and Davide Rodogno, “‘A Horrific Photo of a Drowned Syrian Child’: Humanitarian Photography and NGO Media Strategies in Historical Perspective”, International Review of the Red Cross, Vol. 97, No. 900, 2015.
change.\textsuperscript{57} In her article for this issue of the \textit{Review}, Helen Berents challenges the view of children as victims or bystanders, using children’s own memoirs to demonstrate that they actively exercise “tactical agency” to negotiate life in a war zone.\textsuperscript{58} Considering the narratives of children themselves is important to show that children exercise agency, playing an active role during armed conflicts. They do not simply “endure”, but can contribute to making things better.

In the same vein, this issue opens with testimonies from former child soldiers in the DRC, bringing their voices to the fore and allowing children affected by armed conflict to speak for themselves. The story they tell is one of difficult choices they make in extreme circumstances, and also of stigmatization after having demobilized. To quote one boy:

I spend my days with other young people in the neighbourhood, but no one knows that I was a fighter. I wouldn’t like them to know, because when you have been a fighter, you risk being treated as an outcast and slandered in the community. Some people even accuse you of things you haven’t done.\textsuperscript{59}

Today, the public perception of some children in humanitarian crises around the world appears to be shifting. Although horrific images of children like Alain Kurdi\textsuperscript{60} and Omran Daqneesh\textsuperscript{61} still catch the public attention, there is also a counter-narrative that casts children as a potential security threat, whether they are refugees and migrants in search of a better chance at life or are caught up in armed conflict or other crises. This is particularly apparent in the treatment of children involved in so-called “terrorist” groups.\textsuperscript{62} Helen Durham observes that “children who fall into certain categories or are associated with certain labels – categories such as ‘migrant’ or ‘girl’, and labels such as ‘violent extremist’ – are often at greater risk of facing lower standards of implementation of existing legal protections”.\textsuperscript{63} This issue of the \textit{Review} contains an interview with Mira Kusumarini, who works on the reintegration of children formerly associated with armed groups in Indonesia. She highlights that empathy is the driving force behind successful reintegration – “not only the children’s own empathetic skills, but it was also important for the social workers [working with these children] to

\textsuperscript{58} See Helen Berents, “‘This Is My Story’: Children’s War Memoirs and Challenging Protectionist Discourses”, in this issue of the \textit{Review}.
\textsuperscript{59} See “Testimonies of Former Child Soldiers in the Democratic Republic of the Congo” in this issue of the \textit{Review}.
\textsuperscript{63} H. Durham, above note 33.
work on their empathetic skills in order to understand the children’s situation” as well as that of the community. She also highlights that the narratives in media coverage can be detrimental.64 This can be seen elsewhere, where the narrative of “radicalization” associated with initiatives aimed at countering or preventing violent extremism can be counterproductive and lead to stigmatization.

This begs the question: in an age where it is perhaps not politically popular to provide all children with the protection they are both morally and legally entitled to, how can we ensure that their needs and rights are fulfilled?

Also in this issue are several articles that are not related to the main theme but are nonetheless significant contributions to the debate on humanitarian law, action and history. Julie Freccero et al. look at “Safer Cash in Conflict: Exploring Protection Risks and Barriers in Cash Programming for Internally Displaced Persons in Cameroon and Afghanistan”; James Houlihan looks to the distant past in “Lex Innocentium (697 AD): Adomnán of Iona—Father of Western Jus in Bello”; Suzannah Linton writes on “Deciphering the Landscape of International Humanitarian Law in the Asia-Pacific”; and lastly, Duncan McLean highlights the ever-present danger of attacks on health care in “Medical Care in Armed Conflict: Perpetrator Discourse in Historical Perspective”.

64 See the interview with Mira Kusumarini in this issue of the Review.
Interview with Mira Kusumarini

Executive Director of the Coalition of Civil Society Against Violent Extremism (C-SAVE)*

Even during armed conflict and other situations of violence, all children are entitled to their rights and protections as children without distinction based on their age, gender, religion, or whether they are associated with an armed group. Despite this, millions of children in conflict zones face discrimination, ostracization and stigmatization. This is particularly true for children affiliated with groups designated as “terrorist”, who face a range of challenges in reintegrating into society.

Civil society can play an important role at the international, regional and domestic levels in helping children formerly associated with armed groups, or otherwise affected by armed conflict, to rejoin communities. Mira Kusumarini is a professional in the peace and security field in Indonesia who works to address the problems of women and children who have been associated with armed groups, and to help them reintegrate them into society. She is the Executive Director of the Coalition of Civil Society Against Violent Extremism (C-SAVE), a collaborative network of civil society organizations.

In this interview, she discusses the challenges involved in the reintegration of children who have been associated with extremist groups in Indonesia and the stigma they face, as well as the importance of empathy in helping communities to heal.

Keywords: children, stigma, reintegration, child soldiers, armed groups, empathy.

* This interview was conducted on 21 February 2020 by Ellen Policinski, Editor-in-Chief, and Sai Sathyanarayanan Venkatesh, Editorial Assistant of the Review.
You’ve been involved with the work of several NGOs in Indonesia through the years, working on a diverse range of human rights issues. What drives you in this line of work?

The main drive for my work is my concern around empathy. Even though empathy is so important in our social lives, it isn’t a concern that most people have today. I’ve been working in peacebuilding activities for the past decade in Jakarta, and I co-founded C-SAVE around four years ago.

Prior to joining C-SAVE, I was working on mainstreaming social entrepreneurship, where applied empathy was used as the main driver for innovative social solutions. I started the Empatiku [My Empathy] Foundation to mainstream emotional competence and make empathy as much a priority in early education as any other academic subject taught.

In 2016, when C-SAVE was first established, we started to advocate for changes to national counterterrorism [CT] laws and policies. A proposal in the form of a problem inventory list [daftar inventaris masalah, DIM], was formulated against the draft revised CT Law No. 15/2003. The proposal substantiated on nine themes. In addition to putting in the DIM, the Coalition also put forward the arguments raised through different policy papers. Out of eleven substantial changes in the draft CT Law, eight proposed by the Coalition to better protect human rights were accommodated.

At the time, the media reported that several Indonesians had travelled to Syria and Iraq to join the Islamic State [IS] group. Indonesian activists and NGOs knew that some could have returned back to Indonesia to recruit others. However, it was not until 2017 that it was confirmed that a group of Indonesians who were associated with IS were being detained and sent back to Indonesia, mostly from Turkey. At that point there were around seventy-five returnees, and the Indonesian government had them referred to rehabilitation centres run by the Ministry of Social Affairs.

This was the starting point of C-SAVE’s work with deportees and returnees who had been affiliated with terrorist groups like IS. Out of the seventy-five people that were returned, almost 50% of them were children, about 35% were women and the rest were men. Our goal was to ensure that they were reintegrated back into society so that they could go on to lead normal lives.

At the time that these deportees had been referred to the rehabilitation centres, C-SAVE learnt that there were no programmes in place for their rehabilitation and reintegration. The government and social workers working in these centres were not aware of how to deal with this issue or even how to comprehensively understand the problem. This is where we came in, as we offered to provide support to social workers in the centres. This led to us working together with the government ministries and relevant institutions to help create a standard operating procedure for the rehabilitation and reintegration of deportees and others who were returning to Indonesia. Since then, there have been around 490 people that have been through the rehabilitation and reintegration programme run by the Ministry of Social Affairs.
Affairs. The Standard Operating Procedure for Rehabilitation and Reintegration of Individuals Already Exposed to Radical Terrorism Ideology [SOP] is a set of step-by-step instructions compiled by the Ministry of Social Affairs to help social workers carry out complex routine operations in delivering rehabilitation and reintegration services. The SOP aims to achieve efficiency, quality outputs and uniformity of performance, while reducing miscommunication and failure to comply with related rules and regulations. The SOP contains aspects of rehabilitation delivered by the rehabilitation centres and of reintegration delivered by local governments. We, as a civil society organization, have been there to improve the capacity of the social workers and the policy framework in the centres.

**Why is the reintegration of people, and in particular children, who have been associated with armed groups so important for society? What is the role of empathy in this process?**

The rehabilitation and reintegration of these people is important because they are also human beings. It is important for them to return home and be able to rejoin the community and get the chance to be a normal citizen again, just like the rest of us. Children are the most vulnerable victims of violent extremist ideology. Nearly half of deportees and returnees are under 18 years of age, including toddlers [0–5 years, 48%], children [6–12 years, 42%] and adolescents [13–18 years, 10%]. Based on data from the field, these child deportees and returnees have experienced psychological trauma and have been in environments that have potentially threatened their lives and their physical and mental health.

We learnt that one important skill that enables children to be able to return to society is empathy – not only the children’s own empathetic skills, but it was also important for the social workers to work on their empathetic skills in order to understand the children’s situation and to be able to help them in a more efficient manner. Our goal has always been to ensure that these deportees and returnees are able to return to their local communities and live normal lives. It is important to harness empathy as a skill, as it serves as the backbone to ensuring the return of deportees and returnees back to society.

The goal is not to de-radicalize individuals rather, the first step is to fill the gap in their social skills by including empathy as a basic competency, and to equip them with other relevant social skills so as to enable them to return to society. Therefore, we provide empathy training for social workers, in addition to the other trainings in communication and other skills.

**Ensuring the rights of children affected by armed conflict is complex. What are some of the challenges that children associated with armed groups face when they return to their communities?**

As you rightly mention, dealing with children affected by armed conflict is a multi-dimensional issue. One aspect is related to how to best protect these children. Many of these children were brought to Syria and indoctrinated by their parents. We have
a Law on Child Protection in Indonesia,\(^1\) according to which children are to be under the supervision of their parents. This can pose a challenge where that’s not in the best interests of the child, which must be of primary importance.\(^2\)

Another issue we noticed was that the children who were brought to Syria and back had been exposed to situations which left them traumatized. When they arrived at the rehabilitation centres, we examined them and found that most of them had faced traumatic situations, whether during their time in the detention centres or simply due to separation from their parents, or other situations that caused trauma.

Yet another challenge that we’ve noticed in the past three years is that there is insufficient legal protection for children who, of course, are victims of armed conflict, but who have also allegedly committed criminal acts under the domestic legal system. One such case that I can share is that of two children, one aged 14 and the other aged 15 or 16, who had been sent to the rehabilitation centre. They behaved well in the six months that they were there, and based on this, the rehabilitation centre officials assessed and recommended that they were ready to be sent home. Instead, however, the police sent them to court, where they were sentenced to six months and nine months of imprisonment respectively, without considering the six months they had spent at the rehabilitation centre. We are currently advocating for alternative, restorative justice measures for these children and others in a similar situation.

There are also challenges once children are back home. C-SAVE helps children have access to schooling, but unfortunately, society and the community often discriminate against these children, claiming that the schools which receive these children are “terrorist” schools. So, it’s clear that there are a lot of challenges faced by these children, including legal, social, psychological and protection issues.

**What about children who are separated from their parents? What specific challenges do they face?**

There are two main scenarios for child returnees who have been separated from their parents. The first is where children who still have parents stay together with their parents. The second is where children don’t have parents or any family to go to. In the latter case, according to the Indonesian Law on Child Protection, the government is responsible for the protection of the children and for finding a place for them to live. In these circumstances the government often sends the children to Islamic boarding schools to ensure that they get an education. These schools are accepting of these children and provide them with a place to live, education and the means to survive.

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\(^2\) It is important to note that Indonesia is a party to the Convention on the Rights of the Child, which affirms that the best interests of the child must be a primary consideration under Article 3. Indonesia is also a party to the Optional Protocol on Children in Armed Conflict, which provides further guarantees and protection for children affected by armed conflict.
What is the local community’s perception of these children once they return home?
What can be done to encourage communities to accept these children?

When these children reintegrate into society, they face the social stigma of having been affiliated with terrorist groups. They also face discrimination among other children when they play, and from people who know that they have been to Syria or Turkey and have been associated with an armed group.

Civil society can empower community members to make sure that these children do not feel left out or different from the others. By being alienated and stigmatized, this gives rise to the opportunity for these children to go back down the wrong path and to re-enter the so-called terrorist groups. Therefore, it is vital that civil society and community members act as front-line protectors to ensure that these children are safely reintegrated back into society.

Based on our experience, we have come to realize that it is not in the best interests of the child to raise public awareness around who they are or where they come from because spreading of such information could be counterproductive. Instead of opening up opportunities for them to start their new life, it could give rise to further stigmatization. So when C-SAVE works with the community, we ensure that only key leaders of the community know the identity and past of these children. We prepare them to be front-liners by equipping them to understand early detection measures of possible re-recruitment by armed groups as well as preventative measures with regard to the stigmatization of these children. This provides them with tools for understanding, tolerance and empathy with the children. We encourage communities to promote their social activities in a more inclusive manner so as to build social cohesiveness, resulting in the improvement of the resilient capacity that the local community possesses in dealing with such individuals who have been affected by armed conflict. We have community discussions to raise awareness about the risks of violent extremist ideology. For the discussions, we use animated videos on what the CT Law has to say to protect people. We also broadcast short videos telling the life stories of former returnees or deportees. We work with local religious leaders, especially women ulama, to hold discussions with majelis ta’lims [women’s religious groups] on how to translate religious teachings into concrete actions applying empathy, promoting tolerance and improving social activities for the good of others.

Empathy is the core skill in building community resilience capacity, and this is what we try to achieve through our engagement with the local community. Empathy should be exercised through action. We encourage different community groups to come up with creative initiatives for their social activities. For example, religious groups of women in the local community run prayer activities and, every Friday, do what they call a “Clean Friday” – a day on which they encourage people in the local community to clean out their house, the road and the environment. This is one example of how empathy can be translated into a concrete activity.
Another example is the activities raising awareness of the importance of vaccinations for children by local health groups in the community. This is done to counter the narrative of radical groups who claim that vaccines are *haram*. As a local community, the spread of such misinformation is detrimental to everyone, especially babies and infants, and empathy definitely plays a role in countering these harmful narratives. We encourage these types of activities to promote empathy.

*There is a narrative in the media about “violent extremism” and “radicalization” of children, who are sometimes even labelled “terrorist children”. What are the risks of this type of narrative?*

This is another issue faced by the children. How the media frames the narrative is very tricky and, unfortunately, the news coverage by some media outlets does not consider the impact of their narratives for the future of the children. We have noticed that the narrative impacts not only the returnees and deportees, including children, but also the wider society. For example, when they are interviewed by a national TV company, the objective of the programme is to educate the public on lessons learned from the experience of the returnees—how they are trapped and recruited. Unfortunately, however, most of the audience puts the blame on the returnees, and a preconceived notion of wrongdoing is thrust upon them by way of severe social sanctions such as stigmatization and alienation. It is indeed not easy to control the viewpoint of the entire audience base, but this is a challenge that all of the media should consider so as to bring the least negative effects upon these returnees. Since this is national media coverage, the nationwide spread of hatred towards the returnees has severe and drastic implications.

To address this, we hosted media trainings and discussions with the media to encourage empathetic news coverage, keeping in mind the future of the children and considering the impact on the wider society, where there is a risk that some people will single out children who are identified or come forward in the media, or blame them. When we educate the media, we first have a discussion with them raising the issue in light of the perspective of the children and the perspective of the audience. When the media approaches us to do interviews of deportees or returnees—mostly of adults, but sometimes children as well—we ensure that the interview is done only on a voluntary basis. When they agree to be interviewed, informed consent papers must be signed by the person interviewed and the media representative. This provides some regulations and agreements around what can be reported in the news based on the interview. These are some of the steps that we take to “educate” the media.

*Looking ahead to the future, what are the steps that need to be taken to ensure that affected children can overcome stigma, rejoin society and live a normal life? Are there any particular “success stories” that give you hope?*

Moving forward, we’ll be focused on addressing all those challenges that I had previously mentioned: working to strengthen the legal protection of children, including finding alternative justice measures and working with the police, judges,
the government and other stakeholders to ensure that there is strong legal protection for these children. Second, we would like to ensure that the community is a safe space in which the children can be accepted and be able to live their normal lives without stigmatization. We’re working closely with the communities on improving their capacities, their resilience and their empathy in order to build trust and social cohesion, so that when these deportees and returnees are rehabilitated into society, there is not a negative perception towards their acceptance. Thirdly, in the very near future we want to focus on children without any family or parents. We know that there are hundreds of Indonesian children in Syria right now, in the refugee camps, who have no parents, so we need to prepare the ideal home for these children when they return.

An example of a successful measure would be the handling of the children associated with the 2018 Surabaya bombing in East Java province. After the bombing, they were rejected by their community and they could not return. Now, they live and study with other local children in the Islamic boarding school. When they first came to the rehabilitation centre, they were considered radical, indoctrinated by their parents, and they themselves were very traumatized. Through our efforts they recovered from the trauma and were ready to go home, but because the community had rejected them, the government needed to find another place for them. The government was able to identify an Islamic boarding school that was willing to accept them, and now they are slowly but steadily joining the community there.

To put it into perspective, in Indonesian cultural contexts, Islamic boarding schools, or *pesantren*, have an important role in contributing to the education of the children in terms of both formal and informal education, including religious education. For child deportees and returnees, there should be a social reintegration mechanism to ensure that there are families who will take care of these children, that the society will accept their return, and that there are opportunities for re-socialization. In the specific case of orphans, unless their extended families take care of them, there are institutions such as Islamic boarding schools that provide care and education on a residential basis outside the family home. They provide full-time care and education based on Islamic principles.

We do face several challenges in our work, but we have found solutions and are constantly looking to ensure that the best interests of the children are maintained and that they have a chance for the future.

**Is there anything else you would like to share with our readers?**

To re-emphasize something that I said before, we have concerns about these children being turned over to the courts. We’re working with police and prosecutors to develop common understandings and better treatment for children.

We are also planning to review the existing policies relating to the legal protection of the children, and to work closely with law enforcement for the system to be in the best interests of the children. A current challenge with the correctional system is that many cases of child recruitment occur within the prisons. Concerns
regarding the implementation of Law No. 8 of 2012 on the juvenile justice system are related to a punitive approach that is still pursued by law enforcement despite the law’s emphasis on restorative justice.

Indonesia’s juvenile justice system is already progressive. In 2012, the House of Representatives passed a law on the juvenile justice system which prioritized diversion, increased the age of criminal responsibility from 8 to 12 years, and encouraged the use of restorative justice practices. The law was enacted in 2014. The law states that children should not be in prison, except in exceptional circumstances. However, many Indonesians are still unaware of the legislation and the importance of providing children with special protections, especially in the case of children who have been forced to commit crimes by others such as their parents or other external influences. This should be taken into consideration by the juvenile justice system, and we’re constantly working to ensure that it is.
Testimonies of former child soldiers in the Democratic Republic of the Congo*

In this issue, the Review has chosen to give a voice to former child soldiers in the Democratic Republic of the Congo (DRC). Children recruited by armed groups experience separation from their families, physical and psychological violence, sometimes including sexual exploitation, as well as interruption of their education. Whether they joined an armed group forcibly or by choice, as a fighter or carrying out a different function – every story is unique, reflecting numerous challenges faced by children in these circumstances. The testimonies below reflect children’s experiences, the difficulties they have faced and their hopes for a new life. In order to protect them and their relatives, their testimonies have been anonymized.

O. L., 15 years old, male

When I was 11, I was suspended from primary school for lateness. One day, I set off with my three friends to help my mother in the fields. On the way, six members of an armed group captured us. One friend was allowed to go, but my two friends and myself were made to walk for three days to the base of the armed group. When we got to the camp, I was bad-tempered because I was tired from the long walk in the hills through the mud; I felt dirty and was in desperate need of sleep.

We wanted to continue our studies, and the armed group enrolled us at a local school. I attended the school for only four days. Four armed men accompanied me and my friends there and back. At the camp, I learned to handle a gun and was

* Thanks to the ICRC Delegation in Kinshasa and especially its Protection and Communication Departments for their assistance in collecting these testimonies.
tattooed and initiated in taking care of the gris-gris.¹ I was annoyed that I wouldn’t be able to continue my studies. A month later, I learned that my two friends had managed to escape and had told my parents where the armed group was keeping me. My parents came to negotiate my release with the armed group, offering a goat, but the commander demanded a cow and made fun of them by offering them food. I was furious about the way the commander was humiliating my parents, but there was nothing I could do.

I spent around three years in the forest as the “guardian of the gris-gris”, and took part in five military operations against other armed groups and government forces. I was also involved in robbing people travelling on the main roads. I was unhappy about carrying the gris-gris, but I was also worried about the survival of the others. I couldn’t just abandon them; I had to protect them. I was also troubled by the beatings and pillaging that I witnessed to obtain money and goods, but I couldn’t do anything about it. I was often very angry at the commander; he did not seem to realize that he was capturing and beating my friends, my brothers. To vent my anger, I would shoot my gun in the air, which would usually earn me a beating.

In the last military operation in which I participated, I was shot in the mouth and lost four teeth. They took me to a local health facility, and I handed the gris-gris over to another fighter. The doctor refused to let the fighters take me back to their camp in the forest. I thought that that was it; I thought that I was going to die when the others left me at that health facility. The ICRC [International Committee of the Red Cross] evacuated me to Bukavu general hospital, where I was treated for two months. When I came out of hospital, the commander of the armed group came to take me back to the forest. When the armed group was attacked by government forces, I took the opportunity to escape. I returned to my family but had to remain in hiding from the armed group and was facing arrest by the army. My family talked to a Red Cross volunteer, who informed the ICRC of my situation. I was evacuated again and taken to a transit and orientation centre for former child soldiers in Bukavu², where I could be protected and could obtain a demobilization certificate. Three months later, I was reunited with my family, but within weeks the armed group had managed to locate me and send me a letter inviting me to rejoin them, with the promise that I would be treated well. Fearful about what might happen, together with my family we contacted the ICRC, who immediately arranged for me to be evacuated again and taken back to the transit and orientation centre in Bukavu.

¹ Gris-gris are charms believed to protect the fighters.
² The transit and orientation centre for former child soldiers is run by the Bureau for Volunteer Services for Children and Health.
The only way I will ever be left in peace is if my former commander dies or surrenders to the government forces. I didn’t like living with the armed group. I never laughed. There was nothing I liked about that life except for the food, and even that was tainted as it was obtained by stealing livestock or extorting local people, who were forced to make weekly contributions in exchange for being left alone by the group. I cannot go back home as long as the group remains active in the area. Thanks to the transit and orientation centre and the ICRC, I am doing a hairdressing apprenticeship, which I am about to finish. I want to open my own salon so that I can be independent. Although I don’t yet have the equipment I will need and the rent for the salon, that is how I see my future.

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E. R., 17 years old, male

I am the oldest of three children. Our father died, and our mother has been working in the fields to help our family get by. One day, when I was 15, I was coming home from school with my three friends who lived in the same village as me, and as we were crossing a fruit plantation I heard someone calling my name. I stopped to see who it was, and a boy, who was about 10 years old, suddenly appeared, coming out of the plantation. He kept me amused by telling me nonsensical stories and asking strange questions. I told my friends to go home, saying that I would follow them. A few minutes later, four armed men appeared and forced me to go with them, knocking me about and striking me with a whip. That is how I found myself recruited into an armed group.
During my time with the armed group, I was brainwashed with their ideology and received training in military intelligence, armed robbery, weapons, livestock theft and intimidation methods for robbing people on the road or in the fields, or abducting them. I started as a cook, was promoted to bodyguard of the camp commander and was eventually made responsible for leading operations on a national road. Sometimes, I was sent with other children to support joint operations with other armed groups. There were times when I cried, especially when I thought about my mother and my two brothers, but I couldn’t leave the bush because all the paths out were watched by members of the armed group. They also kept a watch on me.

One day, during an operation to steal livestock, I took an opportunity to lay down my weapon and my military shirt. I left them on the roadside and reported to MONUSCO [the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo], who took me to Uvira, where the ICRC tried to locate my family. I was very happy to be reunited with my mother and decided to stay in the city centre to avoid being forcibly recruited again. One day I received a visit from an NGO which offered me support to continue my studies. I didn’t want to go back to school, though, because I was used to having money, so they helped me with equipment and materials to open a hairdressing salon. I now run my own salon which makes enough for me to get by and sometimes to pay labourers to help my mother farm her land. I am starting to think about having a family myself now.

I think the armed groups should lay down their arms and stop recruiting children because it’s not right.

“There were times when I cried, especially when I thought about my mother and my two brothers, but I couldn’t leave the bush because all the paths out were watched by members of the armed group.”
M. A., 18 years old, male

I was living with my parents in South Kivu. I was not attending school because we couldn’t afford it, but I was surrounded by love and had a peaceful life. I often played football with my friends on a piece of land near our house. At the age of 5, I started taking the village cows into the surrounding hills. I spent my days stuffing myself with milk and potatoes and would return home in the evening as happy as I could be. I stopped herding cows when I was 9 and my parents started teaching me about farming. At 13, I followed the young men from my village to the mines. I wanted to earn some money to buy myself a pair of trousers and change my life, just like all the other young people in the village. When I had been working there for three years, several diggers were crushed in a rock fall. The incident scared me, and I decided to go back home and focus on farming. I was happy.

One Sunday in April 2017, when I was 16, the armed group came to our village because the soldiers stationed there had left to halt the advance of another well-known armed group. When fighters arrived, they forced the villagers to give them food. My friend and I were made to transport the food, but when we got to their camp in the hills, they did not let us go back home. They told us that we were men and that we should stay with them and protect our village. We refused and were beaten. At night, we were forced to guard the camp with just a machete as a weapon. I was horrified to belong to an armed group that didn’t even have enough weapons to protect itself. Luckily, a week later, my friend and I managed to escape. We told our family we couldn’t stay in the area, and left for another village. On the way, some young people who had seen us with the armed group recognized us and informed the government forces. We were arrested and held in a local lockup for four months, and then in a cell in Bukavu for three weeks. We were brought before a military court and sentenced to one year and five months at the Bukavu prison. My friend fell ill and was transferred to Bukavu general hospital, where he died. I was totally overwhelmed by the situation and lost all hope of ever returning home. However, the ICRC visited us and started monitoring my case. They eventually succeeded in having my case handed over to a juvenile judge. I was released and transferred to the transit and orientation centre, where I waited to be issued with a document certifying that I had left an armed group and for the ICRC to find my family. In March 2019, I was reunited with my family. It was an indescribably joyous moment, and all the villagers came to the house to welcome me back. They all thought I was dead.

I am now in the process of building a house for my mother – the greatest honour any man can have. I have gone back to my life as it was before the armed group and hope to start a family of my own one day. My experience with the armed group and in prison is one I hope never to repeat.
I. N., 17 years old, male

I was born in Kasai-Central Province in 2002, the fifth of seven siblings. My mother is a farmer, and my father a builder. Before I was recruited into the militia, I was a third-year student in building at a vocational training college.

In October 2016, I was at college when our neighbourhood was attacked by the militia. When I got home, there was no one there. I spent the night alone in the house and in the morning, on my way to school, I met six classmates who were going to the commune of Nganza, and I went with them. Along the way, they told me that they were going there to be “initiated” for their freedom, and I thought it was a good idea. I therefore decided that I would also get initiated, with the intention of one day becoming a territorial administrator or a mayor.

After the initiation, we went to the front to fight the governmental forces. In the militia, I served as platoon leader in many operations. I fought in Kasai Province, where we slaughtered over fifty soldiers. Then there was the hunt for the FARDC [Armed Forces of the Democratic Republic of the Congo] in the Kasais, the bloodiest clash yet, where the governmental forces were supported by another militia. Facing this resistance, we realized that the gris-gris in our possession were no longer working. I was racked with disappointment, my hopes of becoming a territorial administrator now dashed. The governmental forces, supported by the militia, were becoming stronger and stronger, and we suffered huge losses. My six friends were killed.

I have to admit that life in the militia was good until the gris-gris stopped working. We had gone from victory to victory and were free to do what we wanted. It really was a good life for me. The reason why I left the militia was the round-up carried out by the governmental forces after our attempted hunt for the FARDC, when they arrested all the boys they could find, and would kill everybody on whose body they found a tattoo. We fled to Angola, but the Congolese were expelled and I found myself back in my country. That was when the ICRC found me, contacted my family and took me back to them. Now, I just want to go back to a normal life, resume my training and become a builder one day, like my father.

L. O., 16 years old, female

Five years ago, I joined an armed group in the eastern part of the DRC. I was no longer studying because I wasn’t clever enough at schoolwork. One day, armed men came into my aunt’s shop where I worked. They drank all we had and then asked me to go with them to their base so that they could pay me. I asked two of my friends to accompany me. When we got there, they locked us up for two days. The armed group was preparing to fight, and they let us out and told us

3 At a Tshiota, a ceremonial fire at which fetishes and potions are distributed.
that we could choose between becoming soldiers and dying. We had no choice but to become soldiers. That same day, we were initiated by fetishes. When night came, fighting broke out, and we fought all night. One of my friends who had come with me was killed. I was very angry and decided to stay with the group to avenge my friend.

One day, we were engaged in a clash with another armed group in the bush; the fighting was intense, and we had run out of ammunition. Some members of our group had just been captured. Twelve children, including me, decided to try to escape to the nearest village. We hoped to get to the MONUSCO forces, who would be able to help us demobilize. However, we were intercepted by another group before we could find them. We were beaten and locked up at this armed group’s camp and then quickly incorporated into its ranks. I continued to take part in fighting with this new armed group. It was difficult to find enough to eat, and we were forced to steal goats in the villages, which we often had to eat raw.

I sometimes cry when I recall what I went through. I think a lot about a great friend of mine who was killed in the fighting; he was only 9. After he was recruited into our group, his mother came and begged for him to be released. She took three goats to the commander so that he would let her son leave the group. Eventually, he took pity on her and promised to hand him over to her the next day. That night, however, we were sent to fetch cassava flour from the villages. There were ten of us, but I was the only one with a gun; the others only had spears and knives. On the way, we met some armed men who shot at us and killed my friend. He was the humblest of the group, and we all really liked him; he made us laugh. We all wept bitterly when we saw that he had been killed. We no longer thought about dying – we were filled with rage. We went down into the villages and killed many people, both civilians and combatants. Every time I think about that boy, I am overtaken by a desire to kill.

“\nIt wasn’t easy being a girl in an armed group. Sometimes the boys protected us from the violence meted out by the adults, but the commanders took advantage of night patrols to sleep with the girls.\n”

It wasn’t easy being a girl in an armed group. Sometimes the boys protected us from the violence meted out by the adults, but the commanders took advantage of night patrols to sleep with the girls. They intimidated us, and if you refused to sleep with them, they would kill you and then go back to the camp and say you had been killed in the fighting.

There were clashes all the time. I was tired of the war and had become so thin that I was just a sack of bones. One day, when my commander sent me into the town to find food, I took the opportunity and escaped again. I went to the government forces with three of my friends. I was ready to leave the armed group and join the regular army, but they said that I was not old enough. I was transferred to a transit and orientation centre to be demobilized in August 2018. I was going to be reunited with my grandfather in North Kivu, but all
reunifications in the area were stopped because of the Ebola virus. I appealed to those in charge of the centre, and they decided to take me back to my village. I was reunited with my family in September 2018.

When I arrived, the commander of the armed group that controlled the region recruited me again and wanted me to be his woman. I rejoined the armed group and one day, during a clash, I was shot in the leg twice. I was taken to a local health facility, where I was treated for several weeks. When I recovered, one of my friends gave me a little money, and I decided to come to North Kivu. I don’t have a job at the moment and spend my days wandering around. I don’t like hanging out with the girls in my neighbourhood because there is always tension owing to the things they say about me. Everyone knows that I was in an armed group.

K. E., 17 years old, male

In August 2017, I was with my brother in my village in the east of the DRC. The members of an armed group were making all the inhabitants of the village pay a tax. My brother and I had no money to pay it, so we were captured and taken into the bush, where we were thrown into a cell. It was awful. We slept on small mattresses onto which water was dripping each evening. We had nothing to eat. My older brother managed to escape when we went to fetch water from the river. They accused me of being his accomplice, threatened to kill me and forced me to become a fighter.
The life of a fighter in the bush is very hard. We would spend the night outdoors, even when it rained. Sometimes we found food in the villagers’ fields, but we didn’t have time to cook it or eat it. I was responsible for escorting the commander and wasn’t allowed to eat without his permission. It was difficult to find soap to get washed. We had to extort the local people to get what we needed.

I spent a year and a half in the armed group but didn’t do much fighting. I remember one day, though, when I was nearly killed. It was during a clash with another armed group when four of our fighters were wounded.

In September 2018, I realized that I couldn’t carry on like that any more and resolved to leave the group. One morning, with three other children, I decided to give myself up to the government forces and went to an army base where they promised to train us so that we could join the regular army, but a child protection association came and took all the children away. That is how I ended up at a transit and orientation centre. I didn’t want to stay in the army. Those in charge of the centre spoke to the ICRC to have me reunited with my family, but my family said that I risked being recruited into the army again if I returned there. The ICRC therefore reunited me with my uncle in North Kivu in January 2019.

I would like to be a driver. I spend my days with other young people in the neighbourhood, but no one knows that I was a fighter. I wouldn’t like them to know, because when you have been a fighter, you risk being treated as an outcast and slandered in the community. Some people even accuse you of things you haven’t done.

W. Y., 16 years old, male

I was living in a village in North Kivu, where I had a plot of land. I wasn’t studying any more, and when I wasn’t farming I sold flour in my uncle’s shop. One day, an armed group attacked the village and killed my uncle. A few days later, they returned and killed my grandfather. I was filled with rage and wanted to protect my family, so I decided to join a different armed group.

Three of my friends had lost their parents in the attacks on our village. One day at noon, we decided to go into the bush. When we got to the group’s base, they taught us to handle a gun and we began to take part in night patrols. You had to be tough to live in the bush; we had no pay and couldn’t buy ourselves any clothes. If we wanted money, we had to detain a member of the community and accuse them of something, such as failure to participate in the compulsory community work that the group imposes on the villages. For food, we made the local people bring us produce from their land.

“I spend my days with other young people in the neighbourhood, but no one knows that I was a fighter. I wouldn’t like them to know, because when you have been a fighter, you risk being treated as an outcast and slandered in the community.”
I spent two and a half years in these conditions. I still think about my friends who were killed in the fighting. I remember one day when the army attacked us. We had been drinking and were drunk when the fighting started. Some of our fighters were killed. I was captured, along with twelve other fighters. The government forces took us to their base. I hoped that I would be able to join the regular forces, but people from a child protection organization came. They said that I was a child and that only adults could be trained to become members of the government armed forces. I was disappointed because I wanted to avenge my friends and relatives who had been killed. That was how I came to be reunited with my family here in North Kivu.

Now I sell kerosene in the evenings. During the day, I stay at home with my maternal aunt. I cannot go back to my village now. I did terrible things there; I killed a lot of people and would risk being killed myself if I went back. I am not sure what I will do with my future. I would like to learn to be a mechanic so that I could work and be independent.

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J. B., 18 years old, male

I joined the armed group in July 2017. There were frequent clashes in my village between the armed group and government forces. Sometimes, when members of the regular army came back from the fighting, they would take their anger out on the young people in the village. One day, an armed group came into our village, and the government forces fled. The armed group urged the village’s young people to join them, telling them that if they helped to free the country, they would be rewarded.
I had a small plot of land, where I grew sorghum and potatoes. I told my aunt that I would leave my plot in her care because I couldn’t stay in the village any longer. One evening, I put some clothes in a bag and set off for the armed group’s base in the hills near our village. On the way, I met a member of the armed group who encouraged me to join, and I went with him to their camp. He promised me that I would soon have my own gun.

I was given a warm welcome when I arrived, and was introduced to the leader. He asked me why I wanted to join the group, and I told him that I wanted to free my country. That was the only answer that could be given; otherwise they might suspect you of spying on them. Two days later, I was taught to use different types of weapons.

Four of us in the group were children. There were also some girls, but I don’t know how many. Each time my friends from the village passed near the base and saw me, I felt that I was highly respected. My parents phoned me to tell me to leave the group, but I didn’t want to. It got to the point where I stopped answering the phone.

I remember how one day I left on a night patrol with five other fighters. The others had guns, but I was the youngest of the group and only had a spear. That night I learned how to extort the local people. I managed to get 10,000 Congolese francs. On our way back to the base, we encountered ten or so police officers who opened fire on us. One of my comrades killed a police officer. We captured the others and took them to a place near our base and killed them too. It was after this attack that I was given my own gun and military uniform.

Another day, one of the members of our group decided to leave and join the government forces. We went out to look for him and brought him back. The commander gathered all the local people in the middle of the village. He wanted to make an example of him, so that everyone would know that there would be no mercy for traitors. The commander ordered me to kill him in full view because I was from that village and was the only one in the group who had never killed anybody. I was very scared, but I killed him with a spear while the inhabitants of my village watched on. I knew then that I would never be able to return to my village; I had just dug my own grave.

The government army retaliated that night. It was the first time that I had seen a real battle. Several dozen people were killed, including both combatants and civilians. We got our hands on some of the army’s weapons and uniforms. Some children who had lost members of their family came to join the group of their own volition.

A few days later, I was transferred to the group’s hierarchy. I took part in a number of other clashes in which the fighting was much more intense. I was then promoted to unit commander, and I took advantage of this position to commit abuses against civilians. I am sure that even today, many people in these villages remember me. I killed a lot of civilians and combatants. I had become heartless.

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5 Equivalent to 6 US dollars.
One day, while I was sleeping, there was an attack and I was hit by a bomb blast. Six of my comrades were killed. When I came round, I was tied to a tree and had been whipped by members of the group that had attacked us. I was bleeding all over and thought I would die, but the next day, members of our group carried out a counter-attack and freed me. I was taken to a health facility, where I received medical attention. That was when I resolved to leave the armed group. I was tired of it all and had a feeling that I might die in the next battle. I talked to some of the children in our group, telling them I was planning to escape and that they could come with me if they wanted.

Around noon on the day I decided to leave, I gathered my belongings together, and my friends followed me. We pretended that we were going to the river to wash our clothes. After we had set off, somebody tipped the commander off, and he sent other fighters to follow us. We fled, each taking a different path, and I ended up alone in the bush. I didn’t want to go back; I was sure that if I was caught, I would be executed. I walked all day and all night. The next day, as I was approaching the city of Beni, I asked someone who was working in the fields to help me. He accompanied me to see a local chief, who took me to the city’s authorities. Unfortunately, they handed me over to the army, and I was put in prison for a month. A child protection organization came and took me to a transit and orientation centre in June 2018, and in November of that year, the ICRC reunited me with my family in North Kivu.

I don’t want to go back to the army now. I need to prepare for the future. I don’t want my family to see me as a fighter, and I know that I cannot go back to my village. My plan now is to go back to school.

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<tr>
<th>ICRC support to former child soldiers in the DRC</th>
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<td>The ICRC supports children who have come out of armed groups through small income-generating projects entailing training, material support and follow-up assessments. These projects aim to provide the children with a skill they can use in their home environment, so they can financially support themselves. Limited socio-economic prospects can be a push factor for children to join armed groups, and the income-generating projects aim to prevent the children’s re-recruitment into armed groups.</td>
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<td>To partake in the income-generating projects, the children are first encouraged to analyze what already exists in their home environment and the local markets. They then undergo several days of training on how to budget, save money, and plan and manage an activity. At the end of the training, the children can choose between a range of activities, including hairdressing, tailoring, mechanics, agriculture and phone repairs. Most of the children choose to become street or market vendors, which is also a socially acceptable role for women and girls in the DRC. Thereafter, the children are encouraged to think about what they would like to make (doughnuts, sandwiches, etc.) or sell (soap, peanuts, basic household items, etc.).</td>
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Once the training is over, each child receives a kit from the ICRC with the necessary items to kick-start their chosen income-generating activity once they return home. After a short period, the ICRC carries out a multi-purpose visit to see how the child is reintegrating into their family and the community, and to monitor the income-generating project and provide further advice to support the child and the family if required.
“This is my story”: Children’s war memoirs and challenging protectionist discourses

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Abstract
Protectionist frames of children as passive, uncomprehending victims characterize the international architecture of responding to children in war. However, stories such as those in children’s war memoirs draw attention to the agency and capacity of children to negotiate and navigate distinct traumas and experiences in war. Children experience particular vulnerabilities and risks in conflict zones and their potential as contributors to the solutions to war must also be taken seriously. Children’s authoritative voices in memoir writing reveal the limitations of protectionist-dominated approaches and offer a rationale for taking the participatory elements of international humanitarian mechanisms and responses to conflict more seriously. Such a move may help address the comprehensive silencing of children’s voices in the institutional architecture concerned with children in war.
Introduction

“Who is Malala?” [the man] demanded. … My friends say he fired three shots, one after another. … By the time we got to the hospital my long hair and Moniba’s lap were full of blood. Who is Malala? I am Malala and this is my story.¹

So concludes the prologue to I Am Malala, the memoir of Malala Yousafzai, the Pakistani girl who campaigned for education in the Swat Valley and was shot by the Taliban at age 15 in October 2012. Yousafzai frames the book as a story of a specific experience of conflict and its consequences. Sudanese former child soldier Emmanuel Jal prefaces his book, War Child, by noting that “this one is not meant to be a history of a country to be read by scholars. It is the story of one boy, his memories, and what he witnessed.”² Seventeen-year-old Syrian refugee Nujeen Mustafa says:

I hate the word refugee more than any word in the English language. … The year 2015 was when I became a fact, a statistic, a number. Much as I like facts, we are not numbers, we are human beings and we all have stories. This is mine.³

The genre of children’s war memoir is growing in popularity in literary publishing. Narratives of children’s experiences of war, such as a memoir, open space to overcome the distance and abstraction of numbers. Thus, this article argues that such stories offer a counter-narrative to dominant framings of children in war as passive victims. Children’s war memoirs show children who, even when violence and conflict overwhelm their lives, find ways of navigating, resisting, surviving amidst conflict. Such memoirs reflect how ideas of children and childhood are constructed, reveal “cultural spaces available to host and circulate these narratives”⁴ and are fundamentally located in a space of “struggle for recognition of individuals and groups”.⁵ Thus, they can reveal complex aspects of children’s experiences of war that offer a rich resource for better understanding children’s lives in war and possibilities for better addressing violence and supporting peace.

Protracted conflict, increasingly urbanized warfare⁶ and unprecedented forced displacement around the world⁷ present a particularly challenging

environment for children and for efforts to protect and empower them. The United Nations (UN) Secretary-General’s 2018 Annual Report on Children in Armed Conflict noted that “children continue to be disproportionately affected by armed conflict in many country situations”, with a significant increase in violence through 2017 compared to the previous year.\(^8\) Shifting patterns of conflict since 2016 have seen children increasingly caught up in violence, including recruitment by armed groups in countries such as the Democratic Republic of the Congo, Somalia, the Syrian Arab Republic, Yemen and South Sudan.\(^9\) Ongoing violence in the Syrian Arab Republic, Iraq, Myanmar and other countries has resulted in the death, maiming, starvation and serious illness of large numbers of children.\(^10\) The use of children by terrorist groups such as Boko Haram and the Islamic State, including as suicide bombers,\(^11\) presents new challenges in responding to the multiple and complex forms of violence and risk that children face.

The difficult and complex environments of conflicts have a profound effect on those who live within these spaces. Children actively resist war and go on living amongst its daily consequences. Despite this, their agency is largely absent when speaking about children and war. Their overwhelming, and pressing, requirements for safety, shelter, food and health care, as well as the longer-term needs of education and employment, dominate discussions of children’s experiences of conflict, and position them as passive. Such totalizing narratives of victimhood obscure and homogenize the complexity of the lived experience of children in war. Legal and humanitarian mechanisms for assisting children in war, including the UN Convention on the Rights of the Child (CRC), the Geneva Conventions and the Children and Armed Conflict Agenda, are characterized by a protectionist discourse which limits capacity for understanding multiplicity of experience. Saying this is not to dismiss the significant role these documents and practices have in productively supporting children in conflict, but rather to ask what other experiences of war children have, and what other forms of support they require. To fully understand the implications of children’s experiences of conflict, we must consider the persistent everyday lives of those within conflict zones not reducible to either “victim” or “combatant”. As children’s agency is often erased in formal discussions of preventing or resolving conflict, accounts of their experiences of everyday life can offer a way of recognizing their capacity and legitimating their voice and experience, particularly when produced for mass literary markets. Taking lived experience as meaningful helps in understanding how children experience conflict and suggests ways for working with them for change. It is difficult for these stories to be heard

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\(^10\) **Annual Report of the Secretary-General**, above note 8.

beyond zones of conflict which are distant from the realities of many people’s lives globally, particularly in the global North.

This article considers the particular example of child-owned and -authored narratives of war in order to discuss the limits of protectionist framings and illustrate its argument for taking children’s experiences seriously. Narratives produced by children offer a different way of thinking about children in conflict. The article takes children’s war memoirs as an example of the value and complexity of children’s own narratives. As a form of popular literature, they offer a way of accessing the detail of children’s daily experiences of conflict. Thus, this article suggests that children’s war memoirs offer a site where the complexities of children’s experiences of conflict are visible and accessible to a broad popular audience. Taking such accounts seriously can offer a productive way of thinking about children’s agency in war that can inform discussions about institutional architecture and humanitarian interventions.

This article illustrates its argument by considering a range of popular children’s war memoirs. This includes stories of former child soldiers such as Sierra Leonean Ishmael Beah’s 2007 *A Long Way Gone* and Emmanuel Jal’s 2009 account of his time in the Christian Sudanese Liberation Army, *War Child*, as well as the 2015 *I Am Evelyn Amony*, which recounts Evelyn Amony’s time with the Lord’s Resistance Army (LRA) and as the wife of LRA leader Joseph Kony. It also includes stories of those who have lived through and escaped from war such as Syrian refugee Nujeen Mustafa’s 2016 *Nujeen*, telling the story of her journey to Europe in a wheelchair to escape Syria’s civil war, and 8-year-old Syrian Bana Alabed’s 2017 *Dear World*, which began as live tweets from Aleppo during the 2016 siege. Finally, it includes, from 2013, *I Am Malala* by Malala Yousafzai, telling of a young woman’s activism against extremism. This is a non-exhaustive collection of children’s war memoirs, chosen to illustrate a breadth of experience and selected due to popular reception to these stories.

In discussing children’s war memoirs as a source of knowledge about conflict that centres the capacity and agency of the child and may offer one avenue for considering how such agency can be better accounted for in formal responses to children in conflict, there is an important consideration of the ethics of “using” these texts, analyzing them, bringing them in to broader debate.

13 E. Jal and M. Lloyd Davies, above note 2.
16 M. Yousafzai and C. Lamb, above note 1.
17 This article does not look at fictional stories of children in war such as the filmic depiction of child soldiers in *Blood Diamond* (2006) or *Beasts of No Nation* (2015). Nor does it explore stories told about children such as through NGO advocacy or journalism, as these are stories told without the participation of children, which is central to the discussion (see Jana Tabak and Leticia Carvalho, “Responsibility to Protect the Future: Children on the Move and the Politics of Becoming”, *Global Responsibility to Protect*, Vol. 10, No. 1–2, 2018). The article also does not look at visual depictions by children or “children’s stories” told through images of children such as the image of Syrian toddler Alan Kurdi’s
Kate Douglas, writing in her scholarly discipline of literary studies, offers an incisive consideration of the ethics of considering trauma texts authored by young people, calling for the need to “find appropriate methods for reading these texts within diverse disciplinary and scholarly contexts”.¹⁸ She draws attention to how the narratives of these texts may be taken up in ways that are potentially damaging and reflects on the intersectional imbalances of power and voice in their production. More crucially, she asks scholars to reflect on their engagement with accounts of trauma. While this article cannot delve into the content of these memoirs as much as desired due to space limitations (and as it is not a literary studies analysis but one grounded in international relations), I am profoundly conscious of not reproducing the worst forms of superficial analysis or unethical engagement with the texts considered here.

Children’s capacity is often excluded in dominant narratives of their experiences of war; this article suggests that children’s war memoirs can work to complicate such simple narratives. This article first unpacks the dominant narrative of passivity and totalizing victimhood that characterizes much framing of children’s experiences of war; it argues that such a framing limits our capacity to fully understand children’s experiences and narrows possible responses and support for children affected by conflict. This limited conception of childhood is evident in the protectionist framing of the UN’s Children and Armed Conflict agenda, as well as much of non-governmental organizations’ (NGO) advocacy. Instead, this article argues that recognizing children as having agency and working to respond to violence and navigate conflict allows children’s stories to be seen as a legitimate source of knowledge about conflict. Building on this, the article secondly outlines an argument for recognizing the importance of everyday accounts in constructing fuller and more responsive understandings of conflict.

Having demonstrated that the agency of children should be considered more critically, the article turns to consider the role of children’s war memoirs as a powerful, culturally recognized space for children’s voices in accounts of war. It argues that memoir can be seen as one site where children’s agency in war is evident. Such books offer stories of agency, resiliency and meaning-making by children affected by war, demonstrating the diverse ways children are affected by and navigate armed conflict. Children’s authoritative voice in memoir writing reveals the limitations of protectionist-dominated approaches and offers a rationale for taking the participatory elements of international human rights mechanisms and responses to conflict more seriously. Through these explorations, this article argues for taking children’s own stories of conflict into

account in order to help move towards addressing the systematic and comprehensive silencing of children’s voices in the institutional architecture concerned with children in war.

**Children’s vulnerability**

Definitions of childhood are contested, but there is a broad consensus that childhood is the period from birth to 18 years of age. At the most basic definitional level, the CRC defines a child as “every human being below the age of eighteen unless, under the law applicable to the child, majority is attained earlier”. While in some legal and cultural systems, different competencies are recognized before (and sometimes after) the age of 18 – such as voting, purchase and consumption of alcohol or tobacco, age of consent for sexual activities, and legal accountability – at some point every society recognizes a person as transitioning from childhood to a “competent adult”. The notion of the child that dominates in popular discourse and underpins international conventions such as the CRC is presented as universal but is in fact the product of Western philosophical, psychological and sociological thought: an incomplete, irrational “becoming” who is the passive recipient of socialization and a site of investment for the future. Thus, childhood can be understood as the condition experienced by all children, and their passivity and incompleteness justifies the protectionism of the family, concerned institutions, the State and the international community. Removing children from the public sphere and legislating an “appropriate place” for children reinforces their incomplete status and legitimizes their marginal condition and silencing. They are often seen as “presocial”, which precludes them from being able to articulate political or social positions. Brocklehurst argues that there is a “conceptual separation” of the child and the political, a “containment” of the concept of the child as specifically not political. This also allows the child to be deployed as a motivation for political action (for example, as an emotive symbol) when necessary.

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In being located in the passive, private sphere against the public, political world, the child is prevented from participating or speaking. Moreover, the dominant discourse delegitimized any attempt by children to speak for themselves. It places “the child” in front of the multiplicity of experiences and institutionalizes the dominant conception of childhood. The concept of “children” as seen by adults may not reveal the lived experience of young people themselves, a “phenomenon of duality and misrepresentation which is unique to this cohort, since they cannot represent themselves”. Cordero Arce points out that children are considered dependent, incompetent and irrational, not because they actually are any of these things, but because adults acknowledge children only as lacking competency and rationality; furthermore, he notes that “the child” embodies a whole set of ideas that reinforce this formalized adult “knowing”.

These cultural norms of childhood, even when not in conflict zones, limit children’s agency and prevent them from being seen as competent contributors to communities and societies. In conflict, children are often characterized inherently as victims. They are not seen as having agency, and thus most approaches to building peace marginalize issues surrounding children: they are little discussed in peace-building policies, seldom asked to participate in peace-building projects, and peace-building strategies are rarely informed by knowledge regarding either their wartime experiences or their post-conflict needs.

Children in conflict zones, therefore, may be perceived by aid and development agencies and collective public understandings as “the ultimate victim”. Childhood has been “decontextualized” and is characterized by “dependence and vulnerability”.

As a result, children in conflict environments are portrayed as being consistently, and universally, negatively affected. With their childhoods “lost” or “stolen”, children in these environments are seen as either dangerous delinquents to be reformed or innocent victims to be protected. Adults label former child combatants as “out-of-place” and dangerous because they have transgressed what is seen as appropriate behaviour and appropriate place for a child or young person. Additionally, the presence of large youth populations is constructed as a

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26 Ibid., p. 21.
thing to fear. Alternatively, children are constructed as passive victims, seen as the unwilling and uncomprehending tool of vicious regimes or the unwitting sufferer of tragic circumstance. Thus, collectively, young people are frequently portrayed as dangerous; individually they are seen as in need of care and protection.

Yet, a compelling and every-growing body of detailed research evidence demonstrates that children are not merely or solely victims or delinquents. In 1990, James and Prout identified the key features of the “emergent paradigm” of research and researchers committed to recognizing children in their own right. They argue that while children are still in a process of development, their experiences are not invalidated because of this. They note that childhood can be understood as a social construction, contingent on geographic and historical location; comparative analysis demonstrates a multiplicity of childhoods that run counter to the notion of a universal construction. Those researchers adopting and contributing to this view see children as active in the construction of their own social lives. Young people thus acquire a form of full social position, different in each society, whereby they occupy “subordinate positions within the social structure as ‘dependent beings’ rather than ‘dependent becomings’”.

In conflict contexts, children act to negotiate the difficulties they encounter. This includes joining but also escaping from armed groups, supporting their families financially and taking on head-of-household roles, and persisting to pursue their education when possible. They also have their own opinions on the state of national or local politics, mourn and grieve for loss, and navigate insecure and violent contexts. In Colombia, children affected by the conflict, living as internally displaced people in informal communities, position themselves as active in daily efforts to mitigate violence and construct strong community. Finnstrom’s work in Uganda demonstrates that child rebels do not position themselves as passive but rather negotiate, as actors with agency, their own circumstances. Similar examples are evident in other environments. In conflict

34 A. James and A. Prout (eds), above note 28.
35 N. Lee, above note 28, p. 47.
39 A. M. Honwana, above note 36; C. Nordstrom, above note 36.
zones, children may continue to pursue everyday activities such as schooling, play or family life. Even in the foundational document for the UN’s Children and Armed Conflict agenda, Graça Machel’s 1996 report, there is evidence of children undertaking a wide array of activities and supporting their communities. These kinds of activities may, as Kate Lee-Koo argues, evidence “experience, skill, strength, cunning, political consciousness, capacity for judgement and the ability to act, all of which … qualify as a form of agency and all of which have the capacity to shape a child’s immediate environment”.

It is crucial, in recognizing the agency of children, to acknowledge that the ability to exercise agency is intimately connected to power. States or institutions have the capacity to act in a strategic manner—planning, using resources, establishing control. However, those individuals or groups who are marginalized and lack power can still respond to the context of their daily lives. De Certeau refers to this as “tactical agency”; often invisible, it involves individuals and communities navigating and negotiating structures of power and oppression. Recognizing that children have agency is to recognize that children can enact that agency in ways which are broadly seen as negative, such as joining armed groups and participating in armed conflict, or positive, such as participating in peacebuilding or seeking out education or employment opportunities post-conflict. If we take the definition of “child soldier” from the 1997 Cape Town Principles, we can see that the range of activities in which children are compelled to engage within conflict are multiple and complex:

“Child soldier” in this document is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.

Children recruited to armed groups also find ways of avoiding their responsibilities or subverting orders, to avoid killing or hurting other children for example. Thus, even within a subset of children affected by conflict—child soldiers—it is evident that children exhibit tactical agency in a range of ways.

It is instructive here to bring in Marshall Beier’s distinction between “agency” and “subjecthood”: the former refers to the “capacity to act”, while the

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latter implies “mastery of one’s own agency or the idea that actions are the products of one’s (at least relatively) autonomous choices”.45 Child soldiers, for instance, “might have some measure of acknowledged agency”, but “recognition of autonomous subjecthood runs counter to hegemonic understandings of childhood”.46 To reduce children in war to simply victims limits our capacity to fully understand their experience. As Beier argues,

the denial of subjecthood leaves little room for serious engagement with the possibility that some young people might choose participation in armed conflict as an autonomously reasoned survival strategy. Moreover, directing our gaze instead toward the presumed “real” subjects—the adults in the name of whose projects child soldiers fight—also leaves us potentially inattentive to the material conditions that could motivate a young person to see such a choice as an opportunity for improved circumstances.47

Such attentiveness to the agency of children moves towards recognizing their subjecthood, as per Beier’s insight, and permits an understanding of children’s experiences of conflict as being constituted of victimization, but also acts of resistance and resiliency. It offers an understanding of “children” that takes lived experience seriously and recognizes the inadequacies of universalizing notions of childhood.

To understand children as being worthy of study allows engagement with children in order to understand how they construct and determine their own lives, the lives of those around them, and their societies. In conflict-affected environments, where children act in ways beyond the “appropriate” forms of childhood, flexible and responsive approaches to children allow them to be recognized alongside other marginalized and structurally powerless groups. If children are active contributors and participants in conflict environments, approaches to their protection and support need to account for their lived complexity. To do this, their stories must be taken seriously.

**Limitations of protectionist-focused architecture**

At a broad, overarching level, children’s rights are articulated in the 1989 UN Convention on the Rights of the Child. The CRC establishes a set of universal rights to which all children are entitled, and which all signatory nations are obligated to assure. The CRC is the most ratified document in UN history (only the United States has not yet ratified it), and it both enumerates the rights that

47 M. Beier, above note 45, p. 242.
children should be guaranteed and outlines space for children’s participation in matters affecting them, “in accordance with the age and maturity of the child”.48

International humanitarian law makes special provision for the protection of children in conflict. Article 77 of Additional Protocol I to the Geneva Conventions explicitly outlines the principle of special protection:

Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.49

Other elements of the Geneva Conventions and their Additional Protocols address the evacuation of children, their right to medical care, and other protections against hostilities.

The UN Security Council’s Children and Armed Conflict (CAAC) agenda, comprised of twelve resolutions, provides a comprehensive architecture for the protection and support of children in conflict. In 1999, the initial resolution of this agenda, Security Council Resolution 1261, identified six grave violations of children in conflict as follows: killing and maiming of children, recruitment or use of children as soldiers, sexual violence against children, abduction of children, attacks against schools or hospitals, and denial of humanitarian access for children.50 These grave violations have formed the infrastructure of subsequent compulsory monitoring and reporting to the UN of children in situations of armed conflict. In 2018 the UN Security Council adopted Resolution 2427 on “Children and Armed Conflict”, which emphasized the need for “child mainstreaming” in security sector reform, meaning “to mainstream child protection”.51 Such language is typical of UN documents on the engagement of securing children’s rights in conflict. These are well-established mechanisms, and represent widespread support for the protection of children in conflict; such efforts are significant and laudable.

However, there are valuable and important critiques of child protection systems that do not adequately centre the child in considerations of responding to children’s experiences of war.52 Children are particularly vulnerable in conflict environments, their rights are often violated with impunity, and their perspective on war is often dismissed as “childish”. Yet protection, while the most pressing of concerns for children facing violence and insecurity, is often over-emphasized at a general level without accounting for the complexities of children’s lived experiences of conflict.

48 Article 12 of the CRC states: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”
49 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 77.
51 UNSC Res. 2427, 1 July 2018, p. 3.
For example, Jo Boyden argues that UNICEF’s discourse on the “world’s children” presupposes a monolithic notion of childhood which applies everywhere, a notion that many international organizations adopt and promote. Another pervasive rhetorical device is the idea that childhood can be “lost” or “stolen” from young people. Such a conception performs two functions. The first is that children are seen to either have or not have a “childhood” and that childhood is seen as a set of conditions, but more than this, any absence of these conditions results in the wholesale loss of childhood. The second function is that in claiming a child has “lost” their childhood, that child becomes the perfect (passive) victim of that loss, and responsibility falls upon concerned adults to redeem them and restore the conditions of childhood.

While the Convention on the Rights of the Child was ratified more quickly and more widely than any other UN Convention, its creation was not uncontested, and critiques of the so-called “children’s rights regime”, including and beyond the formal documents of the UN, are enduring. Particularly in conflict contexts, “participation” of children in decisions that affect them, which is one of the “guiding principles” of the CRC, often gets subsumed under the urgency of the protection mandates of the Geneva Conventions and the UN Security Council’s CAAC agenda. In this, opportunity is missed for engaging children’s own experiences in order to better respond to children’s needs in conflict.

The CAAC agenda, argues Lee-Koo, is “animated by a protection ethic” that constitutes an “overbearing focus” which “blindsides the Council to the breadth of experiences and multiple subjectivities of children in armed conflict”. This protectionism isn’t limited to the CAAC agenda but can be seen more broadly in the Security Council’s approach to civilian populations. Lee-Koo notes that the Security Council’s approach can be seen to stem from three imperatives: “international legal obligation to uphold children’s right to be free of violence, moral obligations to protect children from violence, and—importantly—instrumentalist claims that children’s protection is a tool in the maintenance of peace and security”. Similar arguments can be made of the international humanitarian framework—that it is heavily protectionist-driven and universalizing of children’s needs in conflict.

55 K. Lee-Koo, above note 42, p. 57.
56 Ibid., p. 60.
58 K. Lee-Koo, above note 42, p. 59.
Crucial to this discussion is Cecilia Jacob’s argument that child security and child protection need to be distinguished. The “politics that determine children’s insecurity as a site of intervention is as important, if not more so, than the political influence or agency exerted by children”.59 Yet, evidence of children’s agency may motivate changes to the political and legal structures that respond to their insecurity. This article is not arguing that the existing international architecture for responding to children in war is not important or valuable; rather, it draws on a well-established literature which recognizes children’s agency, to argue that the inclusion of children’s direct experiences of war within international architecture and mechanisms can strengthen and complement existing efforts to address children’s needs in conflict.

The children’s war memoir as genre and generative

Hearing children’s accounts of war, accounting for their everyday experiences, and including their insights on surviving unimaginable violence and horror, if done meaningfully, could contribute to strengthening efforts for their protection and engagement. Although not uncontested or unproblematic, children’s war memoirs offer evidence of one way of understanding children as having agency and subjecthood that could productively inform debates about international mechanisms for responding to their needs in conflict.

While many memoirs of childhood that appeared through the 1990s in particular put the family in the global North under scrutiny,60 memoirs of children’s experiences of war that grew in popularity in the early 2000s place the broader context under scrutiny as much as the family. Revolving around a single experience of conflict, children’s war memoirs provide space to unpack and explore the nuance and complexity of life in a war zone, the choices that children make, and the geopolitical context in which these decisions occur. Children’s memoirs of war are not new; Anne Frank’s The Diary of a Young Girl, for instance, presents an account of World War II from the perspective of a Jewish girl in hiding. These accounts have cultural currency and enduring relevance to understanding and accounting for young people’s experiences of war. This article uses the term “children’s war memoirs” as a shorthand for what is a much more complex genre of writing. These children’s books are not solely about their experiences of war; rather, they are memoirs of children’s lived experiences which include experiences of war. This distinction is important to make, as it acknowledges that young people writing about their lived experience produce accounts greater than reductive stories of “war”.

Gillian Whitlock argues that autobiographies function as “soft weapons” which can “personalize and humanize categories of people whose experiences are frequently unseen and unheard”. Kate Douglas, who has undertaken detailed, sensitive and important work on youth memoirs that deal with trauma and war, refers to children’s war memoirs as “trauma texts” and argues that these texts are affective; they may have a consciousness-raising, social-justice agenda, carrying testimony that might otherwise not be heard or comprehended. Many trauma texts deal with global issues. These texts can shift the margins of global citizenship and social suffering; they address and implicate and call for response.

The overlap of these books’ content with debates about human rights and humanitarian responses in the audiences that consume these cultural texts means that such accounts are well positioned to demonstrate the capacity of children to tell narratives of their own experience of conflict. Maureen Moynagh argues that child soldier narratives in particular complicate victim/perpetrator binaries and provide “a ‘textual battleground’ for particular representations of childhood innocence across cultural and political contexts”. These narratives position children as both victims but also as having agency—or even subjecthood (to invoke Beier). They also present a complex moment that requires critical engagement with how memories of children in war operate as “tools of cultural memory” that contribute to or challenge the way social and cultural life is understood and remembered. The stories being told are often accounts of places and experiences that are very different to those familiar to the audience, as these stories, often of war and violence in the global South, are consumed and marketed to audiences in the global North.

There are profound power inequalities and layers of co-constitution within the stories. This does not invalidate children’s war memoirs, but it draws attention to them as a complex site of contestation over understandings of war and children’s agency. Writing about children’s memoirs broadly, Douglas notes:

Children’s lives are traditionally constructed as valuable only for what they can tell us about adult lives, or about adult preoccupations with childhood. The subject of the autobiography must be deemed “worthy” to the critics of the time—or else it risks being labelled trivial or inconsequential.
The memoirs of children’s experiences of war that are published and widely distributed often tell stories of exceptional childhood, traumatic events and experiences that are overcome, presenting accounts that foreground resilience.67

While children’s war memoirs might “play a reparative role after trauma, mediating between the trauma and the witness”68 in crucial and important ways, Mackey also notes that “the complexities of self-representation do not always line up easily with the cultural work that these narratives are expected to do”.69 Children’s war memoirs are complicated because of their entanglement in cultural discourse and political practice; yet it is precisely this entanglement that positions them as important literary texts, and important sites of children’s authoritative voices on their understandings of conflict that highlight the imperative to consider their agency more carefully when discussing their experiences of war.

Children’s stories of war

There is a large popular literary appetite for children’s war memoirs. Malala Yousafzai’s I Am Malala has sold over 2 million copies, and the version for young readers has sold over 750,000 copies.70 Nujeen Mustafa’s book has been translated into nine languages since its publication in 2017. A year after its release, Ishmael Beah’s book had sold over 600,000 copies.71 The commercial success of some of these books is assisted by their being discussed by various celebrities: US late-night TV host John Oliver heard of Mustafa’s love for the daytime soap opera Days of Our Lives that had she had watched to teach herself English and introduced his audience to her story by staging a made-up ending scene from the show.72 Harry Potter author J. K. Rowling heard of Bana Alabed’s love of the books while she was still in Syria and sent her a message of support and e-books of the series.73 The hunger for stories of war told by children is testimony to the potentially important role such books play in making visible and accessible accounts and understandings of children’s experiences of war. These children are, in many ways, exceptional; and yet, while there are exceptional circumstances that enabled the writing of their books, their stories reveal the

67 Ibid., p. 158.
68 Ibid., p. 151.
importance of considering their stories not as exceptional but as illustrative of everyday experiences of war. All these narratives reveal complex and distinct experiences: direct experiences of violence, the challenges of being a child in these contexts, the importance of community and children’s contributions to that community, the challenges in getting those beyond the situation to pay attention and understand, and aspirations for the future. There is a note of caution, however, as there is a danger in these books reproducing simplistic stereotypes as well as simplistic solutions for deeply complex problems.

The children’s war memoirs explored here all begin in a similar fashion. Most begin with a prologue or first chapter describing a key moment in the child’s experience of war, such as Malala Yousafzai being shot in the head, Ishmael Beah and Emmanuel Jal’s experience of being taken by armed groups to become child soldiers, or Nujeen Mustafa’s recounting of the sea-crossing from Turkey to Greece. All return to their childhood and a description of life either before war or before war became all-engulfing. These early chapters of children’s war memoirs tell stories of everyday life and “typical” childhood behaviour. Bana Alabed tells the reader: “[M]y baba always took me swimming at Alrabea Pool, which was my favourite thing to do. Going to the swings was my second favourite thing to do.”74 Yousafzai describes Swat Valley as “the most beautiful place in the world” and tells of her early years, interwoven with history and myths that her father told her growing up.75

The memoirs also tell of the incremental, inexorable arrival of conflict to these children’s lives and communities. Jal notes that “there was peace in Sudan for the first three years of my life, but I cannot remember it. All I knew was a war that grew as I did.”76 Jal describes the arrival of refugees to his village, where his Mamma still woke early for church to “make us porridge made of sorghum grain before putting on our ‘Sunday best’”.77 Experiences of school are also foregrounded, reminding the reader of the crucial importance of education and highlighting the tragedy of war’s impact on children’s ability to safely access schooling. Evelyn Amory tells the reader that her “happiest memory” is when she received “the second-highest grade in my class in Primary Four …. When my dad heard the news, he slaughtered a goat and gave me the liver.”78

Extended attention to education also features in Yousafzai’s story, as it is her advocacy for girls’ education that resulted in the attempt on her life. Douglas argues that the texts produced by Yousafzai, including her memoir, make “visible moments of resistance”79 and allow her to “authorize herself”,80 including explicitly presenting her position as an advocate for girls’ education. In Mustafa’s

74 B. Alabed, above note 15, p. 10.
75 M. Yousafzai and C. Lamb, above note 1, p. 1.
76 E. Jal and M. Lloyd Davies, above note 2, p. 6.
77 Ibid., p. 8.
78 E. Amory and E. Baines, above note 14, p. 3.
80 Ibid., p. 308.
story, her brother says that she “only need[s] to hear something once to remember it exactly”, and yet her disability prevents her from attending school, something the onset of the civil war makes even more unbearable for her. This deep desire to learn and to have an education is an ongoing thread in Mustafa’s story. Education is not only a lived marker of normalcy of childhood, but reflects the importance placed on education by many children in conflict zones. Education provision often suffers in war, and yet opportunities for education can provide spaces for children to escape the violence in their lives and to plan and work towards future goals.81

These similarities in children’s war memoirs reflect a broader convention of autobiographical writing. It is common to return to the beginning in telling a story, but in these stories, this also provides an important frame of “normalcy” for these children’s lives. These are children who, like children everywhere, have both modest and grand visions for their future, have families who love them, and have aspirations to learn and grow. Each of these stories frames a “normal” childhood that is removed from the child, perpetuating the dominant discourse of childhoods that are “lost”. The children in the first chapters of these books are profoundly human and relatable, but they also introduce key themes of relevance to considering how children experience conflict and the major challenges they face: from education as discussed above, to health care and disruption of services, war impacts children’s everyday experiences.

Children’s memoirs of war also offer an argument for recognition of their capacity for resilience and navigation of violence and risk. Many of these children are profoundly affected by the events they have endured. Evelyn Amory finds it difficult to narrate certain experiences of her time with the LRA and the abuse she suffered. Beah speaks of the experience of being inducted and indoctrinated into the group. They made the children burn their clothes and possessions: “I ran towards the fire but the cassettes [with his favourite rap music] had already started to melt. Tears formed in my eyes, and my lips shook as I turned away.”82 Beah also describes how he was made to kill others, and to take drugs that made him “fierce”83 and without fear of death. These experiences are reflected upon later in the book when he is involved in a disarmament, demobilization and reintegration programme and transitions out of life as a child soldier. Bana Alabed shares her terror and fear as Aleppo was bombed around her while she was trapped with her family:

I didn’t know what it was when the first big bomb came. It was just a regular day …. It was the loudest noise I had ever heard in my life, a noise so big you could feel it in your body, not just hear it. The sound and the surprise made my body feel like jelly.84

82 I. Beah, above note 12, p. 110.
83 Ibid., p. 122.
84 B. Alabed, above note 15, pp. 21–22.
These stories, as Beah says, put “a human face” on an “issue that is bigger than everyone and me”. They remind the reader that the statistics are comprised of individual children with unique stories; that every one of the approximately 300,000 child soldiers has a story like Beah or Jal or Amony; that of the tens of thousands of refugees arriving in Europe since 2014, each child carries with them memories of war like Mustafa or Alabed; that while Yousafzai was airlifted to the UK to recover, thousands of girls still risk violence simply by attending school every day. Yet, just as adults do, children in conflict zones find ways of navigating and resisting violence and making sense of the chaos around them to seek out safety. Children’s war memoirs, in this framing, offer a way of recovering children’s agency, recognizing that while they undoubtedly need protection and support, they also have well-developed understandings of conflict and solutions for peace.

**Traumatic texts and the value of children’s voices**

The stories in these children’s war memoirs present a window into the minds and experiences of children and the diversity of their experiences of wars. Children’s war memoirs can be read as a way of recognizing children’s authoritative voice, presenting children as knowledgeable about the situation around them and able to position their single story within the surrounding context. Recalling Douglas’s observation of children’s war memoirs as “trauma texts”, these narratives that recount experiences of violence (both as victims and as perpetrators) and experiences of fear are narratives of negotiating significant trauma. Similarly, while they are literary texts, this also means they function as cultural and political texts. Demands for “forensic truth” undermine the crucially important value in recounting a narrative truth about a lived experience of trauma. A sustained campaign as to the “truth” of Beah’s *A Long Way Gone* by The Australian newspaper claimed that Beah’s account was fundamentally suspect and thus, by implication, had little merit. This deeply problematic critique misses the valid and valuable contribution that Beah has made to a genre of life writing which helps us to better understand the experience of child soldiers and children’s navigation of traumatic memory. Alabed, who started documenting the Syrian conflict via her Twitter account, with the help of her mother, was dismissed as “propaganda” by Assad, and has experienced organized attacks against the

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85 I. Beah, above note 12, p. 14, postscript.
89 G. Sherman, above note 71.
legitimacy of the Twitter account, as well as accusations that she is not a real person.91 Even Nobel Prize winner Malala Yousafzai has been accused of telling her own story at the expense of those still back in Pakistan.92 Literary arguments aside, these critiques of the child authors of these books draw upon deeply held stereotypes about children as innocent and uncomprehending victims. The telling of stories in children’s first-person voices93 challenges perceptions of children in conflict as passive or ignorant of what is happening around them; accounting for trauma as a lived experience offers crucial insight into children’s experiences of war.

The exceptional children of war memoirs

Children’s war memoirs are particularly good examples of “resilient autobiographies” that are seen as “most appropriate” for publication and consumption.94 Such “resilience” is demonstrated through the overcoming of a traumatic event. These children, who have experienced war, escaped or overcome suffering and violence, and found the resources to tell their story, can be seen as exceptional. Not all children affected by war have the capacity or opportunity to tell their story as these young people do; and not all children are given the opportunity to make new lives post-trauma and post-war. The stories that are told via memoirs are instances where children’s agency is visible, and where more complex stories of children’s lived experience of war are told.

Significantly, all these memoirs exist alongside paratexts and intertexts.95 These young people, having overcome individual trauma and survived a collective experience of violence, move their narrative on beyond the reflection and retelling that memoir offers. For example, Yousafzai has gone on to study philosophy, politics and economics at Oxford while running the international girls’ education advocacy organization The Malala Fund. Beah is an ambassador for UNICEF, and Jal has a musical career and runs an NGO. In giving interviews, writing and

93 It is worth noting that these books do have a diversity of by-lines. Both Emmanuel Jal and Ishmael Beah are the sole authors of their memoirs. Nujeen Mustafa and Malala Yousafzai co-authored their books with journalist Christina Lamb. Bana Alabed is sole author, but the book acknowledges that she received help from her mother and editor in telling her story. Evelyn Amory’s book is edited and introduced by associate professor Erin Baines, piecing together notes from conversations with Evelyn to produce the book, which Baines explains in the front matter (pp. xvii–xxiii). Kate Douglas argues that mediation of text – whether via translation or collaboration – is often assumed to create “inferior cultural texts”, but it is important to recognize the bias inherent in such accusations, which particularly affect “young writers and writers whose first language is not English” (K. Douglas, above note 4, p. 307). If, as this article argues, children’s war memoirs can offer a site for conveying children’s experience of war and a way to better account for children’s agency when considering responses to their suffering in war, the implications of adult assistance in authorship must be acknowledge and considered, even as they do not invalidate the narrative themselves.
94 K. Douglas, above note 4, p. 158.
speaking publicly, and continuing to live with public attention, the stories of children’s experience of war told by these young people continue beyond the books they have authored. Their agency is evident in their daily advocacy for children in war.

There is a necessary caution in focusing on these stories. Often described as “exceptional”, these young people have overcome and escaped violence and war; they are held up as icons⁹⁶ to be aspired to. But this framing is imposed and carries particular expectations of performance of certain values and narratives. It also implicitly condemns those children who are not able to escape and succeed in the same way. By emphasizing exceptional agency, it reinforces the implied incapacity of other children and reinforces certain expectations of Western exceptionalism. This is the paradox at the heart of the presence of these young people in popular discourses about war: the contribution of their war memoirs to effecting meaningful change is predicated on highly unequal global power relations, on highly unequal power relations between child and adult, and on the sharing of experiences of trauma. In recognizing the capacity and agency of children, legitimizing their subjection as rights-bearing individuals in conflict, these memoirs offer more complex ways of understanding children’s experiences of war.

Memoirs are one example of child-owned narratives that demonstrate the value and complexity of children’s experiences. For instance, alongside formal published memoirs, children tell their stories through Twitter and blogs. There are other spaces in which the voices of children (or adults who were children at the time of the events in question) are heard, such as accounts of war in which children, as victims, tell their experience to a court record, or a record formed as part of a transitional justice mechanism. These accounts tend to be more formalized and restricted, and the child speaking is a vessel for the legitimacy of experiences of violence; their script is limited. Nevertheless, these multiple sites, in which children’s voices are heard and their experiences recounted, present spaces where children’s agency is evident. They offer insight into how protectionist-driven frameworks can be enhanced by discourses that more fully account for the complexity of children’s experiences of war.

**Conclusion**

Stories like those told through children’s war memoirs can help us to better understand children’s experiences of conflict. In their best form, they can prompt action, support, and investment in solutions that account for children’s agency when addressing their suffering in conflict. At a minimum, they expose readers to experiences beyond their daily lives, fostering awareness of the complexities of violence and insecurity, but also the resilience and hope of children living amidst war.

⁹⁶ See H. Berents, above note 65.
This article has taken children’s war memoirs as one source in which children’s agency is foregrounded and their diverse and complex experiences of conflict are recognized as legitimate. Narratives of children’s lived experience of war have a large audience, with no signs of abating interest. They enter the popular discourse as books discussed in book clubs and in literary reviews, and they influence the ways in which people interact with human rights campaigning and discussion. In these spaces children’s voices are granted authority and—although always implicated in uneven global circulations of power—offer a more nuanced understanding of the consequences of conflict for children in countries often quite distant to the lived experience of the readership of such books.

The institutional architecture that engages children in conflict is frequently characterized by a “protectionist ethic” that subsumes other concerns. While documents like the CRC offer a space for children’s participation (established as a key guiding principle of the document), such participation is often overlooked in practice. The drive to protect children in conflict is crucially important and overwhelmingly urgent. This article seeks to draw attention—via accounts of conflict in children’s war memoirs—to the spaces and ways in which children already participate and demonstrate the “due weight” that their views should be accorded.97

While protectionist frames dominate the international architecture of responding to children in war, stories such as those in children’s war memoirs draw stark attention to the agency and capacity of children in negotiating and navigating incredibly different traumas and experiences of war. While children experience particular vulnerabilities and risks in conflict zones, their potential as contributors to the solutions to war and conflict must be taken more seriously. These children’s war memoirs demonstrate existing avenues for doing so and reveal children themselves as narrators and authors of that experience. This article has highlighted the contributions of a selection of these accounts to argue that taking them seriously offers ways of thinking about war that centre the child as actor rather than just a passive victim. Broadening the inclusion of children’s voices in formal spaces of humanitarian and peace and security practice can offer novel ways of addressing conflict, and prompt new urgency to addressing the enduring challenges and violations experienced by children in war.

97 CRC, Art. 12.
Living through war: Mental health of children and youth in conflict-affected areas

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Children in armed conflict are frequently deprived of basic needs, psychologically supportive environments, educational and vocational opportunities, and other resources that promote positive psychosocial development and mental health. This article describes the mental health challenges faced by conflict-affected children and youth, the interventions designed to prevent or ameliorate the psychosocial impact of conflict-related experiences, and a case example of the challenges and opportunities related to addressing the mental health needs of Rohingya children and youth.

Keywords: children and youth, armed conflict, mental health, psychosocial, epidemiology, interventions, child soldiers, refugees, Rohingya, Cox’s Bazar, social determinants of health.

Introduction

More than twenty years after Graça Machel’s report to the United Nations (UN) on children and armed conflict,1 one of the first documents to promote international awareness of the impact of war and conflict on children and youth, there are still an estimated billion children living in war zones and regions of terror.2 Children continue to be disproportionately affected by armed conflict, and providing support for them should be a priority for the international community.3 Conflict experiences, ranging from being denied access to psychologically supportive environments and resources to being forced into involvement with armed forces or armed groups, violate child rights as outlined in the Convention on the Rights of the Child.4 The burden of mental disorders that results from conflict-related

3 Office of the Special Representative of the Secretary-General for Children and Armed Conflict (SRSG CAAC), 20 Years to Better Protect Children Affected by Conflict, United Nations, New York, 2016.
4 Molly R. Wolf, Shraddha Prabhu and Janice Carello, “Children’s Experiences of Trauma and Human Rights Violations around the World”, in Lisa D. Butler, Filomena M. Critelli and Janice Carella (eds), Trauma and Human Rights: Integrating Approaches to Address Human Suffering, Palgrave Macmillan, Cham, 2019.
neglect, abuse and exploitation is particularly alarming. It is well documented that there are disparities between the mental health of war-affected children and youth and those in the general population.5

This article describes the epidemiology of psychosocial functioning of conflict-affected children and youth, interventions designed to prevent or ameliorate mental health problems, and a case example of current work to address the mental health needs of war-affected children and youth in Southeast Asia. We first present what is known about the prevalence of mental health problems of conflict-affected children exposed to different facets of the phenomena of conflict experience, including child soldiers. Turning to interventions, we describe work conducted with different age groups in conflict-affected regions and refugee camps. The second part of the article focuses on Rohingya children and youth in Cox’s Bazar, Bangladesh. After presenting a framework for understanding Rohingya mental health, we present information on child and youth interventions being carried out in camps in Bangladesh, as well as challenges and barriers to providing services. We discuss the importance and potential of broader socio-economic interventions, specifically those related to employment and livelihoods, to promote the psychosocial well-being of Rohingya youth. Finally, we reflect briefly on the generalizability of the Rohingya experience to war-affected youth in other contexts.

**Epidemiology**

**The effects of war on children**

Experiencing armed conflict during childhood and adolescence poses serious mental health risks and threats to a child’s development. Exposure to different types of violence, the duration of the conflict, and the nature of experienced and witnessed traumatic events are all associated with the onset and severity of mental disorders among conflict-affected children.6 Although the links between armed conflict exposure during childhood and subsequent mental health risks are well established, the reported prevalence of mental disorders varies widely. For example, studies among children affected by the Israeli–Palestinian conflict report post-traumatic stress disorder (PTSD) prevalence ranging from 18% to 68.9%.7 In

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one study among children exposed to the ongoing Syrian Civil War, 60.5% meet the criteria for at least one psychological disorder.8

In addition to real differences due to variation in exposure to trauma, estimates of the percentage of war-affected youth with mental health problems (prevalence) are influenced by the use of an array of assessment tools for screening. Variance may also be attributed to cultural factors including differences in conceptualization of mental health, socio-environmental processes that influence psychological well-being, and expression of psychological distress.9

Also of note is that prevalence surveys in humanitarian settings are often unable to distinguish between normal stress reactions and persistent clinical mental disorders, which may result in inflated estimates. These issues, in addition to the fact that administering prevalence surveys is resource-intensive, suggest caution in spending time and money identifying precise prevalence estimates in conflict settings.10

Overall, the most common mental disorders reported among children exposed to conflict are PTSD and depression.11 Other reported disorders include acute stress reactions, attention deficit hyperactivity disorder (ADHD), panic disorder, anxiety disorders specific to childhood, and sleep disorders. In later childhood, children exposed to conflict-related trauma are predisposed to externalizing symptoms, including behavioural problems and conduct/oppositional defiant disorders.12 In addition, children exposed to armed conflict often experience comorbid psychopathologies, and symptoms of disorder may increase in number with age, with school-age children being the most vulnerable.13

The effects of armed conflict reverberate through a child’s social and developmental ecology.14 Psychosocial manifestations of war trauma among children include proximal and distal effects on family interactions, peer relations,
educational outcomes and general life satisfaction.\textsuperscript{15} Conflict-related stigma, for example, is widespread in many post-conflict settings and is understood to exacerbate mental health problems.\textsuperscript{16} Psychosocial sequelae of armed conflict may affect children’s ability to negotiate social support and resources, including basic needs, in the post-conflict environment—all with important consequences for mental health. Promisingly, though, longitudinal evidence suggests that although conflict experiences and the post-conflict environment can negatively affect mental health, the presence of protective factors including family and community acceptance may act to buffer the negative effects of war, thereby reducing the risk of mental disorders and promoting psychosocial functioning.\textsuperscript{17}

Child soldiers

Recruitment and use of children as soldiers is a serious violation of children’s rights\textsuperscript{18} that persists despite coordinated, international efforts. The number of child soldiers is estimated to have increased nearly 160\% from 2012 to 2017.\textsuperscript{19} A little over 3,000 youth were recruited into armed forces in 2012, compared to over 8,000 in 2017.\textsuperscript{20} Ongoing conflicts in the Middle East and persistent unrest in Somalia, South Sudan, the Democratic Republic of the Congo (DRC), the Central African Republic and elsewhere leave children at risk of recruitment.\textsuperscript{21} Child soldiers are exposed to high levels of violence, including coerced participation in warfare.\textsuperscript{22} In a study comparing the mental health of former


\textsuperscript{16} Kenneth E. Miller and Andrew Rasmussen, “War Exposure, Daily Stressors, and Mental Health in Conflict and Post-Conflict Settings: Bridging the Divide between Trauma-Focused and Psychosocial Frameworks”, Social Science and Medicine, Vol. 70, No. 1, 2012.


\textsuperscript{18} SRSG CAAC, The Six Grave Violations against Children during Armed Conflict: The Legal Foundation, UN, New York, 2013.


\textsuperscript{21} Child Soldiers Initiative, “Reports of Children Used in Hostilities”, available at: https://childsoldiersworldindex.org/hostilities (all internet references were accessed in April 2020).

\textsuperscript{22} Report of the Secretary-General on Children and Armed Conflict, UN Doc. A/73/907, 20 June 2019.
child soldiers and children never conscripted by armed groups, former child soldiers in Nepal experienced a greater severity of mental health problems, with differences persisting after controlling for trauma exposure. 23 Many studies report high prevalence of mental health problems, such as PTSD and depression, among former child soldiers, and document risk and protective pathways associated with their mental health across their life span. 24 A longitudinal study of mental health among former child soldiers in Mozambique, for example, found that post-conflict experiences, including family support and economic opportunity, influenced the mental health outcomes of participants re-interviewed sixteen years after reintegration. 25 There are similar findings in northern Uganda. 26 In Sierra Leone, post-conflict discrimination was associated with the relationship between perpetrating violence during the war and subsequent externalizing symptoms. 27 In addition, stigma mediated the relationship between surviving rape during conscription and increases in depression in a two-year follow-up period. 28 These findings highlight that the experiences of child soldiers, in addition to post-conflict factors like economic and educational opportunities, community acceptance and stigma, and social support, are located along the continuum of mental health risk and protective factors.

Interventions

Early childhood

Early childhood interventions (ECIs) counter deficiencies and stressors faced by young children (up to age 5) and their families, and promote positive development during the critical first few years of life. ECIs target child physical, emotional, social and cognitive development outcomes (which facilitate school readiness), economic development of the parent/caregiver, parent education, parenting skills and prenatal well-being. ECIs aim to strengthen mental health

and well-being, prevent new problems from developing, and reduce symptoms or improve the functioning of children affected by war, by focusing on both children and their caregivers.29 Guidelines call for the use of treatment techniques that are evidence-based, address a myriad of challenges and a range of mental health diagnoses30 and are scalable. Interventions should focus on modifiable risk factors, such as child cognitive and behavioural deficits or parental caregiving skills and mental health.31 Special emphasis is warranted on the importance of preventing or reducing family separation, with parental presence being critical for the secure attachment and mental health of children.32 Overall, effective ECIs benefit from timeliness (early in the life course), address multiple levels of socio-ecological influence, and use frameworks of child rights principles such as the SAFE model.33 SAFE is an acronym that emphasizes the urgency of understanding the interrelatedness and interdependence of four elements of children’s basic security needs and rights: safety/freedom from harm (S), access to basic physiologic needs and health care (A), family and connection to others (F), and education and economic security (E) for the children.

Intergenerational home visiting interventions address the needs of both children and caregivers; studies indicate that family-environment interventions promote protective elements of caregiver–child relationships,34 increase access to hard-to-reach populations and can be tailored to the needs of each family.35 In post-genocide Rwanda, family strengthening interventions have demonstrated improvements in parent–child relationships, child nutritional status and parenting behaviours related to violence. Such family-based preventive interventions have promise for work with war-affected populations, especially when integrated into social protection, health and education systems to ensure

greater reach. Studies have examined the effectiveness of child-friendly spaces interventions that promote the mental and psychosocial well-being of young children. Alternatively, individual-level or group-based interventions may be warranted. Art therapy carried out by trained mental health practitioners shows promise in supporting children toward longer-term healing and enhancing community resilience. Finally, schools, early education centres and clinics are indicated as a focal point for intervention delivery. In Zambia, a trauma-focused cognitive behavioural therapy (TF-CBT) intervention was delivered by trained and supervised lay counsellors to trauma-affected children as young as 5, with significant reductions in trauma symptoms and improvement in functioning.

**School-aged youth**

The realities of work in often chaotic humanitarian settings, such as the overwhelming need to focus on the basic needs of vulnerable populations (i.e., food and shelter), make the development, implementation and evaluation of mental health interventions for war-affected youth extremely challenging. Despite this, there are promising treatment approaches for working with school-aged youth. Such interventions can broadly be categorized as having a socio-ecological orientation, delivered in individual or group-based formats, and/or situated in classroom or school settings.

**Socio-ecological interventions**

In one vein, interventions targeting this age group assume a socio-ecological orientation whereby the youth’s family and community may be targeted within the treatment. In the northern DRC, a pilot study of a family-focused, community-based psychosocial intervention incorporated a life skills leadership programme, relaxation training drawn from TF-CBT, and mobile cinema screenings to address stigma and model community acceptance. Each youth participant was encouraged to bring one caregiver to the sessions, with the overall

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40 Paul O’Callaghan, Lindsay Branham, Ciaran Shannon, Theresa S. Betancourt, Martin Dempster and John McMullen, “A Pilot Study of a Family Focused, Psychosocial Intervention with War-Exposed Youth at
goals of the programme being to strengthen pro-social behaviour and decrease conduct problems. Compared to those not enrolled in the programme, youth who received services reported significant reduction in traumatic stress reactions; at three-month follow-up, there were reductions in internalizing symptoms and increases in pro-social behaviours, and caregivers also noted a decline in conduct problems. An innovative feature of this intervention is the use of community advisory boards comprised of community leaders and local youth to address challenges that arose during implementation. The community advisory board, led by a community pastor with a Master’s in trauma interventions for youth, provided feedback on the appropriateness of interview questions and data collection; throughout the intervention, the lead researcher met weekly with four adults and four youth to assess intervention impact and propose changes to the programme to improve effectiveness, such as having a graduation ceremony.41

This strategy of incorporating community advisory boards into mental health interventions is well aligned with broader guidelines and best practices on working with war-affected populations, in which humanitarian workers and affected communities build equitable partnerships that serve to support and empower vulnerable communities.42

**Individual and group-based treatment**

Interventions have also prioritized an individual or group-based approach to treatment. For example, narrative exposure therapy (NET) was developed to be a brief treatment “for the psychological sequelae of torture and other forms of organized violence” that can be delivered by lay workers in low-resource settings.43 The main intervention element of NET—which is known as KIDNET when used with children and adolescents—is the construction of a trauma narrative.44 KIDNET has successfully been delivered as treatment for PTSD to former child soldiers in Uganda45 and the DRC,46 asylum-seekers resettled in

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41 Ibid.


Germany, Somali refugees living in a Ugandan refugee camp, and youth orphaned from the Rwandan genocide. In all studies, NET, compared against either a control group or another form of treatment, resulted in significant reductions in PTSD, which were often maintained or enhanced over time. TF-CBT has also been utilized to assist school-aged youth as they recover from trauma. TF-CBT is a phased evidence-based mental health intervention that consists of promoting youth coping skills, processing of trauma experiences, and consolidating and providing closure to the treatment experience. In Palestine, trained counsellors delivered a TF-CBT programme called Teaching Recovery Techniques to groups of youth; post-test analyses demonstrated significant reductions in PTSD, depression, traumatic grief and mental health difficulties. Several studies have demonstrated TF-CBT effectiveness in the DRC, targeting male children affected by armed conflict and female youth who have experienced sexual violence. The Youth Readiness Intervention (YRI) is a common-elements based transdiagnostic intervention which integrates elements of CBT and interpersonal psychotherapy and utilizes a group-based format to address emotion regulation and improve daily functioning in war-affected youth. As tested in Sierra Leone, the YRI showed significant post-intervention effects on emotion regulation, pro-social attitudes, social support and reduced functional impairment. Additionally, youth receiving the YRI were rated by teachers as better behaved and better prepared for the classroom, as well as six times more likely to persist in school, compared to youth not receiving the intervention.

55 Ibid.
Classroom-based approaches

While access to education is often disrupted during war, when areas are stabilized or youth have been resettled into more secure environments, the classroom presents a useful setting for delivering interventions. In northern Uganda, the school-based Psychosocial Structured Activities programme utilized fifteen sessions to centre resilience as youth recovered from trauma. Ethnographic approaches were used to identify culturally grounded concepts of youth well-being from the perspective of youth (e.g. social and happy), caregivers (e.g. unstressed and open) and teachers (e.g. cooperative and respectful). Pre- to post-intervention comparisons demonstrated that youth enrolled in the programme had significant increases in ratings of well-being via child and caregiver reports. Other school-based interventions have been implemented and assessed in Burundi, Nepal and Sri Lanka, with varying levels of effectiveness. Across studies, factors such as the age and gender of the young people involved, as well as ongoing exposure of youth to daily stressors, influence intervention effectiveness. For instance, a mental health intervention among war-affected youth in Sri Lanka was more effective in reducing symptoms of conduct problems among younger participants. While school-based interventions have shown promise in addressing youth well-being and mental health, and the classroom setting creates an accessible site from which to deliver such programming, researchers should consider whether classroom-based programming should be delivered to gender- or age-segregated groups. We suggest additional caution related to who delivers these interventions, as it is important to avoid over-tasking and over-burdening teachers; instead, a separate group of individuals should be identified and trained to deliver mental health services.


60 Ibid.
Mental health and psychosocial well-being in the Rohingya community in refugee camps in Bangladesh

Background and context

Myanmar, known historically as Burma, is bordered by Bangladesh, India, China, Laos and Thailand. The tensions between the government and the Rohingya people date to centuries of persecution.\(^{61}\) Myanmar has a population of approximately 51 million and is ethnically and religiously diverse. Only a small number of ethnic minorities, of which the Rohingya are not one, are recognized officially as citizens, despite their historical presence in Myanmar.\(^{62}\) The 1982 Citizenship Law\(^{63}\) excluded the Rohingya from Myanmar’s recognized ethnic groups, rendered them stateless and barred them from the rights and protections of national and international law.\(^{64}\) In August 2017, the situation escalated to the level of a humanitarian emergency involving State-sponsored genocide, mass rape and sexual violence, ethnic cleansing and crimes against humanity.\(^{65}\) More than 730,000 Rohingya, including over 400,000 children, fled violence in Myanmar and settled in Cox’s Bazar District, Bangladesh. Of these 400,000, there are an inconclusive number of unaccompanied or orphaned children, with one report suggesting over 6,000 unaccompanied children\(^{66}\) and another suggesting that one in four Rohingya children are orphaned.\(^{67}\) In Myanmar, 600,000 Rohingya continue to face significant challenges, including lack of freedom of movement, discrimination and limited access to basic services.\(^{68}\)

Politically, the government of Bangladesh and the international community have concentrated on immediate and transitory humanitarian relief. The repatriation of Rohingya refugees from Bangladesh to Myanmar has proved deeply problematic, with the Myanmar government denying the legitimacy of the Rohingya people’s right to belong in Myanmar. Such complex political and
humanitarian contexts have profound long-term implications regarding the Rohingya community’s social, physical and mental health, linked to a lack of belonging and certainty. The cumulative psychological impact of these experiences on child and adolescent mental health is apparent,\(^{69}\) although robust psychological intervention outcome data is sparse.\(^{70}\)

With a population of approximately 162.9 million, Bangladesh is one of the most densely populated countries in the world, with the ongoing refugee influx creating a further strain on the limited resources of the nation. Rising tensions between the Rohingya and local host communities, and within the camps regarding access to limited local resources and concomitant acculturation issues, add to the ongoing complexity.

Understandings of mental health, culture and trauma

There is “no single universal or definitive way of being a healthy person, hence no psychological theory fits everywhere”.\(^{71}\) As such, conceptual and epistemological challenges prevail in understanding the influence of personal, relational, community and socio-political structures on individual mental health. Adult Rohingya camp residents report systematic discrimination in Myanmar, particularly in accessing health and education.\(^{72}\) One can hypothesize that such experiences influence how health and mental health providers are viewed – e.g., as benign or persecutory – and thus have an impact on the community’s help-seeking behaviour, their relationship to mental health provisions, and their acceptance of support. As such, recognizing the impact of historical oppression and persecution, and the acute traumatic experiences of torture, genocide, gender-based violence, and subsequent migration to and residence in the camps, is crucial to understanding mental distress and how services are accessed, accepted or even understood. Given that individual mental difficulties show strong correlations with social factors, distress is unlikely to be relieved through improved access to mental health treatments alone.\(^{73}\)

70 Nargis Islam, Nishat F. Rahman and Naila Z. Khan, “Trauma and Mental Health in the Rohingya Camps: One Year On”, in BRAC Health Watch: Health Sector’s Response to the Rohingya Crisis, BRAC University, 2019.
Human rights and mental health

Human rights violations are inherently linked with humanitarian crises where issues of oppression, power and denied opportunities prevail, particularly in the context of support for mental health difficulties. Human rights violations such as torture and displacement, denial of access to adequate resources, and coercive treatment practices infringe on people’s rights to live healthy lives with opportunities to thrive, further impacting mental health. In the Rohingya experience, human rights-related health issues have been found to present significant structural barriers such as poor living conditions, restricted mobility and lack of working rights, and collectively contribute to poor physical and mental health outcomes.

Social determinants of mental health

It is increasingly recognized that the determinants of mental health and illness involve not just individual factors but also social and socio-political factors, and their interaction with each other, with vulnerabilities linked to poverty, social inequality, persecution and discrimination. Global mental health and global economy researchers are developing a growing body of evidence that associates social inequalities with increased risk of mental health difficulties. Given the structural barriers to social and health support that the Rohingya people have faced in Myanmar and in post-migration displacement settings, their unique social determinants of mental distress are important. The barriers to accessing opportunities to live a fulfilled life and contribute to the well-being of society are particularly salient for refugee populations, where many mental health difficulties...
are shaped by social, economic and physical environments. For the Rohingya community, occupying a “stateless” status is likely to influence their sense of safety and security within legal frameworks. This has significant implications for an internal sense of belonging and safety, validation and recognition of injustices, and recognition of self-worth in addition to future opportunities to thrive.

Of relevance in the Rohingya context is the fact that, despite recognition that social structures can negatively impact mental health, mental health interventions in humanitarian settings often face challenges to an authentic recognition of the cultural and social aspects and idioms of mental distress beyond cultural adaptations to the current (Western-oriented) evidence base. Where the experience of psychological and emotional distress is intrinsically linked to the systemic influence of power, the influence of certain groups prevails on how narratives are constructed, “producing dominant social discourses, with particular consequences”. Therefore, while “individualizing the distress of refugee people and ‘treating’ them by focusing on symptom alleviation” has the potential to be of benefit for those in therapeutic engagement with a compassionate professional, the risk lies in services overlooking, being unaware of, or dismissing the social and material causation of refugee people’s distress while holding to an individualistic trauma discourse. Power to influence global narratives and paradigms exists in the economic and political interests of governments, funders, global corporations and international organizations, in addition to the ethos and politics of the psychological and psychiatric professions. Personal motivations, beliefs and values, post-colonialism and patriarchal worldviews are subtle but influential in what are accepted explanations of individual mental functioning. What is clear is that no one profession or organization can target all levels of influence and power; thus, shared individual and overarching goals, in addition to collaborative action, are seen as the most effective way forward.

Mental health research from the Rohingya camps

There is a lack of published studies on the mental health of the Rohingya following the August 2017 crisis, possibly due to the focus on emergency delivery of public

82 A. K. Tay et al., above note 61.
84 Ibid.
86 N. Patel, above note 83.
87 N. Islam et al., above note 70.
health and social structure support systems, the ethical barriers to researching vulnerable populations, and the time and resources required to implement evaluation projects. However, there is evidence of trauma symptoms and environmental stressors associated with life in the camps (e.g., lack of food, restrictions on movement outside the camps and safety concerns), where symptoms of low mood were associated with daily stressors rather than prior experiences of trauma. A report by the Office of the UN High Commissioner for Refugees (UNHCR) on the mental health and cultural needs of the Rohingya people established that the Rohingya people have limited familiarity with Western concepts of mental distress, and their expressions of distress stem from cultural rather than global descriptors, including their beliefs in spirit possession for issues such as erratic behaviour, visual and auditory hallucinations and paranoid delusions. As such, psychological formulations need to incorporate cultural beliefs around spirit possession when working with psychotic experiences and epilepsy, and in neurodevelopmental disorders in infants, children and adolescents. Research in Bangladesh populations suggest that approximately 70% of attendees at a national epilepsy assessment unit visited indigenous medicine practitioners, exorcists and/or spiritualists before consulting the clinic; only 29% perceived epilepsy as a disease. Cross-cultural studies also suggest that people can hold both neurological and metaphysical beliefs about epilepsy concurrently with regard to religiosity with positive outcomes, with other discussions noting that epilepsy interventions should incorporate both allopathic and faith-based responses to epilepsy. Similarly, clinical and research findings indicate that psychotic experiences are culturally determined; thus, adopting a pluralistic approach in treatment is effective. For instance, a study in India highlights how psychiatric professionals tend not to use diagnostic labels when discussing difficulties with patients, finding that the different meanings attached to unusual sensory experiences can enable a less pathological interpretation of their symptoms.

Religiosity is an important source of finding meaning in the Rohingya experiences of trauma, both from research and from field experiences. Religion as a protective factor and source of resilience has been identified in other refugee

88 A. Riley et al., above note 81.
89 A. K. Tay et al., above note 61.
94 A. K. Tay et al., above note 61.
populations in adolescents,95 and in adults in conflict situations.96 It appears that initially, the Rohingya community were more likely to seek support for physical complaints or somatic symptoms of mental distress rather than seek formal support for mental health difficulties, as stigma and shame are associated with mental health problems in the Rohingya community.97 Coping and health-related behaviours are important indicators of how comfortable children and young people feel in accessing mental health support.

In summary, while there is a dearth of evidence regarding prevalence and expression of mental distress in the Rohingya communities, what is clear is that the experience of forced migration is expressed through worry, fear, low mood and uncertainty about current security (or anxiety, depression and symptoms of PTSD). Factors to consider in a culturally authentic assessment of child and adolescent mental health include the individual experience and socio-political environment, the cultural descriptors and idioms of mental distress, cultural and social barriers to uptake of services, and culturally congruent coping and resilience variables.

Child- and adolescent-specific mental health activity

While in Myanmar, Rohingya children grew up not being legal citizens and experienced ongoing violence and persecution, forced displacement, and restrictions on movement and religious activity.98 As the Rohingya community becomes more settled in the camps, they are helped by a wide range of Bangladeshi government, international NGO and humanitarian partners to gain access to public health and infrastructure services. However, these initiatives are of indeterminate duration, dependent on external aid, and in a context of congested and often hazardous living conditions (e.g., floods from monsoons and damage from cyclones). Holding a status of “forcibly displaced Myanmar nationals” means that the Rohingya community, like many refugees and stateless people, do not have access to formal education or employment that would enable them to gain practical skills and the self-worth they require to thrive.99 Adolescents in particular suffer from a lack of opportunities to learn skills to earn a living, while young girls are vulnerable to trafficking and other forms of exploitation and oppression–i.e., sexual and other gender-based violence, including early and forced marriage.

97 A. K. Tay et al., above note 61.
Research specifically on child and adolescent mental health in the camps is scarce. One study examined neurodevelopmental difficulties in children presenting at a clinic in the Rohingya camps, assessing mental health as a component of their screening process;\textsuperscript{100} it found that over half of the 622 assessed children were in the clinical range for emotional symptoms, and 25\% for peer problems. Children’s mental health difficulties were unsurprisingly significantly associated with being parentless in terms of emotional and peer problems. While parental mental health was not assessed in this study, strengths were noted in the caregiving of Rohingya mothers and kinship caregivers, and it was observed that caregiver mental health could affect children. This finding is supported by recent research conducted in a Western context which found that the neurodevelopmental effect of severe early life stress correlated with poor relational experiences and led to reduced emotion regulation and sensory integration skills.\textsuperscript{101}

**Mental health and psychosocial support interventions in the camps**

The speed and scale of the influx of the Rohingya people’s migration over the course of the three-month period from August 2017 placed an enormous strain on host communities and Bangladesh as a whole. The sheer volume of the humanitarian crisis required immediate responses with the available resource structure, with priority placed on addressing basic needs of food, shelter and public health management. The Bangladeshi army, with their experiences as the largest contributor to UN peacekeeping forces,\textsuperscript{102} were able to rapidly establish infrastructural provisions for initial and basic needs, alongside first response teams from international and local humanitarian organizations.

With over 700,000 individuals joining the already resident 200,000 Rohingya refugees\textsuperscript{103} humanitarian and government agencies were suddenly required to provide immediate care to a population equivalent to that of Stockholm, Sweden (744,000). Adequate physical and mental health services for a population of these proportions are typically developed over long periods of time, with stable and established social, governmental and financial infrastructures. The emergency situation meant that aid agencies and the government of Bangladesh had to respond immediately, with limited information about the Rohingya’s culture and unique needs. This, together with their immediate experiences of torture and genocide, meant that humanitarian and government agencies faced

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an exceptionally daunting task in prioritizing and addressing the Rohingya’s multiple needs. Government, humanitarian and aid agencies such as BRAC, the UNHCR, UNICEF, the International Organization for Migration, Médecins Sans Frontières and the International Committee of the Red Cross all initiated interventions with regard to working with the Rohingya community in the camps and with the host communities, who, although not facing the particular difficulties experienced by the Rohingya, were nonetheless suffering from their own lack of personal and infrastructural resources.104

Child-friendly spaces (CFSs) are designated safe spaces within the camps where communities create nurturing environments in which children access free and structured play, recreation, leisure and learning activities.105 CFSs are the recognized means by which psychosocial support activities for children in humanitarian settings are delivered,106 and alongside temporary learning spaces, activities in these settings provide structure, normalizing activities, safety, socialization and adult supervision. They represent the only structured activities that can be offered to children and young people in the Rohingya refugee camps, and are considered to offer a protective function of providing a location from which to monitor and assess for child safeguarding and protection issues as well as a safe place to play. BRAC, one of the largest NGOs in the world, partnered with the LEGO Foundation, Sesame and UNICEF to implement mental health and psychosocial support (MHPSS) interventions and Humanitarian Play Labs (HPLs) in 308 CFSs across thirty-two camps in the Ukhiya and Teknaf areas of Cox’s Bazar, as well as a number for host communities.107 MHPSS and HPLs have been offered to over 60,000 children between the ages of 0 and 6 years and their families. Launched by BRAC in 2018, the HPL is an MHPSS model that integrates learning through play into the lives of young children. This model has trained paraprofessional play leaders who deliver a model of learning through play that integrates “playfulness” and psychosocial support in order to address the mental health needs of children. The HPL has received international attention and acclaim for its innovative approach to the psychological input and care of children in crisis and emergency settings.

Current challenges and gaps in provision

Despite the commitment and input of the aid and NGO agencies, there is currently no or very little reliable published data or literature on the efficacy of any

104 N. Islam, above note 70.
106 Ibid.
intervention with regard to the psychological well-being of Rohingya children and adolescents; nor is there any evaluation of the clinicians and workers who deliver such interventions, or of whether the community feels that such interventions are useful and helpful. Anecdotally, we know that many children continue to attend the CFSs and are supported and encouraged by their families to do so. What is less clear is how many are not attending and what the reasons for this might be.

In addition to this, there is inconsistency in MHPSS and CFS provisions across the camps. Many organizations have psychosocial service centres and staff; however, given the stigma attached to mental health difficulties, uptake of services is challenging. One method of addressing the problem has been to adopt the Rohingya communities’ term for the clinics as “peace centres” (shanti khana)\(^{108}\) and MHPSS workers as “doctors of the heart” (diller daktar), thus bypassing the stigma of mental health labels and remaining culturally authentic.

Given the large geographical area involved, the distances from homes to health centres can be substantial, presenting a further challenge for MHPSS service provision. Here, outreach services have real potential for community engagement, although there continue to be concerns about the management and treatment of more severe mental health difficulties, confidentiality in client disclosure within the close confines of shelters that can be overheard by family members and neighbours, and safety of the outreach para-counsellors. What is apparent is that, anecdotally, over time the community has become more comfortable with the idea of a psychologically supportive space and has continued to use MHPSS services, suggesting that community members are less distrustful of such services.

Language is the key to ensuring effective MHPSS service. While there are some similarities between the Rohingya language and that of the host community (Chat Gaon), culturally and idiomatically there continue to be significant challenges in communication. While play-based interventions present more of a “universal language”, communication with parents and caregivers with regard to supportive practices and strategies requires effective language communication. Currently, most organizations employ paraprofessionals from the host community due to the similarity in dialects. However, recent research suggests that almost 60% of the surveyed Rohingya people have difficulty in understanding the host community dialect; this is a particular concern for the Rohingya women, who hold the main care responsibilities yet have low literacy rates.\(^{109}\)

Understanding Rohingya culture and the importance of religion in Rohingya narratives of well-being is of particular importance in the delivery of appropriate interventions that are accessible and non-stigmatizing.\(^{110}\) MHPSS

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providers have an ongoing remit to draw on the indigenous narratives of mental health and coping strategies in order to introduce creative and non-traditional methods with regard to mental health support practices; it remains unclear how cultural awareness is informing MHPSS practices, however.

Incidences of polygamy across the host and Rohingya communities are rising. Recent unpublished data and reports indicate that rising polygamy rates in both the host and Rohingya communities have a significant negative impact in terms of the psychological effect of abandonment and the lack of emotional and financial security that a stable marital union brings, in addition to increased risks and vulnerability to sexual and gender-based violence. There is also reason to believe that there is tension between the host and Rohingya communities regarding this incidence of polygamy, although this phenomenon is under-researched and therefore the specifics are unclear. It is therefore plausible to hypothesize that there will be uncertainties and difficulties, impacting on women and children predominantly, regarding emotional and economic resource allocation, with concomitant risks of sexual and gender-based violence. A key concern here is the appropriateness and ethicality of providing therapeutic coping strategies for women, children and adolescents in such contexts that implicitly condone uncertain, exploitative and violent living conditions. Conversely, encouraging the development of autonomy and a “zero-tolerance” approach to violence is problematic and risky without infrastructural support such as the provision of safe refuge spaces, which is particularly challenging in a refugee camp environment. Joint working with mental and social services and security and legal systems is the most effective method of addressing these structural challenges.

The current MHPSS provision is predominantly in the Rohingya communities, although government directives now ensure that any intervention must also be delivered in some form to the host community, where there continue to be pre-existing and ongoing mental health needs. These same host communities responded with great humanity and compassion to the arrival of the initial influx of traumatized Rohingya people, and subsequently sacrificed their lands and resources for the camp sites and provision of services. While some elements of the host communities are benefiting from paid employment in supporting the humanitarian effort, shortages of resources and work, high prices of commodities and intermarriages have created tensions between the host community and the Rohingya communities. Furthermore, such tensions hold significant risks for women and children in terms of psychological and economic impact. These issues of intermarriage, inflation of commodities and workforce problems require intervention on a public health, community development and economic policy level.

112 N. Islam, above note 70.
While there are numerous MHPSS interventions across the camps and host communities, there is very little to no information publicly available on quality assurance processes in the training and development of MHPSS professionals. Therapeutic practitioners have a professional and ethical obligation to provide care that is embedded in a structure of accountability and transparency, usually through case note auditing and clinical outcome measures and some type of regular supervision. Such accountability should, in reality, extend to all who have a role in delivering MHPSS in a support or research capacity in the camps. Lack of accurate quality assurance information is of concern in terms of safeguarding the pre-existing vulnerabilities of the Rohingya people, and from a human rights and ethical practice perspective.

Interconnections of agency, mental well-being and livelihood opportunities among Rohingya refugee youth in Cox’s Bazar

The World Health Organization (WHO) recognizes that psychological well-being and many mental disorders are shaped by the social, economic, geopolitical and physical environments in which people exist. Access and use of social institutions in host countries, such as education and health and social care, as well as employment, have a significant impact on how mental distress is reduced and psychological well-being is achieved, e.g. through meaningful activities such as education and employment. Engagement in such activity benefits individuals, particularly children and adolescents, through increased self-efficacy and sense of self-worth, and the potential to be valued contributors to their community and society. Addressing structural and psychological barriers to such engagement therefore has the potential to affect positive individual and community well-being.

Life skills and livelihood generation among Rohingya refugees is a vital issue as most refugee situations, and many situations involving internally displaced persons, are not resolved quickly; instead they become protracted and often without any clear end in sight. Life skills are usually associated with managing and living a better quality of life, and livelihood programmes generally seek to increase the capacity of households and individuals to enhance their income, skills and assets. In order to address these issues, life skills education activities have been started in Rohingya camps on a small scale. Schooling in camps was approved in 1996 and started in Nayapara camp in 2000. A joint assessment by the UNHCR and the International Labour Organization (ILO) found that Rohingya children are provided with informal education facilities in the camp up to grade five in the primary level (age 6 to 11), after which they cannot officially pursue further education either in the camps or outside due to restrictions placed upon them. As the existing facilities inside camps allow the

113 Ibid.
114 I. Weissbecker et al., above note 10.
children to study up to grade five only, they have to look for outside schools or institutions and will encounter challenges obtaining admission without a valid address. A few children from vulnerable families are not enrolled in the camp schools for lack of awareness of the guardian.116 These education services inside the camps have continued until now, and Rohingya children who have arrived in Bangladesh after the latest influx of 2017 are getting informal education in the camp schools, where the language of instruction is either English or Burmese but not Bengali.

Restrictions on freedom of movement and lack of education and formal employment in Bangladesh limit not only refugees’ current resilience opportunities, but also their prospects of accessing livelihoods in the future in their home country, Myanmar, and/or in any other country. Several studies have highlighted the importance of providing education and employment opportunities to Rohingya youth as livelihood enhancement has the potential to improve social capital, enabling refugees to contribute to local economies and to their future (re)integration within their former country of residence or any other country.117 The UNHCR considers livelihood interventions such as microfinance an attractive option to address these challenges, since refugees in long-term displacement do not face an imminent prospect of return or resettlement.118 This indicates a possible avenue through which Rohingya youth can be provided with formal opportunities to develop vocational skills, which can be tied with microfinance.

A recent Population Council assessment found a strong desire among Rohingya youth, regarding their involvement in income-generation activities (IGAs), to improve their living conditions. The study mainly inquired about the sexual and reproductive health and marriage practices of Rohingya in two time frames, pre-arrival in Bangladesh and post-arrival in Bangladesh, in order to understand how and to what extent their life realities have changed. The study also captured social dynamics and the voices of surrounding host communities to understand how they perceive the changes in their lives after the Rohingya’s arrival in the camps, and related implications.119

In refugee situations in other countries where displacement is protracted, there is little support for livelihoods and self-reliance. To sustain themselves and their families, refugees rely on a wide range of support and ad hoc help from family, friends, neighbours, employers and others in the host community, while

also benefiting from more formal support from State or aid actors. They adopt a range of strategies to sustain themselves over the course of their displacement, including working illegally and informally, working long hours in low-status and low-paying jobs, using their networks to find and increase the quality of their jobs, partnering with locals to start businesses, and maximizing access to formal humanitarian aid.\textsuperscript{120}

Engaging Rohingya in the construction and manufacturing sector seems to be a feasible option. Recently, the Bangladeshi government has begun implementing large infrastructural and industrial (economic zone) projects in Chittagong and Cox’s Bazar which require a large labour force. This opens a window of opportunity to engage young Rohingya populations in the construction and manufacturing sector. In addition, Rohingya can be trained and financed to start home-based enterprises or engage in petty trade.

In Bangladesh, there are few life skills and income-generation activities available at the camps where registered Rohingya have been living for years.\textsuperscript{121} Little is known about the needs of the newly arrived refugees with regard to IGAs. Moreover, it is not known whether interventions designed to build skills among Rohingya are assumed to have effects in the community. Research is needed that will generate evidence on the extent to which livelihood training and IGA opportunities are available to Rohingya youth, what type of skills and training they need (including technical and vocational education and training), the impact of the interventions in the community, where the gaps are, and how to address their livelihood needs. There is uncertainty around how long the refugees will remain in Bangladesh, and in this context an interim strategy of support is needed to ensure an economically secure future for Rohingya youth and to promote their dignity and sense of self-worth. In this regard, policies that increase the Rohingya refugees’ ability to prepare for an economically secure future should be put in place.

**Conclusion**

A review of the research and reports of clinical practices in the Rohingya camps highlights the culturally determined and individualized aspects of the mental health experience while also noting the challenges of understanding such cultural manifestations of distress within a predominantly Western mental health paradigm. In the Rohingya camps, as in most contexts, infants, children, young people and women are most vulnerable to psychological, social and economic difficulties, with determinants located in unhealthy, unsupportive or conflict-ridden environments. The Rohingya people have experienced significant historical and ongoing persecution, oppression and genocide. Being rendered stateless

\textsuperscript{120} Agenda for Humanity, “Supporting the Livelihoods of Refugees in Long-Term Displacement”, available at: www.agendaforhumanity.org/news-details/6640.

\textsuperscript{121} UNHCR and ILO, above note 116.
disallows the protection and support of State nationality and presents an additional structural barrier to Rohingya community well-being. Without the freedom or ability to make choices about lifestyle, movement and employment, and with limited recourse for justice for the atrocities they have endured, the Rohingya occupy a place of disempowerment and subjugation despite concerted international efforts to remediate their plight. At the centre of these experiences reside a people like any other. They want to live in a place of safety where they have access to opportunities to work and for personal fulfilment, to be able to follow their religion in peace, and to be able to nurture and support their children so that they can lead safe and fulfilled lives. What is clear is that no one profession, service or organization can address all levels of influence and power, and as such, it will require collaborative interagency and intergovernmental work to move forward.

One of the main challenges identified from the research highlights the need for a culturally authentic conceptualization of mental health, distress and intervention. Community and outreach services, as well as a reconceptualization of para-counsellors and mental health professionals as *diller daktar* (doctors of the heart) and clinics as *shanti khana* (peace centres), appear to have greater relevance to the Rohingya people’s acceptance of mental health services than counsellors and mental health clinics. Much can be learned from such examples in terms of introducing flexible and creative methods of describing and delivering accessible services that are culturally sensitive and appropriate. The Humanitarian Play Labs and other MHPSS interventions delivered in the CFSs are another example of delivering age-appropriate interventions that recognize the importance of family involvement in the process of healing. Such learning with regard to the importance of cultural context in how distress is experienced and described is relevant to any non-Western humanitarian and development setting. Similarly, recognition that there are commonalities (e.g. play) that are transcultural can enable a basis from which to develop effective and culturally authentic interventions, with the recognition that not all evidence-based interventions can comfortably translate to different communities and cultures.

As this paper has highlighted, critical MHPSS research and innovative intervention work is being conducted and will need to continue in the Cox’s Bazar camps, including education, livelihood and work-related opportunities for children and young people. In the coming months and years, Bangladeshi government policies and practices to support the needs and aspirations of the young Rohingya population will need to evolve. As a protracted crisis and with a massive influx of Rohingyas, the senior policy-makers in the government of Bangladesh will need to understand that attention needs to be given not only to their most immediate needs, including accommodation, safe water, food, sanitation and other basic services, but also to the various coping strategies and livelihoods they adopt to survive in the camps in Bangladesh. Bangladeshi government senior policy-makers are historically open to change and innovations that will support improving broad-based social and economic justice outcomes. These policy-makers must be provided with evidence, clear arguments and policy
options. Based on the evidence of the research in Cox’s Bazar and global best practice, a set of recommendations will be developed to help in-country policymakers and programme managers develop better mental health and livelihood policies and interventions for Rohingya populations living in the camps. Targeted policy advocacy will also need to be in place to create an enabling environment for developing and implementing better mental health interventions as well as market-based skills development programmes for young Rohingya populations.

One crucial aspect to keep in mind while moving forward in the coming months and the next few years will be how the Rohingya context in Bangladesh can inform work in other refugee settings and how policy and practical innovations in MHPSS, livelihoods and work permit policy in other contexts (such as Jordan, Uganda, Kenya and Malaysia) can inform policy-makers in Bangladesh and the wider region. The important work of sharing global good practices is already under way, through the forums and policy advocacy of Bangladeshi, Rohingya and international researchers and practitioners in Cox’s Bazar and Dhaka, who are conducting research, delivering interventions and formulating policy options for the central government to consider. Livelihood-related global experience on creating livelihood and employment opportunities for refugees will continue.

Children and youth exposed to armed conflict are at risk for mental health problems that may persist far into adulthood. In this article, we have highlighted the needs of conflict-affected youth and have discussed some promising mental health interventions aimed at ameliorating or preventing the negative psychosocial consequences of living and growing up in conflict-affected areas of the world. Our case example of Rohingya refugee children and youth highlights the important historical and cultural contexts that must be taken into consideration when working with conflict-affected youth, as well as the challenges and opportunities faced in implementing and monitoring psychosocial interventions in Cox’s Bazar.
Born in the twilight zone: Birth registration in insurgent areas

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Abstract

Insurgent groups are registering births in territories which they control, and yet States do not recognize insurgent birth registration, resulting in a legal vacuum with harsh consequences for children. Based on international human rights and humanitarian law provisions related to birth registration, this article argues that insurgent groups have an inherent power to register births in order to fulfil their obligations under international humanitarian law, and that State obligation to ensure the right to recognition as a person under the law should require States to recognize insurgent birth registration in order to prevent harm to children.

Keywords: birth registration, insurgent groups, armed opposition groups, customary international law, child rights in armed conflict.

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Introduction

More than ever before, large numbers of civilians live for extended periods in areas affected by non-international armed conflict (NIAC); of the forty-nine active conflicts in 2016, only two were inter-State, while the rest were armed conflicts within States. Conflicts are also increasingly protracted in duration. Populations living in insurgent contexts, out of the effective reach of any de jure authority, are covered only by the limited set of provisions regulating NIAC (common Article 3 to the Geneva Conventions, and Additional Protocol II to the Geneva Conventions (AP II)); as a result, understanding the legal basis and regulation of governance functions exercised by insurgent groups in control of territory has become increasingly urgent and relevant.

Birth registration is one of the casualties of thwarted access to justice experienced by populations in areas controlled by insurgent groups. The infant inhabitants in these territories risk disappearing into a legal black hole, as the territorial State can claim that it has lost effective control over those territories, and other States supporting the insurgent groups may deny (or may truly lack) decisive influence, yet the insurgent administration is typically not recognized by States as an authority for the human rights obligation of registration at birth.

Birth registration is a human right enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the United Nations (UN) Convention on the Rights of the Child (CRC), but it is also a practical necessity, as it is often a precondition for exercising other rights. In other words, without proof of a child’s name and age, it is not possible to obtain travel documents, to enrol in school or even to register for humanitarian aid, including family reunification, and social protection entitlements. The impact of lacking identity documents can be devastating and irreparable. In Rwanda, despite years of State efforts including photo and radio tracing in cooperation with the International Committee of the Red Cross (ICRC), in 2001, without birth documents, 3,500 unaccompanied children remained unidentified. In Sierra Leone, many children rescued from forced recruitment could not remember their birth names; due to lack of

3 “Common Article” refers to a provision that is common to all four of the Geneva Conventions. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 1 October 1950) (GC IV); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).
6 Rwanda, Initial Report to the Committee on the Rights of the Child under the Optional Protocol on the Involvement of Children in Armed Conflict, UN Doc. CRC/C/OPAC/RWA/1, 6 December 2011, para. 146.
documentation, the identity of those children was never restored.\footnote{7} In Iraq, due to only possessing insurgent birth certificates, families were not able to receive medical care, food rations or school enrolment for their children.\footnote{8}

The precise number of unregistered children in insurgent areas is unknown because these children are invisible in respect of the law. They are vulnerable to being trafficked, smuggled or forced into underage armed recruitment since they do not possess a valid legal identity for the purpose of prevention or rehabilitation.\footnote{9} Nonetheless, the number of affected children is clearly substantial, in the tens of thousands in the past decade alone. Quilliam and the Romeo Dallaire Child Soldiers Initiative estimated that by March 2016 there were 31,000 pregnant women living under the Islamic State (IS) group, who only had access to IS birth certificates.\footnote{10} According to media reports, in the insurgent-controlled area of Donetsk region in eastern Ukraine, in 2017 alone more than 12,000 infants were born and issued birth certificates by the insurgent group in control of the area.\footnote{11}

International human rights law (IHRL) and international humanitarian law (IHL) in international armed conflict (IAC) have dedicated provisions defining the content of the right to identity registration from birth.\footnote{12} However, there is no black-letter regulation of birth registration by insurgent groups, and this vacuum has attracted little attention from human rights treaty bodies, the only bodies with a mandate to monitor the right to legal identity. For example, in Iraq, due to insurgent control of territory by Al-Qaeda from 2004 to 2009, and IS from 2014 to 2017, thousands of children did not have access to State-run birth registration systems, a concern highlighted by civil society groups and by duty bearers.\footnote{13} The situation of these children was not mentioned by any of the six treaty body Concluding Observations issued on Iraq in 2015.\footnote{14} CRC observations on birth registration in Iraq focused only on barriers faced by children belonging to

\footnote{12} CRC, Art. 7, and ICCPR, Art. 24(2); GC IV, Arts 24, 50, and AP II, Art. 78(3).
minority groups.\textsuperscript{15} The Committee for the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict mentioned the weak Iraqi birth registration system as a serious concern for age verification in armed recruitment, but no mention was made of insurgent-issued identity documents.\textsuperscript{16}

Significant academic attention has been devoted to practices of insurgent groups and the possible content of their duties or powers under human rights and humanitarian law,\textsuperscript{17} but in these treatments, insurgent birth registration has languished in obscurity.\textsuperscript{18} This article will examine the considerable but largely overlooked body of practice of insurgent groups in registering the identity of children from birth. Insurgent or armed opposition groups, as defined in Article 1(1) of AP II, are “dissident armed forces … which, under responsible command, exercise [stable] control over … territory”; this article will use the terms “insurgents” and “insurgent groups” interchangeably throughout to reference the concept of a group meeting the AP II criteria.\textsuperscript{19} The main characteristics of these groups for the purposes of this article are organization, effective control of a population and territory, political opposition to the government of the territorial State, and independent existence (i.e. not a \textit{de facto} organ of another State).\textsuperscript{20} Groups which do not exercise effective control over territory and do not have an organizational apparatus will not be addressed in this analysis, which focuses, as defined in Article 1(1) of AP II, on groups which have the capacity to “implement this Protocol”.

\begin{footnotesize}
\begin{enumerate}
\item[15] UN Doc. CRC/C/IRQ/CO/2-4, above note 14, para. 31.
\end{enumerate}
\end{footnotesize}
States are required under all circumstances to ensure the right to recognition as a person under the law, a non-derogable right. In peacetime, States are obligated under IHRL to register births in order to fulfil that right for infants. In armed conflict, States may derogate from the obligation to register births under the derogation regime of Article 4 of the ICCPR, which allows them to temporarily derogate from their full obligations in regard to certain rights only if the “life of the nation” is threatened and only to the extent and for the duration which is absolutely necessary. However, they will still be bound under IHL provisions to register births in domestic territories under their control whenever materially possible, in order to fulfil the non-derogable right to recognition under the law. This article will argue that in domestic territories not under State control, the obligation to ensure recognition under the law should take the form of an obligation to recognize insurgent-issued birth documents. This article will argue that insurgent groups have the inherent power to register births, in order to “take all appropriate steps” to protect children under Article 4(3) of AP II, human rights devolved on the local population, and international customary law. This article will first review existing insurgent practice of birth registration, demonstrating that many insurgent groups can and do register births, though these registrations are not recognized by States. Second, it will survey relevant IHRL and IHL provisions related to birth registration and identification of children in armed conflict in order to clarify these obligations. Lastly, the article will describe a possible legal basis for recognition of insurgent birth registration and address some common objections to State recognition.

**Birth registration in practice**

**Insurgents’ practice related to birth registration**

A number of insurgent groups with effective control of populations are registering births taking place in their territories. IS issued birth certificates, recording the baby’s weight, length and date of birth, and stamping the document with the seal of the “Caliphate”. Surveys of insurgent groups who engage in humanitarian action have uncovered goals ranging from winning the favour of the local population to demonstrating stability, increasing their legitimacy and facilitating


the smooth running of the local administration;\textsuperscript{23} engaging in administration of territory is likely to have similar motives. Some insurgent groups have formed mutual agreements to recognize one another’s official documents, seeking recognition from the outside world.\textsuperscript{24} Insurgent civil documentation issuance practices are not well understood, due to the limited access of journalists and non-governmental organizations (NGOs) to insurgent-controlled areas. Nevertheless, a few trends can be identified.

The number of affected individuals is not inconsequential. Syrians in 91\% of sub-districts inside Syria report that loss or lack of identity documents is one of their top three protection needs; the 2015 humanitarian situation overview by the Office of the UN High Commissioner for Refugees (UNHCR) found that less than half of the population in most areas of Syria are able to obtain documents.\textsuperscript{25} A review of court records in 2017 indicated that just 38\% of the reportedly 14,000 children born in the first two years of the “Luhansk People’s Republic” in eastern Ukraine have completed the procedure to be registered by the government of Ukraine.\textsuperscript{26} The difficulties faced by these children can last for years after territorial control has been restored. According to the Iraqi Parliamentary Committee on Human Rights, among children born during 2004 and 2009, when Al-Qaeda controlled territory in Iraq, by 2013 more than 500 of those born in insurgent areas still remained unregistered.\textsuperscript{27} Iraq’s Ministry of the Interior assessed that there are at least 250–300 children born with at least one parent as an IS member,\textsuperscript{28} while the Norwegian Refugee Council (NRC) estimates based on existing assessments that in displacement camps alone, approximately 45,000 children in Iraq are lacking birth certificates due to being born in insurgent-held areas.\textsuperscript{29} There are an estimated 45,000 people living in the self-proclaimed Republic of Abkhazia, which has been a contested territory since 1993; Georgia does not recognize Abkhazian birth certificates.\textsuperscript{30}


\textsuperscript{27} N. Houry, above note 22.


\textsuperscript{29} Alexandra Saieh, \textit{Barriers from Birth: Undocumented Children in Iraq Sentenced to Life on the Margins}, NRC, 2019, p. 7.

Many insurgent groups preserve the documentation procedures of the State, continuing implementation by former civil registry staff and using government registry archives, facilities and supplies unless they are destroyed or depleted. In other locations, village councils, religious leaders or religious court judges also issue documents, such as baptismal certificates or Islamic *katb al-kitab* marriage certificates, which take on a new validity due to lack of access to government-issued documents. Even in insurgent-controlled areas, birth certificates are one of the required documents which must be submitted in order to access humanitarian assistance, to confirm legal status within the entity and to ensure freedom of movement through internal checkpoints. Birth certificates are often required to receive local benefits such as baby food or child protection services.

Affected populations living in insurgent areas express the desire to obtain valid government-issued civil documentation, but many are not able to cross to government-controlled areas to access such documentation. In most cases, insurgent-issued documents are not recognized outside the limited area of insurgent control. Obtaining a valid birth certificate in the government-controlled areas requires making a dangerous and highly impractical journey across checkpoints and front lines with a newborn baby. People with disabilities or health issues are often physically not able to make the journey. The most progressive States offer judicial validation procedures for conversion of personal status documents issued by insurgent groups as evidence of life events such as birth; however, this procedure requires an appearance in court on the government-controlled territory, and thus a court fee and transport and accommodation costs. In contrast, insurgent-issued documents are low-cost and

34 For example, as part of its Ani Amaalyki (Mother and Child) project, the NGO International Fund Apsny, in Transnistria, requires submission of a birth certificate to receive a child care package. See the International Fund Apsny website, available at: www.fondapsny.org/en/ani-amaalyki.
35 IRC, above note 32; NRC, *Voices from the East: Challenges in Registration, Documentation, Property and Housing Rights of People Affected by Conflict in Eastern Ukraine*, 28 October 2016, p. 7.
available locally, while conferring the same benefits as valid documentation within non-government-controlled areas. Restrictions on freedom of movement due to lack of valid documentation can have devastating consequences on access to health care and family reunification.\(^{39}\)

Even if physical barriers to accessing government registration offices were removed, many conflict-affected families fear persecution by the State and will not register in the government-controlled area in order to avoid being identified and targeted, with the result that insurgent-issued birth certificates may be the most accurate and complete form of documentation, or the only form, that they can access for their children.\(^{40}\) One refugee has stated: “Many of us Syrian doctors didn’t have the ability to register the births of our children in Syria because we were wanted by the regime.”\(^{41}\) Children of insurgent group members are disproportionately impacted. An internally displaced woman in Syria said: “I can’t register my three children in a regime civil documentation center because I am the widow of a Free Syrian Army fighter.”\(^{42}\) Another significant group facing a disproportionate impact of the requirement to cross to government-controlled territory are single mothers whose male partners are missing, have been killed due to the conflict or detained, or are employed in insurgent structures and thus at risk of persecution by the State.\(^{43}\) Issues of family separation and social protection become irresolvable for families who only have insurgent birth certificates when insurgent documentation is not a recognized form of proof of identity.

Because insurgent documents are not recognized as a valid form of documentation by States, families may be forced to resort to forged documents or to go through middlemen in order to procure documents by proxy, increasing risk of exploitation.\(^{44}\) For many, even the possibility of a forged birth certificate as their only chance at proof of identity is out of reach on a subsistence budget.\(^{45}\) Free legal aid offered by NGOs, which assist populations in government-controlled areas to obtain birth certificates, is often not permitted in insurgent areas. UN operational agencies, which may issue immunization or enrolment certificates that could serve as an alternative form of documentation, are often either non-operational or have a limited presence in insurgent-controlled areas.\(^{46}\)

\(^{39}\) IRC, above note 32; NRC and International Human Rights Clinic at Harvard Law School, Registering Rights: Syrian Refugees and the Documentation of Births, Marriages, and Deaths in Jordan, October 2015, p. 16.

\(^{40}\) IRC, above note 32.


\(^{42}\) IRC, above note 32.


\(^{46}\) N. Houry, above note 22.
Post-conflict response of States to insurgent birth registration

Rigid post-conflict birth registration practices, though intended to protect children from kidnapping or trafficking,\(^{47}\) prove maladapted to conflict realities.\(^{48}\) Reissuance of documents once territory is retaken or families are displaced to government-controlled areas can take months or years—a “bureaucratic nightmare”\(^{49}\) and in the meantime, children are not eligible for essential services like food ration cards, medical care\(^ {50}\) or primary school enrolment.\(^{51}\) Some parents fear that they could be separated from their children or even accused of trafficking when crossing borders, as they have no proof of the child’s identity and parentage.\(^{52}\) One media report tells the story of an 8-year-old boy, still unable to regularize his identity documents after being born in an insurgent area, who is not able to enrol in school and is thus isolated from his peers.\(^{53}\)

Families possessing insurgent birth documents report facing reprisals when the territory is retaken and they seek to regularize their documents, including arrest and interrogation because of the identity document,\(^ {54}\) insurgent birth certificates torn up in front of them,\(^ {55}\) harassment, threats and indefinite discriminatory “delays” in document issuance.\(^ {56}\) As a result of these risks, many families do not even dare to try to obtain valid documents.\(^ {57}\)

Absence of identity provision during NIAC has devastating consequences for children, both during and after the conflict, especially related to family separation, freedom of movement and access to services. Analysis of practice shows that insurgent groups are already issuing identity documents, which many families use as a form of identification. However, lack of clarity regarding the legal effect of those documents outside the area of insurgent control has resulted in a legal vacuum with harsh consequences for children and families.

\(^{47}\) Z. Shahlah, above note 36.
\(^{48}\) D. Barwari and S. Gehad, above note 13.
\(^{50}\) IRC, above note 32.
\(^{52}\) NRC, above note 29.
\(^{55}\) Ibid.
\(^{57}\) Ibid.
Birth registration under international law

Birth registration and the right to recognition as a person before the law

Birth registration was a widespread practice of States long before the rule was ever codified in multilateral treaties, yet it has taken on increasing legal application in the post-war period as it has been consistently integrated into human rights and humanitarian law treaties.58 Due to this historical practice, the obligation to ensure legal identity of children from birth as codified in treaties should be characterized as law-declaring rather than innovative.59 This section will argue that contemporary interpretation of these widely ratified treaties may broaden the scope of application of the norm of birth registration, recognizing the inherent power of insurgent groups to register births and obligating States to recognize children’s identities which are thus registered.60

It is clear that States have an obligation under IHRL to ensure birth registration of children. The right to recognition as a person before the law was enshrined in Article 6 of the Universal Declaration of Human Rights (UDHR),61 though without stipulating how the right should be implemented. The 1959 UN Declaration on the Rights of the Child added the right to a name and a nationality at birth.62 In 1966, a provision on birth registration, Article 24(2), was adopted in the ICCPR; the Human Rights Committee’s General Comment No. 17 interprets Article 24(2) of the ICCPR as “designed to promote recognition of the child’s legal personality”, linking it with Article 6 of the UDHR.63 The right to be registered at birth flows from Article 16 of the ICCPR, the right to recognition under the law, as “only registration guarantees that the existence of a newborn child is legally recognized”.64 A general comment of the Working Group on Enforced or Involuntary Disappearances forcefully states that denial of birth registration means that the affected individual becomes a “non-person”, not recognized by the law and denied access to legal protections.65 The Inter-American Court of Human Rights judged that even a delay by the State in issuing

60 Ibid., p. 103: “Even if all States should expressly assume the obligations of codification treaties, regard will still have to be paid to customary international law in the interpretation of those instruments, and the treaties will in turn generate new customary international law growing out of the application of the agreements.”
birth certificates for children of migrants amounted to a violation of the right to a name and the right to juridical personality.66

The Human Rights Council defines birth registration as the “continuous, permanent and universal recording within the civil registry of the occurrence and characteristics of birth”, and confirms that registration “establishes the existence of a person under law”.67 The procedural standard involves three processes: declaration at a civil registry, recording by the registry, and finally, issuance of a certificate that is “evidence of the State’s legal recognition of the child”.68

In 1989, the CRC added to the protections of the ICCPR; Articles 7 and 8 of the CRC provide for registration immediately after birth, the right to a name and to acquire nationality, the right of the child to be cared for by parents, and the right of the child to preserve his or her identity. The CRC is by far the most widely ratified human rights treaty.69 There are no reservations made to the CRC related to birth registration; the three registered reservations to Article 7 relate to nationality law or the possibility of registering an anonymous birth, not the act of birth registration.70

Although several provisions of the CRC (such as freedom of expression, religion and association) may be limited in emergencies, Article 7, which relates to birth registration, does not contain a limitation clause. The CRC does not have a derogation regime, with the Committee on the Rights of the Child stating: “It is important to emphasize that the Convention and the Optional Protocols thereto apply at all times and that there are no provisions allowing for derogation of their provisions during emergencies.”71 Article 4(2) of the ICCPR explicitly forbids derogation from Article 16 of the ICCPR (the right to recognition as a person under the law) and permits derogation from Article 24 only in a state of emergency and only to the extent and for such a time as is strictly necessary.72 The Human Rights Council confirms that the right to be registered at birth is found in IHL, referencing Article 50 of Geneva Convention IV (GC IV), and states that birth registration is in fact critical during states of emergency, as a crucial mechanism for prevention of underage recruitment, reintegration of child soldiers and family reunification in emergencies.73

Birth registration, then, is the minimum form of individual legal recognition of natural persons in international law. A registered child is able to

66 Inter-American Court of Human Rights, Case of the Yean and Bosico Children v. The Dominican Republic, Series C, No. 130 (Merits), 8 September 2005, para. 260(3).
68 Ibid., para. 5.
70 CRC, Reservations and Declarations.
71 Committee on the Rights of the Child, “General Comment No. 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children’s Rights”, UN Doc. CRC/C/GC/16, 17 April 2013, para. 49.
72 ICCPR, Art. 4(2).
73 Human Rights Committee, above note 63, paras 15, 33–35.
access the minimum protections offered by the legal system of the territorial State.\textsuperscript{74} The right to birth registration is separate from other aspects of legal status such as nationality, in order that legal uncertainties, such as those arising from changes in territorial control, do not affect birth registration as a minimum guarantee.\textsuperscript{75} International organizations have prioritized birth certificates as the “preferred standard in legal identity” because birth certificates establish age, place of origin, name, and family relationships, all needed for issuing other identity documents.\textsuperscript{76}

The right to legal identity from birth is reinforced through other human rights treaties. The CRC’s wording is echoed in Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families\textsuperscript{77} and Article 18(2) of the Convention on the Rights of Persons with Disabilities,\textsuperscript{78} as well as in regional human rights treaties, as seen in Article 6 of the African Charter on the Rights and Welfare of the Child, Article 7 of the Covenant on the Rights of the Child in Islam, and Article 18 of the American Convention on Human Rights.\textsuperscript{79} Article 25(1)(b) of the International Convention for the Protection of All Persons from Enforced Disappearance adds an obligation to criminalize the falsification or destruction of identity documents of disappeared children, and Article 25(5) of that convention applies the Article 3(1) CRC principle – the best interests of the child – to the re-establishment of a child’s identity.\textsuperscript{80}

**Birth registration as a right under customary international human rights law**

The presence of identical birth registration provisions in many international and regional treaties, and in the historical practice of States which preceded these treaties,\textsuperscript{81} serves as evidence of the uniform content of the customary norm which they codify – that is, the obligation to ensure that children can exercise their right to birth registration, in accordance with the best interests of the

\textsuperscript{74} Ineta Ziemele, *Article 7: The Right to Birth Registration, Name and Nationality and the Right to Know and Be Cared For by Parents*, Martinus Nijhoff, Leiden, 2007, para. 43.
\textsuperscript{75} Ibid., paras 6, 44.
\textsuperscript{77} International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2220 UNTS 3, 18 December 1990 (entered into force 1 July 2003).
\textsuperscript{81} See H. L. Brumberg, D. Dozor and S. G. Golombek, above note 58.
child.\textsuperscript{82} There are currently no States in the world which do not have any birth registration system, although in a few countries birth registration is not mandatory.\textsuperscript{83} In industrialized countries and in many countries in Eastern Europe, Central Asia, Latin America and the Caribbean, birth registration rates are above 90\%.\textsuperscript{84} In countries where birth rates are lower, birth registration has been prioritized in achieving Sustainable Development Goal 16, “Promote peaceful and inclusive societies for sustainable development”, as one of the key indicators is “Proportion of children under 5 years of age whose births have been registered with a civil authority, by age”.\textsuperscript{85} The CRC is also cited as an important source for determining child-protective customary norms in conflict and directly incorporates IHL protections for children in Article 38.\textsuperscript{86} Furthermore, when human rights norms become customary law,\textsuperscript{87} it has been argued, “parallel norms in the Geneva Conventions with identical content” also become customary,\textsuperscript{88} thus reinforcing consistent protections across branches of international law. Though IHRL provisions apply concurrently during conflict,\textsuperscript{89} the law on IAC and the law of belligerent occupation also have specific provisions related to ensuring the identity of children in conflict situations.

### Birth registration under international humanitarian law

**Treaty law in international armed conflict**

Article 24 of GC IV confirms that children affected by IAC are entitled to special protection. The parties to the conflict are encouraged to issue “identity discs” for children under the age of 12, recognizing the vital importance of the identity of children during conflict.\textsuperscript{90}


\textsuperscript{84} UNICEF, above note 9, p. 14.

\textsuperscript{85} UN General Assembly, \textit{Transforming Our World: the 2030 Agenda for Sustainable Development}, UN Doc. A/RES/70/1, 21 October 2015.


\textsuperscript{87} For extensive discussion of the customary nature of the Geneva Conventions and certain human rights provisions, applied to States, see also T. Meron, above note 82.


\textsuperscript{89} Human Rights Committee, General Comment No. 31 [80], “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, para. 11.

\textsuperscript{90} GC IV, Art. 24. Identity is a key condition of other Geneva Convention protections – for example, Article 122 of Geneva Convention III on information bureaux, which requires records to be kept on the identification of all prisoners of war who are detained. Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).
The identity discs used should be made of non-inflammable material and should bear the surname, date of birth and address of the child and its father’s first name. These markings should either be engraved on the disc or inscribed in indelible ink. Further particulars might be useful, to reduce the danger of mistakes arising: finger prints, a photograph, an indication of the child’s blood group, Rhesus factor, etc.\(^91\)

The ICRC’s 1960 Commentary to the Geneva Conventions (1960 Commentary)\(^92\) notes that the age limit of 12 was recommended at the 17th International Conference of the Red Cross and Red Crescent because an older child would be able to state his or her identity independently.\(^93\) Although the obligation for material support applies only to unaccompanied and separated children, the recommendation to provide identity discs applies to all children, as it is “essential” to be able to identify all children during conflict; the 1960 Commentary recalls that after World War II, thousands of children were irreparably lost to their families due to lack of identification.\(^94\) According to the Commentary, some delegates were concerned that children would lose or exchange their discs, and others were concerned that wearing discs might facilitate persecution of targeted groups. Ultimately, States are free to determine the form of identification they deem best.\(^95\)

Examples of State practice are limited. Mexico, the United Kingdom and the United States all include Articles 24 and 50 of GC IV in their military manuals,\(^96\) while Ireland and Guinea have included provisions related to child identification in conflict in their domestic legislation, with Ireland incorporating the Geneva Conventions into domestic law and Guinea, though without citing


\(^{92}\) Ibid. The original ICRC commentaries were edited by Jean Pictet, based on the experience of World War II and on the negotiating history of these treaties; similarly, after the adoption of the Additional Protocols, ICRC lawyers drafted commentaries based on the unique mandate of the ICRC in IHL development. See Commentary on the APs, above note 19. The ICRC is now updating these commentaries; as of the time of writing of this article, the ICRC had issued new commentaries for Geneva Conventions I and II. See Jean-Marie Henckaerts, “Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-First Century”, International Review of the Red Cross, Vol. 94, No. 888, 2012. In 2017, a new scholarly commentary edited by Andrew Clapham, Paola Gaeta and Marco Sassòli was issued; however, its chapters related to the identity of children in conflict mainly cite the 1960 Commentary without going into further detail. See Heike Spieker, “Maintenance and Re-establishment of Family Links and Transmission of Information, Part II: Specific Issues and Regimes”, and Hans-Joachim Heintze and Charlotte Lulf, “Special Rules on Children”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), The 1949 Geneva Conventions: A Commentary, Oxford University Press, Oxford, 2015.

\(^{93}\) 1960 Commentary, above note 91, p. 189.

\(^{94}\) Ibid., p. 189.

\(^{95}\) Ibid., p. 189.

specific IHL provisions, stating that such obligations also apply in internal conflict.\textsuperscript{97} The United Kingdom issued identity discs for British children evacuated to Commonwealth countries during the Children’s Overseas Reception Scheme.\textsuperscript{98} There were informal efforts to issue identity discs for children in Australia during World War II\textsuperscript{99} and in the United States during the Cold War.\textsuperscript{100} Although there is no recent State practice, which could indicate that the norm has fallen into desuetude, conflict-affected States with pre-war birth registration systems are often able to implement birth registration systems in territory which they control, with the main impact limited to conflict-affected areas;\textsuperscript{101} this indicates that State capacity surpasses the limited requirements of black-letter law due to technological advances in information management. States without pre-existing birth registration systems may not even be able to issue identity discs, but efforts of the international community have focused on building capacity to administer modern civil registration systems rather than to issue identity discs, also a technological advancement not anticipated by GC IV.\textsuperscript{102}

Article 78(3) of Additional Protocol I to the Geneva Conventions (AP I) updated the identity disc to a paper-based photo identification card, for which the ICRC would maintain a registry.\textsuperscript{103} Article 78(3) of AP I proposes that the card should include not only the name, place and date of birth, parents’ names, and next of kin, but also nationality, language, health condition, and other details relevant for an evacuation scenario, as long as “it involves no risk of harm to the child”. The identity disc of GC IV Article 24 and identity card of AP I Article 78 (3) are \textit{lex lata} which illustrate how States may fulfil their obligations to identify children in the context of IAC, when materially possible.

\textit{Treaty law in belligerent occupation}

The law on belligerent occupation recommends that the Occupying Power should ensure identification of children through registration processes, in the context of detention, evacuation and family reunification. Article 136 of GC IV mandates a registration mechanism, the information bureau, to ensure that births of protected persons are recorded. Article 50 of GC IV states that a special section

\begin{itemize}
\item \textsuperscript{98} See, for example, Imperial War Museums, “Identity Disc, Children’s Overseas Reception Board”, available at: www.iwm.org.uk/collections/item/object/30082130.
\item \textsuperscript{100} Jordan Gass-Poore, “From Toys to Tags and Terror: Children as Young as Six were Forced to Prepare for Nuclear Armageddon during the Cold War and Had DOG TAGS so Their Parents Could Identify Their Bodies in the Event of a Nuclear Fallout”, \textit{Daily Mail}, 10 August 2017.
\item \textsuperscript{101} See UNICEF, above note 7, p. 7.
\item \textsuperscript{102} See, for example, UNICEF Ethiopia, “Italy Supports Vital Events Registration in Ethiopia”, 7 December 2016, available at: https://unicefethiopia.org/2016/12/08/italy-supports-vital-events-registration-in-ethiopia/.
\item \textsuperscript{103} Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978).
\end{itemize}
of the Article 136 bureau should be dedicated to identifying children and registering their family ties. The 1960 Commentary clarifies that Article 50, like Article 24, represents a strong recommendation for parties rather than an obligation.\textsuperscript{104} However, the Commentary pronounces the importance of birth registration in strong terms, describing the registry system as “essential to the legal life of the community” and stating that a system for identifying children is of “extreme importance”, particularly for “newly born infants”.\textsuperscript{105} The 1960 Commentary mentions respect for “the inviolability of the child’s personal status” as the legal principle related to the basic guarantees of Article 24 of GC IV.\textsuperscript{106} The Commentary proposes that registration should record, at a minimum, the place and date of birth, nationality, residence, and any physically identifying marks.\textsuperscript{107} The drafters of GC IV did not impose an absolute obligation to register births even in the context of belligerent occupation, due to the heterogeneity of conflict contexts. The 1960 Commentary clarifies that if registration facilities were destroyed, the Occupying Power would not be obligated to establish them anew; however, if the previous registration system were still functioning, the Occupying Power is bound not to interfere, and “to allow that system to continue and to facilitate its working”.\textsuperscript{108} If similar rules were applied in situations where insurgent groups control territory,\textsuperscript{109} they would also be bound to respect the operations of local registry offices, which is happening currently in several insurgent contexts, as we saw earlier in this article.

**Treaty law in non-international armed conflict**

GC IV and AP I protections only apply to IACs, in which the parties to the conflict are necessarily States. In NIACs between States and insurgent groups, only common Article 3 and AP II apply. Common Article 3 applies to “armed [conflicts] not of an international character”, which are not defined, but indicate that an intensity threshold must be reached in order to trigger application, while AP II, which applies only to its 169 States Parties, contains the further requirement that the Protocol only applies when an insurgent group exercises control over territory and has an adequate level of organization to carry out sustained military operations.\textsuperscript{110} The law on NIACs contains a limited obligation for insurgent groups to ensure recognition as a person under the law in the context of insurgent courts, with common Article 3(1)(d) prohibiting sentencing without “a regularly constituted court, affording all the judicial guarantees … recognized as indispensable”; Article 6 of AP II also categorically prohibits prosecutions

\textsuperscript{104} 1960 Commentary, above note 91, p. 287.
\textsuperscript{105} Ibid., p. 287.
\textsuperscript{106} Ibid., p. 287.
\textsuperscript{107} Ibid., p. 287.
\textsuperscript{108} Ibid., p. 287.
without due process and elaborates on the required elements to satisfy that obligation. These provisions represent an understanding by States that a minimum level of recognition as a person under the law should not be denied to persons under insurgent control.

In common Article 3, children are not mentioned specifically; in Article 4 (3) of AP II, the specificity of protections due to children is greatly reduced in comparison with Articles 77 and 78 of AP I. However, as AP II applies to both States and insurgent groups, the Commentary on the APs recalls that both “de jure and de facto [authorities] have the duty” to ensure protection of children. The 2017 Clapham et al. Commentary to the Geneva Conventions confirms contemporary views on child protection in NIAC, stating that “non-state actors are not free from obligations” and that “children as a distinct group are not without specific protection during NIACs”.

Although a separate article on child protection was originally part of an early draft of AP II during the negotiation process, in the final text only an abbreviated version was included as Article 4(3). The original draft of Article 4 (3)(b), as submitted by the ICRC, had proposed that “children should be identified in the conflict zone whenever possible and necessary, and information bureaux should be established” as in Article 24 of GC IV. Although delegations did not adopt these measures “from a fear that it might not be possible to apply them materially”, the Commentary on the APs states that Article 24 of GC IV remains the guidance for understanding what constitutes “all appropriate steps” to reunite families under Article 4(3) of AP II. The obligations of parties to a conflict towards children in Article 4(3) of AP II are education, family reunification, prohibition on underage recruitment, protection for child detainees, and evacuation. However, the list is not exhaustive and the phrasing added later, “care and aid they require”, is interpreted by the Commentary as warranting a case-by-case approach to assistance for children. Specific measures are neither specified nor prohibited in order to implement these obligations, but birth registration is relevant to all of them, since some proof of identity is required in order to practically organize education, family reunification and evacuation.

As many insurgent groups have shown that they do indeed have the capacity to register births in the conflict zone, and since Article 24 of GC IV remains the interpretive guide for those provisions according to the 1960 Commentary, Article 4(3) of AP II contains an implied power, or permission, for insurgent groups to issue identity discs or cards, when materially possible, in

111 Commentary on the APs, above note 19, para. 4546.
112 H. Spieker, above note 92, p. 116, paras 77, 78.
114 Commentary on the APs, above note 19, para. 4519.
116 Commentary on the APs, above note 19, para. 4553.
117 Ibid., para. 4545.
118 Ibid., para. 4548.
order to fulfil their obligations under Article 4(3) of AP II. This power does not rise to the level of an obligation, as it is not explicitly mentioned in the text, but such a power may be exercised for the purpose of implementing the explicit obligations. Similarly, if States refuse to recognize an insurgent-issued identity card which would prove a child’s identity for the purpose of family reunification and evacuation, or prove a child’s age to prevent underage recruitment, that would not be in keeping with the spirit and purpose of Article 4(3) of AP II, which obligates both parties to protect children.

**Customary international humanitarian law**

Like the CRC, the Geneva Conventions are almost universally ratified. The International Court of Justice (ICJ) has recognized provisions of the Geneva Conventions as customary law in a NIAC. The Eritrea-Ethiopia Claims Commission stated that provisions of the Geneva Conventions applied as custom to the then unrecognized entity of Eritrea. Although consensus is still in progress regarding the content of customary IHL, the ICRC has produced a study entitled *Customary International Humanitarian Law* (ICRC Customary Law Study) which compiles and analyzes State practice in order to identify customary rules of IHL and clarify their content. Although some States, notably the United States, have objected that the ICRC Customary Law Study may relate more to States’ adherence to treaty obligations rather than to creation of custom, it remains the most comprehensive study to date of customary IHL and includes relevant practice of States which have not ratified the Additional Protocols.

Since this article wishes to understand the law relevant to insurgents, this section will focus on custom that is applicable in NIAC. The ICRC Customary Law Study finds that, by custom, children affected by NIAC are entitled to special protection. The customary obligation to facilitate family reunification and to ensure access to humanitarian aid, and the customary prohibition on underage recruitment, can arguably be linked to a customary obligation to provide proof of identity from birth, as fulfilment of these obligations requires that the

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119 See above note 69 on CRC ratification. On Geneva Convention ratification, see T. Meron, above note 88, p. 348: “the Geneva Conventions are binding on even more States than the Charter”.
122 ICRC Customary Law Study, above note 86.
124 Ibid., Rule 135.
125 Ibid., Rule 105.
126 Ibid., Rule 55.
127 Ibid., Rule 136.
authority in question be able to reliably establish the age and identity of the civilian concerned, as argued above in relation to Article 4(3) of AP II. Rule 123 of the ICRC Customary Law Study, “Recording and Notification of Personal Details of Persons Deprived of Their Liberty”, describes the customary obligation in NIAC for the parties, including insurgent groups, to record the identities of civilian internees, including by recording births. If State practice indicates that insurgent groups are obligated by custom to record births in detention, tacitly acknowledging that they are the only entity physically able to record those births, it is not a great leap to assert that insurgent groups are permitted to register births of non-detained persons under their effective control when materially possible, since they are the only entity able to record those births too.

Birth registration in the context of internal displacement

Although the human rights law obligation to register births might seem to apply exclusively to States, the UN Guiding Principles on Internal Displacement (Guiding Principles) apply an obligation to issue birth documents to insurgent groups. The Guiding Principles were recognized by the UN General Assembly in 2005 as “an important international framework for the protection of internally displaced persons”, consistent with IHRL and IHL. The Principles explicitly include documentation as a component of recognition as a person before the law (Principle 20(1)), including birth certificates (Principle 20(2)). Authorities “shall issue” documents, “without imposing unreasonable conditions, such as requiring the return to one’s area of habitual residence” (Principle 20(2)). The Annotations to the Guiding Principles base this obligation in Article 8(2) of the CRC and Article 24(2) of the ICCPR, stating that Principle 20 attempts to fill a gap in protection, as Article 50(2) of GC IV and Articles 20 and 25 of the Refugee Convention, which regulate issuance of identity documents, do not apply to NIAC or to internal displacement respectively. Principle 2(1) explicitly directs its provisions to “all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction”, echoing the wording of common Article 3. Principle 20 thus reflects a degree of support by States for applying obligations related to document issuance to insurgent groups. Moreover, the adoption of a growing number of national laws and regional treaties based on the Guiding Principles in the twenty years since their

128 Ibid., Rule 123.
130 UNGA Res. 60/L.1, UN Doc. A/60/L.1, September 2005, para. 132.
131 See Guiding Principles, above note 129, Preamble, para. 1.
133 See R. R. Baxter, above note 59, p. 100, on how draft texts and other non-binding documents reflect views of States.
development lends support to the argument that the provisions in the Principles may be gradually hardening into binding international legal obligations.134

**Insurgent birth registration and State recognition**

**Treaty and customary law indicate that insurgent groups have the power to register births**

IHRL and IHL outline prohibitions and obligations on duty bearers, but do not always specify the exact mechanism by which these are to be fulfilled. They are “paradigmatic substantive rules on governance”, which presume procedures that make implementation of rights possible.135 Birth registration is a procedural right which secures the substantive right to recognition as a person under the law. Recognition under the law is a non-derogable right under IHRL, applicable in peace and conflict. In peacetime, States are obligated to ensure children’s right to recognition under the law through birth registration, and in armed conflict, States are recommended to register births whenever materially possible, including through alternative procedures such as identity discs or cards. Insurgents are obligated under IHL to respect recognition as a person under the law in the context of penal prosecution. Insurgent groups are not prohibited from identifying children under IHL, and several provisions of humanitarian law – notably Article 4(3) of AP II, which the Commentary on the APs states should be interpreted in light of Article 24 of GC IV, and Rule 123 of the ICRC Customary Law Study – strongly imply that insurgent groups have an inherent power to register births. Although not rising to the level of an obligation to register births since this obligation is not explicit in Article 4(3) of AP II, the power to register births will enable insurgents to fulfil their obligations under IHL to treat civilians humanely, take all measures to reunify families, prevent underage recruitment and facilitate safe evacuation, and are in harmony with the insurgent obligation to ensure recognition under the law in the operation of insurgent courts.

This section will consider theoretical bases explaining why insurgent groups which exercise effective control of territory may assume the power to register births in order to fulfil their obligations under IHL. The idea that insurgents possess obligations under international law may be justified by arguments based on their capacity, their effective sovereignty, domestic legislative jurisdiction, and obligations under customary international law. This article does not provide an exhaustive treatment of these theories, which are comprehensively addressed in the references cited in this section, but rather presents a range of reasonable options which support the general argument that insurgent groups

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may assume certain legal obligations. I will then counter the major objections to State recognition of insurgent birth registration, including the obligation of non-recognition, State sovereignty and lack of effective control, and the fear of inappropriately legitimizing insurgents. My counterarguments remind us that the obligation of non-recognition is not absolute, that multiple duty bearers may bear differing obligations to fulfil rights, and that engagement and legitimacy are inherently in tension in IHL.

**Insurgent group capacity gives rise to obligations**

Many insurgent groups have capacity far beyond common Article 3 standards, yet there are no detailed minimum standards for their treatment of the civilian population at large, leaving a legal vacuum.\(^\text{136}\) Capacity as a trigger for insurgent obligation is well represented in the academic literature;\(^\text{137}\) though not uncontroversial, many objections are based in scepticism that insurgent groups are materially able to implement these obligations,\(^\text{138}\) but in fact, as we have seen earlier in this article, they are. Arguing that insurgent groups have the right to establish courts under common Article 3, Somers states that they possess “the legal capacity to exercise the rights which flow from the obligations and prohibitions of IHL”.\(^\text{139}\) Capacity may also trigger IHRL obligations; for example, the International Criminal Tribunal for the former Yugoslavia’s Čelebići decision reinterprets the definition of torture in international IHRL to recognize the “official capacity” of insurgent groups, “in order for the prohibition to retain significance” in NIAC.\(^\text{140}\) Several scholars have suggested that capacity of insurgent groups should determine their level of obligation in a manner similar to the obligation of progressive fulfilment of rights in the International Covenant on Economic, Social and Cultural Rights.\(^\text{141}\) Capacity as a trigger for obligations

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138 For opposing views, see Lyndsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 194 (“Human rights obligations are binding on governments only …. Non-governmental parties are particularly unlikely to have the capacity to uphold certain rights”); L. Zegveld, above note 20, p. 152 (“Armed opposition groups rarely function as de facto governments”); M. Sassòli, above note 137, pp. 15–17.

139 J. Somer, above note 137, p. 658.


141 K. Fortin, above note 17, p. 165; A. Clapham, above note 17, p. 502, D. Murray, above note 17, Chap. 8.II.A.
is a similar concept to the organizational criteria of AP II, which triggers application of obligations under the Protocol and by extension should also trigger related customary norms.

**Insurgent groups’ de facto control and effective sovereignty give rise to obligations**

Combining the capacity-based approach\(^{142}\) with the needs of individual rights holders, Murray proposes a “context-dependent approach” which considers both insurgent group capacity and the needs of the affected population together. Murray calls the legal basis for this approach the “de facto control theory”, where exclusive territorial control and effectiveness trigger applicability of human rights obligations to prevent a legal vacuum.\(^ {143}\) The “de facto control theory” is similar to the principle of “effective sovereignty” over territory, by which the 1960 Commentary explains how insurgent groups are bound by common Article 3.\(^ {144}\) If an insurgent group controls territory, especially when the State is absent, a threshold for new powers and obligations has been reached. The *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* states that when insurgent groups maintain effective control over a territory, and when the State is not able to meet the needs of the civilian population, the insurgent group has a responsibility to meet those needs.\(^ {145}\) Special Rapporteurs have held that when insurgent groups exercise control over territory and political organization, these groups are bound by the “demands” and “expectations” of the international community to respect basic human rights.\(^ {146}\) Similarly, an analogous “agents of necessity” theory is based on Article 9 of the International Law Commission (ILC) Draft Articles on State Responsibility, whereby public governance by non-State actors is considered “an act of a State” in a situation of necessity when “state action is missing but required”, for example during loss of control of territory.\(^ {147}\)

Schoiswohl states that insurgents controlling territory have “an implied mandate” to fulfil administrative functions in the territory which they control\(^ {148}\)

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142 See references cited in above note 137.
143 D. Murray, above note 17, Chap. 5.1.
147 B. Rudolf, above note 135, p. 140; ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10, UN Doc A/56/10, November 2001, Art. 9: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”
and even “an inherent duty” to respect international human rights standards in fulfilling those functions. Schoiswohl goes even further to speculate that de facto authorities may be “entitled” to assume administrative functions and that States may “inhibit the exercise” of the human rights of individuals living in insurgent-held areas if they fail to recognize the legal effect of such insurgent acts. Gal similarly argues that the factual circumstance of effective territorial control by insurgent groups should extend the application of existing norms to ensure protection for the local population, for example by applying the law of occupation to such territories. Although insurgent groups do not have full legal personality, due to their control of territory they become “bearers of international obligations”. As with capacity/organization, control of territory again relates to the criteria for triggering application of AP II obligations, and by extension, related customary norms.

**Insurgent groups bound by treaty obligations of the territorial State**

The Human Rights Committee has stated that the rights set out in the ICCPR belong not to the State, but to the individuals living in the territory of the State: “once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them”. In the ICJ Genocide case, Judges Weeramantry and Shahabuddeen stated that the treaty rights should still apply to the population, since human rights treaties represent a commitment to international norms beyond the interests of a single State, and will be needed most in times of instability. The principle that rights continue to protect the local population after a transition in de facto authority is in harmony with the theory that insurgent groups are bound by the treaty obligations of the territorial State. Indeed, States have recognized that control of territory entails responsibility related to international treaty obligations. In the US Civil War, Great Britain asked the Confederate States to fulfil US treaty obligations, and in the Spanish Civil War, the Spanish government informed the Portuguese government that the Franco rebels were responsible for international treaty obligations in the area under their control. In more recent examples where territorial control has been linked with treaty obligations, the European Parliament has called upon the Transnistrian authorities to comply with

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149 Ibid., p. 77.
150 Ibid., p. 72.
151 T. Gal, above note 109, p. 27.
155 S. Sivakumaran, above note 17, p. 371.
156 K. Fortin, above note 17, p. 156.
European Court of Human Rights (ECtHR) rulings and Israel has stated before the UN Committee on Economic, Social and Cultural Rights that the Palestinian Council, though not a State, is not “preclude[d from] responsibility in the sphere of human rights protection” Devolution of treaty obligations explains how obligations under AP II apply to insurgent groups in States which have ratified the Protocol.

**Insurgent groups are bound by customary law**

Although not uncontested, direct application of customary norms as binding on insurgent groups is well represented in the jurisprudence of international tribunals, from the ICJ to the international criminal tribunals. Customary international law can only bind an insurgent group if the entity possesses international legal personality. Traditionally only States could be bound by international law, but in the 1949 ICJ Reparations Advisory Opinion, the ICJ recognized that the “needs of the community” influence the definition (the “nature”) of entities with international legal personality, making way for the concept of different types of legal subjects. Recognizing limited, functional legal personality of insurgent groups, permitting them to take on certain powers or obligations under customary law, can meet the needs of States by binding these groups to norms which States have created and recognized as well as meeting the needs of the wider community of individual rights holders by increasing protection. The Special Representative of the UN Secretary-General for Children in Armed conflict has called on insurgent groups to abide by

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160 For more about the legal personality of armed opposition groups, see V. Bilkova, above note 20; D. Murray, above note 17; M. Sassòli, above note 137.


“traditional norms governing the conduct of warfare”.163 The Darfur Commission of Inquiry stated that insurgent groups meeting criteria of control of territory and organization possess international legal personality and are bound by customary international law,164 and the Commission of Inquiry on Syria stated that the actions of insurgent groups “may be assessed by customary international legal principles”.165 This language by UN quasi-judicial bodies shows that there is increasing awareness of the urgent need to address insurgents exercising territorial control with relevant customary norms regulating their conduct, moving from a traditional State-centric understanding of legal obligation (or as Alston terms it, the “not-a-cat” approach to non-State actors166) to a more flexible concept recognizing different degrees of authority. Customary law applies regardless of treaty ratification; thus, in States which have not ratified AP II, relevant customary norms will apply to both States and insurgent groups.

States have an obligation to recognize insurgent birth registration

The obligation of non-recognition is not absolute

An obligation of non-recognition of unlawful exercise of authority does exist. Article 41(2) of the ILC Draft Articles on State Responsibility states that “no State shall recognize as lawful a situation created by a serious breach [of jus cogens]”, prohibiting, for example, recognition of the administration of a territory which was seized through a violation of the prohibition on the use of force.167 However, the obligation of non-recognition of official acts issued by an unrecognized entity is not an absolute obligation. The commentary on the draft articles clarifies that “the consequences of the obligation of non-recognition are not unqualified”, citing the ICJ Namibia Advisory Opinion, which judged that the obligatory invalidity of legal acts “cannot be extended to those acts, such as the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory”.168 Similar jurisprudence

166 P. Alston, above note 163, p. 3.
167 ILC, above note 147.
recognizing administrative acts of unrecognized entities is found in national court decisions\textsuperscript{169} and in cases of the ECtHR\textsuperscript{170} Therefore, Schoiswohl concludes that it is now “firmly established … in international jurisprudence that the validity [of legal acts of de facto regimes] derives directly from current international law and does not depend on the subjective will of States”\textsuperscript{171}

If the obligation of non-recognition of insurgent legal acts is not absolute, while the State remains the primary duty bearer under international law for public administration, the door is opened for insurgents to become a duty bearer for certain tasks of civil administration in territories which they control. The tests for which administrative acts can be recognized by States should be drawn from the ICJ’s Namibia Advisory Opinion, which notes that “non-recognition … should not result in depriving the people of any advantages derived from international cooperation”\textsuperscript{172} and that States should continue to respect “general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people”\textsuperscript{173}

Application of IHRL, extraterritorially and in situations where States are not in effective control of territory, can explain the concept of shared State and insurgent obligations by way of analogy. The ICJ and ECtHR have elaborated in their jurisprudence that human rights obligations are applicable both in areas not under effective control of a recognized State\textsuperscript{174} and in areas under a State’s effective control outside its own borders,\textsuperscript{175} with duty bearers having a different share of the obligation depending on their level of effective control. This principle is also present in decisions and general comments of the Human Rights Committee.\textsuperscript{176} The ECtHR has held that human rights, being indivisible, cannot be divided and tailored, as rights holders must be able to exercise the full spectrum of rights;\textsuperscript{177} however, States can be held responsible to the degree that they exercise effective control, with the obligation to fulfil human rights thus “divided and tailored” between duty bearers in order to ensure full protection of

\textsuperscript{171} M. Schoiswohl, above note 148, p. 76.
\textsuperscript{172} ICJ, Namibia, above note 168, para. 125.
\textsuperscript{173} Ibid., para. 121.
\textsuperscript{174} See, for example, ICJ, Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia), 1 April 2011; ECtHR, Loizidou, above note 170; ECtHR, Catan and Others v. Moldova and Russia, Appl. Nos 43370/04, 8252/05, 18454/06, 2012; ECtHR, Case of Sargsyan v. Azerbaijan, Appl. No. 40167/06, 16 June 2015; ECtHR, Ilascu and Others v. Moldova and Russia, Appl. No. 48787/99, 8 July 2004.
\textsuperscript{175} See, for example, ICJ, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004; ECtHR, Al-Saadoon and Mufdhi v. United Kingdom, Appl. No. 61498/08, 30 June 2009; ECtHR, Al-Škeini and Others v. United Kingdom, Appl. No. 55721/07, 7 July 2011.
\textsuperscript{177} ECtHR, Bankovic, Stojanovic, Stoimedovski, Joksimovic and Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom, Appl. No. 52207/99, 2001.
rights. If effective control is shared, so is the obligation. In this way, rights are upheld and the State retains its status as the primary duty bearer, though the implementation of that obligation takes a different form due to the loss of effective control—for example, in the form of financial support or diplomatic efforts rather than direct implementation. Regarding birth registration, the obligation should take the form of State recognition of insurgent birth registration.

State fears that recognition will inappropriately legitimize insurgent groups are misplaced

Unlike insurgent detention or facilitation of humanitarian assistance, birth registration by insurgent groups must uniquely be recognized as a legally valid act by a wide range of duty bearers in order to offer meaningful protection for rights holders. Without State recognition of insurgent birth registration, the power or capacity of insurgent groups to register births will not result in increased protection for children. Logically, there is no reason for insurgents to have the power to register births if that registration will not be recognized. The question of birth registration in insurgent-controlled areas is at the nexus of individual recognition as a person before the law, which is a non-derogable human right, and recognition of legal acts of non-State entities under international law, which is highly contested.

States are extremely wary of legal recognition of insurgent groups and therefore also avoid recognition of insurgent administrative or legal acts. One of the main characteristics of the law on NIAC as developed by States is its silence on recognition generally; for example, IHL does not authorize insurgent detention, but simply regulates applicable minimum protections, denying a clear legal basis for insurgent detention. More broadly, States at times refuse to acknowledge the very existence of conflict to avoid granting insurgents status under common Article 3, much less under AP II, as categorization of armed conflict gives armed groups a “curious sort of international recognition”. However, States’ reluctance to recognize insurgent status may be driven by political considerations in order to evade their obligations under IHL. As an example by analogy, in Hamdan v. Rumsfeld, the US Supreme Court found that the US government had violated common Article 3 by not extending the IHL protections of either civilian or prisoner-of-war status to Hamdan. While not directly related to legal acts of insurgents, the Hamdan case shows the lengths to which States may seek to evade their obligations. States may fear that recognizing insurgent birth registration means recognizing de facto control of the population.

178 K. Fortin, above note 17, p. 160, citing ECtHR, Al-Skeini, above note 175.
180 Z. Dabone, above note 17, pp. 415–418.
181 A. Clapham, above note 17, p. 293.
182 Ibid., p. 510.
183 Ibid., p. 496.
as registration provides feedback on population numbers. However, States may also unjustly withhold recognition in order to manipulate demographic statistics, since “exclusion [from birth registration] is an effective way of deliberately massaging population figures.” Recognizing State recalcitrance, the law on NIAC imposes obligations on parties to a conflict regardless of recognition of status.

Furthermore, States have not always refused to recognize the validity of insurgent birth registration. The legal effect of insurgent-issued civil documents was uncontroversial in the American Civil War, with US Supreme Court cases confirming the validity of insurgent-issued civil acts, even stating: “No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects [i.e. birth and marriage certificates].” In contemporary examples, insurgent birth registration documents and databases have been recognized for the purpose of allowing parents and children to exercise rights, with the Russian Federation accepting Chechen birth certificates as proof of eligibility for child welfare benefits in 2001, and the Angolan government recognizing information from the insurgent-run birth registration system to reunite separated children with their families after the 2002 peace agreement.

Recognition of insurgent birth registration requires tackling head-on the question: at what point do the humanitarian goals of IHL outweigh concerns that States have about inappropriately legitimizing insurgent groups? Any engagement with insurgent groups, including recognition of their legal acts, may result in increased legitimacy, but the tension between the benefit of engaging with insurgent groups and the risk of inappropriately legitimizing them is already inherent in common Article 3, which acknowledges insurgent groups as parties to a conflict but does not entitle them to legal status. States came to a consensus when they adopted common Article 3: the increase in legitimacy gained by insurgent groups as parties to a conflict is far outweighed by the protections resulting from engagement. The UN Secretary-General, in his 2017 report on protection of civilians in armed conflict, stated: “The focus on [insurgent] recognition and legitimacy is problematic, in that it detracts from the more serious issue of the consequences for civilians when engagement does not take place.”

185 UNICEF, above note 7, p. 11.
186 A. Clapham, above note 17, p. 493.
190 UNICEF, above note 7, p. 32.
191 S. Sivakumaran, above note 18, p. 512.
The *reductio ad absurdum* of legitimacy concerns is to hope that insurgent groups will violate IHL norms in order to decrease their legitimacy.\(^{193}\) Although the "legitimizing effect" is recognized as an incentive for refusing to engage with insurgent groups, the potential for legitimacy is also a powerful motivator.\(^{194}\) Recognizing the legal effect of insurgent birth registration does not put insurgents on the same level as States, but it increases protections for the civilian population under their control.\(^{195}\) Parties to a conflict do not have equal legal status under IHL; rather, their equality lies in their "equal rights and obligations flowing from the international law norms regulating the subject matter of IHL".\(^{196}\) States have additional rights, such as the right to grant nationality, accede to treaties and participate in multilateral bodies, as well as additional obligations, including the full range of obligations under IHRL and the UN Charter. However, under IHL, both parties have equal rights and obligations with regard to conduct of hostilities and humane treatment of non-combatants.

**Conclusion**

Insurgent groups who meet the criteria of Article 1(1) of AP II have the obligation to reunite families, prevent underage recruitment and facilitate evacuation under Article 4(3) of AP II, and similar customary norms apply to insurgents in States which have not ratified the Protocol. Insurgent groups are required to register births of detainees and to ensure some form of recognition as a person under the law in the context of insurgent prosecution. These obligations imply an inherent power or capacity to register births, since birth registration is instrumental in effectively fulfilling all of these obligations, though not rising to an obligation on insurgent groups to register births, since this obligation is not explicit in Article 4 (3) of AP II. According to the Commentary on the APs, the delegates who drafted AP II believed that insurgent groups would not have the capacity to register births. However, since they do in fact have that capacity and since the law on NIAC does not prohibit insurgent groups from registering births, I argue that they are permitted to do so in order to fulfil their IHL obligations. There are several legal theories which explain how both treaty and customary obligations may be binding on insurgent groups.


\(^{195}\) A. Roberts and S. Sivakumaran, above note 193, p. 133.

\(^{196}\) J. Somer, above note 137, p. 663.
States have the obligation to register births under IHRL, but under the law on IAC and the law of belligerent occupation, they are not obligated to do so; Articles 24 and 50 of GC IV are not obligatory according to the 1960 Commentary. However, States are strongly encouraged to register all births of populations under their control whenever materially possible, given the grave consequences for children of not doing so. The reasons given in the Commentary for not absolutely requiring States to register births in conflict are material conditions and State lack of capacity to do so in some intense conflict contexts. Though the law on NIAC does not specifically mention birth registration, I argue that States are obligated to recognize insurgent birth registration where insurgents are registering births, in order to fulfill State obligations under Article 4(3) of AP II (family reunification, evacuation and prevention of underage recruitment), and in accordance with the non-derogable human rights obligation to ensure the right to recognition as a person under the law. Furthermore, the law on NIAC does not prohibit State recognition of insurgent birth registration. If insurgents are registering births, and State objection to recognition is merely political and is not justified by States’ material incapacity to do so, then non-recognition of insurgent birth registration is not consistent with the object and purpose of the AP II Article 4(3) obligations, nor with the non-derogable obligation to ensure recognition as a person under the law. Recognition of insurgent birth registration is a matter of law, while the specific administrative mechanism for recognition and type of registration method are matters of policy that are left to States to decide.

Many insurgent groups register births in territories not under State control, though this registration is rarely recognized by States. However, lack of clarity regarding the legal effect of insurgent birth registration outside the area of insurgent control has resulted in a legal vacuum, with harsh consequences for children and families. The main arguments against recognition of insurgent birth registration do not stand, because the obligation of non-recognition is not absolute, recognition does not necessarily confer legal status, and practice of international bodies has shown that the way forward in balancing engagement and legitimacy lies in prioritizing the rights and protection of the local population.

Ultimately, insurgent groups are already registering births whether or not States choose to engage with such registration. However, greater engagement between States and insurgent groups on IHL norms, such as working together to register children for the purpose of reunification or evacuation, may offer opportunities to encourage compliance in other areas of IHL. Limiting the scope of insurgent groups’ powers to basic functions which are needed to fulfil IHL obligations, such as registering births, reduces aspirations of political legitimacy, and simply regulates the ongoing actions of insurgent groups.

197 Ibid., pp. 681, 690.
198 K. Fortin, above note 17, p. 170.
The Policy on Children of the ICC Office of the Prosecutor: Toward greater accountability for crimes against and affecting children

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Abstract
The Policy on Children published by the International Criminal Court (ICC) Office of the Prosecutor in 2016 represents a significant step toward accountability for harms to children in armed conflict and similar situations of extreme violence. This article describes the process that led to the Policy and outlines the Policy’s contents. It then surveys relevant ICC practice and related developments, concluding that despite some salutary efforts, much remains to be done to recognize, prevent and punish the spectrum of conflicted-related crimes against or affecting children.

* As Special Adviser, the author assisted in the research, drafting and implementation of the Policy discussed in this article; however, the article itself is written solely in her personal capacity.
Children have become the unwilling emblems of armed conflict and extreme violence. Searing proofs of this claim surface almost daily in news stories, aid workers’ alerts and rights groups’ dispatches. Particularly unforgettable was the 2015 photograph of a war refugee whose 3-year-old body had washed up, face down, on a Turkish beach – yet this example was by no means unique. The innumerable images that appeared in succeeding years included toddlers in trucks bound for camps, a 5-year-old pulled from Aleppo rubble, a small South Sudanese soldier wedged in line between much taller adult infantrymen, and a 7-seven-year old reduced to skin and bones on account of Yemen’s conflict-fuelled famine. Putting to one side the ethical concerns surrounding the publication of such images, these depictions underscore the need to continue to press for strategies both to combat harms against children and to bring the persons responsible to justice.

Several ongoing initiatives merit particular attention. The United Nations (UN) Office of the Special Representative of the Secretary-General for Children and Armed Conflict monitors what are known as the Six Grave Violations. Derived from the Special Representative’s analysis of UN Security Council resolutions as well as international humanitarian, human rights and criminal law, they are: recruitment and use of children; killing or maiming of children; sexual violence against children; attacks against schools or hospitals; abduction of children; and denial of humanitarian access. UNICEF and many other UN entities complement the Special Representative’s efforts. Meanwhile, groups forming the Global Coalition to Protect Education from Attack have secured 101

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3 See, for example, Nancy Lipkin Stein and Alison Dundes Renteln (eds), Images and Human Rights: Local and Global Perspectives, Cambridge Scholars Publishing, Newcastle upon Tyne, 2017; Heide Fehrenbach and Davide Rodogno, “‘A Horrific Photo of a Drowned Syrian Child’: Humanitarian Photography and NGO Media Strategies in Historical Perspective”, International Review of the Red Cross, Vol. 97, No. 900, 2016. Discussion of this important issue is beyond the scope of this article.

States’ endorsements of a Safe Schools Declaration.\(^5\) Eighty-nine States have endorsed the Vancouver Principles on Peacekeeping and the Prevention of the Recruitment and Use of Child Soldiers.\(^6\) These and other soft-law instruments amplify obligations that States assumed when they joined the 1989 Convention on the Rights of the Child (CRC) or a handful of child-related treaties compiled in the International Committee of the Red Cross (ICRC) database.\(^7\)

Taken together, such initiatives indicate normative support for child protection, but in practical terms, they lack teeth. Some depend largely on endorsers’ good faith, or on whatever deterrence may lie in the power to name and shame wrongdoers. Others simply hope that each State Party will incorporate articulated norms into its internal law enforcement system. The presence of an international jurisdiction that is able, and willing, to prosecute conflict-linked crimes against children is thus essential to the struggle against the commission of such crimes.

Tribunals that have served this role in recent decades include the Special Court for Sierra Leone (SCSL), which enunciated the customary international law status of the ban on child-soldiering and subsequently imprisoned a former head of State for violating that ban,\(^8\) and the International Criminal Court (ICC), whose first case centred entirely on a militia commander’s culpability for the war crimes of conscripting, enlisting and using in hostilities children under the age of 15.\(^9\) Although they broke ground by calling leaders to account for child combatancy, these cases failed to identify, prosecute or punish the full range of international crimes that children endure amid armed conflict and similar situations of extreme violence.

Following her election as the ICC’s second prosecutor, Fatou Bensouda announced plans for a broader approach in an important 2012 speech.

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\(^{5}\) See the Global Coalition to Protect Education from Attack website, available at: http://protectingeducation.org/ (including the text of the 2014 declaration, formally named the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict, as well as a list of endorsers). See also Ashley Ferrelli, “Military Use of Educational Facilities during Armed Conflict: An Evaluation of the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict as an Effective Solution”, Georgia Journal of International and Comparative Law, Vol. 44, No. 2, 2016.

\(^{6}\) See the Vancouver Principles, available at: www.vancouverprinciples.com (including the text of the principles and a list of endorsers).


\(^{9}\) ICC, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, 1 December 2014. Unless otherwise noted, all ICC documents cited in this article are available at: www.icc-cpi.int. For a discussion of Lubanga, see, for example, Diane Marie Amann, “Children and the First Verdict of the International Criminal Court”, Washington University Global Studies Law Review, Vol. 12, No. 3, 2013.
“Our focus”, she said, “should shift from ‘children with arms’ to ‘children who are affected by the arms’ in the context of the crime of enlisting and conscripting child soldiers.” To that end, Bensouda appointed the Prosecutor’s first Special Adviser on Children in and Affected by Armed Conflict, consistent with a mandate in the ICC’s Rome Statute; listed, as one of her office’s six strategic goals, “particular attention to … crimes against children”; and initiated work on a policy paper on the subject. The result was the ICC Office of the Prosecutor’s Policy on Children, published in 2016 in English, and in Arabic, French, Spanish and Swahili translations.

This article focuses on that Policy. It first lays out the Policy’s contents, then discusses relevant ICC practice and related developments. The article concludes that although the Policy is an important component of ongoing efforts, much remains to be done to recognize, prevent and punish the spectrum of conflicted-related crimes against children.

The ICC Office of the Prosecutor’s Policy on Children

The Policy on Children emerged out of research, drafting and editing undertaken by a working group composed of staff in various Office of the Prosecutor sub-units, along with the Special Adviser on Children in and Affected by Armed Conflict. Supplementing the working group’s internal process were numerous external meetings: gatherings of academic experts and practitioners at Leiden Law School in the Netherlands and at the Dean Rusk International Law Center, University of

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10 Fatou Bensouda, “The Incidence of the Female Child Soldier and the International Criminal Court”, keynote speech before the Eng Aja Eze Foundation in New York, 4 June 2012, available at: http://cpcjalliance.org/international-day-african-child/. Notably, that same year saw the issuance by the Extraordinary Chambers in the Courts of Cambodia (ECCC) of a judgment that did discuss a range of children’s experiences – a fact seldom remarked upon, perhaps because the counts of conviction were not explicitly framed as crimes against or affecting children. See ECCC, Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Appeal Judgment, 3 February 2012, available at: www.eccc.gov.kh/en/


13 ICC Office of the Prosecutor, Policy on Children, November 2016 (Policy on Children). This article cites only the English version; all five versions are available at: www.icc-cpi.int/Pages/item.aspx?name=161115-otp-policy-children. Published as a paperback booklet, this document was the sixth in a series that the Office had issued. Preceding it were “policy papers” dating to 2007 and covering issues including victims’ participation, preliminary examinations and case selection. See ICC Office of the Prosecutor, “Policies and Strategies”, available at: www.icc-cpi.int/about/otp/Pages/otp-policies.aspx; see also note 18 below. The Office has announced work on at least one other such policy initiative. See ICC, “The ICC Office of the Prosecutor and UNESCO Sign Letter of Intent to Strengthen Cooperation on the Protection of Cultural Heritage”, 6 November 2017. For an analysis of papers that predated the Policy on Children, see Lovisa Bådagård and Mark Klamberg, “The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court”, Georgetown Journal of International Law, Vol. 48, No. 3, 2017.
Georgia School of Law, in the United States; a consultation at the ICC premises with a global array of representatives of civil society organizations; and dialogues, in Canada, Colombia, the Democratic Republic of the Congo, the Netherlands, Qatar, Sierra Leone and Somalia, with young people, many of whom had lived in conflict zones.14 The Policy’s public launch took place in November 2016, at an event in The Hague that featured speeches by Prosecutor Bensouda, Zeid Ra’ad Al Hussein, then the UN High Commissioner for Human Rights, and General Roméo Dallaire, founder of the Roméo Dallaire Child Soldiers Initiative.15

Published in booklet form and spanning forty-four dense pages, the Policy on Children highlighted the concern for children that is apparent in the Rome Statute’s preamble, enumeration of crimes and other provisions, and in instruments like the ICC Rules of Procedure and Evidence and Elements of Crimes.16 Observing “that most crimes under the Statute affect children in various ways”, the Policy promised “particular attention” by the Office of the Prosecutor “both to the commission of crimes against or affecting children, and to its own interaction with children”.17 Its elaboration of that promise adhered to the format that the Office had adopted in its Policy Paper on Sexual and Gender-Based Crimes, issued two years earlier.18 An Executive Summary thus opened the Policy on Children, preceding chapters entitled “Introduction”, “General Policy” and “The Regulatory Framework”. Together, those three chapters synthesized legal instruments, doctrines and jurisprudence pertaining to harms that the Rome Statute authorizes the ICC to prosecute and punish—harms referred to throughout the Policy on Children as “crimes against or affecting children”. Then followed a final part of a more operational nature, composed of six chapters on “Preliminary Examinations”, “Investigations”, “Prosecutions”, “Cooperation and External Relations”, “Institutional Development” and “Implementation”. Each part will be discussed in turn.

**Legal synthesis**

Embedded in the Policy on Children is a synthesis of international and regional instruments, jurisprudence, advocacy reports and academic literature touching on children and armed conflict. These writings were relatively unconnected at the time that work on the Policy began. Broad-based treatment of the ICC and children appeared in commentaries issued soon after the 1998 adoption of the

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14 Policy on Children, above note 13, pp. 10–11, paras 13–14 and n. 22. ICC Office of the Prosecutor staffers leading this process were Shamila Batohi and Yayoi Yamaguchi, then the senior and associate legal advisers respectively, and Gloria Atiba Davies, head of the Gender and Children Unit.


16 Policy on Children, above note 13, pp. 6–8, paras 1–4.

17 Ibid., p. 11, para. 15, and p. 12, para. 17.

18 ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014.
Rome Statute, yet attention to the subject had narrowed somewhat over time. The phenomenon of child soldiering did garner extensive attention in international humanitarian, human rights and criminal law circles, but almost to the exclusion of the many other ways that armed conflict and extreme violence affect children. Sexual violence was also discussed, as was treatment of victims and witnesses; not infrequently, however, the needs of children merged into those of adults. Child rights literature, meanwhile, tended to centre on compliance within national systems. Work on the Policy thus entailed, and helped to generate, new and comprehensive research.

As an initial matter, development of the Policy required determining the meaning of “child”. The Rome Statute does not define the word, and while it authorizes ICC jurisdiction only if a person was at least 18 at the time of the alleged crime, its child soldiering provisions apply only if the child recruited or used by an armed force is under 15. The Policy specified that “children” included “persons who have not yet attained the age of eighteen”; in so doing, it pointed not only to the Statute’s prosecution threshold, but also to the understanding that, in the prohibition of forcible transfer as genocide, the term “children” connotes any person under the age of 18. The Policy construed the recruitment-or-use age of under 15 not as a definition but rather as a statutory element that confers ICC jurisdiction over a specific war crime.

Having established what it means by “child”, the Policy embraced what it labelled “a child-sensitive approach”, to be applied in all the work of the Office of the Prosecutor, and grounded in the CRC:

This approach appreciates the child as an individual person and recognises that, in a given context, a child may be vulnerable, capable, or both. The child-sensitive approach requires staff to take into account these vulnerabilities and capabilities. This approach is based on respect for children’s rights and is...
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guided by the general principles of the 1989 Convention on the Rights of the Child: non-discrimination; the best interests of the child; the right to life, survival and development; and the right to express one’s views and have them considered.24

The use of “child-sensitive” rather than, say, “child-centred” reflected the balancing of children’s and many others’ interests that is inherent in the work of a prosecutor’s office; indeed, the term “child-sensitive” was derived from 2005 UN guidelines on treatment of children who appear as victims or witnesses within a legal system.25

The Policy’s explanation of the child-sensitive approach, moreover, effectively rejected a characterization often heard in discourses of international criminal law, international human rights law and international humanitarian law. To be specific, it moved away from what Professor Mark Drumbl has dubbed the notion of the child as “faultless passive victim”.26 “Children may be victims”, the Policy observed, but it then added that “they may be involved in the commission of crimes; they may witness the commission of crimes against others, including members of their own families; or they may be unable to receive an education or medical care due to the destruction of schools or hospitals”.27 Furthermore, “children may be impacted differently by crimes based on their sex, gender, or other status or identities”, the Policy said.28 These observations signalled a recognition, common in contemporary international child law, that children, like all human beings, are rights-bearing, multifaceted individuals and at the same time members of multigenerational communities:

Children, by the very fact of their youth, are frequently more vulnerable than other persons; at certain ages and in certain circumstances, they are dependent on others. Notwithstanding any vulnerability and dependence, children possess and are continuously developing their own capacities—capacities to act, to choose and to participate in activities and decisions that affect them. The Office will remain mindful, in all aspects of its work, of the evolving capacities of the child.29

The commitment to engage with children according to their capacities informed an integral component of the child-sensitive approach; to be specific, the two-step inquiry posited the following as a means to arrive at decisions in the best interests of the child:

24 Policy on Children, above note 13, p. 13, para. 22.
27 Policy on Children, above note 13, p. 12, para. 17.
28 Ibid., p. 12, para. 18.
29 Ibid., p. 14, para. 25. See also ibid., p. 7, para. 3 (describing generational concerns), and p. 14, para. 24 (listing child rights). See also CRC, Art. 5 (referring to children’s evolving capacities).
First, “assess the best interests of the child”, considering “the views of the child and of other relevant persons, and the child rights at issue” – plus “the child’s specific situation”, which may include pertinent, and likely intersecting, factors, such as age and maturity, ability or disability, gender or sexuality, status in an underrepresented group, and living circumstances.\(^\text{30}\)

Second, examine whether any other factors “require a balancing of various interests”; such factors may include “legal or operational issues”, as well as conflicts between the interests of the child and those of parents or other parties to the decision.\(^\text{31}\)

After setting out this synthetic framework for considering issues related to children, the Policy next identified crimes of special concern.

**Enumeration of crimes against or affecting children**

Almost all crimes within the ICC’s jurisdiction affect children, the Policy on Children reiterated; focus was placed on crimes in the Rome Statute that expressly refer to children, and on several other “crimes directed specifically against children or those that disproportionately affect them”.\(^\text{32}\) The Policy thus emphasized the following crimes against or affecting children:

- conscription, enlistment and use of children under the age of 15 years to participate actively in hostilities, as war crimes in violation of the Rome Statute, Articles 8(2)(b)(xxvi) and 8(2)(e)(vii);
- forcible transfer of children and prevention of birth, as acts of genocide in violation of the Rome Statute, Articles 6(d) and 6(e);
- trafficking of children as a form of enslavement constituting a crime against humanity in violation of Rome Statute, Articles 7(1)(c) and 7(2)(c);
- attacks on buildings dedicated to education and health care, as war crimes in violation of the Rome Statute, Articles 7(1)(c) and 7(2)(c);
- torture and related war crimes and crimes against humanity, in violation of the Rome Statute, Articles 7(1)(f), 7(1)(k), 8(2)(a)(ii), 8(2)(a)(iii) and 8(2)(c)(ii);
- persecution as a crime against humanity, in violation of the Rome Statute, Article 7(1)(h); and
- sexual and gender-based violence as war crimes and crimes against humanity, in violation of the Rome Statute, Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi).\(^\text{33}\)

Overlaps between the Policy’s Rome Statute listing and the UN’s Six Grave Violations are evident. Both enumerations evince concern, for example, about child soldiers, attacks on schools or hospitals, and sexual violence. To be precise, the Policy speaks not of “sexual violence” but rather of “sexual and gender-based crimes”, a phrasing that pays heed to the fact that boys as well as girls may be

\(^{30}\) Policy on Children, above note 13, p. 16, paras 29–31; see also ibid., pp. 18–19, para. 37.

\(^{31}\) Ibid., p. 16, para. 29, and p. 17, para. 32.

\(^{32}\) Ibid., p. 19, para. 38; see also text accompanying above note 17.

victims of crimes “because of their sex and/or socially constructed gender roles”, and that such crimes “are not always manifested as a form of sexual violence”.34 One notable addition in the Policy’s listing of crimes against or affecting children is persecution; the Policy makes clear that “acts targeting children on the basis of age or birth may be charged as persecution on ‘other grounds’”, and that “children may also be persecuted on intersecting grounds, such as ethnicity, religion and gender”.35 Another addition is torture, which is excluded from the UN list albeit sometimes cited by UN officials as an aspect of listed violations like sexual violence.36 The Policy further adds child trafficking and forcible transfer of children, provided that those acts meet the requisite contextual elements of a crime against humanity or genocide. The inclusion of these two categories of international crimes underlines the Policy’s wider scope. As a formal matter, the UN Special Representative’s mandate is limited to armed conflict.37 But the Rome Statute, upon which the Policy is founded, additionally confers jurisdiction over widespread or systematic attacks against civilian populations, in the case of crimes against humanity, and even over peacetime, in the case of genocide.38

Operational aspects

The legal framework concerning crimes against or affecting children having been set out, the balance of the Policy considered operational aspects in all the activities of the Office of the Prosecutor. These included preliminary examination, investigation, charging and prosecutions, cooperation and external relations, institutional development and, finally, implementation. Envisaged regarding the latter aspects were more training, greater cooperation with partners and further dissemination of the Policy, “in a format that children can understand”.39 Animating this part was the child-sensitive approach, amplified by the Office’s commitment to “strive to ensure that its activities do no harm to the children with whom it interacts, particularly victims and witnesses”.40 In fulfilment of earlier statements on children’s capacities, the Policy stated that “children are capable of giving credible evidence”, and furthermore, that “the views of children and their parents or caregivers on matters affecting them”

34 Ibid., p. 12, para. 19 and n. 28 (citing ICC Office of the Prosecutor, above note 18, p. 12, para. 16).
35 Ibid., p. 24, para. 51 (quoting Rome Statute, Art. 7(1)(h)).
36 See Statement by Virginia Gamba, Special Representative of the Secretary-General for Children and Armed Conflict, “Briefing to the Security Council on the Situation of Children in Syria (Humanitarian)”, 27 July 2018, available at: https://childrenandarmedconflict.un.org/srsgs-briefing-to-the-security-council-on-the-situation-of-children-in-syria/ (stating with regard to the ongoing civil war in Syria that “[r]ape has been used as a means of torture, especially while children were deprived of their liberty”).
38 See Rome Statute, Art. 6 (setting out as the sole chapeau element “intent to destroy, in whole or in part, a national, ethnic, racial or religious group”), Art. 7(1) (detailing the contextual elements of crimes against humanity). “Peacetime” is used advisedly, given the violent essence of genocide.
39 Policy on Children, above note 13, p. 43, para. 116; and see ibid., pp. 41–44, paras 108–125.
40 Ibid., p. 17, para. 33.
would be sought out and considered. Detailed procedures, including video and audio recording, were specified for staff contacts with children.

Of particular note was the Policy’s pledge to “make full use of the regulatory framework to address the various ways that children are affected by crimes within the jurisdiction of the Court”, with the aim of “strengthening the accountability for such crimes, thereby contributing to their prevention, and also to the development of jurisprudence”. Naming again the Rome Statute crimes against or affecting children that it already had listed, the Policy stated: “In order to capture the totality of the violence perpetrated against children, and to highlight the unique experiences of children, the Office will consider appropriate charges wherever the evidence permits.” This consideration was to extend to the end of trial; should the accused be convicted, “crimes against or affecting children should be seen as particularly grave for the purpose of sentencing … taking into account the immediate and long-term harms caused to children, their families and communities”. In sum, the Policy’s commitment to a full accounting for crimes against or affecting children echoed Prosecutor Bensouda’s 2012 agenda-setting speech, and furthermore established a framework for ICC practice.

**ICC practice and related developments**

The agenda of broadening the ICC’s treatment of children’s experiences beyond those related to recruitment or use in armed groups has surfaced not only in strategic documents like the Policy on Children, but also in ICC practice.

Following the surrender in 2013 of a long-time fugitive Congolese rebel leader, the ICC Office of the Prosecutor amended the original indictment to include war crimes charges that the accused was responsible not only for the recruitment and use of children, but also for acts of rape and sexual slavery, committed by subordinates in his militia against children under 15 in the same militia. An interlocutory judgment by the ICC Appeals Chamber sustained the new charges, setting a precedent that promises to expand the scope of protection against sexual and gender-based crimes not only for underaged children but also for youths and adults victimized by or within armed groups with which they have as perpetrators.12

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12 See *ibid.*, pp. 28–33, paras 63–82, and pp. 35–37, paras. 89–97.
13 *Ibid.*, pp. 33–34, para. 84; and see *ibid.*, p. 38, para. 100 (detailing how this approach affects the presentation of evidence).
16 See above note 10 and accompanying text.
17 See ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda (ICC Pre-Trial Chamber II), 9 June 2014, paras 36, 74.
become associated. A Trial Chamber convicted the accused of those and other charges in July 2019, and subsequently sentenced him to thirty years’ imprisonment. That same month, an Appeals Chamber confirmed a $10 million reparations award against another Congolese militia leader, the defendant in the ICC’s first case, for hundreds of victims, identified as “children under the age of fifteen years who were conscripted or enlisted into the FPLC, or used to participate actively in hostilities, as well as to indirect victims—including family members of those children”.

Meanwhile, the victimization in Myanmar of Rohingya children and their families formed the core of a new ICC investigation, authorized in November 2019 following a request by the prosecutor. Recounting the allegations on which it had based its authorization decision, the Pre-Trial Chamber wrote with respect to Myanmar: “Victims’ representations also mention that children were often targeted and killed, including small children who were thrown into water or fire to die.”

Another aspect of the 2016 Policy on Children—the fact that amid armed conflict, children “may be involved in the commission of crimes”—played out in the three-year trial on multiple charges, including several crimes against or affecting children, of a Ugandan commander who said he had been abducted into an armed group at age 14. In her opening statement, Prosecutor Bensouda maintained that presumed status as a “perpetrator-victim” did not bar prosecution of the accused: “[H]aving suffered victimization in the past is not a justification, nor an excuse to victimise others”, she said, adding that her office aimed to “prove what he did, what he said, and the impact of those deeds on his many victims.”

The evidentiary phase concluded in December 2019, and the case now awaits a verdict.


49 ICC, Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2359, Judgment (Trial Chamber VI), 8 July 2019; ICC, Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2442, Sentencing Judgment (Trial Chamber VI), 7 November 2019. At the time of this writing, both judgments are on appeal.

50 ICC, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-3466-Red, Judgment on the Appeals against Trial Chamber II’s Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo Is Liable (Appeals Chamber), 18 July 2019, para. 37. On Lubanga, see also above note 9 and accompanying text.

51 ICC, Case No. ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar (Pre-Trial Chamber III), 4 November 2019, para. 29.

52 Policy on Children, above note 13, p. 12, para. 17, quoted text accompanying above note 27.

A persistent obstacle to securing accountability for crimes against and affecting children is related to the tendency to focus prosecutions on high-ranking officials. Several cases before the ICC have turned on whether judges concluded that the accused himself bore responsibility pursuant to one of the modes of individual criminal liability set out in the Rome Statute. A number of such prosecutions resulted in acquittal, at either the appellate or trial level. In one case, judges deemed the presence of armed and underaged child combatants to have been widespread, yet entered judgments of acquittal on the grounds that there was insufficient proof of a link between their presence and the culpability of the accused.\(^{54}\) In another, a military commander was acquitted in an appellate judgment that rejected a Trial Chamber’s conviction based on the doctrine of command responsibility.\(^{55}\) At times too, failures of proof have been attributed to concerns regarding reliability of evidence, particularly regarding younger witnesses; that fact presents a particular challenge for the implementation of a more comprehensive approach to prosecution of crimes against or affecting children.

Especially challenging, it must be said, is a change in geopolitical appetite for international criminal accountability. An example may be found in the narrative of the prosecutor’s 2017 request to open an investigation into conduct in Afghanistan, an ICC State Party, by members of armed groups like the Taliban and of the armed forces of Afghanistan and the United States.\(^{56}\) Among the actions alleged, in addition to the criminal recruitment of children, were attacks on schools and hospitals, gendered violence against girls and crimes against child detainees.\(^{57}\) While the request was pending, in April 2019, the United States retaliated against the inquiry by revoking the prosecutor’s US visa; within weeks, a Pre-Trial Chamber rejected the request based on a novel application of the Rome Statute’s interests-of-justice provision.\(^{58}\) Pending at the time of this writing is an appellate review of that rejection—which, if sustained, would have the effect of precluding an ICC prosecution for harms that children have suffered during the protracted conflict in Afghanistan.

Such reverses underscore that international criminal justice alone cannot secure accountability for crimes against or affecting children, let alone fully prevent those crimes. The success of international criminal justice depends on

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54 See ICC, Procureur c. Mathieu Ngudjolo, Case No. ICC-01/04-02/12, Judgment Rendered Pursuant to Article 74 of the Statute (ICC Trial Chamber II), 18 December 2012; ICC, Procureur c. Germain Katanga, Case No. ICC-01/04-01/07, Judgment Rendered Pursuant to Article 74 of the Statute (ICC Trial Chamber II), 7 March 2014, para. 1025, analyzed in D. M. Amann, above note 21, pp. 263–266.


support from States, other international organizations and civil society. The Policy on Children has a role to play among these entities; as Bensouda put it in 2016: “I hope that this Policy will also serve as a useful reference for national authorities, civil society and other actors in their endeavours to address crimes against and affecting children, and to improve the experience of children in judicial processes.”

States, international organizations and civil society must also work for prevention in spheres other than the ICC, and by means other than criminal prosecution. Salutary recent events in this respect include the 2019 filing by Gambia of an International Court of Justice case alleging Myanmar’s State responsibility for genocidal acts against Rohingya children and adults; the 2017 Inquiry into Protecting Children in Armed Conflict, chaired by UN Envoy Gordon Brown, which produced a 500-page exposition of pertinent legal instruments and jurisprudence and norms of international humanitarian law, human rights law, international criminal law, and customary international law; and a number of UN initiatives to combat the conflict-related detention of children. Commentators have a role to play; by way of example, it is unfortunate that, in its current form, a proposed treaty on crimes against humanity retains the 1998 Rome Statute definition of the crimes, and thus does not reflect newer understandings regarding children. The UN processes based on the Six Grave Violations, moreover, must continue to be strengthened. Civil society campaigns respecting attacks on education and child combatants, as well as recent attention to the effects on children of blast injuries, likewise merit continued endeavour. Through such interrelated initiatives, a path may be found to the prevention and punishment of the full array of wartime harms to children.


61 See Shaheed Fatima, Protecting Children in Armed Conflict, Hart, Oxford, 2018 (describing the Inquiry at pp. 5–7, and setting out the Inquiry’s findings and conclusions).


International humanitarian law, Islamic law and the protection of children in armed conflict

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Abstract

This paper compares how rules of international humanitarian law and rules of Islamic law protect children in armed conflict. It examines areas of convergence and divergence, and areas where there is room for clarification between these two legal systems. This comparative exercise spotlights four key topics marking the wartime experience of children: the unlawful recruitment and use of children by armed forces and armed groups, the detention of children, their access to education, and the situation of children separated from their families.

Keywords: Islamic law, child recruitment, children deprived of their liberty, education, restoring family links, armed conflict, children.

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Introduction

Children shoulder a disproportionate human cost of the armed conflicts raging today, as the laws designed to protect them from the worst excesses of war too often fail to do so. This suffering is particularly evident among children living in countries where the majority of the population is Muslim: conflicts such as those in Afghanistan, Somalia, the Syrian Arab Republic and Yemen demonstrate the imperative need to reduce the harm marking the lives of children affected by these wars. To reduce this harm, the law protecting children in war – though existing comprehensively on paper – needs context-specific solutions to counter severely inadequate implementation.

In countries where the majority of the population is Muslim, or where Islam is used as part of the value system of weapons bearers, a number of parties to conflict have expertise in and look to the rules of the Islamic law of war as they fight, and can be more conversant in and loyal to these rules than to the applicable rules of international humanitarian law (IHL). As both legal systems contain provisions that govern the treatment of children in situations of armed conflict, the purpose of this article is to identify complementarities between the two frameworks so as to strengthen weapons bearers’ adherence to protective norms, bridging the discourses between the Islamic law and IHL protections of children in order to find mutual reinforcement. We seek to do this in three ways – first, by identifying what IHL says about the protection of children. This is important because IHL norms are not always popularly known, so the discussion of IHL’s protective framework herein, presented alongside Islamic law provisions, is intended to raise awareness of these rules. Second, this article similarly identifies what the Islamic law of war says about the protection of children. This is important because the Islamic law of war can play a significant role in influencing the behaviour of warring parties who use it as a source of reference. Organizations such as the International Committee of the Red Cross (ICRC), which seek to ensure that the behaviour of warring parties complies with IHL, are better equipped to enhance respect for the law if dialogue with warring parties starts from a point of mutual understanding; knowledge of how the Islamic law of war regulates the protection of children is a foundational step towards this point.

Third, and most ambitiously, both bodies of law are very much alive, and this discussion seeks to identify mutually reinforcing synergies between them as well as areas for clarification. Various international legal authorities are cognizant of the need to engage with contemporary interpretations of Islamic law in order

1 The UN Secretary-General’s annual report on children and armed conflict documented over 24,000 violations by government forces and non-State armed groups in 2018. Report of the Secretary-General on Children in Armed Conflict, UN Doc. A/73/907-S/2019/509, 20 June 2019 (Secretary-General’s Report), para. 5.

2 The term “Muslim States” is used as shorthand in this article to refer to States where the majority of the population is Muslim.

3 ICRC, The Roots of Restraint in War, Geneva, 2018, p. 34.

4 Regarding the influence of local Islamic scholars and legal institutions, as well as global Salafi-Jihadi scholars, on two non-State armed groups in Mali, see ibid., pp. 46–51.
to identify such synergies, and indeed, various Islamic rules and their relationship with international law are being deliberated by both local and international Islamic law authorities and experts. The content of protective norms in domestic-level legislation on the protection of children in armed conflict in States with Islamic law traditions is also subject to development, and accordingly there is room for contemporary debate and exchanges on this content. Just as there is scope for the clarification of legal interpretation of certain Islamic law rules, there is similarly scope for the same in certain areas of IHL – for example, the rules regulating the treatment of children deprived of their liberty in non-international armed conflict (NIAC) is one area that has been identified as meriting further clarification. This article’s comparison of the norms protecting children in armed conflict under Islamic law and IHL thus seeks to demonstrate complementarities between these legal traditions, for the purpose of mutual reinforcement.

Continuing the conversation

The focus of this article is the protection of children in armed conflict. To address this topic, it adopts the approach of previous publications addressing Islamic law by

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5 For example, the United Nations (UN) Committee on the Rights of the Child has “noted with satisfaction that there were different interpretations of some aspects of the application of Sharia (Islamic law) and that Egypt has adopted an attitude consistent with the spirit of human rights in that regard”. Committee on the Rights of the Child, Consideration of Reports: Egypt Concluding Observations, UN Doc. CRC/C/15/Add.145, 21 February 2001, para. 56.

6 Saudi Arabia and Oman, for example, have stated that they find the definition of the child within Article 1 of the Convention on the Rights of the Child (CRC) to conform with Islamic law. Saudi Arabia’s report to the Committee on the Rights of the Child in 1998 stated that “Article 1 of the Convention on the Rights of the Child is totally in harmony with Islamic law with regard to the definition of the child”. See Committee on the Rights of the Child, Consideration of Reports: Initial Report of Saudi Arabia, UN Doc. CRC/C/61/Add.2, 29 March 2000, paras 30–32. Regarding its law that sets the age of 18 as the age of legal adulthood, Oman reported that “[t]he Decree is in accordance with the principles of Islamic Sharia”: see Committee on the Rights of the Child, Consideration of Reports: Initial Report of Oman, UN Doc. CRC/C/78/Add.1, 18 July 2000, paras 13–14. For additional analysis of Islamic law and its relationship with international law, see, for example, Mahmood Monshipouri and Claire L. Kaufman, The OIC, Children’s Rights and Islam, Danish Institute for Human Rights, Copenhagen, 2017, available at: www.humanrights.dk/sites/humanrights.dk/files/working_papers/2015._matters_of_concern_monshipouri_and_kaufman_feb2015.pdf (all internet references were accessed in November 2019); Nasrin Mosaffa, “Does the Covenant on the Rights of the Child in Islam Provide Adequate Protection for Children Affected by Armed Conflicts?”, Muslim World Journal of Human Rights, Vol. 8, No. 1, 2011.

7 For example, a child rights bill was drafted in Somalia between 2017 and 2018. This development was noted in the Secretary-General’s Report, above note 1, para. 146. Prior to the drafting of this bill, Somalia entered the following reservation when it ratified the CRC in 2015: “[the] The Federal Republic of Somalia does not consider itself bound by Articles 14, 20, 21 of the above stated Convention and any other provisions of the Convention contrary to the General Principles of Islamic Sharia.” The principles of Islamic Sharia referenced therein are accordingly of import to the State’s interpretation of children’s rights.

8 This subject of the legal protection of children deprived of their liberty in NIACs was one of the topics identified for further research, consultation and discussion by the ICRC at the 32nd International Conference of the Red Cross and Red Crescent: see ICRC, Concluding Report on Strengthening IHL Protecting Persons Deprived of Liberty, Geneva, June 2015, pp. 44–46, available at: http://rcrcconference.org/wp-content/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf.
one of the authors, and builds on the discussion therein of the sources of Islamic law, its characteristics, and the main principles of the Islamic law of armed conflict. The discussion in this article also seeks to inform the dialogue that the ICRC has engaged in over the last two decades with Muslim and other religious scholars regarding humanitarian law, principles and action.

Beyond IHL, plenty of similar work has been undertaken in the field of international human rights law regarding the almost universally ratified 1989 Convention on the Rights of the Child (CRC) and its relationship with Islamic law. The CRC is at once the only international human rights treaty that expressly references Islamic law and, alongside the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the treaty with the greatest number of religion-based reservations amongst Muslim States. With this said, the fact that Muslim countries that did not initially ratify CEDAW were ready to ratify the CRC is arguably indicative of the CRC’s potential for accommodation of cultural differences, as well as general agreement between the Islamic legal tradition and the CRC on the overall goal of improving the well-being of children. In its assessments of State party compliance with CRC obligations, and in light of extant Islamic-law-based reservations, the Committee on the Rights of the Child has taken a multifaceted approach to interpretations of the CRC through the lens of Islamic law – it has emphasized areas of consensus, stated a preference for wider interpretations of certain Islamic rules, welcomed interpretations consistent with human rights standards, recommended that relevant States consider the practice of other Muslim States that have been successful in reconciling fundamental rights with Islamic texts, and encouraged an exchange of information on such reconciliations. Aspects of this approach are echoed throughout the present analysis of the protection of children in armed conflict under Islamic law and IHL.


12 Ibid., p. 196.


Roadmap

This article will discuss four key topics that lie at the heart of the protection of children caught up in armed conflict: the question of age limits for child recruitment and criminal responsibility, the rules governing the detention of children, the protection of access to education, and the protection of children separated from their families. These reflect the ICRC’s four priorities in its institutional child protection strategy. In discussing these four topics, a brief overview is given of the relevant rules of IHL, followed by a discussion of related provisions of Islamic law. Analysis is made of areas of convergence and divergence, and areas where there is room for clarification.

It is important to identify areas of convergence because such areas illustrate the common logic of the legal traditions, and this compatibility can be leveraged to strengthen compliance with the substance of the protective norm. It is similarly useful to identify areas of divergence and issues where there is scope for further exchange between IHL and Islamic legal scholars. Understanding how Islamic law and IHL rules differ, and awareness of cultural and traditional norms present in distinct Muslim contexts, are prerequisites for improved communication and informed decision-making in complex humanitarian contexts. Accommodating and respecting Muslim religious norms, where they do not contravene IHL obligations, should ultimately facilitate work to meet the needs of children affected by armed conflict. The identification of divergences is also required to engage in conversation and work together across fields of expertise towards common interpretations; engaging local and international Islamic law institutions and individual Islamic law experts on these challenges can provide Islamic law solutions.

The special protection of children in armed conflict: Four focuses

Before embarking on the discussion of the four focus issues, the first observation that merits emphasis in this comparative study is that both Islamic law and IHL identify children as a category of persons who are placed at particular risk in


16 This potential for mutual reinforcement is illustrated in, for example, Afghanistan’s 2018 Policy for Protection of Children in Armed Conflict, approved by the minister of national defence and minister of the interior, which begins with a reference to both Islamic Law and international law as the legal basis for government responsibilities regarding the protection of children in armed conflict: “Based on inherent human rights, Islamic teachings, and established international legal standards, the Ministry of Defence (MoD) will take every necessary step to support the humanitarian treatment and protection of children in various situations arising during armed conflict. The protection of children is one of the Government’s basic responsibilities.” Afghanistan, “Policy for Protection of Children in Armed Conflict”, Ministry of Defence and Ministry of Interior, Kabul, 2018.

17 For an application of this solution-oriented approach to matters related to the management of the dead, see A. Al-Dawoody, “Management of the Dead”, above note 9.
situations of armed conflict. In other words, both bodies of law contain the general notion that children are entitled to special respect and protection, in addition to the more general rules which apply to all persons (adult or child) in armed conflict.

Customary IHL provides that children affected by armed conflict are entitled to special respect and protection in situations of both international and non-international armed conflict.\(^{18}\) This obligation is reflected in the many more detailed rules of the Geneva Conventions and their Additional Protocols that articulate specific measures for the treatment of children,\(^{19}\) as well as in State practice. This specific respect and protection includes protection against all forms of sexual violence;\(^{20}\) separation from adults while deprived of liberty unless they are members of the child’s family;\(^{21}\) access to appropriate education, food and health care;\(^{22}\) evacuation from areas of combat for safety reasons;\(^{23}\) and the reunification of unaccompanied children with their families.\(^{24}\) The rationale for this special protection takes heed of the fact that the effects of armed conflict cause children particular harm—the ICRC noted during the drafting of the Additional Protocols that “psychological traumas caused by war often left indelible impressions on them”\(^{25}\) and that accordingly, they “require privileged treatment in comparison with the rest of the civilian population”.\(^{26}\) The need for special respect and protection also reflects the reality that children may not have the same capacity to understand the danger and risk inherent in certain situations, such that they must proactively be prevented from becoming engaged in those situations. Regarding the recruitment of children into armed forces, the ICRC commented during the drafting of the Additional Protocols that “although children taking such action ran precisely the same risks as adult combatants, unlike adults they did not always understand very clearly what awaited them for participating directly or indirectly in hostilities”.\(^{27}\)

Islamic law develops sets of frameworks that regulate the rights and duties between different members of society and between the State and its people, on the one hand, and Islamic religious obligations, on the other. One of these frameworks is a set of rules that protects the rights of children, in recognition of their particular

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20 AP I, Art. 77(1).

21 On the treatment of children deprived of their liberty, including their separation from adults, see GC IV, Arts 51(2), 76(5), 82, 85(2), 89, 94, 119(2), 132(2); AP I, Art. 77(3–4); AP II, Art. 4(3)(d).


23 GC IV, Arts 14, 17, 24(2), 49(3), 132(2); AP I, Art. 78; AP II, Art. 4(3)(c).

24 GC IV, Arts 24–26, 49(3), 50, 82; AP I, Arts 74, 75(5), 78; AP II, Art. 4(3)(b).


vulnerability and their role as the future of society. This is reflected in the preamble of the Organization of the Islamic Conference (OIC) Covenant on the Rights of the Child in Islam, which further points out that Islamic efforts to protect children “contributed to the development of the 1989 United Nations Convention on the Rights of the Child”.28 Islamic law thereby establishes that safeguarding children is the responsibility of their parents and the State.

More specifically, in the Islamic law of armed conflict, children recurrently surface as the prime example of a protected category of civilians in the deliberations of the classical Muslim jurists. Importantly for this article, the work of the classical Muslim jurists from the seventh and eight centuries still forms part of the rules of the Islamic law of armed conflict referred to today; we therefore refer to them throughout. In Hadith (reported sayings, deeds and tacit approvals of the Prophet Muhammad) collections and the Islamic legal compendia, the Prophet Muhammad prohibited targeting five categories of civilians in armed conflict: women, children, the clergy, the aged, and the usafā (those hired by the enemy to perform services on the battlefield, but who do not take part in active hostilities).29 Based on the rationale behind the prohibition on targeting these categories – i.e., civilian status and exposure to distinct risks in situations of armed conflict – classical Muslim jurists have subsequently extended this list.30 But of relevance for our purposes, children have long been provided with special protection, because of the fact that they are (usually) not combatants and because of their distinct vulnerability. For example, among the Hadiths prohibiting harm to these categories are the following: “Do not kill an aged person, a young child or a woman”;31 “Do not kill children or the clergy”;32 and “Do not kill children or usafā.”33 On this basis, when it came to protecting non-combatants, the Companions of Prophet Muhammad followed his example; for instance, the first caliph Abū Bakr (d. 634) instructed his army commander: “Do not kill a child or a woman.”34 And in keeping with this tradition, Article 3(a) of the Cairo Declaration on Human Rights in Islam, adopted by foreign ministers at the OIC on 5 August 1990, reaffirmed: “In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men,

The preamble of the OIC Covenant on the Rights of the Child in Islam also refers to the child as “the vanguard and maker of the future of the Ummah [Muslim nation]”. The Covenant wasadopted by the 32nd Islamic Conference of Foreign Ministers in Sana’a, Republic of Yemen, in June 2005. The authors of the present article did not ascertain the number of States bound by the Covenant.


33 Ibid., p. 339.

women and children.”\textsuperscript{35} In short, and albeit in a general sense, both IHL and the Islamic law of armed conflict start from the point that children must be explicitly singled out for protection from the effects of war.

Questions of age: Definition, recruitment, and criminal responsibility

This section of the discussion pertains to three separate questions of age – the age under which an individual is defined as a child, the age at which a child may lawfully be recruited into armed forces or armed groups, and the minimum age of criminal responsibility. It is perhaps the most technical element of this article, but also of wide-ranging significance on the ground as it determines who benefits from the protection of the laws governing children in armed conflict. For the sake of clarity, it is worth emphasizing that international law deals separately with the age under which persons are defined as “children”, the age of lawful child recruitment, and the minimum age of criminal responsibility – in other words, international law foresees the possibility that children above a certain age (but still legally defined as children) may be prosecuted and may be lawfully recruited into armed forces or armed groups. This is evident in domestic legal systems, as well as in the CRC. Article 1 of the CRC defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”, while Article 38(3) of the CRC sets the age of lawful recruitment into armed forces at 15 (a standard subsequently raised for States party to the Optional Protocol on the Involvement of Children in Armed Conflict),\textsuperscript{36} and Article 40(3)(a) leaves the age of minimum criminal responsibility to the discretion of States (though the Committee on the Rights of the Child’s General Comment No. 24 sets an international standard of 14 years for the minimum age of criminal responsibility\textsuperscript{37}).

The separation of the definition of a child from the matters of lawful recruitment and prosecution is significant from a humanitarian standpoint, because even when children can be lawfully recruited into armed forces or armed groups, and even when they can be lawfully prosecuted for crimes committed, they nevertheless continue to benefit from certain legal protections as long as they are under the age of 18.\textsuperscript{38} In sum, the definition of who has the status of being a “child” is not tied to criminal responsibility nor age of lawful recruitment in international law, and accordingly these three questions of age are addressed separately below.

\textsuperscript{35} OIC, Cairo Declaration on Human Rights in Islam, 5 August 1990, available at: \url{www.refworld.org/docid/3ae6b3822c.html}.

\textsuperscript{36} This age was subsequently raised in Articles 2, 3(1) and 4(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000. The age of lawful recruitment is set at 18 years of age by Article 22(2) of the African Charter on the Rights and Welfare of the Child, 1990.

\textsuperscript{37} Committee on the Rights of the Child, “General Comment No. 24 on Children’s Rights in the Child Justice System”, UN Doc. CRC/C/GC/24, 2019, paras 21–22.

\textsuperscript{38} For example, all children facing criminal charges are entitled to the rights set out in Article 40 of the CRC, as well as the other rights in this convention unless an age limit is otherwise stipulated in a given provision.
The definition of a child

IHL treaties do not define the terms “child” or “children” – while some rules apply to “children” without further qualification, others specify that they apply to certain categories of children, in particular those under 12, those under 15 or newborn babies. There are also a number of rules that extend protections specifically to persons under the age of 18. Beyond IHL treaties, international practice generally – and the CRC specifically – recognizes that persons under the age of 18 are children, unless otherwise stipulated.

Defining the terms “child” and “orphan”, and determining the age until which an individual is a child, have been important issues from the very beginning of the emergence of Islamic law. These definitions trigger the initiation and termination of certain rights and duties, and can determine when individuals become legally and religiously responsible for their actions. For example, Article 6 (b) of the Cairo Declaration on Human Rights in Islam states that “[t]he husband is responsible for the support and welfare of the family”; the identification of the age of the child is necessary here, because the father is financially responsible for male children until they reach the age of maturity. Put simply, an “orphan” is a person whose parents died while he or she was still a child, and because the status of “orphan” comes with specific legal rights in Islamic law, the age until which an individual is an “orphan” is important. With this said, determining the age of a child has been a complicated and controversial issue among Muslim jurists.

Generally speaking, in Islamic law, a child is someone who has not attained puberty. But reaching the age of puberty differs from one person to another and from one culture to another, and Islamic scholars and legal systems have set different standards. While the age of puberty discussed in the context of child recruitment is set at 15 (discussed in greater detail below), Abu Hanifah (d. 767), the eponymous founder of the Ḥanafī school of law, raises the threshold of the age of puberty to 18 for boys and 17 for girls. Notably here, Abu Ḥanīfah drops the age of puberty for girls by one year because, he puts forward, they grow physically and mentally earlier than boys. This position is reflected in the lower

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40 See ibid., Arts 14 (hospital and safety zones to protect different categories of persons, including children under 15), 23 (free passage of humanitarian assistance for some categories of persons, including children under 15), 24 (measures to ensure that orphans and children separated from their families who are under the age of 15 are not left on their own), 38 (same preferential treatment for alien children under 15 as for nationals), 50 (maintenance of preferential measures in regard to food, medical care and protection adopted prior to occupation for children under 15), 89 (additional food for interned children under 15); AP I, Art. 77, and AP II, Art. 4(3) (prohibition of recruitment and participation in hostilities for children under 15).
41 See AP I, Art. 8 (newborn babies to have the same protection as the wounded and sick).
42 GC IV, Arts 51 (prohibition of compulsion to work in occupied territory), 68 (prohibition of pronouncement of the death penalty on persons under 18 at the time of the offence); AP I, Art. 77 (prohibition of execution of the death penalty on persons under 18 at the time of the offence); AP II, Art. 6 (prohibition of pronouncement of the death penalty on persons under 18 at the time of the offence).
43 Article 1 of the CRC defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. 
minimum age of marriage for girls than boys in some Muslim-majority States, including some who do not follow the Ḥanafi school of law.\textsuperscript{44} This disparity in age limits for boys and girls diverges from IHL and international human rights law, which do not set different age limits for boys as compared to girls. Beyond the Ḥanafi school of law, the jurists of the Mālikī school of law\textsuperscript{45} posit various thresholds for the age of puberty: while most of them put it at the age of 18, some say 16, 17 or 19. Islamic legal discourse is thus unsettled as to the age of puberty following which a person is no longer a “child”, but the work of the jurists considered for the purposes of this article places this age variously between 15 and 19.

\textbf{The lawful age of recruitment}

Prohibitions on the recruitment and use of children in hostilities are contained in a number of international IHL and international human rights law instruments, as well as customary law. Though it is not the purpose of this article to delve into the detail and debate of the complex set of standards that apply to the recruitment and use of children,\textsuperscript{46} a brief overview of the relevant obligations governing the age at which it is lawful to recruit children into armed forces or armed groups is provided here to facilitate a comparison with Islamic law. Generally speaking, IHL and human rights instruments set three different levels of protection. Additional Protocol I (AP I), Additional Protocol II (AP II) and the CRC prohibit the recruitment of children below the age of 15.\textsuperscript{47} Raising this protection, the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict prohibits the \textit{compulsory} recruitment of persons under 18 into armed forces,\textsuperscript{48} requires States Parties to raise the minimum age from 15 for \textit{voluntary} recruitment into armed forces,\textsuperscript{49} and prohibits non-State armed groups from recruiting (on a forced or voluntary basis) children under the age of 18.\textsuperscript{50} Most progressively, the African Charter on the Rights and Welfare of the Child prohibits all recruitment under the age of 18.\textsuperscript{51}

\begin{footnotesize}
\begin{enumerate}
\item Attesting to this disparity in the lawful age of marriage between girls and boys, the World Policy Center maintains databases on the minimum age of marriage for girls, the minimum age of marriage for boys, and gender disparity in the legal age of marriage, available at: www.worldpolicycenter.org/topics/marriage/policies.
\item The Mālikī school of law is predominant in countries such as Mauritania, Morocco, Tunisia, Algeria, Libya, Sudan, the United Arab Emirates and certain States in West Africa.
\item Article 77(2) of AP I binds parties to IACs; Article 4(3)(c) of AP II binds parties (State and non-State) to NIACs; Article 38(3) of the CRC binds States party to the CRC.
\item Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000, Art. 2.
\item \textit{Ibid.}, Art. 3(1).
\item \textit{Ibid.}, Art. 4(1).
\end{enumerate}
\end{footnotesize}
The age of lawful child recruitment is also addressed quite explicitly in the Islamic law of armed conflict. There is a Hadith attributed to ṣAbd Allh ibn ṣUmar (d. 693) in the Hadith collections of Al-Bukhari (d. 870), the most authentic of the six canonical Hadith collections for the Sunni Muslims, in which ibn ṣUmar narrated:

Allah’s Apostle called me to present myself in front of him on the eve of the battle of Uhud, while I was fourteen years of age at that time, and he did not allow me to take part in that battle, but he called me in front of him on the eve of the battle of the Trench when I was fifteen years old, and he allowed me [to join the battle]. Ṣafī’ said, “I went to ṣUmar bin ṣAbdul Aziz who was Caliph at that time and related the above narration to him. He said, ‘This age [15] is the limit between childhood and manhood’, and wrote to his governors to give salaries to those who reached the age of fifteen.”

Based on this Hadith, jurists from the Shafi‘i53 and Ḥanbali54 schools of Islamic law – as well as the Ḥanafī55 Iraqi jurists Abū Yūsuf (d. 798), the first to hold the position of qāḍī al-quḍāh (“judge of the judges” or chief justice) in Islamic history, and al-Shaybānī (d. 805) – took the position that the age of 15 is the age of puberty for both male and female persons. Therefore, as indicated in this Hadith, 15 years is the age required for lawful recruitment into fighting forces, and consequently also the age at which a ḥarbī (an enemy belligerent) can be targeted. Notably, the Hadith addresses an example of voluntary child recruitment, and therefore, a fortiori, forced recruitment below the same age is prohibited. It should be pointed out here, however, that there seems to be some inconsistency on behalf of ibn ṣUmar, the narrator of this Hadith, because the battle of the Trench took place in 627, two years after the battle of Uhud, which took place in March 625. This means that ibn ṣUmar was aged 16 and not 15 when he was permitted to join the battle – on this basis, the argument could be made that the lawful age of child recruitment in the Islamic law of armed conflict may be 16. This is higher than the age of 15 set out in the Additional Protocols to the Geneva Conventions. With this nuance, the Islamic law of armed conflict and the Additional Protocols converge on the age of 15 – at the very minimum – as the age of lawful recruitment of children into armed forces.

The discussions on the minimum age limit of recruitment for the battle of Uhud address a context that can be described in modern IHL terms as international armed conflict (IAC) – i.e., fighting between a Muslim State and a non-Muslim State. The same minimum age limit therefore applies to intra-Muslim fighting, because the Islamic rules of engagement in the case of intra-Muslim armed

52 Available at: www.sahih-bukhari.com/Pages/Bukhari_3_48.php.
53 The Shafi‘i school of law is predominant in States such as Yemen, Jordan, Palestine, Lebanon, Somalia, Djibouti, the Maldives, Indonesia, Malaysia, Brunei, Singapore, the Philippines and Thailand.
54 The Hanbali school of law is predominant in States such as Saudi Arabia and Qatar, and to a lesser extent in the other Gulf States.
55 The Ḥanafī school of law is predominant in countries such as Syria, Egypt, parts of Iraq, Turkey, the Balkan States, Pakistan, Afghanistan, Bangladesh and India.
rebellion (akin to the IHL equivalent of NIAC) are more protective than the Islamic
drain equivalent of IAC rules.\textsuperscript{56} And beyond the debate regarding age, it is
unequivocal that the above-mentioned Hadith unequivocally prohibits
recruitment of children into a Muslim army. This prohibition is affirmed in
Article 14 of the Rabat Declaration on Child’s Issues in the Member States of the
Organization of the Islamic Conference, which

\begin{quote}
strongly condemn[s] any recruitment and use of children in armed conflict
contrary to international law, and urge[s] all parties to armed conflicts who
are engaged in such practices to end them and to take effective measures for
the rehabilitation and reintegration of such children into society.\textsuperscript{57}
\end{quote}

This declaration was adopted by the ministers in charge of child affairs in the
member States of the OIC, and the heads of Arab, Islamic and international
governmental and non-governmental organizations taking part in the First
Islamic Ministerial Conference on the Child, held in the Kingdom of Morocco in
2005, in cooperation and coordination between the Islamic Educational, Scientific
and Cultural Organization, UNICEF and the OIC.

\textit{The age of minimum criminal responsibility}

While both IHL and the CRC foresee the possibility that children above a certain age
may be prosecuted for criminal acts,\textsuperscript{58} neither specifies a minimum age of criminal
responsibility (MACR). Beyond treaty text, in its General Comment No. 24, the
Committee on the Rights of the Child observes that “the most common
minimum age of criminal responsibility internationally is 14” and therefore
encourages States to increase their MACRs to at least 14.\textsuperscript{59} In practice, domestic
legislation varies considerably on the MACR, and consequently children of varied
ages face criminal prosecution in contemporary armed conflicts.\textsuperscript{60} Where a child
has committed a crime, international law prescribes certain standards for juvenile

\textsuperscript{56} For further information, see, for example, Ahmed Al-Dawoody, “Internal Hostilities and Terrorism”, in
Niaz A. Shah (ed.), \textit{Islamic Law and the Law of Armed Conflicts: Essential Readings}, Edward Elgar,
Cheltenham, 2015; Mohamed Badar, Ahmed Al-Dawoody and Noelle Higgins, “The Origins and
Evolution of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law
Discourse”, in Ignacio de la Rasilla and Ayesha Shahid (eds), \textit{International Law and Islam: Historical
Explorations}, Brill’s Arab and Islamic Laws Series, Leiden, 2018; Ahmed Al-Dawoody, “Conflict

\textsuperscript{57} OIC, Rabat Declaration on Child’s Issues in the Member States of the Organization of the Islamic
Conference, 8 November 2005, available at: \url{www.refworld.org/docid/44eb01b84.html}.

\textsuperscript{58} See CRC, Art. 40(1); AP I, Arts 77(4–5); AP II, Art. 6(4).

\textsuperscript{59} Committee on the Rights of the Child, above note 37, paras 21–22.

\textsuperscript{60} In 2019, the UN Global Study on Children Deprived of Liberty estimated that at a minimum, 35,000
children were deprived of liberty in the context of armed conflict, including in Iraq and Syria. Though
the number of these children facing criminal charges is not specified by the Global Study, reports have
indicated that many have faced prosecution in Iraq. \textit{See Report of the Independent Expert leading the
United Nations Global Study on Children Deprived of Liberty}, UN Doc. A/74/136, 11 July 2019 (Global
Study Report), para. 68.
justice, on the basis that while they may have committed a crime, children nevertheless remain entitled to certain treatment by the State on the basis of their status as children.

Arguably reflecting a similar recognition that children can retain their status as children while being capable of discernment meriting legal responsibility, in the lengthy deliberations over the definition of the child and the corresponding applicable Islamic rules, Muslim jurists make a distinction in some rules between al-tifl al-mumayiz and al-tifl ghayr al-mumayiz (a discerning and non-discerning child). Beyond this, and as is the case for non-Muslim States, there is disparity in the minimum age of criminal responsibility set by national legislation in different Muslim States, with ages ranging from as young as 7 up to 16.

Another Islamic legal nuance exists regarding whether to calculate the age according to the solar or lunar calendar. For example, the Algerian, Egyptian and Libyan penal codes calculate the age of criminal responsibility according to the solar calendar as stipulated respectively in Articles 3, 94 and 13 of the codes, while Article 147 of the Iranian Islamic Penal Code reads: “The age[s] of maturity for girls and boys are, respectively, a full nine and fifteen lunar years.”

Notably, as a result of this nuance, if the age limit of 15 for child recruitment mentioned in the Hadith above is calculated according to the lunar calendar, it would be 14 years and seven months.

Towards higher standards of protection

The variation in age standards discussed above is a reflection of the development of these norms in varied historical periods, and across different regions and social, cultural and legal traditions in Muslim States. At the same time, there have been, and will continue to be, efforts in Muslim States to raise the threshold of minimum age for child recruitment, the minimum marriageable age, and the MACR. The goal of these attempts is to improve the protection of children, whether in armed conflict or in peacetime. This was also the goal behind Prophet Muhammad’s rejection of ibn ‘Umar’s attempt to join the Muslim army at the battle of Uhud, wherein he was considered by the Prophet to be fit for fighting only after he had reached the age of 15 (according to ibn ‘Umar’s words, or 16

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62 The Child Rights International Network maintains a database of States’ minimum ages of criminal responsibility; for examples of MACRs in Muslim States, among others, see: https://archive.crin.org/en/home/ages/asia.html.


To be clear, however, if it is decided by Muslim jurists or military, health or psychology experts that raising the threshold of the minimum age of recruitment from 15 is necessary because children are physically and mentally unprepared for the risks inherent in joining armed forces, then there is nothing in Islamic law that would prevent this change. This is because the rationale for raising this age limit is the same rationale that was used for the rejection of Ibn ‘Umar’s participation in hostilities at the battle of Uhud when he was aged 14. It is also worth pointing out here that classical Muslim jurists agree that the applicability of a ruling depends on the existence of its *raison d’être*, as expressed in the famous Islamic legal maxim: *al-ḥukm yadūr ma’ al-‘illah* (the ruling evolves with its effective cause).

The diversity of Islamic rules and (sometimes daunting, yet rich) details pertaining to questions of age can be confusing to non-specialists when it comes to applying these rules on the ground. Such diverse Islamic legal rulings are the product of Muslim jurists’ attempts to regulate their distinct contexts in accordance with Islamic values, using Islamic legal tools and methodologies. Ultimately, Muslim authorities, including those that are State and non-State parties to a conflict, can choose more protective interpretations in cases of the existence of conflicting rules, and can do this through domestic codification and accession to international treaties.

**Children deprived of their liberty**

The deprivation of liberty (or “detention”) of children, including Muslim children, in situations of armed conflict is a feature of numerous contemporary conflicts. In 2018 and 2019, reacting in particular to children deprived of their liberty as conflicts raged in Syria and Iraq, the UN Security Council, the UN Secretary-General and the UN Global Study on Children Deprived of their Liberty emphasized the need to uphold international standards governing the treatment of children detained in the context of armed conflicts, highlighting the particular vulnerability of children associated with groups designated as “terrorist”. This section deals with the content of these standards under IHL and Islamic law.

Under IHL, children may be detained for reasons related to an armed conflict either on account of their own conduct or status, or because members according to calendar calculations). To be clear, however, if it is decided by Muslim jurists or military, health or psychology experts that raising the threshold of the minimum age of recruitment from 15 is necessary because children are physically and mentally unprepared for the risks inherent in joining armed forces, then there is nothing in Islamic law that would prevent this change. This is because the rationale for raising this age limit is the same rationale that was used for the rejection of Ibn ‘Umar’s participation in hostilities at the battle of Uhud when he was aged 14. It is also worth pointing out here that classical Muslim jurists agree that the applicability of a ruling depends on the existence of its *raison d’être*, as expressed in the famous Islamic legal maxim: *al-ḥukm yadūr ma’ al-‘illah* (the ruling evolves with its effective cause).

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66 Regarding the detention of children for alleged or actual affiliation with armed groups in Iraq, Syria, Nigeria and Somalia, see Secretary-General’s Report, above note 1, paras 12–13. See also Global Study Report, above note 60, para. 68.


68 Aside from criminal grounds for the deprivation of liberty, in exceptional circumstances, GC IV allows States Parties to deprive certain persons of their liberty for imperative reasons of security (Art. 78,
of their family are detained. In addition to the key protections that IHL provides to any person deprived of their liberty, specific rules are in place to protect children in this particularly vulnerable situation. First, whether interned in international or non-international armed conflict, children must be lodged in quarters separate from those of adults, except where families are accommodated together. Second, they are entitled to tailored age-appropriate treatment when interned: in situations of IAC or occupation, Geneva Convention IV (GC IV) provides as a general rule that “proper regard shall be paid to the special treatment due to minors”; more specifically, that interned children must continue to have access to education, as well as to special playgrounds for sport and outdoor games; and that internees under the age of 15 years are entitled to additional food in proportion to their physiological needs. In situations of NIAC, the requirement of humane treatment established in Article 3 common to the four Geneva Conventions requires a context-specific assessment of the concrete circumstances of the internee which includes their age, and Article 4(3)(d) of AP II confirms that children under the age of 15 who have fought with armed groups continue to benefit from special care and aid when captured. Finally, rules of IHL applicable in both international and non-international armed conflict provide that the death penalty may not be carried out, or pronounced, on persons who were under 18 at the time of the offence.

To examine the rules on the detention of children under the Islamic law of armed conflict, it is useful to borrow the classical caliphate paradigm in which all Muslims were united under the rule of one government. This paradigm divides our discussion into two sets of different Islamic rules applicable to the detention of children in cases of international and non-international armed conflicts: the treatment upon capture of non-Muslim children (in the equivalent of IACs), and the treatment of Muslim children (in the equivalent of NIACs). Under this classical paradigm, an IAC was a conflict between Muslims and non-Muslims. In these conflicts, captured women and children of the defeated party to the conflict were enslaved or exchanged for prisoners of war (PoWs). It is critical to emphasize that this paradigm has arisen from events taking place in the seventh century.
and eighth centuries, so while enslavement may not have been prohibited in international relations at the time, the consensus among Islamic scholars today is unequivocally that such practice in conflict is abhorrent; this view is held by all except a minority of Islamic armed groups. With this disclaimer, what can be observed is that the capture of non-Muslim children was nevertheless governed by certain rules.

In such contexts, non-Muslim “enemy” women and children were not kept in the contemporary equivalent of camps: they were integrated into society as slaves living under Muslim rule. This is because the PoW status only applied to male adult combatants; women and children were not to be interned by the Muslim detaining power. Until they could be integrated into society, certain standards can be discerned for the treatment of these women and children: members of the same family could not be separated (as discussed below), and humane treatment was required to be provided to all detainees. On this latter point, the treatment provided to PoWs in the Battle of Badr in March 624 AD forms the basis of the Islamic rules on the treatment of persons deprived of their liberty in the context of armed conflict (PoWs or others). These rules include that detainees must be provided with shelter, food, water and clothing if need be, on the basis that they must be protected from heat, cold, hunger and thirst; and that they must be protected from any kind of inhumane treatment or torture aimed at obtaining military information about the enemy, as indicated by Imām Mālik (d. 795). Historical and more recent examples illustrate respect for this standard of humane treatment: when the Muslim leader Ṣalāḥ al-Dīn al-Ayyūbī (d. 1193) was unable to feed the large number of detainees who had fallen under his control when he reclaimed Al-Aqṣā Mosque, he chose to release them rather than leave them unfed. Likewise, Troy S. Thomas, a retired US Air Force colonel, pointed out that “[a]s evidenced by the treatment of Taliban POWs at the prison in Mazar-i-Sharif, Muslim commanders have proven willing to free prisoners when they could no longer provide for their basic care”. Accordingly, while these standards of humane treatment in the Islamic law of war were developed for adult male PoWs, on the basis that the treatment of children must be at least as favourable as that afforded to adults, the basic needs of all non-Muslim children must be met if they are captured in armed conflict.

As stated above, however, the ancient practice was to enslave non-Muslim children, and this involved integration into Muslim society. This practice led classical Muslim jurists of the time to develop sets of rules addressing the religion

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79 T. S. Thomas, above note 77, p. 95. Thomas also served in the White House from 2013 to 2017 on the National Security Council as special assistant to the president for national security affairs, senior director for defence policy, and director for strategic planning.
of these children. If children were separated from their parents, such as in the case of
dead or missing parents, they were to be raised as Muslims. But if children were in
the company of one or both of their parents, then with the exception of the jurist al-
Awzā‘ī (d. 774), the majority of classical Muslim jurists agreed that they should
retain the religion of their parents.80 This indicates a concern for the children’s
right to religion, and respect for the role of their parents in this regard. It is
similar to the stipulation in AP II that children shall receive an education,
including religious and moral education, in keeping with the wishes of their
parents.81 For our interpretive purposes, and with acknowledgement that the
promise of integrating enslaved children into society is a non-starter, respect for
the maintenance of a child’s religious identity is of relevance for children in the
power of an enemy force in conflicts today.

By contrast with these classical Islamic rules on the treatment of captured
non-Muslim children (i.e., in the Islamic law equivalent of IAC), the Islamic rules on
non-international (i.e., intra-Muslim) armed conflict are significant here because
among the ten most salient rules that distinguish these NIAC rules from IAC
rules are: (1) Muslim women and children cannot be enslaved; and (2) after the
cessation of hostilities, captured rebels must be released.82 This means that in
theory, according to classical Islamic law, Muslim children cannot be detained for
reasons related to armed conflict.83 But in any case, in line with the general
Islamic law rules requiring the humane treatment of detainees and the special
protection provided to non-Muslim children in the event of armed conflict, a
fortiori, Muslim children who are detained for reasons related to an armed
conflict would be required to receive at least the same humane treatment in
detention as their non-Muslim counterparts.

This exploration reveals clear divergences as well as certain areas of accord.
The IHL and Islamic law of armed conflict rules evidently differ considerably on the
issue of children deprived of their liberty: IHL considers this circumstance expressly
and without adverse distinction based on religion, unlike the Islamic legal sources
discussed above, which instead – and with a necessary reminder that these
sources date from the seventh and eighth centuries – address the enslavement of
non-Muslim children following capture in armed conflict, and do not foresee the
detention of Muslim children. Certain similarities can nevertheless arguably be
discerned by analogy to the Islamic law of armed conflict rules governing the

81 AP II, Art. 4(3)(a). See also Articles 14(1) and 14(2) of the CRC on the child’s right to freedom of religion
and respect for the rights and duties of parents and legal guardians in the child’s exercise of that right.
82 Though some argue that they should be released when they no longer have shawkah (organized force) – i.
e., when they do not constitute a danger.
83 See, for example, Muhammad ibn Idrīs al-Shāfī‘ī, Al-Umm, 2nd ed., Vol. 4, Dār al-Ma‘rifāh, Beirut, 1973,
p. 218; Muwaffaq al-Dīn ‘Abbād Allah ibn Ahmad ibn Qudāmah, ‘Umdah al-Fiqh, ed. ‘Abbād Allah Safar al-
‘Abdal and Muhammad Dughaylib al-‘Utaybī, Maktabah al-Tarafayn, Taif, undated, p. 149; Khaled Abou
El Fadl, Rebellion and Violence in Islamic Law, Cambridge University Press, Cambridge, 2006, pp. 152,
treatment of captured adult male combatants – these require that detainees must be
provided with shelter, food, water and clothing, and prohibit inhumane treatment
and torture. Given that these Islamic law rules apply to adult male detainees, they would also apply – at a minimum – to any children detained in the context of armed conflict. Additional areas of similarity with IHL are the obligations to respect parents’ wishes with regard to a child’s religion, and the principle of non-separation of families, which the Islamic law of armed conflict articulates regarding captured non-Muslim children (discussed below). With these diverging and converging areas loosely identified, it is clear that there is room for discussion on specific issues including, though not limited to, whether and how the humane treatment standards set out by the Islamic law of armed conflict for captured adult male combatants could be tailored more specifically to the treatment of both Muslim and non-Muslim children who are deprived of their liberty for reasons related to an armed conflict.

Access to education

IHL contains a family of rules which aim to ensure that in situations of international and non-international armed conflict, education can continue and students, educational personnel and educational facilities are protected. In situations of IAC, the Geneva Conventions and AP I specifically address the need to facilitate access to education in the following situations: for all children under 15 orphaned or separated as a result of war, for civilian internees, notably children and young people; in situations of occupation; in circumstances involving the evacuation of children; and for any person who is a PoW. In NIAC, AP II requires that children must receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care. Indeed, State practice indicates the inclusion of access to education in the special respect and protection to which children are entitled under customary law.

The Islamic law sources consulted for this article emphasize the general importance placed on education, and reveal one example specific to armed conflict. In a general sense, Islamic scriptural sources as well as international Islamic conventions and declarations put great emphasis on the importance of education. The Prophet Muhammad is reported to have said that seeking

84 A. Al-Dawoody, above note 29, pp. 136–141.
85 For further detail on the protection of education by rules of IHL, see the sub-chapter on access to education in ICRC, above note 67, pp. 36–39.
86 GC IV, Arts 13, 24.
87 Ibid., Arts 94, 108, 142.
88 Ibid., Art. 50.
89 AP I, Art. 78.
90 Geneva Convention III, Arts 38, 72, 125.
91 AP II, Art. 4(3)(a).
92 ICRC Customary Law Study, above note 18, Commentary on Rule 135.
knowledge is an obligation on every Muslim, male and female.93 In 1990, the Cairo Declaration on Human Rights in Islam established the provision of education as a duty for society and the State in Article 9. Other instruments also establish the right of children to receive an education: Article 12 of the 2005 Covenant on the Rights of the Child in Islam reaffirms the OIC States Parties’ commitment to the provision of “compulsory, free primary education for all children on equal footing”; and Article 2(4) makes it clear that one of its objectives is
to provide free, compulsory primary and secondary education for all children irrespective of gender, color, nationality, religion, birth, or any other consideration, to develop education through enhancement of school curricula, training of teachers, and providing opportunities for vocational training.

In the same vein, the 2005 Rabat Declaration calls upon the member States of the OIC, in Articles 15 and 17, to double their efforts to ensure the provision of quality education, and reaffirms in Article 16 the commitment to achieving gender equality in education.

A prime example, and perhaps the earliest example in Islamic history, that shows the importance of education specifically in the event of armed conflict is that Prophet Muhammad set free a number of the seventy prisoners of war taken at the Battle of Badr in March 624 AD in exchange for teaching ten Muslim children to read and write. Thus, while the rules of IHL are more specific in their requirements that the education of children be protected from disruption in situations of armed conflict, it is clear that the importance of a child’s access to education is a notion shared by both legal traditions. On this basis, there is room for further discussion among IHL and Islamic scholars regarding how the protection of education in armed conflict is articulated in Islamic scholarship.

Beyond the IHL rules specifically addressing access to education, and of central importance to the protection of education in armed conflict, students, education providers, schools and other education facilities are also protected as civilians and civilian objects under IHL.94 This means that they cannot be directly targeted unless and for such time as they directly participate in hostilities (for civilians)95 or become a military objective (for civilian objects).96 Even in the event that students, teachers, schools or other educational facilities do become military targets, all feasible precautions must be taken to avoid or, at minimum, minimize incidental harm to civilian students and educational personnel and

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94 Accordingly, they benefit from the general protection that IHL extends to civilians and civilian objects, as laid out in a number of treaty and customary law provisions: Common Art. 3 to the Geneva Conventions; AP I, Arts 48, 49 50, 52, 53, 57, 58; AP II, Arts 4, 13, 16; 1954 Hague Convention and 1999 Second Protocol; ICRC Customary Law Study, above note 18, Rules 1–24, and see also Rules 38, 40.
96 AP I, Art. 52; ICRC Customary Law Study, above note 18, Rule 10.
facilities, and attacks expected to cause excessive incidental harm are prohibited.\textsuperscript{97} Finally, parties to an armed conflict have obligations to take all feasible precautions to protect the civilian population (including students and teachers) and civilian objects under their control (such as schools) against the effects of attack.\textsuperscript{98} This obligation must be taken into account if a party to the conflict is considering using a school building for military purposes.

Similarly, under the Islamic law of armed conflict, whether in situations of international or non-international armed conflict, civilians and civilian objects cannot be deliberately harmed or damaged. While the Islamic law of armed conflict does not protect “schools” by name (indeed, at the time these rules were established, education was not delivered via the modern school system in place today), as civilian objects, education facilities are nevertheless protected by the detailed rules developed by classical Muslim jurists to ensure the protection of civilian persons and civilian objects in the context of the wars of the seventh and eighth centuries. The renowned jurist al-Awzā‘ī (d. 774) not only prohibited deliberate attacks on civilian objects of the non-Muslim enemy during the course of hostilities, but also argued that such an act shares one of the core elements of the crime of terrorism under Islamic law (ḥirābah). He pointed out that takhrīb (deliberate/excessive destruction) of enemy property constituted fasād (destruction, damage), which is a Qur’anic figurative description of one of the core elements of the crime of terrorism under Islamic law. An explanation of the Islamic worldview helps here in understanding the gravity of this crime: since everything in this world belongs to God, and human beings – as His successors on Earth – are entrusted with the responsibility of ‘imārah al-‘ard (contributing to human civilization), accordingly, attacks on civilian objects in the course of hostilities are prohibited on Islamic legal grounds. In sum, IHL and Islamic law bear a fundamental similarity in that both protect civilian objects, such as schools and other educational facilities, from attack.

Children separated from their families

When a child is separated from their family in a situation of armed conflict, IHL contains rules that seek both to ensure that the child’s needs are met while they are separated, and to re-establish contact and ultimately achieve the reunification of family members when possible. In IACs, among other relevant obligations, parties must ensure that children under the age of 15 who are orphaned or separated from their families as a result of the war “are not left to their own resources and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances”.\textsuperscript{99} This requires parties to take measures related to, \textit{inter alia}, the child’s food, clothing, accommodation and

\textsuperscript{98} AP I, Art. 58; ICRC Customary Law Study, above note 18, Rules 22–24.
\textsuperscript{99} GC IV, Art. 24(1).
medical needs. Beyond these provisions related to child welfare, Article 26 of the GC IV and Article 74 of AP I provide for steps to be taken to facilitate the reunion of families separated in armed conflict. In NIACs, AP II specifies that “all appropriate steps shall be taken to facilitate the reunion of families temporarily separated”. More generally, it is a rule of customary IHL that family life must be respected as far as possible, and this requires, to the degree possible, the maintenance of family unity, contact between family members and the provision of information on the whereabouts of family members.

Islamic sources make it abundantly clear that it is the obligation of the parents, the State and Muslim society at large to take care of children and provide for their basic needs. Two sets of rules illustrate this. First, the notion of the maintenance of family unity present in IHL rules is similarly reflected in Islamic sources: classical Muslim jurists affirmed the importance of keeping children with their parents, as well as, more generally, with members of the same family. Abū Ayyūb al-Anṣāri (d. 674), born in Medina in Saudi Arabia and buried in Istanbul, reported that he heard Prophet Muhammad saying: “Whoever separates between a mother and her children, God will separate between them and their loved ones on the day of Judgment.” More specifically, classical Muslim jurists are unanimous that, during captivity of male PoWs or enslavement of women, members of the same family must not be separated: these jurists prohibited the separation of children from their parents, grandparents or siblings, and some also prohibited their separation from other members of the extended family. Both bodies of law therefore contain a duty for belligerents to avoid, as far as possible, separating members of a family in their power. In addition, IHL contains the stipulation that parties to conflict must take steps...
to reunify families temporarily separated, and this area would benefit from further exchange between scholars from both legal traditions.

Second, the various obligations contained in IHL regulating the care of unaccompanied children find harmony in the Islamic legal tradition’s framework governing the care of children, albeit without the specificity of application in armed conflict. According to Islamic law, there is a certain framework of financial rights and obligations of family members whereby children must be taken care of. But in addition to this, and in the absence of such family members, Islamic law affirms the State’s obligation, and that of society at large, to take care of children; because of their even greater vulnerability, orphaned children receive a special status of protection, respect and care. Indeed, from a moral pre-Islamic Arab tradition (which was incorporated into the Islamic legal tradition), giving refuge and protection to the oppressed, the vulnerable and those who seek it is an obligation incumbent on Muslims, and this is relevant in cases where a party to a conflict finds an unaccompanied child in its power. In short, both IHL and Islamic law affirm the obligation of the State to provide for the care of unaccompanied children, though IHL does so specifically in situations of armed conflict while Islamic law does so in more general terms.

Conclusion

The present discussion is an illustration of two distinct legal systems, each with its own sources, history and contexts, yet both sharing the same humanitarian imperative to protect children suffering in war. Both IHL and Islamic law begin from the point that children must be explicitly singled out for protection from the effects of armed conflict. Both provide that the age of 15—<43– at the very minimum—is the earliest at which a child can be recruited to armed forces; both establish a requirement of humane treatment for individuals detained in armed conflict; both reflect the notion of the importance of a child’s access to education (albeit not specifically in situations of armed conflict in the Islamic legal sources consulted for this article); and both require the avoidance, as far as possible, of separation of family members in situations of armed conflict. There is ample room for further discussion—avenues of further work could include, for example, whether and how the humane treatment standards set out by the Islamic law of armed conflict for captured adult male combatants could be tailored more specifically to the treatment of both Muslim and non-Muslim children who are deprived of their liberty for reasons related to an armed conflict; and how Islamic law might complement IHL’s specific obligations as to the protection of education, the facilitation of the reunification of families temporarily separated,

and the care of unaccompanied children in situations of armed conflict. While reflecting on these synergies and avenues for further work, we also must emphasize that obligations in IHL are not “optional” – parties to armed conflict are at all times legally bound by the applicable IHL.

The foregoing discussion is an effort to provide a point of departure for future work and more detailed discussion between scholars and practitioners in the fields of IHL and Islamic law. At times, we have reached for simplicity and have made analogies in the name of distilling some clarity from this comparative exercise. Due to the usual constraints of time and resources, we are conscious that we have dealt in stark brevity with subjects that affect the lives of thousands of children every day. We are also cognizant that the content of the norms discussed here represents a certain interpretation of IHL, and a certain interpretation of the Islamic law of armed conflict – there are of course many others. We nevertheless aim for this exercise to feed further discussion, and we look to the views and expertise of others on this subject of pressing practical import. This dialogue can serve to disseminate key protective norms – both IHL and Islamic law are quite specialized, technical fields of expertise, so awareness-raising exercises are just as crucial as substantive debate over their content. This dialogue also bears the potential to influence the development and clarification of both IHL and Islamic law, both of which have long adapted to changing contexts on modern battlefields; Islamic law, unlike Islamic theology, is flexible in many of its rules and responds to changing realities and contexts. It also has great impact on the daily lives of hundreds of millions of Muslims, and can therefore contribute alongside IHL to the alleviation of the suffering of victims of armed conflicts.
Child marriage in armed conflict

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Abstract
Eradicating and addressing child marriage in situations of armed conflict requires that stakeholders increase their attention, knowledge, evidence-based protection measures, and resources in a coordinated fashion. To this end, this article examines what constitutes child marriage within the international legal framework. It then presents a concise analysis of what is known about child marriage in development contexts, before moving on to discuss the (limited) state of knowledge on child marriage in humanitarian settings, and the global response. It presents information on different married child populations, including child brides and grooms, girls forcibly married to armed actors, child widows, and child marriage within natural disasters. It concludes with ideas on the information and knowledge that is still needed to inform effective response.
Keywords: children, child marriage, forced marriage, humanitarian settings, armed conflict, gender, sexual and gender-based violence.

Introduction

Past and recent history is filled with examples of sexual violence against girls, and to a lesser extent against boys, during armed conflict. Sexual violence against children during armed conflict includes sexual exploitation, sexual humiliation, sexual assault, sexual mutilation, rape, sexual enslavement, enforced prostitution, forced sterilization, and other cruel and inhuman sexual acts committed by parties to conflict and civilians during times of armed conflict. In addition, girls have been subjected to forced impregnation, forced child-bearing and forced termination of pregnancy. While in most cases the perpetrator is an adult, in some cases the abuser is another child.1

This article focuses on a little-studied form of sexual and gender-based violence against children during times of armed conflict: child marriage. It makes a unique contribution by documenting and analyzing what is known regarding girls, and to a lesser extent boys, and child marriage during or as a result of armed conflict. The article thereby aims to fill gaps in the literature on different forms of sexual and gender-based violence during conflict; furthermore, based on this analysis, the authors outline key areas for future research on child marriage in armed conflict.

Our documentation and analysis are based on a comprehensive review of academic and grey literature (i.e., reports and briefings by non-governmental organizations) for manuscripts that discuss child marriage in situations of armed conflict. After a thorough search, the authors located fifty-seven such manuscripts. The literature on child marriage in development (i.e., non-conflict) settings is vast, and thus the authors limited their review and analysis to the most comprehensive reviews of the findings in this field.2 Our purpose in consulting

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the development-based literature was to gain insight into the range of push and pull factors and prevalence rates for child marriage in settings that were not in conflict to see what, if any, overlap or differences existed in the findings specific to conflict. The authors also carried out a total of seventeen in-depth interviews with experts from United Nations (UN) agencies, international agencies and international think tanks, as well as independent university researchers, working on areas directly or closely related to child marriage in conflict. The authors developed their first list of experts based on information provided by UN and international humanitarian and human rights organizations, and then snowballed out from there to locate and interview other experts. Finally, the lead author draws upon twenty years of field and research experience working with girls forcibly married during conflict.

This article examines what constitutes “a child” from a variety of vantage points, and what constitutes child marriage within the international legal framework. It then presents a concise overview and analysis of what is known about child marriage in development contexts, before moving to discuss the (limited) state of knowledge on child marriage in humanitarian settings, and the global response. The article considers a number of different child populations who are married within its review of the literature, including both child brides and grooms, girls forcibly married to armed actors, child widows, and child marriage within natural disasters. Throughout, the authors highlight gender and age differences where they appear. The article concludes with ideas about what information and knowledge is needed to inform response. In summary, eradicating and addressing child marriage in situations of armed conflict requires that stakeholders increase their attention, knowledge, appropriate and evidence-based protection measures, and resources in a coordinated fashion. This cannot be done effectively without evidence to inform practice. It also requires the full and meaningful participation of the women and girls who are affected, from the early stages through the monitoring and evaluating of efforts to address this pressing issue.

What is a child?

What constitutes a “child” in one place and time and under different cultural, knowledge and legal regimes can differ, though the UN Convention on the Rights of the Child (CRC) defines a child as every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. Hence, our investigation of “children” in child marriage takes into account the dynamic biological, neurological, cultural, social, political and legal state of childhood and adolescence. Biologically, a human child is a person that is incapable of reproduction and has not reached puberty. Puberty and reproductive capacity normally begin between 11 and 13 years of age for girls, and 11 and 14

years of age for boys. However, in terms of cognitive and emotional development, human brains are not fully developed until approximately 25 years of age. With developments in neurology and brain science, we now know that adults (i.e., those whose brains are fully developed) primarily use their prefrontal cortex for processing information. This region of the brain is where rational and logical thinking, organization and an ability to foresee long-term consequences for actions are housed. In comparison, humans in their pre-teens through to their early twenties process information using both the amygdala, which is the emotional site of the brain, and the prefrontal cortex, which remains undeveloped. The result is that the brains of humans in their teens and early twenties process information significantly differently than adults, and hence they think, respond and act differently than adults.

In the fields of religion, history, sociology and anthropology, what constitutes a child in different cultures, countries and time periods is largely understood as a social and political construct. For example, Islamic law declares that the age of puberty marks the end of a person being a child. Abū Ḥanīfah (d. 767), the founder of the Ḥanāfī school of law, declared the age of puberty to be 18 for boys and 17 for girls, arguing that girls physically and mentally mature earlier than boys. The Islamic Māliki jurists offer various ages of puberty, ranging from 16 to 19. As a result, Islamic law is not settled on the age at which one is no longer a child. From a sociological perspective, in some cultures it is not until a male has secured a home, married and had children that he is considered a “real man” and may take his place as such in that society. For females in similar societies, it is not until they are wedded, with a bride price or a dowry, and have children that they are considered “true” and legitimate women.

Within the legal regime, the CRC is the premiere instrument of international law regarding children’s rights. Article 1 of the CRC defines a child as “a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”. The CRC has been ratified by all UN member States except the United States.
are signatories, 18 is the age of majority, but in some cases laws vary on what constitutes a child, and sometimes the age is lower than the CRC standard of 18 years. Importantly, in some countries, the age of majority—meaning the age at which a child attains (nearly) all adult rights—can differ from the lawful age of marriage, criminal responsibility or enlistment in armed forces in domestic frameworks. In the United States, for example, in thirteen states children as young as 10 can be tried as adults for violent crimes and sentenced to imprisonment in adult detention facilities.¹⁰

Per the authors’ focus on child marriage, the Committee on the Rights of the Child, which oversees the enactment of the CRC, “strongly recommends that state parties review and where necessary reform their legislation and practice to increase the minimum age for marriage with and without parental consent to eighteen years for both boys and girls”.¹¹

Notably, the “Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices”, in 2014, highlighted the evolving capacities of a child:

As a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.¹²

**Sexual violence against children in times of armed conflict: The international legal framework**

International human rights law, international humanitarian law (IHL) and international criminal law all apply during situations of armed conflict. Below, the article discusses key aspects of these bodies of law in order to understand what constitutes sexual violence against a child.¹³ At the same time, there may be other legal frameworks applicable at the regional, domestic or even municipal levels.


¹³ For a comprehensive review and analysis of the development of crimes of sexual violence within international humanitarian and human rights law, see G. Gaggioli, above note 1.
National laws regarding sexual violence and abuse of children vary by country based on the legal definition of what constitutes a child and child sexual abuse, and when a person reaches the legal age of consent for sexual activity. Under the laws of most countries, minors are expressly singled out for protected from sexual abuse and are considered incapable of granting legal consent for sexual activity. Even so, many countries continue to allow the marriage and subsequent sexual abuse of girl children by adult males.14

The World Health Organization (WHO) defines sexual violence as any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work. Coercion can cover a whole spectrum of degrees of force. Apart from physical force, it may involve psychological intimidation, blackmail or other threats.15

The CRC obliges States to adopt a comprehensive and strong approach to preventing abuse of children, including sexual abuse. Article 19 directs:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.16

Article 34 instructs States Parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.

Article 35 extends this protection to “prevent[ing] the abduction of, the sale of or traffic in children for any purpose or in any form”. Article 39 of the CRC calls for States Parties to take all measures “to promote physical and psychological recovery and social reintegration of a child victim” of any exploitation or abuse, including sexual, “in an environment which fosters the health, self-respect and dignity of the child.” Furthermore, the CRC Optional Protocol on the Sale of

16 CRC, Art. 19.
Children, Child Prostitution and Child Pornography offers additional protection against sexual abuse for children of all genders.17

IHL has developed in line with increased attention to sexual and gender-based crimes.18 Article 27 of Geneva Convention IV of 1949 states: “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.” Common Article 3 to the Geneva Conventions, which prohibits sexual violence in all conflicts against non-State armed groups, also prohibits sexual violence.19 People of all genders are given protection against some sexual crimes committed by parties to conflict with Additional Protocol II of 1977, which states that the following acts shall remain prohibited at any time and in any place whatsoever: “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.20 Furthermore, customary IHL prohibits sexual violence in both international and non-international armed conflict.21

In The Prosecutor v. Jean-Paul Akayesu, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) asserted that sexual violence is “any act of a sexual nature which is committed on a person under circumstances which are coercive”,22 and that it is “not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact”.23 Thus the term “act of a sexual nature” is very wide-ranging, from comments that are sexual through to penetration of any opening of the human body with any object. The ICTR Trial Chamber further held that coercion should be understood broadly to include any act or show of physical force, as well as “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation”.24

18 See G. Gaggioli, above note 1.
23 ICTR, Akayesu, above note 22, para. 688.
24 Ibid.
International criminal law has further codified crimes of sexual violence, most notably in the Rome Statute of the International Criminal Court (ICC). Here, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity against a person of any age, sex or gender may constitute a war crime or crime against humanity.\(^{25}\) While international law prohibits sexual violence against all persons regardless of sex, gender or age, it is only within the last twenty years that national and international actors and courts have explicitly and rigorously paid attention to sexual crimes.\(^{26}\)

The UN Security Council has passed a number of resolutions regarding sexual violence against children. One of the most impactful is Resolution 1612, which requires “the systematic gathering of accurate, timely, objective and reliable information on six grave violations committed against children in situations of armed conflict” and triggers action by the Security Council and other key actors. These six violations are (1) killing and maiming of children, (2) recruitment and use of children by armed forces and groups, (3) sexual violence against children, (4) attacks against schools or hospitals, (5) abduction of children and (6) denial of humanitarian access for children.\(^{27}\) Security Council Resolution 1882 identifies sexual violence against children during armed conflict as a top priority and requires parties to the conflict to create and enact plans to stop these crimes.\(^{28}\) Furthermore, Human Rights Council Resolution 7/29 condemns child sexual abuse and exploitation during armed conflict.\(^{29}\) The ten United Nations Security Council Resolutions that make up the Women, Peace and Security Agenda also call for action to address sexual violence against girls and boys; they are Resolutions 1325,\(^{30}\) 1820,\(^{31}\) 1888,\(^{32}\) 1889,\(^{33}\) 1960,\(^{34}\) 2106,\(^{35}\) 2122,\(^{36}\) 2242,\(^{37}\) 2467\(^{38}\) and 2493.\(^{39}\)


\(^{34}\) UNSC Res. 134, UN Doc. S/RES/134, 1 April 1960, available at: www.refworld.org/docid/3b00f1893c.html.


\(^{38}\) UNSC Res. 2467, UN Doc. S/RES/2467, 23 April 2019.

\(^{39}\) UNSC Res. 2493, UN Doc. S/RES/2493, 29 October 2019.
Regionally, Article 16 of the African Charter on the Rights and Welfare of the Child urges member States to take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.  

Article 27 of the African Charter states:

State Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials.

The Council of Europe Convention on Action against Trafficking in Human Beings criminalizes any human trafficking, including sexual exploitation and abuse of children. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse criminalizes all sexual contact with a child that is under the legal age of consent.

In conclusion, the international human rights, humanitarian and criminal law systems have robust protections in place to safeguard children from sexual violence. However, many States fail to comply with international standards that protect children from sexual violence. Notably, this failure includes child brides and grooms who are married prior to obtaining legal age, and who are thus incapable of giving consent. In contrast to boy grooms, who are usually older or near the same age as their bride, girl brides are often married against their will to men a decade or more older than them who forcefully initiate them into sexual relations.

Child and forced marriage

Marriage is a complex and diverse social, cultural, religious and legal institution that has been examined in a range of fields including social anthropology, legal scholarship, economics, sociology and political science. Scholars studying

41 Ibid., Art. 27.
45 For a legal discussion of the use of the term “marriage”, see M. Bergsmo, A. B. Skre and E. J. Wood (eds), above note 26.
marriage contend that there is no universal definition of marriage that can be applied cross-culturally.\textsuperscript{46} For our purposes, it is important to recognize that the practice of child marriage also occurs in a variety of arrangements. Child marriages include those that are formalized, registered and recognized by custom, religion or the State, as well as those that are not formalized, are unregistered and are not recognized by custom, religion or the State. It is necessary to recognize, document and collect information on the entire range of child marriages that are occurring during and as a result of armed conflict.

The practice of child marriage threatens the lives and futures of girls and women around the world. Importantly, the UN General Assembly has declared that “deep-rooted gender inequalities and stereotypes, harmful practices, perceptions and customs, and discriminatory norms are … among the root causes of child, early and forced marriage”.\textsuperscript{47} Research conducted in development settings finds that child marriage occurs due to a variety of factors, including insecurity, increased risks of sexual and gender-based violence, the misconception of providing protection through marriage, gender inequality, lack of access to continuous, quality education, the stigmatization of pregnancy outside marriage, the absence of family planning services, disruption in social networks and routines, increased poverty and the absence of livelihood opportunities.\textsuperscript{48}

Child marriage robs children of their agency to make decisions about their lives. It disrupts their education and makes them more vulnerable to violence, discrimination and abuse. Child marriages prevent children’s full participation in economic, political and social spheres throughout their lives. For girls, child marriage is also often accompanied by early and frequent pregnancy and childbirth, resulting in higher than average maternal morbidity and mortality rates. Maternal health consequences associated with early child marriage have been extensively documented. Adolescent mothers are at a substantially greater risk for maternal child morbidity and mortality, and are more likely to experience pregnancy complications. These risks in turn increase the probability of neonatal death, stillbirth, premature and low-birth-weight infants, and infant and child morbidity and mortality.\textsuperscript{49} To illustrate, in a study of child marriage throughout

\textsuperscript{46} See Paul Bohannan and John Middleton (eds), \textit{Marriage, Family, and Residence}, American Museum Sourcebooks in Anthropology, New York, 1968, p. 50; Edmund Ronald Leach, “Polyandry, Inheritance and the Definition of Marriage”, \textit{Man}, Vol. 55, 1955, pp. 182–183. The Merriam-Webster Dictionary notes that the definition of the word “marriage” is highly controversial because it relates to culture, religion, legal rulings and human rights. Therefore, the definition that the dictionary does provide is quite inadequate, and the only definition that does not itself use the term “marriage” is “an intimate or close union”. See: www.merriam-webster.com/dictionary/marriage.


\textsuperscript{49} Anita Raj, “When the Mother Is a Child: The Impact of Child Marriage on the Health and Human Rights of Girls”, \textit{Archives of Disease in Childhood}, Vol. 95, No. 11, 2010; Andrew Nove, Zoe Matthews, Sarah Neal
several countries in sub-Saharan Africa, Nour found that mortality rates for babies born to mothers under 20 years of age were 73% higher than infants born to older mothers.50

Since 2014, the UN General Assembly and the Human Rights Council have adopted resolutions urging member States to respond to, prevent and eliminate early, child and forced marriages. Recent guidance by the Committee on the Elimination of Discrimination against Women (CEDAW) and Committee on the Rights of the Child recommended that all States ensure “that a minimum legal age of marriage for girls and boys, with or without parental consent, is established at 18 years”.51 In 2018, the UN General Assembly also made strides on setting a universal marriage age, calling upon States to enact, enforce and uphold laws concerning a minimum age of marriage, to monitor their application and to progressively amend laws with lower minimum ages of marriage and/or ages of majority to 18 and engage all relevant authorities to ensure that these laws are well known.52

In 2015, over 190 countries adopted the Sustainable Development Goals (SDGs) and committed to ending child marriage by 2030.53 SDG Target 5.3 aims, for the first time, to “eliminate all harmful practices, such as child, early and forced marriage”. Also relevant to child marriage are Target 16.1, “Significantly reduce all forms of violence and related death rates everywhere”, and Target 16.2, “End abuse, exploitation, trafficking and all forms of violence against and torture of children.”

For girls forcibly married to armed actors, SDG Target 8.7 is relevant; it calls upon States to

take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.

In addition, UN Security Council Resolution 2427 notes the need in reintegration processes to address children born of rape, including to girls forcibly married to armed actors:

Recognizing the important roles of both local and religious leaders and civil society networks in strengthening community-level protection, reintegration and combatting stigmatization of children, in particular girls, affected by


51 Committee on the Rights of the Child and CEDAW, above note 12, para. 55(f).


armed conflict, including children born as a result of sexual violence in conflict.\textsuperscript{54}

Important international, regional, national and subnational instruments, mechanisms and initiatives are now in place to end child marriage. Most notably, these include the African Union’s Campaign to End Child Marriage,\textsuperscript{55} the Regional Action Plan to End Child Marriage in South Asia,\textsuperscript{56} the Joint Inter-Agency Programme to End Child Marriage and Early Unions in Latin America and the Caribbean,\textsuperscript{57} and the Southern African Development Community Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage.\textsuperscript{58}

Child marriage is a global problem that spans across countries, religions and cultures. Currently, our knowledge of child marriage as a phenomenon is primarily based on information gathered in development settings, and focuses on child brides.\textsuperscript{59} Yet humanitarian and human rights actors are increasingly aware of the practice of child marriage in situations of armed conflict. The 2017 Human Rights Council Resolution on Child Marriage in Humanitarian Settings acknowledges that gender inequality is among the root causes of child marriage, with poverty and lack of education among the key drivers of the practice.\textsuperscript{60} Research finds that child marriage is driven by multiple, complex factors including gender norms, poverty, lack of alternatives, tradition, insecurity, and rural and urban differences (with rural girls being significantly more like to become child brides).\textsuperscript{61}


\textsuperscript{60} Human Rights Council, 35th Session, Agenda Item 3, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development”, 6–23 June 2017.

While child marriage affects both boys and girls, girls and women suffer disproportionately—650 million women alive today were married as children, compared to 156 million men. Generally, girls are married at younger ages and there is often a large age difference between the female and male spouses. Currently, 12 million girls under 18 years of age are married each year worldwide. South Asia is home to the largest number of child brides, followed by sub-Saharan Africa, though child marriage of girls is found in all regions of the world, including Western countries. In the top twenty countries reporting the highest prevalence rates of marriage of girls, the rates range from 76.3% of girls married in Niger to 35.4% in Sao Tome and Principe. The gender discrimination against girls in marriage laws is stark: in fifty-two countries girls under 15 years of age can be married exclusively with the authority of their parents, while for boys the same applies in twenty-three countries. In the majority of countries, the legal age of marriage for girls is younger than it is for boys.

We know very little about the push and pull factors associated with boys marrying, and even less about their experiences of child marriage. Prevalence rates are only just emerging. Researchers analyzing data from eighty-two countries in seven regions found that, overall, 4.7% of males were married before they were 18 years of age. Notably, the countries with the highest rates of marriage for boys did not have similarly high rates of marriage for girls. Researchers found that in the top twenty countries reporting the highest prevalence rates of marriage of boys, the rates range from 27% of boys married in the Central African Republic (CAR) to the low end of 6.5% in Sierra Leone. Importantly, boy grooms are much less likely to be forcefully sexually initiated, face no risks of pregnancy and early childbirth, and are not stigmatized and abused when divorced in the ways that girl brides are. Nonetheless, marrying as a boy is a negative and harmful experience which often robs the boy of his childhood and educational opportunities and traps him in poverty.

Child marriage is not the same for girls and boys, nor is it the same around the world or even within a country. Context plays a highly significant role in determining the many factors that shape child marriage. Research in 2017 by Petroni et al., across four countries in Sub-Saharan Africa (Kenya, Senegal, Uganda, and Zambia), confirms the findings of the existing literature:

63 Ibid.
65 C. M. Gastón, C. Misunas and C. Cappa, above note 64.
Child marriage is rooted in inequitable gender norms that prioritize women’s roles as wives, mothers, and household caretakers, resulting in inadequate investments by families in girls’ education. These discriminatory norms interact closely with poverty and a lack of employment opportunities for girls and young women to perpetuate marriage as a seemingly viable alternative for girls.67

However, Petroni et al. also found at the African study sites that sexual relations, unplanned pregnancy and school dropout often preceded child marriage. These findings differ from most existing evidence on child marriage in South Asia. Furthermore, unlike in South Asia, where family members typically determine the spouse a girl will marry, most girls in the Africa study settings have greater autonomy in partner choice selection.68

The practice of child marriage for girls and boys has continued to decline around the world. During the past decade, the proportion of young women who were married as children has decreased by 15%, from one in four (25%) to approximately one in five (21%).69 However, according to UNICEF, given population growth and at the current rate of decline, countries are still not on track to reach the SDG of ending child marriage by 2030. In fact, at current rates, an additional 150 million girls will be married by that date.70

Child marriage in armed conflict and humanitarian settings

In 2017, a Human Rights Council Resolution on Child Marriage in Humanitarian Settings recognized child, early and forced marriage as a human rights violation and a harmful practice that disproportionately affects women and girls globally. “Humanitarian settings” were defined by the Human Rights Council as “including humanitarian emergencies [and] situations of forced displacement, armed conflict and natural disaster”.71 As discussed above, under international standards, a child marriage is a form of forced marriage given that one or both parties have not expressed full, free and informed consent.72

68 S. Petroni et al., above note 67.
69 UNICEF, above note 62.
70 Ibid.
71 Human Rights Council, above note 60.
72 The Committee on the Rights of the Child and CEDAW do however note that “[a]s a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition”. Committee on the Rights of the Child and CEDAW, above note 12, para. 20.
During situations of war and crises, research shows that the family is one of the most important resources that children and youth have to help them survive with their physical, mental and emotional health intact.73 This is not always the case, however. People who look at armed conflicts from afar tend to believe that armed conflict is the driving force of harm in young people’s lives, but children and youth see and experience violence, including sexual violence, much more broadly and pervasively. We need to challenge the narrative of the supremacy of war as the leading cause of violence, including sexual violence, in the life of a child affected by armed conflict. One of the most striking findings that comes from listening to young people in areas affected by armed violence is how often the violence associated with the war and the warring parties is not what they report and experience as most threatening, harmful or damaging to them. Rather, among the most toxic and pervasive physical, sexual and emotional violence that many young people experience is that which comes from their family members, and for child brides, from their husbands.74

In recent years, the implications of conflict-related sexual and gender-based violence have drawn increased attention at the local, national, and international levels. Child marriage is a form of sexual and gender-based violence that involves other violations, including, for example, forced labour.75 Conflict and instability are thought to be significant drivers of child marriage, particularly for girls. Indeed, there is some evidence to suggest that girls in armed conflict and humanitarian crisis situations and fragile States are made more vulnerable to child marriage. Out of the ten countries with the highest rates of child marriage for girls in 2017, seven are considered fragile States: Niger (76%), the CAR (68%), Chad (67%), Bangladesh (59%), Mali (52%), South Sudan (52%) and Mozambique (48%). Furthermore, all of these countries are experiencing armed conflict and or are hosting large conflict-displaced populations with high rates of child marriage, with the exception of Mozambique.76

Notably, of the top ten countries reporting the highest prevalence rates of child marriage for boys, only the CAR (28%) is experiencing armed conflict, while Nicaragua (19%) and Honduras (12%) are experiencing high levels of armed forces- and gang-related violence and crime.77

74 Dyan Mazurana, We Have Hope: Children, Violence and Resilience, forthcoming.
77 The top ten countries with the highest prevalence of marriage for boys under 18 are, in order of ranking, the CAR, Nicaragua, Madagascar, Nauru, Honduras, Comoros, the Marshall Islands, the Lao People’s Democratic Republic, Cuba and Nepal. See C. M. Gastón, C. Misunas and C. Cappa, above note 64.
As discussed below, research is only just emerging that looks in depth at child marriage in humanitarian settings. These studies are predominately comprised of one-off, small-scale, primarily qualitative research focusing on particular ethnic or geographic populations. The majority of studies to date have been carried out in the Middle East and North Africa region and have focused on child marriage among displaced and refugee communities.

A consistent finding in studies of conflict-affected families and child marriage is that many families who marry off their young girls are doing so in an effort to protect them from real or perceived threats of increased sexual violence because of the conflict. Researchers working with Syrian refugees found that some families that remained in Syria in the early part of the conflict married their daughters to older men or men in the military as a way to try and protect the girls from kidnappings, sexual violence and the Syrian military’s bombings. Others married their daughters to different members of the armed groups that controlled their areas to try and protect and gain resources for their girls and the larger family.78 Carrying out research in Syria, Jordan and Turkey with Syrians, Care International found that families’ concerns about increased sexual violence led them to marry their girls earlier to guarantee their virginity upon marriage and thus, in part, uphold the family’s and their girls’ perception of honour.79 In Sri Lanka, there were reports of parents marrying their girls to try and protect them from being recruited by the Liberation Tigers of Tamil Eelam.80 In Somalia, some families married their girls to prevent them from being forced to marry members of Al-Shabaab.81 In northern Uganda, families encouraged their girls to become “temporary wives” or the second or third wives of soldiers and militia members in order to try to afford their girls and the family additional security, protection from abduction and forced marriage by the rebel force, and access to food, money and other resources.82

As noted throughout the above paragraph, families experiencing armed conflict may also marry their girls in an attempt to maximize resources. They may marry her to lessen the resources they need to give to the girl herself, thus freeing up more resources for their remaining family members. They may also marry her to try to access resources or protection from her husband and his

78 Interview by Dyan Mazurana with researcher Aisha Hutchinson, 27 November 2018, on file with author; Dallin Van Leuven, Dyan Mazurana and Rachel Gordon, “Analysing Foreign Females and Males in the Islamic State in the Levant (ISIL) through a Gender Perspective”, in Andrea de Guttry, Francesca Capone and Christopher Paulussen (eds), Foreign Fighters under International Law and Beyond, T. M. C. Asser Press, The Hague, 2016.
family for their larger family, as is noted in research regarding Syrian refugees marrying their girls to men in Jordan and Lebanon\textsuperscript{83} and in South Sudan.\textsuperscript{84}

However, girls are not safer in child marriages, as many are married to men a decade or more older than them and experience powerlessness, sexual violence and other forms of abuse within their marriages.\textsuperscript{85} In some countries where polygamy is practiced, these girls are often made to serve both their husband and the older wives in household, subjecting them to more abuse.\textsuperscript{86} Girls in both Syria and Afghanistan have been documented attempting suicide or succeeding in killing themselves as a means to escape their violent husbands and dehumanizing marriages.\textsuperscript{87}

To date, only one study by UNICEF and the International Center for Research on Women has carried out comparative research on child marriage in humanitarian and development settings. The study was carried out in Egypt, Jordan, Lebanon, Morocco, Sudan and Yemen, and highlighted four factors influencing child marriage in humanitarian settings. First, the study found that girls with limited freedom of movement that hinders their ability to go to school or contribute to household livelihoods are seen as a burden on the family. Furthermore, in locations where the family itself is confined to camps or legally unable to work, pressure mounts to find other ways to access resources and opportunities; here, marrying their girls may be a way for family members to open up resources and opportunity. Second, social and cultural functions that enforce social gender roles for girls to marry and produce children may be strengthened where families feel pressure to uphold cultural values and notions of family honour, and to continue their cultures. Third, where key service provisions are lacking, girls appear more likely to be married. Where girls and their family members have access to school and access to legal services and redress, it appears the practice of child marriage may decrease. Finally, the study noted legal gaps, including lack of birth registration, that enable parents to exaggerate the age of the child, and laws that permit girls to be married with parental permission. The report stressed the urgent need for coordination among local, national and international actors to generate knowledge through research and programmatic interventions in order to prevent and respond to child marriage.\textsuperscript{88}

\textsuperscript{83} CARE UK, above note 79.
\textsuperscript{86} Human Rights Watch, above note 84.
\textsuperscript{88} UNICEF, A Profile of Child Marriage in the Middle East and North Africa, 2019, available at: https://www.unicef.org/mena/reports/profile-child-marriage. Another comparative research programme is under way between the Women’s Refugee Commission and Johns Hopkins University. Research was carried out in Ethiopia, Myanmar and Lebanon; results will be available in 2020 and 2021.
The UN and international non-governmental organizations (INGOs) are leading the way in research on child marriage among refugees and the displaced; rigorous academic and scholarly studies, which are discussed below, are only now emerging. The conditions families experience in refugee and internally displaced persons’ camps or in urban settings where these populations settle can contribute to increasing girls’ likelihood of being married.\footnote{Ibid.; ICRC, \textit{Displaced in Cities: Experiencing and Responding to Urban Internal Displacement Outside Camps}, available at: \url{https://tinyurl.com/vbqsfe}.} Research with displaced conflict-affected populations in Lebanon, Malaysia, India and Indonesia (Rohingya girls), and northern Cameroon and Nigeria finds that loss of assets and livelihoods, inability to find paid employment, increase in debt, reduced incomes and increased seclusion of girls (leading to their inability to contribute to household livelihoods) can lead families to see child marriage as a way to meet their needs.\footnote{Girls Not Brides, “Child Marriage in Humanitarian Settings”, 2018, available at: \url{www.girlsnотbrides.org/wp-content/uploads/2016/05/Child-marriage-in-humanitarian-settings.pdf}.} 

As detailed here, there is an important body of knowledge being built around the situation of Syrian girls fleeing the war in Syria. Studies in Turkey, Syria and Jordan have found that displacement due to armed conflict increases Syrian girls’ vulnerability to child marriage. In particular, resources are lost or drained, families are split apart, and social and family protection networks fray. At the same time, there is increased insecurity, including the risk of sexual violence, which prompts some families to look to child marriage to protect their girls, their perception of their family honour and themselves.\footnote{Ibid.}

child marriage in the Syrian crisis. However, the study was unable to capture child marriages that were not registered; thus, we know little about what is happening with girls inside unregistered marriages and how they compare to registered marriages.

Mourtada et al. carried out a qualitative study among Syrian refugees in Lebanon to investigate recent reports suggesting that child marriage had increased among Syrians as a result of displacement and conflict. While child marriage was a common practice in pre-conflict, rural Syria, the study found that new factors were contributing to an increased risk of marriage for Syrian girl refugees in Lebanon. Key factors increasing this risk included conflict- and displacement-induced safety concerns, deteriorating economic conditions, and interrupted education. The study also recorded changes in marriage practices, including a briefer engagement period, reduced bride price, modifications in marrying cousins and a lowering of girls’ age at marriage.94

A study by Bartels et al. sought to understand the factors driving child marriage among Syrians in Lebanon. These researchers collected and analyzed the narratives of approximately 1,400 adolescent Syrian girls and boys who sought refuge from the Syrian war in Lebanon. Bartels et al.’s study is particularly interesting in that it found significant differences in narratives of child marriage among female and male participants, with females focusing on safety and education and feeling girls were overprotected and stifled, while males spoke more about financial concerns and said that more should be done to protect their vulnerable females, which linked directly to marrying off their girls:

Syrian girls and mothers were more likely to share stories about protection/security and/or education and were more likely to report that girls were overprotected. Male participants were more likely to share stories about financial security as well as sexual exploitation of girls and more often reported that girls were not protected enough.95

These findings highlight the fact that the gender of the respondent significantly influences an understanding of the drivers of child marriage and the impact those drivers have on the lives of Syrian girl refugees.

A study carried out in 2019 in conflict-affected areas of South Sudan found that households that married off a child under age 18 in the previous twelve (at baseline) or six (at endline) months reported increased social capital after marrying off children. They found that child marriage was most prevalent among internally displaced persons (IDPs) living with a host community, in comparison to IDPs living in a camp setting or local residents (i.e., non-displaced persons).


Furthermore, a recent marriage of a child under the age of 18 was associated with a greater number and diversity of social connections as well as total resources accumulated through those social connections. In addition, if a household reported that a child was married between the baseline and endline, their number of social connections significantly increased. These findings imply that child marriage may be an important coping strategy used by IDP households living amongst the host community to increase their social capital and, as such, their access to critical resources—but this strategy appears less relevant in camp settings.96

Finally, within the research on child marriage and displacement, there are very few studies on child marriage and repatriation. However, in one study with Afghan refugee families who returned to Afghanistan or settled in Pakistan, researchers found that children who are not in school are at increased risk of marriage compared to those who are enrolled in school.97

Child marriage by fighting forces and armed groups

One notable exception to our lack of robust knowledge on child marriage in humanitarian settings is information on girls forcibly married into fighting forces and groups. The most current examples of this form of child marriage include girls taken by Boko Haram and forced to become the wives of fighters, Yazidi girls abducted by Islamic State (IS) fighters and supporters who were sold as sexual slaves (to the extent to which this form of sexual slavery also consisted of forced marriage), and Somali girls forced to be wives to Al-Shabaab fighters.98

For nearly twenty years academics and practitioners have undertaken substantial quantitative, qualitative, mixed-methods and comparative research detailing girls’ entry into forced marriages with armed actors, they and their children’s experiences within these relationships, and the experiences of girls, young women and their children upon leaving these relationships. Research with these populations has been conducted in Colombia, Liberia, Iraq, Mozambique, Nepal, Nigeria, Rwanda, Sierra Leone, South Sudan, Sudan, Syria and Uganda.99

97 Girls Not Brides, above note 90.
While contexts vary, on the whole researchers find that girls are often forced into these relationships, entering through coercion and ensuing captivity. In such cases, forced marriage overlaps with the crime of forced recruitment of children. For girls who enter into child marriage this way, they, their families and their communities often do not consider these relationships valid. In some cases, the girls are considered polluted by these relations. Other girls may “willingly” take a fighter husband as a means to try to ensure their own or their family’s security and access to food and shelter. Once inside these relationships, girls perform many essential roles for the fighting group or force. They are also required to assume the conjugal roles of monogamous sexual relations, childbearing and rearing, house-making and housekeeping, and the status of a “wife”. Indeed, these components were essential to the development of international jurisprudence on the crime of forced marriage, first seen in the Special Court for Sierra Leone100 and most recently prosecuted by the ICC in The Prosecutor v. Dominic Ongwen, concerning a top commander within the Lord’s Resistance Army (LRA).101

Importantly, studies show that those who have been forcibly married and have children born of war-related sexual violence experience both more and different challenges than those who do not. Most girls forcibly married into


100 The Special Court of Sierra Leone Appeals Chamber has defined forced marriage as “a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental, or psychological injury to the victim”.

armed forces and groups who return with children will never enter or re-enter schooling, and they remain largely uneducated and poor.\textsuperscript{102}

Research also finds that the majority of these girls, and their children produced from these forced marriages, are rejected by their families and communities upon their return. The reasons for rejection include a combination of being perceived as polluted, out of social harmony or possessed by evil spirits; an economic burden to the family; and a potential economic threat to the land and inheritance of the other male children in the family.\textsuperscript{103} Studies in northern Uganda find that even upon return from captivity and years after the conflict has ended, these girls and their households are significantly more likely to be victims of a range of crimes committed by family and community members because of the stigma attached to them and their low social status.\textsuperscript{104}

**Children born to girls married to members of fighting forces and armed groups**

While there is a strong body of literature on girls married into armed forces and groups, gaps in knowledge remain regarding children born as a result of these marriages. Insisting on the need to protect children from rape and sexual violence in armed conflict and post-conflict situations, UN Security Council Resolution 2122 specifically notes “the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination”.\textsuperscript{105} During the last decade alone, it is estimated that tens of thousands of children have been born worldwide as a result of forced marriages and child marriages to members of fighting forces and armed groups.\textsuperscript{106}

Only a handful of researchers in the world have carried out in-depth fieldwork with the children born of these relationships, their mothers and their communities, most notably in Bosnia, Mozambique, northern Uganda, Rwanda and Sierra Leone. The evidence suggests that regardless of the nature of the parents’ sexual relationship (forced, survival sex, consensual), many of these children are stigmatized, discriminated against, abused, abandoned by family members, and denied basic rights and access to services such as health care and education. In some cases, children may be beaten or starved to death by family members frustrated at their parentage.\textsuperscript{107} These children are routinely denied

\textsuperscript{102} J. Annan \textit{et al.}, above note 99; E. Amony, above note 99; T. Atim, D. Mazurana and A. Marshak, above note 99; S. McKay and D. Mazurana, above note 99.


\textsuperscript{104} T. Atim, D. Mazurana and A. Marshak, above note 99.


\textsuperscript{107} T. Atim, D. Mazurana and A. Marshak, above note 99; C. Carpenter (ed.), above note 106; Myriam Denov and Antonio Piolanti, “Mothers of Children Born of Genocidal Rape in Rwanda: Implications for Mental
membership of their mother’s family and community. This exclusion demonstrates one of the most profound intergenerational consequences of wartime child marriages: the loss of identity and social exclusion experienced by the resulting children. This exclusion is compounded by their father’s perpetrator status, their perceived association with the armed group, and the shame and “pollution” surrounding rape. The accumulation of these factors may give rise to grave abuses and crimes against these mothers and their children throughout their lives.

Important research in northern Uganda working directly with children born of forced marriages to rebel LRA fighters finds that the children prefer their treatment during war and in captivity to their experiences of so-called “post-conflict” and “peace”. What the children born of war rape inside the LRA remembered was that their fathers were present and attentive to their needs. Their fathers protected them; their fathers provided for them. Post-conflict and back in their mother’s community, they experienced rejection, abuse and deliberate deprivation by people who were supposed to care for them. However, there are some cases, most notably in Mozambique and Bosnia, in which these children and their mothers appear to be accepted by their families and communities, and more knowledge is needed on these cases.

Child widows and child brides whose husbands have left, been detained or disappeared

Almost no research has been specifically conducted on child widows. The authors found no research at all conducted specifically on child brides whose husbands have left to fight or to seek refuge internally or across borders, or who have been detained or disappeared in conflict and humanitarian settings. An important and rare study by Watson addresses this population in its larger findings, however.


M. Denov and A. A. Lakor, above note 107.

Watson finds that armed conflict and disaster contribute to the widowing of child brides, who are among the most vulnerable of widows. Child widows’ vulnerability comes in part because they are immature and struggle to handle the psychosocial, economic, cultural, legal, labour and child-rearing implications of the death of their adult husbands. Furthermore, child widows are often denied inheritance rights, and property is often taken by their brothers or brothers-in-law. They lose control of their children. They are evicted from their homes and land. They are exploited by family and community members. They are vulnerable to sexual exploitation and abuse. Data on child brides whose husbands have left to fight or to seek refuge internally or across borders, or who have been detained or disappeared in humanitarian settings, is almost never collected in humanitarian or development settings. However, these child brides should be considered important populations about whom more information and informed response are needed within conflict and humanitarian settings.

Context matters

As demonstrated in the review of studies presented above, one of the most consistent findings from both the emerging body of literature on child marriage in conflict and the interviews with experts and practitioners carried out by and on file with the authors is the primacy of the context of the conflict or crisis in shaping child marriages. The literature and experts stress that child marriage in armed conflict trends, drivers, and push and pull factors vary greatly based on context, the moment of time within a conflict or crisis, and how communities and individual families are coping with insecurity and shocks. Hence, what is learned from one context (or community or household) may not apply to another context (or community or household). Additionally, what was true at one point in the conflict or crisis regarding child marriage may not hold true for a past or future point in time for the same conflict or crisis.

Another important finding from the literature and the authors’ interviews with experts is the range of key contextual factors that can influence families’ and girls’ and boys’ decisions around child marriage, as well as the prevalence and incidence of child marriage. Specifically, these factors include security risks and threats, food security, assets and wealth, livelihood options, health and nutrition, education levels, spatial mobility and freedom of movement, experience of shocks and crimes, and coping strategies. Individuals’ own intersectional identities also play a role, particularly gender, age, nationality, ethnicity, class/caste, religion, disability and urban or rural status. Influences also include larger gendered societal, economic, security, religious, and psychosocial factors that families are experiencing during and as a result of armed conflict.

Child marriage during climate change and natural disaster

As detailed below, there are only a handful of academic and INGO studies that specifically explore the links between climate change and natural disaster and the marriage of children. At present there is a significant lack of rigorous study on this topic, and thus there are large gaps in our knowledge. Based on the few academic and INGO studies that exist, findings suggest that in contexts where marriage is an economic transaction or a strategy to improve capital accumulation (e.g., through dowry or bride price systems), more climate crises—drought, tsunami, flooding, earthquakes—result in increases in families’ economic hardship, thus potentially increasing the use of child marriage as a negative coping strategy. These increased economic hardships are believed to lead to higher rates of child marriage, as well as a driving down of the age of child brides, as found in research in Aceh, Bangladesh, India, Indonesia, Mozambique, Nepal, Somaliland and Sri Lanka. In some cases, however, climate crises may result in fewer child marriages, as found in a study of drought in Ethiopia (a country with among the world’s highest rates of child marriage). In this study, drought caused a reduction in Somali refugees’ ability to provide for a wedding and thus resulted in a decrease in child marriage. Again, context matters deeply for understanding what is happening, and why, with regard to child marriage in conflict and humanitarian settings.

What we need to know

What knowledge is needed to address child marriage in conflict settings?

On 12 November 2018, the UN General Assembly passed a resolution on “Child, Early and Forced Marriage”. As part of this resolution, the General Assembly highlighted the need for States to improve the collection and use of quantitative, qualitative and comparable data on violence against women and harmful practices, disaggregated by sex, age, disability, civil status, race, ethnicity, migratory status, geographical location, socioeconomic status, education level and other key factors, as appropriate, to enhance research and dissemination of evidence-based and good practices relating to the prevention and elimination

114 Systems of exchange play important roles in marriage practices throughout the world, and bridewealth (also known as bride price) and dowry are two key systems of exchange that involve the transfer of goods or services between the husband and his kin to the family of the bride (see A. Bunting, B. N. Lawrance and R. L. Roberts, above note 99). The bridewealth payment is framed as an exchange for the bride’s productive and reproductive labour as part of the marriage. Bunting et al. explain: “Bridewealth was a strategic investment that built and maintained webs of kinship and organized and controlled labor” (ibid., p. 17). While dowry and bridewealth are part of similar systems, dowry is provided by the bride’s kin to the groom and “is a means to enhance the attractiveness of a bride in marriage” (ibid., p. 18).

115 Girls Not Brides, above note 90.

116 Ibid.
of child, early and forced marriage and to strengthen monitoring and impact assessment of existing policies and programmes as a means of ensuring their effectiveness and implementation.\textsuperscript{117}

The General Assembly also called on relevant UN bodies, regional organizations, international financial institutions, civil society and other key stakeholders to work together with States and their national statistical agencies to build capacity for data and reporting on progress to end child and forced marriage. Finally, the General Assembly called on the Secretary-General to submit a comprehensive, evidence-based report on progress to end child, early and forced marriage, including gaps in research and data collection.\textsuperscript{118}

Almost without exception, every published report and study, and every person interviewed for this article, noted the urgent need to build a robust body of knowledge on the subject of child marriage in conflict and humanitarian settings. While the current studies are invaluable, the reality that child and forced marriage is significantly shaped by a wide variety of factors, context, and changes over time necessitates a larger, more rigorous body of context-specific and comparative evidence to inform response.

The reality is that most aspects of child marriage in conflict and humanitarian settings are significantly under-studied. Much of what we know is based on a handful of important but limited one-off studies, the observations of field practitioners and researchers, and anecdotal findings or hypotheses that remain untested. The lack of a rigorous body of evidence, comparative research, and research that tracks changes over time on child marriage in conflict and humanitarian settings leaves practitioners, policy-makers and scholars with more questions than answers.

Based on our review and analysis of the findings to date, the authors conclude that it would be helpful to have context- and time-specific and gender- and age-disaggregated information in the following areas where children and their families are affected by armed conflict:

- Both the prevalence and incidence\textsuperscript{119} of child marriage at country, regional and subregional levels, and among particular communities.
- How changes in a range of factors may significantly affect a family’s, girl’s or boy’s decision to reject or accept child marriage. These factors could include security, insecurity, gender inequality, views on pregnancy out of wedlock, traditions of child marriage, access to continuous quality education, access to quality health services including reproductive health services, livelihoods, livelihood opportunities, assets and wealth, debt, poverty, food security, freedom of movement, experience of a range of shocks and crimes (including sexual and gender-based violence) and displacement.

\textsuperscript{117} UNGA Res. A/C.3/73/L.22/Rev.1, above note 52.

\textsuperscript{118} \textit{Ibid}.

\textsuperscript{119} Prevalence is the proportion of cases in the population at a given time and indicates how widespread child or forced marriage is in the population. Incidence is the occurrence of new cases over a set amount of time (usually months or a year) and can provide information about the risk of child or forced marriage and the rate of occurrence of new cases.
• How families decide to protect their girls from child marriage, or how and why they decide to accept or pursue the marriage of their girls or boys.
• Decision-making processes in households and families around rejecting or pursuing child marriage for both girls and boys.
• The ability of girls and boys to negotiate within these spaces, or when and why they may reject or pursue marriage.
• How best to anticipate and mitigate the risks, threats and vulnerabilities faced by these child brides and grooms and their families, and how these risks, threats and vulnerabilities change over time.
• How to promote these children’s (and if they are married, eventually their own children’s) well-being, rights and acceptance in their families and communities.
• What happens to these girls and young women, and their children, when they are widowed, left or abandoned, or when their husbands are detained or disappeared, as many are likely to be in situations of armed conflict, major natural disasters and/or displacement.

Scholars, policy-makers and practitioners need a better understanding of the different drivers and impacts that arise in sudden and slow-onset natural disasters as opposed to conflict settings. What are the differences between IDP settings and refugees? Within refugee and IDP settings, are there differences in camp settings compared to host community influxes?

What is clear from our review of the literature and interviews with key informants is that understanding and addressing child marriage in conflict and humanitarian settings requires the coordinated development, among key stakeholders seeking to prevent and address child marriage, of common data collection tools that can both deliver snapshots in time and be collected over time and with greater frequency than is currently occurring. There is a need for data collection on prevalence, incidence, trends, drivers, push and pull factors, decision-making processes and consequences. There is a need to collect data on children at risk of child marriage, those already married, those with children of their own, and those who are widowed. It is also important to collect data on what is happening to the children born of child marriages.

Furthermore, the data collection tools need to be nuanced enough to capture contextual influences and differences (if any) among child marriages, including formal and informal marriages, marriages to armed actors, child widows, and, where possible, child brides whose husbands have left to fight, or to seek refuge internally or across borders, or who have been detained or disappeared. The data collection tools need to produce data that provides users with a more sophisticated contextual understanding of child marriage in the settings where they are working. And, in order for us to understand how child marriage may differ or be similar in different settings, the data need to be comparable among conflict, disaster, refugee and development contexts. In summary, such data would be extremely useful for prevention and response planning regarding child marriage in conflict and crisis settings, and should be compiled in a way that allows disaggregation in enough detail for the tailoring of programme design.
Engaging armed non-State actors on the prohibition of recruiting and using children in hostilities: Some reflections from Geneva Call’s experience

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Abstract
Despite the existence of a comprehensive international legal framework protecting children in armed conflict, ensuring its respect by armed non-State actors (ANSAs) still remains an important challenge. This can be linked to several circumstances, such as their lack of knowledge of the law, the absence of an incentive to abide by the applicable rules, their fragmented structure and their lack of capacity to implement the applicable framework. Certain practical cases, however, show that ANSAs’ behaviours may vary throughout armed conflicts. While certain groups
have, at a given moment, breached some of their international obligations, others have shown some degree of commitment to respecting children’s safeguards. When addressing the prohibition of recruiting and using children in hostilities, the reasons behind these variations have remained insufficiently explored. This article reviews some of the lessons learned from Geneva Call’s experience when engaging ANSAs towards their compliance with child protection norms.

Keywords: armed non-State actors, child recruitment and use, engagement, ownership, international law, compliance, Geneva Call.

In 2017, two armed non-State actors (ANSAs)\(^1\) from the Central African Republic issued internal command orders prohibiting the recruitment and use of children in armed conflict.\(^2\) Similarly, the Coordination des Mouvements de l’Azawad (Coordination of Azawad Movements) in Mali and the Civilian Joint Task Force in Nigeria signed action plans with the United Nations (UN) to release children from their ranks and to prevent future recruitment.\(^3\) Also in 2017, more than forty children left ANSAs fighting in the North Kivu region of the Democratic Republic of the Congo (DRC) after engaging with Geneva Call.\(^4\) In Colombia, between September 2016 and August 2017, 135 children were formally released from the Revolutionary Armed Forces of Colombia – People’s Army in the context of the commitment the group had undertaken with the government as part of the peace process.\(^5\) In the same vein, the Moro Islamic Liberation Front was delisted from the UN Secretary-General’s 2017 annual report on the recruitment and use of children following the completion of its action plan with the UN, which resulted in the disengagement of 1,869 children from its ranks.\(^6\)

1 Although the international law and political sciences literature normally refers to “non-State armed groups”, “armed opposition groups”, “armed groups”, “rebels” and “insurgents”, sometimes interchangeably, this article will use the term “armed non-State actors”. This term encompasses organized armed entities that are not operating under State control and lack the legal capacity to become party to relevant international treaties. ANSAs comprise different types of actors, such as opposition and insurgent movements, dissident armed forces, de facto authorities, paramilitary groups and self-defence militias. See, generally, Annyssa Bellal, “What Are ‘Armed Non-State Actors’? A Legal and Semantic Approach”, in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), International Humanitarian Law and Non-State Actors: Debates, Law and Practice, T. M. C. Asser Press, The Hague, 2020.


3 Ibid.


5 Report of the UN Secretary-General, above note 2, p. 36, para. 263.

Although these examples show some promising steps towards the protection of children in armed conflict, millions of children around the world are still affected, either directly or indirectly, including an estimate of more than 300,000 child soldiers. Children are being killed and maimed, abducted and raped, recruited and used in hostilities. They are also denied access to health care and education. ANSAs are responsible for many of these grave violations.

Through the development of different mechanisms and legal instruments, the international community has recognized the importance of protecting children in armed conflict. International humanitarian law (IHL) and international human rights law (IHRL) prohibit, in particular, their recruitment and use in hostilities, and also include provisions on their access to basic needs. The Statute of the International Criminal Court has included as a war crime the conscription, enlistment or use children under the age of 15 to participate in hostilities, both in international and non-international armed conflicts. The UN has also taken an active role in this field by creating the UN Monitoring and Reporting Mechanism (MRM) to address six grave violations committed against children in times of war: killing or maiming; recruiting or using child soldiers; attacks against schools and hospitals; rape or other forms of grave sexual violence; abduction; and denial of humanitarian access.

Despite these mechanisms and instruments, generating respect for international law still remains an important challenge, especially when dealing with ANSAs. While some armed groups have shown a certain level of respect for

9 See Report of the UN Secretary-General, above note 6, p. 5, where it is highlighted that in 2016 there were at least 4,000 verified violations by government forces and more than 11,500 verified violations by ANSAs. The SRSG CAAC has, in fact, affirmed that ANSAs “have systematically constituted the vast majority of parties listed for grave violations against children in the annual reports of the Secretary-General on children and armed conflict”. See SRSG CAAC, “Engagement with Parties to Conflict Who Commit Grave Violations Against Children”, available at: https://childrenandarmedconflict.un.org/tools-for-action/engagement-with-parties-to-conflict/.
children’s safeguards, even as providers of health care\textsuperscript{13} and education,\textsuperscript{14} others have deliberately disregarded these norms.

Created in 2000 by members of the International Campaign to Ban Landmines, Geneva Call is a humanitarian non-governmental organization (NGO) that promotes respect by ANSAs for international humanitarian norms in armed conflict and other situations of violence. The following pages provide an overview of Geneva Call’s approach to child protection issues, including its \textit{Deed of Commitment for the Protection of Children from the Effects of Armed Conflict} (Deed of Commitment for the Protection of Children), launched in 2010. Subsequent sections focus on concrete cases experienced by Geneva Call in the course of its work and lessons learned from engaging ANSAs on the prohibition of recruiting and using children in hostilities. The article concludes with some reflections as to why ANSAs comply, or do not comply, with international law.

\textbf{Geneva Call’s approach to child protection issues}

While initially focusing on the prohibition of anti-personnel mines, Geneva Call began to work on child protection issues in 2006. Together with the Coalition to Stop the Use of Child Soldiers, it co-organized in July of that year an International Forum on Armed Groups and the Involvement of Children in Armed Conflict.\textsuperscript{15}

Following this event, and almost in parallel to the establishment of the UN MRM process by Resolution 1612,\textsuperscript{16} the United Nations Children’s Fund (UNICEF) funded Geneva Call to develop a programme aimed at engaging ANSAs on the protection of children, including the development of a specific Deed of Commitment on this theme. As the Coalition to Stop the Use of Child Soldiers would report, UNICEF realized that while progress was being achieved by States to prevent the recruitment and use of children in hostilities, ANSAs’ practices were “far less positive”.\textsuperscript{17} At the time UNICEF approached Geneva Call, there were already thirty-four ANSAs that had signed the \textit{Deed of Commitment for


Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action.\textsuperscript{18} In addition to UNICEF, a number of ANSAs also expressed their support for the development of a new Deed of Commitment on child protection in a meeting gathered in 2009 by Geneva Call. Although there was some disagreement over the minimum age for recruitment,\textsuperscript{19} a consensus was reached to support Geneva Call’s proposal to expand its work to child protection.

The Deed of Commitment for the Protection of Children was officially launched in 2010.\textsuperscript{20} In signing this document, ANSAs commit to prohibiting the use of children in hostilities, to ensuring that children are not recruited into their armed forces, and to never compelling children to associate with, or remain associated with, their armed forces. For the purposes of the Deed of Commitment, children “are defined as persons under the age of 18, and where there is a doubt as to whether a person has reached the age of 18, (s)he will be treated as a child”. ANSAs that have signed the Deed of Commitment also commit to “treat[ing] humanely children who are detained or imprisoned for reasons related to the armed conflict, in accordance with their age and gender specific needs, recognizing that deprivation of liberty may be used only as a measure of last resort and for the shortest appropriate period of time”\textsuperscript{21} and to releasing or disassociating children from their armed forces “in safety and security, and whenever possible, in cooperation with child protection actors”\textsuperscript{22} such as UNICEF, Save the Children and other specialized NGOs. The Deed of Commitment also contains positive obligations for ANSAs, such as protecting children living in areas under their control from the effects of military operations, facilitating children’s access to the aid and care they need (food, shelter, health care, education, etc.), and avoiding the use of schools for military purposes.\textsuperscript{23}

Since 2010, Geneva Call has engaged more than eighty ANSAs from all around the world on children’s safeguards. Twenty-nine of them have signed the Deed of Commitment for the Protection of Children, while others have made

\begin{itemize}
  \item \textsuperscript{18} Geneva Call, \textit{Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action}, 2000.
  \item \textsuperscript{19} Jonathan Somer, “Engaging Armed Non-State Actors to Protect Children from the Effects of Armed Conflict: When the Stick Doesn’t Cut the Mustard”, \textit{Journal of Human Rights Practice}, Vol. 4, No. 1, 2012, pp. 113–114 (stating that “[i]t was also evident that there was no clear consensus on age standards. Many ANSAs agreed with a straight-18 position – that is, a straightforward prohibition of all recruitment and participation in conflict, whether compulsory or voluntary, of persons below the age of 18. Others opposed it on religious or cultural grounds. Interestingly, Islamic-based ANSAs had different interpretations of whether Islam allowed for a straight-18 position”). For other views shared by ANSAs, see Geneva Call, \textit{In Their Words: Perspectives of Armed Non-State Actors on the Protection of Children from the Effects of Armed Conflict}, 2010, pp. 10–31, available at: \url{https://resourcecentre.savethechildren.net/node/13768/pdf/2010_gc_cansa_intheirwords.pdf}.
  \item \textsuperscript{21} Deed of Commitment for the Protection of Children, above note 20, Art. 5.
  \item \textsuperscript{22} \textit{Ibid.}, Art. 6.
  \item \textsuperscript{23} \textit{Ibid.}, Arts 4, 7.
\end{itemize}
similar pledges and raised the age limit for fighters to 18 years old. As a result, and as will be seen below, hundreds of child soldiers have been released from the ranks of ANSAs.

**Geneva Call’s experience in engaging ANSAs on child protection issues**

While a number of studies have been made on the use of violence against civilians by parties to armed conflict, such as on sexual violence and on attacks against healthcare personnel, ANSAs’ reasons for not complying with the prohibition of recruiting and using children in hostilities have been insufficiently explored. Violations against children do not simply happen; they are the result of complex mechanisms entailing a variety of explanations. These include accruing the resources necessary for ANSAs’ survival, the fact that international standards do not match with local customs or norms, and the fact that children are seen as easily influenced and recruited. Other explanations are related to ANSAs’ lack of knowledge of international standards, their insufficient capacity to verify the age of individuals, and the lack of socio-economic alternatives for children.

This section will draw on Geneva Call’s experience when engaging with three ANSAs on the prohibition of recruiting and using children in hostilities: the Karen National Union/Karen National Liberation Army (KNU/KNLA) in Burma/Thailand.  

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29 For instance, although a spokesman for the Moro Islamic Liberation Front stated that the group was indeed committed to not recruiting persons under 18 into its ranks, the group “insisted that there were differences in cultural definitions. Boys older than 13 are normally considered adults in local Islamic law, and if born into families involved in the fight for independence, are duty-bound to help in the struggle.” *The New Humanitarian*, “Moves to End Use of Child Soldiers, but Problem Persists”, 8 April 2011, available at www.thenewhumanitarian.org/feature/2011/04/08/moves-end-use-child-soldiers-problem-persists.

30 Further reasons include the following: (1) children require less food and lower salaries, thus costing less for ANSAs; (2) they are somewhat protected by the reluctance of adults to attack them; and (3) ANSAs’ members may not have internalized the prohibition against recruiting and using children at an individual level, as they could have themselves been recruited while they were under 18 years old. Together with certain disadvantages to using and recruiting children in hostilities, some of these reasons are listed in Olivier Bangerter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 371.
Enforcement challenges: The KNU/KNLA case

Formed in 1947, the KNU is a political organization drawn from Burma/Myanmar’s Karen people, the second-largest ethnic group in the country. In 1949, the KNU created the KNLA to fight on its behalf. The conflict between the government of Myanmar and the KNU/KNLA continued for decades until both parties declared a bilateral ceasefire in 2012. This was followed, in October 2015, by the signing of the Nationwide Ceasefire Agreement by the government, the KNU and other ANSAs active in that country.32

During the first few decades of the conflict, the KNLA openly accepted children into its ranks. Although this trend was acknowledged by its leaders, they contended that child recruits were in fact volunteers.33 According to an interview by Human Rights Watch (HRW) with the former KNU secretary-general Padoh Mahn Sha Lah Phan, in the late 1980s the KNLA even formed a “boy’s company” of about 100 children aged between 15 and 17, but “disbanded it after two years because it was deemed not useful; most child soldiers after that were sent into regular units”.34 Despite the KNU’s claim about the voluntary nature of child recruitment, a quota system was seemingly applied to villages in the territories controlled by the group, at least until the early 1990s. Families with several sons were reportedly obliged to provide at least one of them to the KNLA.35

Based on these and other similar findings, HRW recommended in 2002 that ANSAs, including the KNU, “develop and enforce clear policies … to prohibit the recruitment of children under the age of eighteen”, and that they [e]nsure that such policies are widely communicated to members of the armed forces and to civilians within the group’s area of influence”.36 Possibly in

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31 This section is based on earlier work conducted by Geneva Call as part of a research project led by the University of Geneva and ETH Zurich on “Civilian Victimization and Conflict Escalation”. See Swiss Network for International Studies, Civilian Victimization and Conflict Escalation: Executive Summary, April 2017, pp. 11–16, available at: https://snis.ch/wp-content/uploads/2020/01/2014_Cederman_Executive-Summary.pdf.

32 For a brief summary of the conflict, see H. Jo, above note 28, pp. 203–205.


34 Ibid. There seem to be divergent views regarding the exact number of children and their age, as some internal documents from this ANSA refer to eighty children between 14 and 17 years old. See, in this sense, statement of the KNU regarding child soldiers, 15 August 2005, and letter from KNU secretary-general Padóh Manh Sha Lah Phan to Ms Radhika Coomaraswamy, Special Representative of the Secretary-General for Children and Armed Conflict, 31 July 2006. Documents on file with the authors.


36 HRW, above note 33, pp. 11–12.
response to this report, the then KNU secretary-general Padoh Mahn Sha Lah Phan issued in January 2003 a directive to notify the KNU district chairmen and the KNLA brigade commanders that they “shall not accept youths of 18 or under in the Karen National Liberation Army”. The directive justified this by stating:

1. Many countries have traditions, rules and laws designating youths of 18 and under as children, who have not reached maturity. For that reason, children of 18 and under are not allowed by law to vote, to marry, to drink or buy alcohol. Accordingly, children as defined by law, shall not be recruited into the army or trained for military service.

2. The Karen revolution shall also appreciate international laws, protect the rights of children and respect the rules followed by many countries.

Positively, the KNLA made efforts to promptly disseminate this directive within its structures. On 28 January 2003 the adjutant-general issued an “Informing Directive” to notify KNLA departments, branches, battalions and officers that they were “required to read [the directive] thoroughly, understand, obey and further instruct [their] subordinates at all levels so that [they] may not be in breach”.

Later that year, however, the persistent presence of children in the KNLA came to the attention of the UN, and the KNU was listed by the UN Secretary-General in the annex of his report on children and armed conflict as being a group that recruits and uses under-18s in hostilities. In 2005, the UN introduced an expanded listing process on the basis of UN Security Council Resolution 1539, adopted the previous year. Under this mechanism, the KNU/KNLA has since then appeared every year in the UN Secretary-General’s report.

Geneva Call began engaging KNU/KNLA in 2006, focusing initially on the promotion of a ban on anti-personnel mines. When it expanded its thematic areas in 2010 to include the protection of children in armed conflict, Geneva Call collaborated with the Human Rights Education Institute of Burma (HREIB), an NGO that had been working from Thailand for several years to raise awareness.

37 KNU, “Recruiting”, 2003, available at: https://tinyurl.com/tdm2z3n. In a response to a report of the UN Secretary-General in 2009, the KNU issued a public statement in which it acknowledged that it had previously accepted children above the age of 16 years into its ranks, but also pointed out that it had revised its policy in 2003 to set the minimum age for recruitment at 18. See KNU, “KNU Press Statement on the Report of the UNSG”, 27 April 2009, available at: https://tinyurl.com/wblk7ul.

38 KNU, “Recruiting”, above note 37.


41 In Resolution 1539, the UN Security Council requested the Secretary-General to “devise urgently” an action plan for a comprehensive monitoring and reporting mechanism that could provide accurate and timely information on grave violations against children in armed conflicts. The resolution also called on listed parties to prepare concrete “action plans to halt the recruitment and use of children in violation of the international obligations applicable to them”. UNSC Res. 1539, UN Doc. S/RES/1539, 2004. See also M. D. Kotlik, above note 12, p. 391.

of international standards amongst ANSAs active in Burma/Myanmar. Building on previous advocacy work conducted by HRW and UNICEF, Geneva Call and the HREIB carried out several rounds of high-level dialogue and two training workshops with the KNU.

In 2013, the KNU/KNLA signed the Deed of Commitment for the Protection of Children and expressed the need for technical support for both the implementation and monitoring of this commitment. While, at that time, the KNU/KNLA asserted that there were no children within its ranks, it did admit that children below the age of 18 were sometimes voluntarily associated with the KNLA in non-military roles. When providing an explanation, the KNU identified that a lack of ground-level awareness of international rules was a significant obstacle to achieving full compliance. It also acknowledged difficulties in training its own forces, which were spread over a large geographical area and located mainly in remote locations with poor internal communication capabilities. In addition, its organizational structure allowed considerable autonomy to KNLA brigade commanders, some of whom have strained relationships with the central leadership, and certain NGOs had noted that the disciplinary sanctions which the KNU had reportedly instituted for child recruitment appeared not to have been enforced.

In response, Geneva Call provided training to KNU/KNLA representatives on several occasions. The signing ceremony for the Deed of Commitment, in this sense, facilitated training sessions on its provisions for focal points from most of the areas controlled by the ANSA. This was soon followed by trainings of trainers – consisting mainly of brigade-level KNLA officers – with the expectation that they would trickle down the training in their operational areas. Geneva Call learned of a positive development related to one of the subsequent trainings when a children’s boarding house was moved away from a military camp, an obligation contained in the Deed of Commitment to protect children from the effects of military operations. To address the decentralized nature of the ANSA, Geneva

46 Deed of Commitment for the Protection of Children, above note 20, Art. 4.
Call not only provided further training for high-ranking KNU/KNLA officers but also initiated brigade-level training and partnered with the Karen Women’s Organization (a community-based organization with a wide reach across KNU’s controlled areas) to raise awareness about the Deed of Commitment at the community level. As a result, some measures were taken to end the use and recruitment of children, such as the amendment of the KNLA Army Act to include the age of 18 as the minimum age for new recruits.

Ongoing contact with Geneva Call has proven instrumental in dealing with alleged cases of violations that have arisen since the signing of the Deed of Commitment. During 2018 and 2019, for instance, specific allegations were collected by Geneva Call and discussed with the KNU/KNLA. In response, the group admitted two cases of recruitment and explained that “the commanders did not know the [children’s] age when they joined the military because their parents had brought them”. They added that at the moment of receiving the allegation, those children who had already turned 18 “would finish their service”. Based on Geneva Call’s experience, this example shows that, although KNU/KNLA policy has improved over time and actual cases of child recruitment have dramatically declined, ensuring full compliance has remained challenging and depends on a number of factors. Three can be identified: the need for continuous dissemination and training at the rank-and-file level on the prohibition of using and recruiting children in hostilities; strong internal mechanisms within the KNLA to monitor compliance; and effective disciplinary sanctions to be enforced in case of violations. As Bangerter has explained, “[a] better respect for international humanitarian law is primarily the result of inside action, and no one can respect international humanitarian law in the stead of parties to a conflict”. Geneva Call’s view with respect to the KNU/KNLA case is that prevention and accountability mechanisms should be made more robust in order to ensure that no children are recruited or used.

The age assessment challenge: The case of the APCLS

The APCLS is a Mai-Mai militia group operating in North Kivu in the DRC. Originally part of the Coalition of Congolese Patriotic Resistance, it was officially

founded in Nyabiondo, Masisi, in 2008, when it refused to sign the Goma Accords and to be integrated into the DRC’s armed forces. It is led by “General” Janvier Buingo Karairi and draws most of its support from the local Hunde population.

The APCLS has been listed in the annual reports of the UN Secretary-General since 2013 as responsible for using and recruiting children in hostilities. When Geneva Call began engaging this group, it was difficult to estimate the number of children incorporated into its forces. It had been reported that much of the recruitment was “voluntary” and was generally done with the tacit acquiescence of parents and/or guardians. In many cases, families did not prevent their children from joining, often even encouraging them to do so. It appears that the real or perceived threat of other armed actors was a strong driving factor for child recruitment. For instance, when the Nyatura group, a Congolese Hutu militia, was created, the Hunde community provided the APCLS with many children to defend the local population. Thus, forced recruitment seemed to coincide with an escalation of hostilities and periods of heavy and deadly fighting. In an interview in 2012, a former member of the group explained that “[i]n general, we did not force people, but as soon as the number of effectives diminished through combat, we took the young by force.”

The first interaction between Geneva Call and the APCLS was established in 2015 through a local community-based organization. Since then, Geneva Call has conducted a number of trainings on international law, including on child protection norms, for both officers and fighters of the APCLS. During these sessions, the APCLS shared its policies and practices, in particular in relation to military recruitment. Though it claimed not to recruit individuals under 18 years old, the ANSA agreed to amend its internal code of conduct to include a specific provision on the minimum age of recruitment.

Since the early stage of its engagement, Geneva Call has raised concerns about alleged violations of children’s rights, in particular cases of recruitment and use in hostilities as detailed in the UN Secretary-General’s annual reports on children and armed conflict. The APCLS claimed that it was unaware of these reports and of its inclusion in the list of parties that have committed such violations. In September 2015, “General” Janvier Buingo Karairi wrote a letter to


For the most recent report, see Report of the UN Secretary-General, above note 42, p. 40.


Information on file with the authors.


the UN Secretary-General denying the allegations, recalling the APCLS’ 18-years-old recruitment policy and inviting the UN to conduct field investigations in areas under its control.\footnote{Information on file with the authors.} The invitation was reiterated in person to the Special Representative of the UN Secretary-General on Children and Armed Conflict in the context of a meeting on child protection issues organized by Geneva Call in November 2016.\footnote{Information on file with the authors.}

Despite these steps, the ANSA’s leadership shared with Geneva Call that age verification during the recruitment of new members remained challenging. This is a practical difficulty faced by many ANSAs, particularly in countries with low birth registration rates or where there is no other documentary evidence of age (such as official identity cards, school diplomas or medical records). In the absence of such documents, children are “more vulnerable to under-age recruitment by non-state armed groups”.\footnote{UNICEF, *Innocenti Insight: Birth Registration and Armed Conflict*, 2007, p. 7, available at: www.unicef.org/protection/birth_registration_and_armed_conflict(1).pdf. This difficulty was also pointed out by the ICRC when dealing with child detainees: “In some circumstances, for example where births are not registered, official documents or records may not exist to help check the age of individuals facing detention, execution or other legal measures, thereby reducing their chances of being treated properly.”} Considering that these documents are generally issued under governmental authority, children living in the territories controlled by ANSAs often do not have them.\footnote{ICRC, *Children and Detention*, Geneva, 2014, p. 3, available at: www.icrc.org/eng/assets/files/publications/icrc-002-4201.pdf.} The issue of age assessment was importantly discussed with more than twenty ANSAs and specialized agencies at the above-mentioned meeting in 2016.\footnote{There are, of course, exceptions. In Aleppo, the United Courts Council, a temporary judicial council, was reported to issue birth and death certificates: see Ivan Watsin and Raja Razek, “Rebel Court Fills Void Amid Syrian Civil War”, CNN, 26 January 2012, available at: https://edition.cnn.com/2013/01/25/world/meast/syria-rebel-court/index.html. It has been also reported that the Islamic State group issued birth certificates printed on Islamic State stationery to babies born in the territories that it controlled: see Rukmini Callimachi, “The ISIS Files: We Unearthed Thousands of Internal Documents that Help Explain how the Islamic State Stayed in Power So Long”, *New York Times*, 4 April 2018, available at: https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html. See also Nabih Bulos, “Born Under a Bad Sign: Mosul Residents with Islamic State Birth Certificates Need a Do-over”, *Los Angeles Times*, 6 March 2017, available at: www.latimes.com/world/middleeast/la-fg-iraq-mosul-court-20170306-story.html.} During this event, several groups asked for guidance and trainings on age assessment methods and processes, as they were lacking the capacity to carry them out. Yet, it was clearly underlined that these processes should only be undertaken as a measure of last resort, considering that when there is a doubt over the person’s age, the individual should not be recruited.\footnote{Geneva Call, above note 44, pp. 10-11.} The challenge, however, still persists in different contexts. In the absence of qualified experts, it was advised that age assessment protocols should be developed and carried out by designated focal persons who have previous training on the issue and are aware of the local culture or context.

Like other ANSAs, the APCLS acknowledged that it had difficulties in assessing the age of new recruits, notably due to the malnutrition of young

\footnote{See *ibid.*, p. 10, for the methods and standards that were shared with ANSAs participating in the meeting.}
people, which made them appear older than their real age. The group admitted relying mainly on physical appearance but also claimed to recruit only those who possessed birth certificates or electoral cards. In cases where such documents were not available, the APCLS would check with their relatives and local communities. Hence, in addition to training the ANSA with respect to its obligations under international law, Geneva Call also provided a briefing on how to verify the age of an individual. In November 2016, the APCLS signed the Deed of Commitment for the Protection of Children, confirming its pledge to prohibit all forms of child recruitment and use in hostilities. This case shows from a practical perspective how important it is that ANSAs receive training not only on the relevant legal framework but also on the various technical issues, such as age assessment methods, that could assist them in acquiring the necessary capacity to implement their obligations.

Drivers of recruitment and lack of alternatives for children in conflict settings: The YPG/YPJ case

The YPG was originally created after the Qamishli uprising in 2004, but only officially emerged when the unrest erupted in Syria in 2011. Together with its female branch, the YPJ, it has been the dominant military force in the Kurdish-populated areas since the withdrawal of most government forces in 2012. The YPG/YPJ has been mainly fighting against Islamist ANSAs, especially the Islamic State group, although clashes against Syrian armed forces as well as Turkey have occurred occasionally. In October 2015, the YPG and YPJ, some Free Syrian Army (FSA) brigades and the Syrian Military Council created a multi-ethnic and religious alliance called the Syrian Democratic Forces (SDF), which has been supported by certain States, including the United States.

The YPG/YPJ has been listed in the annual reports of the UN Secretary-General since 2013 as responsible for recruiting and using children in hostilities. In the 2018 report, it was stated that the recruitment and use of children by YPG/YPJ increased almost fivefold (from 46 to 224) compared to 2016. Nearly one third of the verified cases of children recruited by the group were girls (72) and 16 per cent were of Arab origin.

In response to this scenario, the YPG/YPJ-led SDF signed an action plan with the UN in July 2019 “to end and prevent the recruitment and use of children, to identify and separate boys and girls currently within its ranks and to put in place preventative,

69 Report of the UN Secretary-General, above note 2, p. 25, para. 185.
protection and disciplinary measures related to child recruitment and use”. Indeed, this commitment follows the listing of the YPG/YPJ for the recruitment and use of children, and allows this ANSA to be currently included under the heading of “[l]isted parties that have put in place measures during the reporting period aimed at improving the protection of children”.

Geneva Call’s experience with this ANSA evidences that in many cases, children, including some younger than 15 years old, have been used to man checkpoints and transfer information and military supplies. They have also served in combat roles, and indeed, during the battles for Kobane and Raqqa, several of the “martyrs” who died in combat were children. While much of the recruitment appears to be “voluntary”, allegations of “conscription” policies targeting children were also levied against the YPG/YPJ, and several cases of abduction were reported. Similarly, between July 2014 and July 2015, HRW compiled fifty-nine cases of children who were recruited by or volunteered for the YPG/YPJ, of which ten were under the age of 15.

Geneva Call initiated dialogue with the YPG/YPJ in October 2013. In response to allegations of child recruitment reported in various sources, the YPG/YPJ stated that, under their rules of procedure, only persons above 18 years old could become members, but admitted that some of its units had breached this rule. Geneva Call noted, however, that under these rules, girls under the age of 18 could be admitted to the YPJ in some circumstances (such as when they had been subjected to forced marriage). Geneva Call also inquired what standard procedure was in place to prevent the recruitment of children below 18, raising concerns on the use of children at checkpoints by the Asayish police force. On 15 December 2013, the YPG/YPJ replied that while individual cases of recruitment of minors may have happened, these had been investigated and those responsible held accountable. Regarding the girls below 18 who had joined the YPJ to avoid being forcibly married, it was explained that they were placed in special training centres located away from the front lines, where they received education. Geneva Call was invited to visit these centres. The YPG/YPJ also shared that on 14 December 2013, the General Command issued a “circular” to all commanders of recruitment centres and heads of battalions and brigades in which it reiterated the strict prohibition against “recruit[ing] or join[ing] any person to YPG ranks


Ibid.

Report of the UN Secretary-General, above note 42, p. 42.


without his completion of the legal age of 18 years”. It further claimed that a violation would lead to sanctions, in accordance with the internal rules of the group. Following the command order, the YPG/YPJ announced that seventeen children had been “disqualified from YPG military operations” and sent to “service-based institutions such as the media, or educational and political training centers”.78

In July 2014, the YPG/YPJ signed the Deed of Commitment for the Protection of Children. The group’s signature publicly formalized its policy to prevent children under 18 from taking part in hostilities, and to protect them from the effects of the conflict. Geneva Call agreed to a temporary reservation to Article 2 of the Deed of Commitment, according to which persons who have reached their 16th birthday will be allowed to voluntarily join, or remain in, the YPG/YPJ forces, under a non-military active category of membership, meaning without the authorization to participate in hostilities – both directly and indirectly – until they are 18 years old.79

This reservation was due to the practical difficulties that the ANSA had at the time of signing the Deed with regard to immediately sending certain children back to their families. Nonetheless, the YPG/YPJ would increase the protection of its 16-to 18-year-old members, as it committed to separating them from the active armed forces, relocating them to safe areas, providing them with education and allowing Geneva Call to visit them.

In order to ensure the implementation of the Deed of Commitment, Geneva Call and the YPG/YPJ agreed to a series of measures, which included training and dissemination, a review of the age verification and screening processes in place, strengthening of the group’s internal monitoring, reporting and investigation mechanisms, and provisions on the release of children in safety and in collaboration with actors who could facilitate their return and reintegration. On the day the Deed was signed, 149 children were demobilized.80 A number of them returned to their families, while the majority joined youth centres established by the YPG/YPJ. In 2015, sixty-five additional children were released.81 Geneva Call was able to visit the centres and mobilize an international NGO to carry out

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78 HRW, above note 76.
79 See the Deed of Commitment as signed by the YPG/YPJ, p. 5, available at: https://genevacall.org/wp-content/uploads/dlm_files/2014/07/2014-5july-YPG-YPJ-syria-children.pdf. Article 15 of the Deed of Commitment allows the entering of a reservation under certain strict conditions: “Any reservation to this Deed of Commitment must be consistent with its object and purpose, international humanitarian law, and the minimum obligations of State parties to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. It must be expressed in writing upon signature and will be periodically reviewed towards attaining the highest possible respect for the rights of children. Geneva Call will be the final arbiter on the permissibility of any reservation.”
medical check-ups. It further informed specialized child protection agencies of the need to support the centres, notably in terms of teaching and educational material as well as leisure activities. Unfortunately this did not materialize, and thus Geneva Call decided to temporarily support the centre that hosted children under 16 in order to ensure that they would receive appropriate education.

Geneva Call has had the opportunity to meet the commanders of the YPG/YPJ on several occasions to discuss the persisting recruitment and use of children in breach of the Deed of Commitment. Despite the measures taken to address these compliance issues, the YPG/YPJ admitted that it was facing difficulties in its efforts to refuse and send back all children, in particular those between 16 and 18 years old. This was because, according to the group, some of the children wanted to defend their communities against the Islamic State group’s attacks or to take revenge for the loss of their family members. There were also several cases of girls joining the YPJ to seek protection from domestic violence and forced marriage.

As can be seen, there are a number of factors that may push children to join ANSAs. These include living in poor conditions and a lack of education and economic opportunities. In situations of armed conflict, access to basic services and employment can be difficult, particularly in areas controlled by armed groups. Orphans, homeless children or other vulnerable children may seek shelter from the local authorities, without necessarily distinguishing whether it has a State or non-State nature. In many cases, ANSAs provide protection for children from opposing forces, even evacuating them to safer areas. This has notably been the case because other alternatives are absent, such as a child protection agency. Other reasons that may

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83 Following a field visit to Syria in 2017 to monitor compliance with the Deed of Commitment, Geneva Call confirmed the existence of cases of violation of the prohibition on child recruitment and use in hostilities. In an official response, the YPG/YPJ admitted responsibility and announced a series of measures that would be included in its internal regulations in order to address these violations, such as the establishment of “[n]ew and rigorous internal investigation mechanisms to follow up violations resulting from recruiting or using children aged under 18 years in combat positions” and the issuing of “an internal circular notice to all its units, forces and centres to explain their new policies and request them to abide by these new instructions”; Geneva Call, “Syria: New Measures Taken”, above note 82. The YPG General Command had already issued, in 2015, an internal circular to commanders and heads of recruitment centres instructing them not to recruit or accept any person under 18. See YPG, “Circular”, 2015, available at: https://tinyurl.com/vv6gp4t. The YPG/YPJ also established a monitoring committee responsible for inspecting military camps, recruitment centres and front lines and investigating all complaints and allegations of child recruitment made by families, media and human rights organizations. The committee had full authority to demobilize persons who did not meet the membership conditions according to their ages and sanction officers responsible for these violations. Information on file with the authors.

84 This information was collected through interviews conducted by Geneva Call’s staff directly with children who have joined the YPG/YPJ. See, for example, Geneva Call, “A Report from Inside Syria”, above note 82.

drive children to join a group include political motivation, indoctrination and family or community pressure. In some cases, impoverished parents may also encourage their children to fight. Some children may join ANSAs in search of empowerment or to avenge the loss of family members, while others may live with their relatives who are active within an ANSA or in communities where the separation between fighters and civilians is practically non-existent. These drivers should be acknowledged and addressed when designing strategies of humanitarian engagement with ANSAs, and as much as possible, viable solutions should be provided for in order to prevent future child recruitment and facilitate the sustainable reintegration of former child soldiers.86

Concluding remarks: Some reflections on ANSAs’ compliance with the prohibition against recruiting and using children

As illustrated in the above cases, ANSA compliance with the prohibition against recruiting and using children can be a long and challenging process. While various authors have tried to explain why ANSAs abide by their obligations or not, the cases show that these are not entities that either violate or respect international law at large; rather, they may follow certain rules while disregarding others.87 A group may recruit and use children in hostilities but at the same time decide not to attack schools, even providing education. The UN MRM process seems to follow this logic, and ANSAs (and States) are only listed for violations of specific norms. Colombia’s Ejército de Liberación Nacional (National Liberation Army), for instance, is included in the 2019 report for recruiting and using children, and not as a party responsible for rape and other forms of sexual violence against children, or as a party that engages in attacks on schools and/or hospitals.88

Furthermore, these non-State entities often modify their behaviours throughout the conflict, reflecting an increase or decrease in their level of commitment and compliance with humanitarian provisions.89 A group going through a peace process, possibly looking for political recognition or legitimacy, might adopt a different attitude than a group whose main goal is to show its strength to the local population.90 ANSAs, in this sense, may weigh the costs

86 See concrete suggestions in Geneva Call, above note 44, pp. 9, 11–12.
87 Michael L. Gross, The Ethics of Insurgency: A Critical Guide to Just Guerrilla Warfare, Cambridge University Press, Cambridge, 2015, p. 74, referring to different behaviours of Kosovar and Aceh guerrillas and the Taliban in Afghanistan. This does not exclude the fact that a number of ANSAs still reject international law or some of its norms, such as the 18-year standard, for ideological, military or other reasons.
88 Report of the UN Secretary-General, above not 42, p 39.
90 In this sense, Jo has argued that compliant ANSAs emerge when they seek legitimacy, which in turn is “typically politically situated and audience specific. Compliant rebels are those that want to enhance the ‘legitimacy’ of their own organization and movement in the eyes of key political ‘audiences’ that care about values consistent with international law at domestic and international ‘levels’”. H. Jo, above
versus the benefits of complying with international law, and the results will vary depending on the goals of the group and the moment in time in which the behaviour in question takes place. For example, although children may be easier to indoctrinate, they could also be difficult to train; or while they can be used as an easy way of filling the ranks, their forced recruitment could create problems with local communities.

ANSAs’ behavioural variations may also depend on their level of organization and internal dynamics. It is expected that a relatively stable group with a vertical command structure will behave differently than one with various autonomous factions struggling to lead the movement or operating under a loose coalition. As the International Committee of the Red Cross has recently put it, “[a]n armed group’s organizational structure is an important determinant of its behaviour”. The decentralized nature of some ANSAs, such as the KNU/KNLA, can indeed make the enforcement of organizational policies in the field more difficult. These complexities require a long-term vision of “sustained dialogue with those identified as having influence on violence and restraint at a particular time”.

Other arguments explaining ANSAs’ level of compliance relate to the way in which the group in question has actually been conceived. Those non-State entities constituted around “economic endowments are predicted to exhibit much higher levels of indiscriminate violence, looting, and destruction, while rebellions rooted in social endowments are expected to demonstrate restraint and discipline”. Alternative causes stem from the lack of capacity and resources allowing ANSAs to realize and implement some of their obligations. The APCLS’ lack of an age assessment mechanism that could assist them in respecting the prohibition against using and recruiting children below the age of 18 is a case in point. Exchanges between Geneva Call and different ANSAs have confirmed that their organizational capacity is a key factor in their level of compliance with international law provisions.

Note 28, p. 13. In any case, this scenario will depend on each context. In Sri Lanka, for instance, it was claimed that the Liberation Tigers of Tamil Eelam (LTTE) were responsible for war crimes during the final months of the conflict, including the use of civilians as human shields, shooting civilians as they tried to flee LTTE control, deploying artillery near civilians and forcibly recruiting children. Meenakshi Ganguly, “Sri Lanka Takes the Wrong Road to Peace”, 17 May 2011, available at: www.hrw.org/news/2011/05/17/sri-lanka-takes-wrong-road-to-peace.

93 ICRC, above note 25, p. 21.
94 Ibid., p. 65.
Moreover, the local context and the relationship of the ANSA with local communities may have an impact on the group’s actions. In this sense, some children may voluntarily decide to join an ANSA, for instance, to escape forced marriage or for economic reasons. The YPG/YPJ example shows the importance of understanding and addressing the root causes of recruitment and use of children. Domestic violence and the lack of livelihood opportunities or access to education are causes that often remain neglected.

To conclude, ANSAs should be conceived as dynamic and evolving entities, and compliance in their contexts should be seen as a spectrum rather than a “two-way switch that is either on or off.”

97 By reflecting on the notion of a spectrum, we can see ANSAs’ actions as “a matter of degree varying with the circumstances of the case”. 98 All three cases examined above show that, to some extent, ANSAs have changed their policies over time and have improved their levels of compliance with certain norms. All three ANSAs agreed, in the first place, to relinquish their practice of recruiting and using children in hostilities. Ensuring full compliance will be a long journey, but Geneva Call’s experiences suggest potential pathways and show that ANSAs are more likely to comply when (1) they are aware of their obligations throughout the entire chain of command; (2) they have the capacity to actually implement those obligations; and (3) the factors leading to violations, such as the lack of alternatives for children, are actually addressed.


98 Ibid.
Taking measures without taking measurements? An insider’s reflections on monitoring the implementation of the African Children’s Charter in a changing context of armed conflict

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Abstract
The efforts to create a world fit for children, including for those affected by armed conflict, remain a work in progress. Increasingly, regional organizations, prime among them the African Union and its organs, are being asked to play a more meaningful role in pushing for the realization of the rights and protections of children in armed conflict. This piece explores trends and developments in respect of children and armed conflict in Africa, and offers few ideas on how the African Committee of Experts on the Rights and Welfare of the Child, which holds significant promise, can continue to rise to this challenge.

Keywords: children, armed conflict, African Children’s Charter, African Committee, regional organizations.

Introduction
The impact of armed conflict on children is staggering.1 Graça Machel’s 1996 study entitled Impact of Armed Conflict on Children (Machel Study)2 put the children and armed conflict agenda firmly on the international political landscape.3 Since then it has spurred unprecedented action in the form of standard-setting, the adoption of numerous resolutions by the United Nations (UN) Security Council, the appointment of a Special Representative of the Secretary-General on Children and Armed Conflict (SRSG CAAC),4 and mobilization of resources, to name but a few successes. Some would also

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1 See UNICEF, 25 Years of the Convention on the Rights of the Child: Is the World a Better Place for Children?, 2014, p. 9, which highlights that “[a]lthough the number of armed conflicts around the world has decreased from a peak of 52 in 1991 to 33 in 2013, the new century has already seen major conflicts”;
2 UN General Assembly, Impact of Armed Conflict on Children, UN Doc. A/51/306, 26 August 1996 (Machel Study);
3 In addition, substantial legal discussions on the protection of children in armed conflict occurred in the lead-up to the 1949 Geneva Conventions and the 1977 Additional Protocols, and it was the standards in these instruments that fed the text of the Convention on the Rights of the Child (CRC), Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) and International Criminal Court (ICC) Statute that followed.
attribute credit to the Machel Study, at least partially, for the accountability work that is done by the International Criminal Court (ICC) and other similar initiatives.\(^5\)

Yet, in the same month that the Machel Study marked its twenty-two-year anniversary, in August 2018, the world woke up to horrific images of scattered bodies and carnage as a result of an air strike that hit a bus carrying children in Saada province in Yemen.\(^6\) A month earlier, a graphic video had emerged online that showed the summary execution of two women and two young children, by armed and uniformed men (allegedly Cameroonian soldiers), reportedly as punishment for the women’s affiliation with Boko Haram.\(^7\) In June 2018, the Appeals Chamber of the ICC released the rebel commander turned politician Jean Pierre Bemba, who was initially convicted for pillage, rapes and murders, including of children, committed by his forces, the Movement for the Liberation of Congo militia.\(^8\) The atrocities of the Syria conflict too, which has been raging for more than eight years now, have a child’s face.\(^9\) News feeds are full of these atrocities against children.

Sadly, many children continue to die and suffer for causes they can barely understand, and accountability still appears to be a currency that is in short supply. Particularly in Africa, the need to make concrete progress preventing and addressing violations of the rights and protections of children in the context of armed conflict cannot be over-emphasized.\(^10\)

In 2015, Conflict Dynamics International (CDI) underscored the various levels of implementation and accountability for violations of international law against children in conflict – namely, the local, national, regional and international levels. At the regional level, which is the main focus of this article, human rights courts, monitoring and reporting and fact-finding missions, and regional treaty bodies are singled out as playing a critical role.\(^11\) CDI also identified three critical gaps in the global accountability mechanisms for violations against children in the

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\(^5\) Such as the Special Court for Sierra Leone.


context of armed conflict. These are the limited attention accorded to children in general accountability processes, the minimal use of child-specific accountability mechanisms, and the challenge of “working in silos”—for example, limited collaboration between those working on emergencies, development and human rights, leading to fragmentation in approaches to accountability.

The point of departure for this article is that, as a regional treaty body, the potential contributions of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC or African Committee) established under the African Charter on the Rights and Welfare of the Child (ACRWC or African Children’s Charter) appear to squarely fit the last two gaps identified by CDI. The Machel Study, under the heading “Regional and Subregional Arrangements”, in particular encouraged the then Organization of African Unity “to work with national organizations and Government entities to formulate plans of action to protect children” within the framework of the ACRWC. While on the topic of treaty bodies, it is also worth noting that it is the treaty body established under the Convention on the Rights of the Child (CRC), the Committee on the Rights of the Child, that, along with the UN General Assembly, asked the Secretary-General to name an expert to study the impact of conflict on children.

This article begins by offering a brief insight into the role of some regional organizations in preventing and addressing violations of the rights of children in the context of armed conflict. Given the increasing emphasis placed on regional organizations by the Security Council and the SRSG CAAC, this opening section places particular emphasis on these two entities. Subsequently, a closer scrutiny of the most relevant substantive provisions of the ACRWC is offered, with the aim of investigating the extent to which the potential work by the ACERWC is standing on a solid base. The section that follows offers a critical look at State Party reporting, individual complaints mechanisms and other processes that the ACERWC can avail itself of in its efforts to play a meaningful role as a regional body tasked with the role of monitoring the implementation of the ACRWC. Such an assessment takes into account and focuses on the “changing context” of children and armed conflict on the African continent, which has increasingly featured protracted internal conflicts, has had huge impacts on civilians, and has involved specific violations, including sexual exploitation and abuse of children by peacekeepers, that represent a particular challenge. A concluding section wraps up the discussion.

12 Ibid.
13 Ibid.
14 Machel Study, above note 2, para. 279
15 The two other relevant regional instruments mentioned are the European Convention on Human Rights and the Santiago Declaration.
17 UNICEF, above note 1, p. 28.
Regional organizations and children in armed conflict: A brief overview

The role of regional organizations in addressing the challenges faced by children in the context of armed conflict has been acknowledged for decades. For instance, the Machel Study alluded to this in 1996. However, the importance of the role of regional organizations has reached new heights in the last couple of years. To demonstrate this, the 2018 Report of the Secretary General on Children and Armed Conflict and the most recent UN Security Council Resolution on the issue are good indicators.

The relevant section of the 2018 Report underscored, in two full paragraphs, how regional and sub-regional organizations can play a role with member States and the UN to address high levels of cross-border recruitment, and the accompanying repatriation and reintegration complexities. Regional and sub-regional organizations are also recommended to strengthen dedicated child protection capacities and assist in the development of tools aimed at preventing grave violations. During the debate, some States also emphasized the importance of “the strategic advantage of regional organizations in addressing the impact of armed conflict on children” as well as the critical role they play in “addressing the cross-border nature of threats against children”.

UN Security Council Resolution 2427 explicitly mentions the word “regional” on no less than sixteen occasions. For comparison purposes, it is worth noting that the three most immediately preceding resolutions—namely Resolution 2225 of 18 June 2015, Resolution 2143 of 7 March 2014, and Resolution 2068 of 19 September 2012—make reference to the term “regional” only four, five, and zero times respectively.

In recognition of the increasing role of regional and sub-regional organizations, the SRSG CAAC has undertaken a number of measures. A cooperation agreement was signed between the Office of the SRSG CAAC and the Peace and Security Council of the African Union (AU) in 2013.

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18 Machel Study, above note 2, paras 279–280.
20 UNSC Res. 2427, UN Doc. S/RES/2427, adopted at its 8,305th meeting, 9 July 2018. The other main resolutions of the Security Council that address the protection of children affected by armed conflict are listed in above note 4.
21 Report of the Secretary General, above note 19, paras 256, 257.
22 Ibid., para. 257.
24 See Statement summary of His Excellency Christof Heusgen, Permanent Representative of the Government of the Germany to the UN in New York, in UN, above note 23.
25 See UNSC Res. 2427, UN Doc. S/RES/2427, 2018, Preamble, paras 5, 8, 10, 11, 39.
26 These three Security Council resolutions are listed in above note 4.
partner, the European Union has continued to contribute its support,\(^{28}\) including by strengthening capacity-building in countries where children are affected by armed conflict.\(^{29}\) The relationship between the North Atlantic Treaty Organization (NATO) and the SRSG CAAC has further been consolidated\(^{30}\) with the adoption of a child protection policy\(^{31}\) and guidelines that benefited from the Office’s inputs.\(^{32}\) NATO has also provided training for its troops on children and armed conflict,\(^{33}\) established an e-learning module on child protection in 2013,\(^{34}\) and appointed focal points for children and armed conflict throughout the NATO Command Structure.\(^{35}\)

The ACRWC and the ACERWC

There is an adequate amount of literature scrutinizing the provisions of the ACRWC\(^{36}\) and comparing them with those of the CRC.\(^{37}\) Suffice it to mention that the issue of children living under apartheid,\(^{38}\) the protection of refugees and internally displaced persons, the special vulnerability of girls, including in relation to accessing education during and after pregnancy,\(^{39}\) and the monitoring mechanism set in place through the African Committee are some of the added values brought up by the ACRWC. Indeed, the use of children by armed forces and groups and the need to institute a minimum age of 18 for military service was one significant reason for the adoption of the Charter.\(^{40}\)

As of June 2019, the ratification of the ACRWC stood at forty-nine countries. The latest ratification of the Charter was by Sao Tome and Principe in April 2019.\(^{41}\) Currently, there are six countries that have not ratified the Charter;

\(^{28}\) The European Union has also adopted a policy on the protection of children affected by war, entitled the European Union Policy on the Rights of Children Affected by Armed Conflict.

\(^{29}\) SRSG CAAC, above note 27.

\(^{30}\) Ibid.

\(^{31}\) See NATO, Protection of Children in Armed Conflict – the Way Forward, March 2015.

\(^{32}\) SRSG CAAC, above note 27.

\(^{33}\) Ibid.


\(^{35}\) Ibid.


\(^{38}\) ACRWC, Art. 26.

\(^{39}\) Ibid., Art. 11(6).


\(^{41}\) Available at: https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf.
these are the Democratic Republic of the Congo (DRC), Morocco, the Saharawi Republic, Somalia, South Sudan and Tunisia.

The African Children’s Charter prohibits, in Article 22(2), the recruitment and use of children under the age of 18 in both international and internal armed conflicts and requires that States “take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child”. Unlike the CRC and the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC), it adopts a “straight 18” position whereby the recruitment and/or use of persons below the age of 18 in hostilities is prohibited with no exceptions. Moreover, the rule on the protection and care of children who are affected by armed conflict also applies “to children in situations of internal armed conflicts, tension and strife”.44

Under the ACRWC, States undertake an obligation “to take all necessary measures to ensure” that no child takes a direct part in hostilities, and to refrain in particular from recruiting any child. Arguably, this should also cover children who are involved in non-combatant status but in the meantime are at risk of real danger. The risk of this broader interpretation of “direct participation” and “recruiting any child” to include children other than those fighting (including cooks, scouts, etc) is that it could mean that such children become a legitimate target for attacks.

Article 1(3) of the Charter, which is the “more conducive environment clause” that permits the application of more conducive provisions of national or international law, has significant relevance for children and armed conflict. Similar provisions are found in the CRC and OPAC. Article 22 and other relevant provisions of the Charter would bind States Parties, and if the same States are a party to the CRC and/or OPAC and in the instances that these latter instruments contain more conducive provisions, they are expected to comply with the same.

In outlining the obligations of States Parties, Article 1 of the Charter makes reference to “constitutional processes”. While the ACERWC has not interpreted this provision as imposing an obligation on States Parties to constitutionalize the provisions of the Charter, the constitutionalization of children’s rights is often welcome. In this respect, the South African Constitution and the Burundi Constitution provide age 18 as the minimum age for joining armed forces. Subsidiary legislation setting the minimum age for military service at 18 is also in

42 Morocco joined the AU in January 2017 and is the only country among the six countries that has not yet signed the Charter.
44 ACRWC, Art. 22(3).
45 Ibid., Art. 22(2).
46 CRC, Art. 41; OPAC, Art. 5.
47 ACRWC, Art. 1(1).
abundance. However, out of about fifty States globally (mostly in the north) that allow under-18s to join the armed forces of a State, some are African countries.

Unlike the African Charter on Human and Peoples’ Rights (ACHPR), where the discussion on the application of international humanitarian law (IHL) revolves around Article 61 (which is a general provision on sources of inspiration in international law that the African Commission “shall also take into consideration”), the ACRWC explicitly refers to IHL. The reference to “relevant international humanitarian law” in Article 22 of the African Children’s Charter is similar to what is contained in Article 38 of the CRC. This is an aspect of the African human rights system that is less explored, including under the ACHPR.

The rules of IHL are contained in the four Geneva Conventions and their two Additional Protocols. In particular, Geneva Convention (IV) relative to the Protection of Civilian Persons in the Time of War of 12 August 1949 protects children. Articles 14 and 17 provide protection for “children under fifteen, expectant mothers and mothers of children under seven” from the effects of war. Article 23 caters for the removal of children and pregnant women from besieged or encircled areas and the free passage of essential necessities such as medication and food for children and expectant mothers. A number of other relevant articles

49 In Madagascar, by way of example, the minimum age of recruitment for national service has been raised to 18 years by Act No. 2005-037 of 20 February 2006. In Algeria, while the age for voluntary recruitment is unclear, the National Service Code explicitly states that the age for conscription into the regular armed forces is set at 19 years.

50 Including the United States and the United Kingdom, as well as some countries in Eastern Europe and Asia.


52 For instance, the Seychelles, despite being a State party to the ACRWC, still maintains the possibility of under-18s being recruited into the armed forces as its Defence Act does not explicitly prohibit the enlistment of any person under the age of 18 years.


54 ACRWC, Arts 22(1), 22(3).


56 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II). Article 77 of AP I (“Protection of Children”), which applies in international armed conflicts, and Article 4(3) of AP II (special care of children), which applies in non-international armed conflicts, are of critical importance.
include provisions for access of children to essential goods, health care and education;\textsuperscript{57} protection of children against torture, abuse or neglect;\textsuperscript{58} protection for children separated from their family;\textsuperscript{59} protection for children in the hands of the enemy;\textsuperscript{60} and protection for children deprived of their liberty.\textsuperscript{61}

According to the International Committee of the Red Cross (ICRC), there are a number of customary IHL rules that are specific to children. These rules are established based on \textit{opinio juris}, as well as State practice. In this respect, four rules are of significant relevance for the application of Article 22 of the African Children’s Charter: namely Rule 120, which requires that children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units;\textsuperscript{62} Rule 135, which requires that children affected by armed conflict are entitled to special respect and protection;\textsuperscript{63} Rule 136, establishing that children must not be recruited into armed forces or armed groups;\textsuperscript{64} and Rule 137, obliging that children must not be allowed to take part in hostilities.\textsuperscript{65} By definition, customary law is binding on States, including African States, irrespective of their ratification status of treaties.

Of further particular interest is Article 22(3) of the Charter, which extends the application of “obligations under international humanitarian law” to “also apply to children in situations of internal armed conflicts, tension and strife”. This provision has been lauded as reflecting the reality on the ground where there is a relatively high frequency of internal tensions. As a result, the threat that civilian children face need not reach a high threshold of violence for it to trigger the application of IHL.\textsuperscript{66} Such an approach has been lauded as showing the priorities of a region that has suffered a lot as a result of tensions and strife.\textsuperscript{67}

Obviously, the intent of this provision is to ensure greater protections for children, and therefore Article 22(3) is not intended to apply IHL rules on the conduct of hostilities outside of situations of armed conflict, as this would incorrectly permit the targeting of military objectives as well as civilian damage that is proportionate to the military advantage of an attack.

\textsuperscript{57} See, for example, GC IV, Arts 23, 38; AP I, Art. 70(1); AP II, Art. 4(3)(a); AP I, Art. 78(2); GC IV, Art. 38.
\textsuperscript{58} See for example, AP I, Art 75(2)(b), 77(1); AP II, Art. 4(2)(e); GC IV, Art. 68(4); AP I, Art. 77(5); AP II, Art. 6(4).
\textsuperscript{59} See GC IV, Arts 25–26, 136–140; AP II, Art. 4(3)(b); GC IV, Arts 24(3), 50(2).
\textsuperscript{60} See GC IV, Arts 50(1), 50(3); GC IV, Art. 50(2), 50(4); GC IV, Art. 50(5); GC IV, Art. 51(2).
\textsuperscript{61} See, for example, GC IV, Art. 82(2), 82(3); AP I, Art. 77(4); GC IV, Arts 76(4), 89(5), 94(2–3).
\textsuperscript{65} \textit{Ibid.}, Rule 137, “Participation of Child Soldiers in Hostilities”, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule137.
Monitoring is an important aspect of ensuring the implementation of rights and protections by States. The Charter establishes the treaty body, the African Committee, whose mandate is to promote and protect the rights in the Charter.\textsuperscript{68} Before the coming into force of the Charter in 1999, an \textit{ad hoc} committee on children and armed conflict operated as a precursor to the operationalization of the African Committee. The Committee has the power to consider State Party reports,\textsuperscript{69} as well as individual complaints and inter-State communications.\textsuperscript{70} The Committee, aware of the significant importance of the subject of children and armed conflict, dedicated its first continental report to this topic.\textsuperscript{71} Most of the Committee’s activities in the context of children and armed conflict, and the aspects of its work in need of improvement, are a subject of detailed discussion later in this article.

\textbf{Overview and thematic trends in Africa}

\textbf{Overview}

It is reported that the number of children living in conflict zones around the world has increased from about 200 million in the early 1990s to about 357 million in 2016.\textsuperscript{72} The Africa region is second only to Asia, with one in five children on the African continent being affected by conflict.\textsuperscript{73}

In 2017, the armed conflict in Somalia was characterized as “escalating”.\textsuperscript{74} A car-bomb blast in Mogadishu in October 2017 killed more than 350 people, including children.\textsuperscript{75} The Human Rights Council has noted a number of violations of children’s rights in the context of armed conflict in Somalia. It has, for instance,

\begin{quote}
expr[ess][d] concern at the abuses and violations perpetrated against children, including the unlawful recruitment and use of child soldiers and children in armed conflict, killing and maiming, rape and other sexual and gender-based violence, and abductions, and emphasize[d] the need for accountability and justice for all such violations and abuses.\textsuperscript{76}
\end{quote}

\textsuperscript{68} ACRWC, Art. 32.
\textsuperscript{69} \textit{Ibid.}, Art. 44(1)(a).
\textsuperscript{70} \textit{Ibid.}, Articles 44, 45.
\textsuperscript{71} ACERWC, above note 10.
\textsuperscript{73} \textit{Ibid.}
\textsuperscript{76} UN Human Rights Council, Res. 36/27, 29 September 2017, para. 4.
The ongoing armed conflict in Northeast Nigeria, too, has seen a large number of children – reportedly more than 3,500 children – being recruited and used by non-State armed groups.\textsuperscript{77} Children have also been killed, maimed, abducted and raped in the conflict.\textsuperscript{78}

According to the SRSG CAAC, the current state of affairs in relation to children and armed conflict remains grim. As of 2016, there were a reported fifty-nine parties to conflict at the global level, involved in conflicts in fourteen countries, that were listed in the SRSG’s report’s annexes.\textsuperscript{79} Out of the fifty-nine parties, while the largest majority were non-State armed groups, eight were government forces.\textsuperscript{80} Out of these, five were African States – namely, the Central African Republic (CAR), Mali, Somalia, South Sudan and Sudan.\textsuperscript{81} In 2017, the CAR was delisted.

The African countries where armed groups recruit children below the age of 18 are the CAR, the DRC, Mali, Nigeria, Somalia, South Sudan and Sudan.\textsuperscript{82} The story of child soldiers from Darfur, Sudan, taking part in the war in Yemen has also been reported in the media.\textsuperscript{83} Reportedly, there is a correlation between the recruitment of children by armed forces and the creation of a more conducive environment for armed groups to do the same.\textsuperscript{84} The SRSG CAAC also notes that the abduction of children in the context of armed conflict is a continuing problem in Africa, and is in fact increasing in a few contexts – particularly by the Lord’s Resistance Army (LRA), Al-Shabaab and Boko Haram.\textsuperscript{85}

The findings of the SRSG CAAC in her 2018 report generally portray a deteriorating situation in African countries as compared to previous years.\textsuperscript{86} In this respect, it is reported that the recruitment and use of children doubled in the DRC and quadrupled in the CAR.\textsuperscript{87} In Somalia and South Sudan, the recruitment and use of children persisted at alarming levels, at 2,127 and 1,221 verified cases respectively.\textsuperscript{88} A direct link between the increase in recruitment and use of children and maiming and killing of children is also


\textsuperscript{78} UNICEF, above note 77.


\textsuperscript{80} Ibid.

\textsuperscript{81} Ibid.

\textsuperscript{82} Child Soldiers International, above note 51.


\textsuperscript{86} SRSG CAAC, above note 79.

\textsuperscript{87} Ibid., para. 6.

\textsuperscript{88} Ibid.
emerging. In Nigeria, suicide attacks, on some occasions perpetrated by children that have been forced to do so by Boko Haram, accounted for over half of verified child casualties.

Globally, there is an increasing trend to protect students, teachers and schools from the negative consequences of military use of schools. Part of this progress has been achieved through the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* and its accompanying Safe Schools Declaration. The number of African countries that have endorsed the Declaration stands at just twenty-three, but on a positive note, a number of countries currently undergoing armed conflict have endorsed the Declaration.

Some thematic issues

There are a number of thematic issues around which the interpretation of the ACRWC by the African Committee can add value to the promotion and protection of the rights of children in the context of armed conflict.

While the OPAC provides the possibility for State armed forces (though not armed groups) to recruit children below 18 on a voluntary basis, such a concept appears alien to the Charter, where a “straight 18” position is adopted. Accordingly, in Africa, the instances in domestic law where under-18s are allowed to join the army are rare. In fact, there are examples where voluntary enrolment is also explicitly set at 18 years. In Morocco, in terms of the law, you must be at least 20 years old to be conscripted into the army, and in terms of voluntary enrolment, the minimum age has been set at 18. In Angola, the Armed Forces of Angola may only be joined through compulsory recruitment from the age of 20, whereas voluntary recruitment is set at 18 years of age. In Egypt, voluntary recruitment is permitted from the age of 16, and in Algeria, children may be voluntarily recruited into the armed forces from the age of 17. In the DRC the law allows for children to be recruited into the army from the age of 16; however, as the law defines “direct participation” as “direct participation in hostilities” or being at the “front lines” of hostilities, it states that

89 Ibid, para. 7.
90 Ibid.
91 As of 25 May 2019, these countries were Angola, Botswana, Burkina Faso, Cameroon, the CAR, Chad, Côte D’Ivoire, the DRC, Djibouti, Gambia, Kenya, Liberia, Madagascar, Mali, Mozambique, Niger, Nigeria, Sierra Leone, Somalia, South Africa, South Sudan, Sudan and Zambia.
92 Morocco Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/MAR/1, 19 June 2012, para. 13.
93 Ibid., para 19.
94 Angola Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/AGO/1, 23 February 2017, para. 22.
95 Egypt Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/EGY/1, 17 March 2010, para. 30.
96 Committee on the Rights of the Child, Concluding Observations to the Algeria Report, UN Doc. CRC/C/OPA/DZA/CO/1, 22 June 2018, para 19.
97 DRC Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/COD/1, 19 April 2011, paras 43–44.
those who are between 16 and 18 may not be sent to the front lines.\footnote{Ibid., paras 47, 49.} In Sudan, the Child Act prohibits the exploitation or use of children in armed conflict.\footnote{Sudan Report to the UN Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/SDN/1, 16 December 2009, para. 22.} However, from the age of 16, children can become “cadets” who will receive military training before they turn 18;\footnote{Ibid., para. 55.} they (officially) become soldiers when they turn 18 years of age.\footnote{Ibid., para. 53.}

How age determination processes are conducted, especially in a context where there is no birth certificate, is an issue in need of close attention. For example, in Angola, the age determination process has been reported as unreliable, as oral confirmation of age by two witnesses is sufficient.\footnote{Angola Report, above note 94, para 18.} In Uganda, the age determination process relies on confirmation by a local chief/authority or an examination of height, years of schooling completed, etc, which can be inaccurate.\footnote{Uganda Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/UGA/1, 17 July 2008, para. 19.} Due to this, despite the law, it has been found that there were children serving in the Uganda People’s Defence Force.\footnote{Ibid., para. 14.} There are also children serving in militia groups such as the LRA.\footnote{Ibid., paras 14, 46–48.} Unlike in some countries such as Tunisia, it is not compulsory to show an identity card in order to verify one’s age in Uganda.\footnote{Ibid., para. 28.} In Sudan, before recruitment, at the time of application, a person has to produce a birth certificate in order to prove his or her age.\footnote{Ibid., para. 52.}

While the criminalization of child recruitment under 15 is required by IHL, it is not an obligation that explicitly emanates from the African Children’s Charter and the CRC. However, under the OPAC, the Committee on the Rights of the Child has expressed concern that Algeria,\footnote{Algeria Concluding Observations, above note 96, para. 29.} Guinea,\footnote{Committee on the Rights of the Child, Concluding Observations to the Guinea Report, UN Doc. CRC/C/OPAC/GIN/CO/1, 25 October 2017, para. 21.} Malawi,\footnote{Malawi Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/MWI/1, 20 June 2016, para. 4.2.} the DRC,\footnote{Ibid., para. 83.} and Madagascar,\footnote{Madagascar Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/MGD/1, 5 November 2014, para. 101.} among others, have not yet explicitly criminalized the recruitment of child soldiers by both State and non-State armed groups or security forces. There are a few countries that explicitly criminalize recruitment of persons below 18; in Sierra Leone, for example, national legislation criminalizes the recruitment of children under 18 into the armed forces,\footnote{Ibid., para. 22.} and in Sudan the law criminalizes...
the recruitment of “someone who does not qualify” to be recruited into the army, which includes children under 18.\textsuperscript{114} There are instances where so-called “local militias” or “local defence forces” that are often associated with or supported by government are involved in the recruitment of children below the age of 18. The application of the provisions of the African Children’s Charter in these instances, and the accompanying obligations of States Parties, is an area that can benefit from guidance by the African Committee.

There are commendable examples from domestic law that expand the level of protection to children beyond only armed conflict. The Beninese Children’s Code, which is awaiting promulgation, prohibits the involvement of children in armed conflict and “other related matters”.\textsuperscript{116} In Rwanda the law sets the recruitment age at 18 and prohibits military service for persons under the age of 18.\textsuperscript{117} Furthermore, members of the Local Defence Force must also be at least 18 years old.\textsuperscript{118}

The number of UN-verified cases of maiming and killing has increased globally;\textsuperscript{119} this increase is reported to be a staggering 300% since the year 2010.\textsuperscript{120} Africa has contributed more than its fair share in this regard. There are documented cases of forcing children to become suicide bombers,\textsuperscript{121} including on the African continent. It is documented that Boko Haram has kidnapped children (more than 1,000 cases as of June 2015) and indoctrinated them or forced them to serve as suicide bombers.\textsuperscript{122}

Sexual violence as a tactic of war and terrorism, especially against women and girls, but also against boys and men, is an increasing trend recorded in at least nineteen countries.\textsuperscript{123} Almost half of these countries identified by the SRSG on Sexual Violence in Conflict – namely Burundi, the CAR, Côte d’Ivoire, the DRC, Mali, Nigeria, Somalia, South Sudan and Sudan – are in Africa.\textsuperscript{124}

In this respect, some trends of serious concern include the targeting of very young girls and boys for sexual violence, including in Burundi, the CAR, the DRC, Somalia, South Sudan and Sudan (Darfur); and the increased reporting of sexual violence against boys and men, despite the reporting barriers and stigma of

\begin{footnotes}
114 Ibid., para. 79.
115 Ibid.
116 Benin Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/BEN/1, 24 November 2017, para. 60.
117 Rwanda Report to the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/RWA/1, 6 December 2011, para. 70.
118 Ibid., para. 83.
119 Save the Children International, above note 72, p. 7.
120 Ibid.
124 Ibid.
\end{footnotes}
perceived emasculation they face. 125 Often the criminalization of adult same-sex conduct, coupled with the absence of rape laws that are sex-neutral, exacerbates the situation for boys and men. Mothers and their children born of wartime rape/sexual conduct face ostracization within their communities—a good example of this being children born to Boko Haram members in Nigeria, who are labelled as “bad blood” or “children of the enemy”. 126

The arrest, detention and in some instances torture and ill-treatment of children who are accused of association with groups designated as terrorist organizations, or related activities, is also an issue in need of closer scrutiny if the enjoyment of the rights in the African Children’s Charter are to be realized by all. Preventive detention, used under the guise of protecting children from joining groups such as Boko Haram and ISIS, has led to arrests of children in Cameroon, Nigeria, Libya and other countries. 127 The use of children for suicide bombing has been flagged as one of the issues in need of attention, especially in the context of Boko Haram and Al-Shabaab insurgencies. For instance, it has been reported that there has been an increase in suicide bombings carried out by children in Cameroon and Nigeria for and on behalf of Boko Haram. 128

Another issue worthy of exploration relates to the denial or unlawful use of humanitarian access, and its relationship with children’s rights. Activities of this nature have reportedly increased, for instance, in the context of the conflict in South Sudan. 129 This begs the question of how the provisions of the African Children’s Charter, especially Articles 22 and 5, as well as relevant standards from IHL, should be interpreted and applied. Moreover, the relative success or lack thereof of the Charter can also be measured by the extent to which its provisions and their interpretation have impacts on non-State armed groups, and are also applied in instances of extra-territoriality, including sexual exploitation and abuse by peacekeepers. Other areas in need of further interpretation and guidance include the relevance of the provisions of the Charter in reducing the impact of terrorism-related offences on children; children displaced by armed conflict; and attacks on schools and hospitals. It is important that the work of the African Committee address these issues in the foreseeable future.

Some trends on accountability

There is no evidence that the reported increase in instances of the UN Security Council Monitoring and Reporting Mechanism’s six grave violations on the African continent has yet been matched with increased

125 Ibid., p. 6.
127 Child Soldiers International, “Submission to the 75th Pre-session of the UN Committee on the Rights of the Child: Cameroon”, August 2016 (website no longer available).
129 SRSG CAAC, above note 84, para. 9.
accountability. The number of countries that have withdrawn, or threatened to withdraw, from the ICC, at least at face value, could have a negative effect on accountability for violations of children in the context of armed conflict. This is more so the case until the criminal bench of the African Court of Justice becomes operational. Another example of the ineffectiveness of the ICC is displayed in the situation in respect of Saif al-Islam Gaddafi, who is accused of murder and persecution of civilians including children. While the ICC rejected the request by Libya to try Gaddafi domestically for crimes against humanity, on 9 June 2017 Gaddafi was released from detention by the group that captured and detained him for five years. Also, it is notable that during the 2016 UN Security Council vote to expand the role of the body in respect of accountability for the violations of the rights of children by peacekeepers, one African country abstained.

Accountability mechanisms, including domestic court processes, might fall short of addressing the particular issues faced by children in the context of armed conflict. For instance, in respect of sexual violence, it is reported that the trials of persons accused of terrorist acts in Nigeria and Mali do not contain charges of sexual violence. For many instances in Africa, the operationalization of the Special Criminal Court in the CAR is an emblematic example of the need to strengthen the entire justice system as the lynchpin for the success of such initiatives. The use of customary or traditional courts – to which 90% of cases were reportedly referred in Somalia and South Sudan – might fall short of delivering justice, including adequate reparations to victims.

Success stories in respect of accountability, while very limited, are taking place on the continent. In the DRC, the High Military Court upheld Frederic Batumike’s life sentence for the rape of thirty-nine children in Kavumu between 2013 and 2016. The conviction of a colonel of the Forces Armées de la République Démocratique du Congo, including for the war crime of rape, is also worthy of mention. On law reform, the successful efforts in delinking rape from adultery in criminal codes, for example in Somalia and Sudan, can assist in improving reporting and subsequent prosecution of perpetrators.

130 See, for example, Children and armed Conflict: Report of the Secretary-General, UN Doc. A/59/695–S/2005/72, 9 February 2005, para. 68.
132 See Geneva Academy, above note 131, pp. 82–83 and footnotes therein.
134 Conflict-Related Sexual Violence, above note 123, p. 8. The charges referred to in Nigeria are brought mainly under the Terrorism (Prevention) (Amendment) Act of 2013.
135 Ibid., p. 9.
136 Report of the Secretary-General, above note 126, p. 7.
138 Report of the Secretary-General, above note 126, pp. 8–9.
139 Ibid., p. 8.
In Nigeria, for instance, the Office of the Prosecutor of the ICC continues to follow the situation of eight potential cases involving alleged commissions of war crimes and crimes against humanity by Boko Haram (six crimes) and the Nigerian security forces (two crimes). In due course, the Nigerian government has initiated court proceedings against Boko Haram suspects, and has established two inquiries—a Special Board of Inquiry within the Nigerian Armed Forces to investigate allegations of rights violations against the Nigerian army, and the Presidential Investigation Panel to Review Compliance of the Armed Forces with Human Rights Obligations and Rules of Engagement, which, inter alia, aims to “investigate alleged violations of international humanitarian law and human rights law and matters of conduct and discipline in the Nigerian Armed Forces in local conflicts and insurgencies”. The extent to which these processes have looked into violations of the rights and legal protections of the child in the context of armed conflict remains to be seen.

Accountability mechanisms could at times either be strengthened or undermined by the unilateral measures undertaken by States involved in some form of military assistance. A good example in this respect is the United States. Through the enactment of the Child Soldiers Prevention Act (CSPA) of 2008, one of the two instruments aimed at implementing the OPAC by the United States, the US government prohibits the provision of several categories of US military assistance to governments that directly recruit or use child soldiers, or support non-State armed groups that recruit or use child soldiers.

There is an exception to this arrangement, however, whereby the US president has the authority to grant full or partial so-called “national interest waivers” for purposes ranging from “political considerations to supporting counterterrorism operations”. In fact, both in 2013 and 2017, the Committee on the Rights of the Child has expressed concerns about waivers granted to countries where reports from the UN had indicated the recruitment or use of children, or other related grave violations of the rights of the child in the

140 Geneva Academy, above note 131, p. 113.
141 This was established in March 2017.
142 This panel conducted hearings from September to October 2017, and concluded its activities in November 2017.
143 Geneva Academy, above note 131.
144 The ACRWC is silent on the issue of international cooperation; the OPAC has detailed provisions on this topic.
146 Section 5 of the CSPA prohibits the provision of assistance in the form of finances, training or arms sales to countries whose governmental armed forces or government-supported armed groups (including paramilitaries, militias and civil defence forces) recruit or use child soldiers.
149 Ibid.
context of armed conflict. In 2013, the Committee urged the United States to amend the CSPA with a view to removing the possibility of presidential waivers. In 2017, the Committee expressed “regrets that the State party has taken limited actions towards … withdrawing the possibility of presidential waivers to countries involved in recruitment and use of children in armed conflict and/or hostilities”.

In particular, African countries who use or support the recruitment or use of child soldiers have been beneficiaries of partial or full presidential waivers. For the years 2011–2017, the African countries that dot the list are the CAR, Chad, the DRC, Libya, Nigeria, Rwanda, South Sudan, Somalia, and Sudan. While in 2017 the annual CSPA list of countries that use child soldiers included the DRC, Mali, Nigeria, South Sudan, Sudan, Somalia, Syria and Yemen as offenders, the White House stated that “only Sudan, Syria and Yemen did not receive some form of waiver this year, and none of these three countries were due any military assistance that could have been withheld in the first place”.

The United States has argued that instead of “granting blanket waivers”, the government tries to “connect specific policy actions with partial or full waivers, transforming the CPSA into a strategic, diplomatic tool”, in order to encourage the listed governments “to enter into action plans with the UN”. In this respect, the US government highlights the situation with Chad as a success. Chad was included on the CSPA list in 2010, 2012 and 2013, but as a result of the joint action plan it signed in 2011 with the UN outlining concrete actions, which it fulfilled (no children in its national army) by 2014, it was not included in the 2015 CSPA list. However, while the situation of Chad is commendable (and, arguably, something of a rare example), it is still highly questionable how other countries such as Somalia and Sudan, two countries that have been on the CSPA

150 Ibid., paras 10, 41.
151 Ibid., para. 6.
153 Ibid.
154 Ibid.
155 Ibid.
156 Ibid.
158 According to Human Rights Watch, by 2016 “Rwanda, which had been included in 2013 and 2014 but removed in 2015, reappeared after officials recruited child soldiers from a refugee camp”. Ibid.
159 A full waiver was granted in 2012 and 2013, and partial waivers were granted in 2014, 2015 and 2016. Including for direct commercial arms sales.
160 Including for direct commercial arms sales.
163 Committee on the Rights of the Child, above note 148, para. 31.
164 Ibid.
165 Ibid., para. 31.
list every year at least from 2010 to 2016 and have been granted some form of waivers.\textsuperscript{166} have been able to improve their compliance with the ACRWC and other relevant instruments. The argument that most of the waivers granted were “aimed at working with [the countries’] militaries to promote needed reforms and professionalize their armed forces to be more respectful of human rights”\textsuperscript{167} is probably not fully supported by the data. Human Rights Watch has argued that, while one of the seven categories\textsuperscript{168} of assistance – the International Military Education and Training programme – contains human rights training, the remaining six relate “almost exclusively to the provision of arms, military equipment, and financing for military purchases”\textsuperscript{169}

**Implementing suitable responses to address some of the main challenges: The role of the ACERWC**

**Upgrading the Reporting Guidelines**

The reporting procedure under the African Children’s Charter is the main component of its monitoring mechanism.\textsuperscript{170} The quality, nature and depth of information in State Party reports is in part dependent on the extent to which the Guidelines for State Party reports are tailored in a focused and detailed manner. The ACERWC has adopted *Guidelines for Initial Reports of States Parties* (Guidelines for Initial Reports)\textsuperscript{171} and *Guidelines on the Form and Content of Periodic State Party Reports* (Guidelines on Periodic Reports).\textsuperscript{172} Compliance with the Guidelines helps States Parties to present reports in a uniform manner, reduce the duplication of information, and also minimize the risk that State reports are deemed inadequate in scope or insufficient in detail.\textsuperscript{173}

The Guidelines for Initial Reports are very terse on the level and nature of information that is required from States on the issue of children and armed conflict. Under a cluster on “Family Environment and Alternative Care”, they request that States provide information on law, policy and practice, including progress and

\begin{itemize}
\item Human Rights Watch, above note 157.
\item These are International Military Education and Training, Foreign Military Financing, Direct Commercial Sales, Foreign Military Sales, Excess Defense Articles, Section 1206, and Peacekeeping Operations.
\item ACERWC, Art. 44(1)(a).
\end{itemize}
challenges faced in respect of “separation caused by internal displacement arising from armed conflicts”.

In addition, under the cluster on “Special Protection Measures”, States are requested to include information in their reports that underscores progress, challenges, future goals and priorities, and to undertake legislative and other measures in respect of “[c]hildren in armed conflicts, including specific measures for child protection and care (Article 22)”.

The Guidelines on Periodic Reports are not significantly better. These Guidelines expand the request for information to include measures aimed at ensuring that “children do not take part in hostilities”, and measures to protect those affected by armed conflict, strife and tension, including demobilization, disarmament and reintegration (DDR). The Guidelines also request disaggregated data on the number of children affected as a result of armed conflict, tensions and strife, and the number of those that are accessing DDR.

The extent to which States appreciate the importance and depth of their reporting obligations on issues pertaining to children and armed conflict, and comply with them, is at times very limited. Experience of the reporting (or non-reporting) under the OPAC has shed light on this issue. A number of States Parties that are neither at war nor have a recent experience of armed conflict appear not to appreciate the added value of the reporting obligation established under the OPAC. As of 1 March 2017, it was reported that the OPAC had the third-highest number of initial reports overdue by States Parties of all the UN human rights treaty bodies, and also the third-highest proportion of non-reporting States Parties (overdue initial reports), standing at 28%. Even when State Parties report, statements by heads of delegations during the consideration of the State Party report sometimes underscore how, given the fact that there is no armed conflict in the State Party concerned, the discussions on the implementation of the OPAC are either too limited, irrelevant, or of academic interest only. With this as a backdrop, the extent to which the Guidelines of the ACERWC emphasize issues such as prevention, peace education, treatment of children on the move (including asylum-seekers) that are affected by armed conflict, and cross-border and international cooperation to address issues of children and armed conflict is important.

Another issue worthy of explicit inclusion for requests for information, as relevant, is the sexual exploitation and abuse of children by peacekeepers. With a view to demonstrating the increasing relevance of this issue, some statistics are

174 Guidelines for Initial Reports, above note 171, para. 14(c).
175 Ibid., para. 21(a)(ii).
176 It is to be noted that, unlike Article 22 of the ACRWC, the Guidelines omit the reference to “direct” in “direct part in hostilities”.
177 Guidelines on Periodic Reports, above note 172, para. 29(d).
178 Ibid., para. 30(c).
179 The number of reports overdue was forty-six. See OHCHR, “Compliance by States Parties with Their Reporting Obligations to International Human Rights Treaty Bodies: Note by the Secretariat”, UN Doc. HRI/MC/2017/2, 2 May 2017, para 10.
180 Ibid., para. 11.
181 Ibid.
vital. The UN has started to provide information about the nationalities of alleged perpetrators beginning from the year 2015.\footnote{UN, “Conduct in UN Field Missions”, available at: \url{https://conduct.unmissions.org/sea-subjects}. See also UN Secretary-General, Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach, UN Doc. A/71/818, 28 February 2017, p. 47.} While there are forty-three nationalities of uniformed personnel who have been implicated in allegations of sexual exploitation and abuse, what is striking is the extent to which African countries are overrepresented on the list. The list involves 206 personnel hailing from the forty-three countries.\footnote{“Conduct in UN Field Missions”, above note 182.} On the list are twenty-eight African countries,\footnote{South Africa, the DRC, Congo, Morocco, Cameroon, Burundi, Tanzania, Gabon, Niger, Senegal, Benin, Ghana, Mauritania, Nigeria, Ethiopia, Malawi, Rwanda, Burkina Faso, Chad, Egypt, Gambia, Guinea, Madagascar, Mali, Namibia, Togo, Zambia and Zimbabwe.} while the remaining fifteen come from outside of the continent.\footnote{Bangladesh, Pakistan, Canada, Nepal, Guatemala, Romania, Uruguay, El Salvador, Fiji, Germany, Indonesia, Moldova, Paraguay, the Philippines and Slovakia.} The top thirteen countries with the highest number of personnel implicated in allegations are in Africa, amounting to 152 of the 206 personnel implicated in allegations. This reality should be sufficient enough for the Guidelines to explicitly ask for specific information on sexual exploitation and abuse by peacekeepers.

Individual complaints and investigative/advocacy missions

The ACRWC provides the ACERWC with the mandate to receive and consider individual complaints.\footnote{ACRWC, Art. 44.} Individuals, civil society organizations and other relevant stakeholders are able to file complaints, including group complaints. Article 45(1) of the ACRWC also mandates the ACERWC to resort to any appropriate method of investigating any matter falling within the ambit of the Charter.

To date, the ACERWC has received a few communications\footnote{Table of cases available at: \url{www.acerwc.africa/table-of-communications/}.} and has conducted both promotional and investigative missions pertaining to children and armed conflict on the continent. The first communication submitted, as confirmed during the sixth session of the ACERWC, related to the plight of children in Northern Uganda, and underscored the violations of rights as a result of the twenty-year-old civil war between the LRA and the government.\footnote{See Hansungule and Others (on behalf of children in Northern Uganda) v The Government of Uganda, Communication 1/2005, 2005 (Uganda Decision). The communication related specifically to events in Northern Uganda from 2001 to 2005.} It emphasized the obligation of the Ugandan government under the Charter\footnote{See Benyam Dawit Mezmur, “The African Committee of Experts on the Rights and Welfare of the Child: An Update”, African Human Rights Law Journal, Vol. 6, No. 2, 2006, p. 564; Julia Sloth-Nielsen and Benyam Dawit Mezmur, “Like Running on a Treadmill? The 14th and 15th Sessions of the African Committee of Experts on the Rights and Welfare of the Child”, African Human Rights Law Journal, Vol. 10, No. 2, 2010, pp. 547–548.} and made an allegation that there were instances where “children were taken to the frontline in order to support intelligence gathering against the LRA”.\footnote{Uganda Decision, above note 188, para. 6.} Before
deciding on the communication, the ACERWC undertook a field mission to Uganda in February 2013. The ACERWC’s decision found a violation of children’s rights and protections in respect of one of the five complaints—namely, on the recruitment and use of children. The Uganda Peoples’ Defence Forces Act of 2005, in Section 52, introduced 18 years as the minimum age for recruitment by the armed forces. The absence of legislation to this effect covering the material time of the communication (2001–05) was found to have violated Article 1(1) of the Charter, which requires States parties “to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter”. In respect of four of the other allegations—namely sexual violence, violations of the right to the highest attainable standard of health, attacks on schools, and abduction—the ACERWC did not find a violation.

The added value of the communication procedure is on display here. First, the generous standing granted by the communication mechanism, which does not have a strict “victim requirement”, is positive. It also highlights that communications which involve an unidentified number of child victims, which is often the case in the context of children and armed conflict, can be entertained, thereby demonstrating the African Committee’s flexibility to entertain individual complaints even when the alleged victims are not individually identified.

Secondly, the ACERWC’s decision adds value to the interpretation of Article 22—for example, it ventured into the responsibility of the government for the role of non-State armed groups, in this case the Local Defence Units of Uganda. Furthermore, by citing jurisprudence from the African Commission on Human and People’s Rights, including a decision against Chad which held the government accountable for attacks by unidentified militants, the Committee underscored States’ responsibility to implement laws with due diligence in time of conflict, too.

Thirdly, the recommendations of the decision included the need to provide comprehensive provisions in Uganda’s Penal Code to establish criminal responsibility for persons who recruit or use children in armed conflict; to implement fully the standard operating procedures for the reception and handover of children separated from armed groups or forces; to conduct comprehensive DDR programmes; and to improve Uganda’s birth registration coverage, including by making sure that in instances where there is conflicting information on, or absence of conclusive evidence of, the age of a child, no recruitment should take place; and that the government should rely on child-friendly justice processes for accountability, and should rely on forms of accountability other than detention and criminal prosecution. Inter alia, the decision sheds lights on the fact that, if implemented, the recommendations in an individual complaints mechanism can

191 Ibid., para. 17.
192 Ibid., para. 81.
193 Ibid., para. 44.
194 Ibid.
195 Ibid., para. 38.
196 Ibid., para. 81(1–5).
address systemic issues which could assist in preventing and addressing violations including the recruitment and use of children in armed conflict.

While the decision had recommended that the Ugandan government should report on the progress of implementation of the contents of the decision within six months, and that the African Committee, in accordance with its Rules of Procedure, should appoint one of its members to follow up on the implementation of the decision,\textsuperscript{197} there is no evidence that this reporting has been done. Notably, the Committee has since established the practice of implementation hearings,\textsuperscript{198} which should be implemented in a systemic manner. Moreover, a few substantive areas that could have benefited from an authoritative interpretation seemed to have received limited or no attention—these include the obligations of States under IHL, and the fact that while the decision explicitly acknowledged that the “ability of a State to fulfil its human rights obligations can be severely undermined by its involvement in hostilities”\textsuperscript{199} and that “the decision in this Communication give[s] due consideration to this reality”,\textsuperscript{200} it is not clear if there are obligations which are so fundamental that even a State involved in an armed conflict is expected to uphold them. Also, while reference is made to the fact that the Amnesty Act “does not necessarily follow the criteria for granting amnesties under international legal obligations of the State”,\textsuperscript{201} the links between this issue and the provisions of the Charter and accountability are unfortunately not further elucidated.

In terms of Article 45(1) of the ACRWC, the African Committee may use appropriate methods to investigate any matter covered by the Charter, and to investigate measures taken by States Parties to implement the Charter. Investigative or advocacy missions enable the Committee to directly gather information relevant for monitoring the implementation or violation of the Charter by States Parties.\textsuperscript{202} Apart from the promotional visits that the Committee undertook in countries experiencing conflict such as Sudan (2004) and the DRC (2013), as mentioned above, the Committee also undertook a fact-finding mission to Northern Uganda from 15 to 19 August 2005. Based on a resolution that it passed on the situations of children in South Sudan and the CAR during its 23rd Ordinary Session,\textsuperscript{203} the Committee also undertook “advocacy missions” to South Sudan\textsuperscript{204} and the CAR\textsuperscript{205} in 2014.

\textsuperscript{197} Ibid., para. 81(6).
\textsuperscript{198} Two communications that have benefited from implementation hearings are Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. The Government of Kenya, and The Centre for Human Rights (University of Pretoria) and La Recontre Africaine pour la Defense Des Droits de l’Homme (Senegal) v. The Government of Senegal.
\textsuperscript{199} Uganda Decision, above note 188, para. 36.
\textsuperscript{200} Ibid.
\textsuperscript{201} Ibid., para. 51.
\textsuperscript{202} Apart from Article 45 of the ACRWC, investigative missions are governed by the Guidelines on the Conduct of Investigations by the ACERWC.
\textsuperscript{203} Held from 7 to 16 April 2014 in Addis Ababa, Ethiopia.
\textsuperscript{204} ACERWC, Report on the Advocacy Mission to Assess the Situation of Children in South Sudan, August 2014 (South Sudan Mission Report), available at: www.refworld.org/docid/545b4e384.html.
The recommendations from the mission to South Sudan mostly addressed the six grave violations, and a few additional elements such as nutrition. The CAR mission recommendations included systemic improvements such as using the security sector reform process to prevent recruitment and use of children by armed groups, and a continued role for the UN Stabilization Mission in the Central African Republic in providing support for training of troops for child protection before and during deployment. The fact that the Committee was permitted to undertake missions to two non-State parties to the Charter at the time of the missions further consolidates the positive impact that this mandate can contribute, as well as the positive willingness of African countries to engage with the Committee. Moreover, undertaking such missions at the initiation of the Committee itself is commendable, and in particular can add value to conflict situations in Africa that are not on the agenda of the Security Council. How such a mechanism can be used as an early warning system not only to address violations in the context of armed conflict but also to prevent them remains an issue on which the African Committee needs to reflect. Finally, it is also not clear whether a concrete follow-up to the recommendations that emanated from the missions was undertaken; this is an issue that requires close attention on the part of the Committee for further guidance.

Bridging the gap between “political” decisions and child rights decisions

There is an argument that can be made that decisions made within inter-governmental political bodies, including political regional organizations, are beyond reproach by treaty bodies. This approach seems to endeavour to demarcate a line between what is a “political” decision on the one hand, and what is a human rights decision on the other.

An example is appropriate here. In 2013, during the consideration of the State Party Report of China under the OPAC, the Committee on the Rights of the Child posed a question to the delegation on why China had abstained on Security Council Resolution 2068 (2012). The resolution was aimed at strengthening and extending the mandate of the SRSG CAAC. The resolution was passed with eleven “yes” votes and four abstentions.

It seems that the question posed to the government of China was in part triggered not only because of the State Party’s position as a permanent member of the Security Council but also because of information contained in its State

206 South Sudan Mission Report, above note 204, pp. 21–27.
208 CAR Mission Report, above note 205, p. 28.
209 Ibid., p. 29.
210 Such as Cameroon and Burkina Faso.
Party Report. This information underscored China’s role in and contribution to the UN and the Security Council, but also explicitly underlined how the State “supports the work of the Secretary-General and his Special Representative for Children and Armed Conflict”.

A similar query can be raised in the context of few African countries that report to the African Committee. An example of this can be found in Security Council Resolution 2272 of 11 March 2016. The resolution, the first of its kind, is aimed at preventing sexual exploitation and abuse in peacekeeping, and strengthening the accountability of perpetrators. It specifically addresses three critical aspects of accountability. It underscores the power of the Secretary-General to repatriate an entire contingent in the instance of a pattern of sexual exploitation and abuse by its members; reiterates the obligation of UN member States to investigate reports of sexual exploitation and abuse and to hold violators accountable; and lends support to the UN administrative reforms, including improving “the ability of victims to seek justice and to see it being done by the United Nations”. While all members of the Security Council voted for the resolution, the government of Egypt abstained. Arguably, countries with similar records could be questioned by the ACERWC to explain such a vote, and asked to explain how their voting record fits within the State’s child rights obligations under the African Children’s Charter.

In its reporting responsibility to the Executive Council of the AU, the ACERWC has engaged in efforts to bring the issue of children and armed conflict to the fore of the AU’s political agenda. This can in part be deciphered from the decisions of the Executive Council under the ACERWC reports. In 2018, the Executive Council endorsed “Humanitarian Action in Africa: Children’s Rights First” as the theme for the Day of the African Child (celebrated every year in June 16) in 2019. In 2017, the Executive Council noted the African Committee’s findings in its continental study on armed conflicts, and urged member States of the AU to take action to address the plight of children in such situations. Previously,

213 Committee on the Rights of the Child, China State Party Report, UN Doc. CRC/C/OPAC/CHN/1, June 2012, para. 105.
214 Ibid.
217 Ibid., para. 1.
218 Ibid., paras 2, 3, 8.
in 2016, the focus of the Executive Council had shifted onto strengthening accountability mechanisms, including in the context of armed conflicts.\footnote{AU Executive Council, “Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)”, Doc. EX.CL/977(XXIX), July 2016, para. 7.}

The occasion in recent memory where the Executive Council expressed “its strongest support” to a theme for the Day of the African Child was in 2015, for the 2016 theme “Conflict and Crises in Africa: Protecting All Children’s Rights”.\footnote{AU Executive Council, “Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)”, Doc. EX.CL/923(XXVII), July 2015, para. 6.} The Council further expressed “grave concern” about the involvement of children in armed conflict, especially as soldiers, as well as sexual exploitation, smuggling and abduction of children.\footnote{Ibid.} During the same time, South Sudan and the CAR were urged to address the challenges faced by children in their jurisdictions.\footnote{Ibid., para. 7.} In its July 2012 decision, the Peace and Security Council (PSC) of the AU was requested to take into account the rights of the child in its work, and also to cooperate with the ACERWC.\footnote{AU Executive Council, “Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)”, Doc. EX.CL/744(XXI), July 2012, para. 7.} The government of Uganda’s invitation to the African Committee to undertake a mission to the country to engage with stakeholders on the issue of children and armed conflict was also welcomed by the Council.\footnote{Ibid., para. 9.} Such efforts by the African Committee to bring the issue of children in armed conflict into the political organs of the AU should continue in a systemic manner.

In respect of the PSC too, recent developments are promising with a view to offering the ACERWC opportunities for engagement. Since 2014,\footnote{On 8 May 2014, for the first time, the PSC, at its 434th meeting, held an open session exclusively devoted to the children and armed conflict topic. This was held as a follow-up to the 420th meeting of the PSC, held on 18 February 2014 with the ACERWC.} the PSC has held open sessions exclusively devoted to children and armed conflict. The latest open session was held on 16 April 2019.\footnote{PSC, “Press Statement of the 841th [sic] PSC Meeting on the Theme: ‘Children Affected by Armed Conflicts in Africa’”, 14 May 2019, available at: www.peaceau.org/en/article/press-statement-of-the-841th-psc-meeting-on-the-theme-children-affected-by-armed-conflicts-in-africa.} The decision by the ACERWC to focus its continental study on children and armed conflict emanated from an engagement with the PSC. The status of implementation of decisions from the PSC open session on children and armed conflict needs to be evaluated. Such an evaluation could also include an assessment of the extent to which the PSC is bound by the African Children’s Charter, as well as whether its decisions and activities are in compliance with these obligations.\footnote{A similar inquiry has been made in respect of the Security Council. See, for example, Sarah M. Field, “UN Security Council Resolutions Concerning Children Affected by Armed Conflict: In Whose ‘Best Interest’?”, International Journal of Children’s Rights, Vol. 21, No. 1, 2013.} Are efforts to implement decisions of the PSC that might lead to a violation of child rights subject to review for compliance with the Charter, for instance by the ACERWC or the African Court? In the context of the Security Council, Field has cited
the experience of the European Court of Justice, which held that “regulations of the European Union implementing Council resolutions could be reviewed for compliance with fundamental rights”.231

Commissions of inquiry: Bringing children and their rights from the margins to the mainstream

In recent years, a few African countries have been the subject of commissions of inquiry (CoIs) either by the AU or the UN. South Sudan, Eritrea and Burundi are prime among these. In all three cases, the impact of conflict and political instability on children is central to the reported human rights violations in the countries concerned. A brief look at the experiences of the South Sudan CoI established by the AU and the Burundi CoI established by the UN can shed light on some of the critical roles that the ACERWC can and should play in bringing children’s rights in the context of conflict onto the international agenda.

The South Sudan CoI established by the AU contained, in its terms of reference, the inclusion of a “representative of Women, Youth, and Children”.232 As is often the case when children’s and women’s issues are lumped together, this position was filled by an expert on women’s rights—the Special Envoy of the African Union on Women and Conflict.

The methodology used in the work of the CoI underscored that “[w]ith respect to issues relating to children and youth, the Commission took a similar approach [as it did] to gender”.233 This seemed to suggest that as “the Commission decided to integrate gender analysis into all aspects”,234 so too was a focus on children made a golden thread that run through its work and Final Report. The end product in the form of the Final Report underscores a number of issues directly relevant to children, though some serious limitations are apparent. For example, while it is indicated that “the Commission held special meetings … to obtain women and girls’ perspectives on all mandate areas”,235 there is no indication that the same was done for boys. Also, it is not surprising that the ACERWC did not get a mention in the Final Report, perhaps because South Sudan is also a State party to the African Children’s Charter, as an AU organ with a role to play. At the risk of appearing to duplicate efforts, the ACERWC actually conducted a mission to South Sudan in 2014, the same time the CoI was ongoing, which could have been avoided by integrating a representative of the ACERWC into the CoI.

231 Ibid., p 161.
234 Ibid., para. 13.
235 Ibid., para. 17.
236 See discussions above on investigative/advocacy missions.
In November 2016, the Human Rights Council appointed three persons to serve on the CoI on Burundi.\(^{237}\) Despite some shortcomings, the terms of reference, as set out in the Human Rights Council resolution that established the CoI, held some promise for addressing the impact of conflict on children’s rights. The first operational paragraph expressed the Human Rights Council’s “deep concern” on the deterioration of human rights in the country, “in particular the situation of women and children”.\(^{238}\) The resolution also strongly condemned “mass arbitrary arrests and detentions, including cases involving children”, and violations against “young demonstrators”.\(^{239}\) The Final Report of the CoI, however, did not follow through on this initial promise. While the devastating effect of the political instability and conflict in Burundi on children is well recorded elsewhere,\(^{240}\) it is addressed in a scant manner in the Final Report.

The non-separation of adults and children in detention did receive a mention in the Final Report.\(^{241}\) In a sign of appreciation of child participation, the CoI also interviewed children that were victims of sexual violence; the Final Report contains interviews with “more than 45 victims of sexual violence whose ages ranged from 8 to 71”,\(^{242}\) but there is no disaggregated information by age. In particular, the situation of children in street situations, the right to education, and the mental health of children as a result of political instability appear to be some of the serious shortcomings of the Final Report.

The importance of having child rights expertise in the composition of the membership of such CoIs, or at a minimum in the CoI support team, cannot be overemphasized. Some of the shortcomings on engagement mentioned above are a result of the working methods, resources and priorities of external stakeholders. However, others relate to the capacity and focus of the ACERWC – for example, even though the Burundi CoI made a call for contributions,\(^{243}\) with an extended deadline, the ACERWC did not engage with the process. Ultimately, the recommendation on engagement with various stakeholders does not identify the ACERWC. Some of the shortcomings highlighted above in the context of the South Sudan and Burundi CoIs shed light on the potential role that the ACERWC should play in the context of similar future initiatives.

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\(^{239}\) Ibid., para. 2.


\(^{242}\) Ibid., para. 48.

Conclusion

There is a long list of developments around the work of the ACERWC that have implications in respect of fulfilling its potential in the exercise of its mandate with a view to preventing and addressing the effect of armed conflict on children. These developments include the ongoing reform of the AU; the development of a General Comment on Children and Armed Conflict; the appointment of a Special Rapporteur on Children and Armed Conflict within the ACERWC; the appointment of a child protection adviser in the PSC; the decision by the PSC to appoint a special envoy on children and armed conflict; the increased recognition of the role of regional and sub-regional organizations as reflected in Security Council resolutions; and institutional efforts to operationalize child protection units in peace support operations in Africa.

These are indeed critical and welcome developments. However, as this article has shown, there are a number of additional aspects that the ACERWC needs to reflect on, including the changing nature of conflict, that would assist the Committee in fulfilling its mission to monitor the implementation of the Charter in Africa, lest it fall foul of taking measures without taking adequate measurements.
Q&A: The ICRC’s engagement on children in armed conflict and other situations of violence

In conversation with Monique Nanchen, Global Adviser on Children, ICRC*

The protection of children in war and other situations of violence is enshrined in various bodies of law, and these provide a framework for several International Committee of the Red Cross (ICRC) activities benefitting children, in particular in areas where the institution has a clear mandate and where vulnerabilities are exacerbated by international humanitarian law (IHL) violations. The activities of the ICRC benefitting children stem from its mandate provided by the 1949 Geneva Conventions and the 1977 Additional Protocols, the Statutes of the International Red Cross and Red Crescent Movement, and the resolutions of the International Conferences of the Red Cross and Red Crescent. Although the ICRC is not a child protection agency per se and child protection is not a standalone activity for the organization, it makes up a significant part of ICRC’s operations, in particular where children’s vulnerabilities are exacerbated by the realities of armed conflict.

In this conversation with the Review, Monique Nanchen, the ICRC’s Global Adviser on Children, explores the multiple efforts being put in place to mainstream child protection into the ICRC’s work, and reveals some of the various challenges.

* This interview was conducted in Geneva on 6 June 2019 by Ellen Policinski, Editor-in-Chief, and Kvitoslava Krotiuk, Thematic Editor at the Review.
that come with protection and assistance activities benefiting children affected by conflict and other situations of violence.

**Keywords:** children, armed conflict, child recruitment, access to education, detention, IHL, restoring family links, urban violence, child participation.

It may seem obvious at first glance who is considered a “child”, but in fact the age associated with certain protections varies under international law and in the policies of States and humanitarian organizations. Who are children in the ICRC’s understanding?

The Convention on the Rights of the Child provides that “child” means every human being below the age of 18 years, and accordingly the ICRC considers everyone below the age of 18 to be a child.\(^1\) Everyone under the age of 18 enjoys specific protections both under IHL and international human rights law. It’s true that in some contexts, childhood is understood to end much before 18. One might be considered an adult with the first signs of puberty, such as when the first hair is growing on the chin. However, for the purposes of the ICRC’s activities, a child is anyone below 18.

How did child protection come to be a specific track in the ICRC’s work?

The ICRC implements a number of activities benefiting children, in particular in conflict-affected areas where their vulnerabilities might be exacerbated by IHL violations.

The ICRC is not a child protection agency, but children are nevertheless the beneficiaries of 40% of the ICRC’s assistance and protection activities. When thinking of all the activities implemented by the ICRC across the globe, ranging from the provision of safe and clean water and of health care to conflict-affected populations, to awareness-raising efforts on weapons contamination, to nutritional programmes and activities aimed at protecting the civilian population, many children benefit from the ICRC’s support. It is therefore key that we are mindful of the specific needs and vulnerabilities of children—though not underestimating their incredible sense of hope and their resilience—and that we tailor our response accordingly. Among the IHL violations we come across in our work, some, such as child recruitment, affect children specifically. Therefore, it is imperative that we are well equipped to address such challenging issues.

Additionally, interacting with children, be it to better understand their needs, to trace their parents, or to support their return to their community of origin, requires specific skills and approaches. The ICRC takes proactive measures to ensure that its activities on behalf of children are implemented in a child-

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friendly and adapted manner and are in line with the principle of “best interests of the child”.2

Mainstreaming child protection into the ICRC’s work while focusing mainly on our existing areas of expertise is our priority.

**Which legal instruments and standards does the ICRC draw on in its child protection activities?**

The Geneva Conventions of 1949, their two Additional Protocols, and customary IHL contain many clear and specific obligations addressing the treatment of children in armed conflict, and these norms lie at the heart of the ICRC’s child protection work.3 In addition, there are a number of important human rights treaties that the ICRC draws on to complement these IHL protections, including most notably the Convention on the Rights of the Child, its Optional Protocol on the involvement of children in armed conflict, and regional instruments such as the African Charter on the Rights and Welfare of the Child.4

Finally, where a State has committed to implementing additional standards such as the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups,5 the Vancouver Principles on Peacekeeping and Preventing the Recruitment and Use of Child Soldiers,6 or the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict,7 the ICRC can incorporate these into its dialogue with relevant authorities.

**What are the ICRC’s activities related to the protection of children?**

The ICRC’s strategy on children promotes a multidisciplinary approach towards assessing, analyzing and responding to children’s needs, in a contextualized

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manner. The strategy focuses on four main priority issues, which inform our work in favour of children, their families and communities: children in detention, child recruitment, the impact of conflict and violence on children’s access to education, and family separation.

Children and detention is one of our priorities. For example, there can be children detained under a criminal law framework for actions they have allegedly committed. This includes first-time offenders charged with minor offences, such as theft, or children being detained due to their association with an armed group. Children might accompany their parents in detention (some being born to a detained mother), and there are also many children in immigration detention. The ICRC’s aim is to ensure that the conditions in which children are detained respect their specific needs and meet internationally recognized juvenile justice standards. When needed, the ICRC will offer to re-establish contact between a detained child and his or her family.

Another priority area is child recruitment. In several of the contexts where the ICRC is present, we witness how children continue to be recruited and used by armed forces or armed groups. This is an issue that the ICRC raises in its confidential dialogue with parties to the conflict reminding them of their obligation not to recruit children. In some contexts, such as the Democratic Republic of the Congo [DRC], the ICRC helps children formerly associated with armed groups to return to their communities of origin and rebuild their lives.

The impact of conflict or other situations of violence on children’s access to education is another priority. Students or teachers may be attacked in school or on their way to school, while schools themselves may be used as places for unlawful recruitment or may be targeted or incidentally damaged during an attack, and are quite often used for military purposes. The resulting interruption of education has severe consequences for children’s future. The ICRC engages with authorities and weapon bearers on the protection of education, supports particularly exposed schools, and advocates for vulnerable children, such as detained children and internally displaced children, to have access to education.8

Finally, family separation is also one of our priorities in terms of child protection. Armed conflicts and other situations of violence, often resulting in people having to flee in a sudden manner, too often lead to children becoming separated from their loved ones. The ICRC has a mandate under IHL to restore links among separated family members. Together with our partners from the National Red Cross and Red Crescent Societies, we register unaccompanied children and do our best to locate their parents – for example, going to the last known address of the child, working with displaced communities’ leaders, or using means such as posters, online tracing or radio messages. Across the world, we facilitate tens of thousands of phone calls among family members separated.

by war or by migration, as in South Sudan\textsuperscript{9} or in Angola.\textsuperscript{10} After children have been reunified with their family, the ICRC checks up on them and assesses their needs and well-being as they reintegrate into their family and community. In 2018, the ICRC’s efforts led to 840 children being reunited with their families.\textsuperscript{11} The ICRC also runs a dedicated website where those looking for a missing family member can find information on possible search alternatives and do online tracing by browsing through the names and pictures of persons missing in relation to specific emergencies.\textsuperscript{12}

Those are the specific priorities—not necessarily listed by order of importance—in our work on children. At the same time, there are numerous other conflict-related issues that affect children and that the ICRC raises with parties to armed conflict. Due to their age, size and relative immaturity, children are also often highly vulnerable to physical and psychological violence. Sexual violence does not spare children: they can be directly affected or might be born out of rape, leaving them vulnerable and stigmatized.

As part of our work to protect vulnerable migrants, we come across children who might face some of the issues mentioned above, such as losing contact with their relatives or ending up in detention. They might find themselves in situations that could expose them to exploitation, abuse and/or trafficking, and might face challenges in accessing essential services such as health care and education.

The notion of accountability to affected people is central to the ICRC Institutional Strategy 2019–2022. One part of it is listening to and consulting with people affected by armed conflict and other situations of violence in planning operations. What are the challenges involved in including needs directly voiced by children when building a relevant response?

I believe that the main challenge is the prevailing tendency to assume that adults know better than children about what children need. We think that if we speak with parents, with community leaders or teachers, we will understand what children’s needs are. That is why consulting children is not typically done in a systematic enough manner. Such an approach contradicts a core principle of the Convention on the Rights of the Child: the principle of child participation.\textsuperscript{13} We


\textsuperscript{12} See the ICRC’s Restoring Family Links website, available at: https://familylinks.icrc.org.

have developed tools and are increasing our training efforts to ensure that field staff are aware of the importance of systematically consulting with children – as much as their age and maturity allow – and including their voices in the assessments they are conducting. It is about asking children about their worries, their fears, how they think the ICRC could help them. While this is improving, I keep noticing that in some contexts it is not done – sometimes due to self-restraint out of concern not to hurt the children’s feelings, or because it can be challenging to interact with children.

At the moment we are working on building the capacities of our colleagues to interview children in a child-friendly manner, adapting their approach to children’s ages and stages of development. In Northeast Nigeria, we have recently conducted several group discussions with internally displaced adolescents separated from their families. We had underestimated some of their challenges and will now start a pilot project to respond to some of them. We also systematically encourage ICRC field staff to include children in focus group discussions during assessments – for instance, in relation to our restoring family links or community-based protection activities – so that we take their views into account in our analysis and while building the response.

It is important to point out that all our actions are guided by the “do no harm” principle requiring humanitarian organizations to minimize the risk of harm caused by their activities. Therefore, as much as we try to directly interact with children in order to build a tailored response, it might not be appropriate to hear from them on particular topics. In particular when it comes to discussing protection issues, which the ICRC often does, it might not be suitable to hear from children regarding sensitive and sometimes traumatic issues, or topics that are taboo and that children are not supposed to know about.

Does the ICRC face situations where needs voiced by children are different, or perhaps even opposite, to those voiced by their parents? How does the organization respond in such cases?

It does indeed happen. In internal displacement situations, for instance, children’s preferences for durable solutions may be different from their parents’. Parents and other adult family members might want to return to their place of origin, while children born in displacement or having spent long years displaced in an urban environment might wish to stay and integrate where they are, as they have no knowledge of, or attachment to, their place of origin, and they can only imagine their future lives in the place of displacement.

In such circumstances, the ICRC would seek to ensure that everybody’s voice within the community is considered, including children’s, in the process of

devising durable solutions. However, we would not try to change the local culture and social values that might typically give the elderly the power to decide for the family or the entire community. It is not up to the ICRC to change existing societal norms or power structures, but we always favour options which do not contradict the principle of the “best interests of the child”.

According to studies conducted by several organizations, children in crisis situations see education as one of their top priorities. How does the ICRC respond to those who face challenges in accessing education?

Being able to go to school is essential in providing war-affected children with a sense of normalcy. It offers them a stable environment, which is key for their development and their mental and psychosocial well-being.

Our own observations, based on discussions with children in several conflict-affected countries, confirm the importance of education. Children who participated in focus group discussions identified the lack of access to education as their main challenge. This is interesting because if you look at the results for adults, education is not necessarily that high up in terms of priority.

The ICRC has paid increased attention to the issue of access to education in recent years. In addition to being one of the four priorities in the ICRC strategy on children, since 2017 the ICRC has adopted a Framework for Access to Education. Our approach is twofold: to strengthen our existing work in education, and to step up our support for efforts to ensure that education is part of the humanitarian response at large.

From a child protection perspective, we work on improving children’s access to education on mainly three fronts. First, we tackle the protection of education as part of our confidential bilateral dialogue with parties to the conflict on the protection of the civilian population. After a careful gathering of information on a given incident, ICRC delegates talk with weapons bearers about issues such as military use of schools, attacks on or damage to schools, threats against teachers or students, and the risk posed by the presence of a military objective, such as a checkpoint or a military camp, near a school.

The second aspect is the work carried out in several delegations to make schools safer. The focus is on schools located close to a front line, or in streets and neighbourhoods which are particularly exposed to violence. This is something that we do, for example, in Ukraine, Lebanon, Azerbaijan, Armenia

15 See, for example, Save the Children, Education Against the Odds: Meeting Marginalised Children’s Demands for a Quality Education, London, 2019, available at: https://resourcecentre.savethechildren.net/library/education-against-odds-meeting-marginalised-childrens-demands-quality-education. In this recent study, “nearly a third (29%) of children surveyed said education was their top priority” (p. 4).
and various contexts in Latin America. Our work is multidisciplinary and aims not only to make schools physically safer, but also to reduce teachers’ and students’ exposure to conflict- and violence-related risks, to prepare them on how to react in case of shooting or clashes in the vicinity, and to support them in handling the stress linked to the situation. These efforts should be sustained by bilateral, confidential conversations with weapons bearers – “protection dialogue” – to ensure that they uphold their obligations with respect to educational facilities, students and staff, because reducing the immediate risks has a limited impact unless supported by a call aimed at fostering respect for schools during the conduct of hostilities.

The ICRC also supports and promotes access to education for particularly vulnerable groups of children, such as children formerly associated with an armed group or an armed force, children returning home after a long separation from their family, children of missing persons, or children in places of detention – as we did in Myanmar,18 where we built classrooms to offer detained children a suitable learning environment. We witness in several contexts how internally displaced children face specific obstacles preventing them from accessing education. These can be related to discrimination, to local infrastructure being insufficient to absorb the newcomers, to parents being unable to afford school fees or being compelled to send their children to beg or to work as a survival strategy, or to administrative barriers linked to the fact that displaced children often lack the official documentation required to enrol in school. The ICRC may also provide direct support to children for whom accessing education is particularly challenging through the transfer of school certificates, as between South Sudan and Uganda, or the provision of uniforms, school kits or books, as is the case in the DRC.

The phenomenon of child soldiers remains a grim reality in a number of armed conflicts. Children who are forcibly recruited, as well as those who voluntarily decide to join armed groups or armed forces, suffer terrible consequences and are often forced to commit atrocities. What is the ICRC’s experience in terms of assisting reintegration of such children into their communities?

First, let me explain that in addition to being “child soldiers”, children might be used in a variety of roles, such as cooks, porters, messengers, spies, sexual slaves, forced labourers or even human bombs. Rather than speaking of “child soldiers”, we prefer referring to them as children associated with an armed group or an armed force, or CAAFAG, as the term covers these different realities.

Reintegrating children who have gone through the challenging experience of spending time with weapons bearers is a real challenge. Reintegration programmes should have a long-term perspective and should provide children with real alternatives to rejoining an armed group.

Currently, in the context of a pilot project, we work with children in the eastern DRC who have left or have been released from armed groups: we trace their relatives, prepare the children, their parents and the community for family reunification, and provide children with skills to ease their reintegration and make a living once they have returned, such as tailoring, growing crops, herding small cattle or selling food in the market. Accepting children back might lead to many interrogations for the parents: have the children changed? Have they become violent? How will they behave once back in the village? The family of the returning child might also be concerned about the way they will be perceived by the rest of the community. In some areas, return cannot be envisaged because formerly associated children would simply not be welcome. This means that the family will either have to relocate or send their children to relatives living far away.

Being re-recruited is a risk for many children returning home after being associated with an armed force or armed group. This is particularly true for children in areas with few economic alternatives, where access to educational or vocational opportunities is limited, or where armed groups are present, sometimes embedded within the community. Some children rejoin armed groups to feed their family or to be able to send their siblings to school.

Stigmatization of returning children might pose an additional challenge, in particular for girls, who are also frequently present – though much less visible than boys – within armed groups or armed forces. When coming back, girls might be rejected, especially if they are pregnant or accompanied by a baby.

Access to education is particularly important for children formerly associated with armed groups or armed forces. For younger children, going to school might go a long way in increasing their acceptance by the community and reducing the stigma they might face upon return. However, older children who have been associated with an armed group or an armed force have often missed out on several years of their education. Thus, it might be challenging for them to integrate into a class with much younger children. This obviously does not contribute to their acceptance and reintegration. Ideally, catch-up classes should be put in place so that returning children can keep up with children of their age group.

In armed conflicts that can involve foreign fighters, their children may either come to a foreign territory with their parent(s) or be born there. Could you elaborate on the main vulnerabilities and protection concerns for these minors?

This is a situation that has attracted a lot of public interest in recent months due to events in Syria and Iraq, though it is not a completely new situation, nor is it related only to that region. Children allegedly associated with “foreign fighters” face several challenges. One of them, especially for those who were born in a territory controlled by a non-State armed group, is the lack of official documentation, such as birth certificates, which means that confirming their identity is challenging, and leads to many additional vulnerabilities. Identity documentation is fundamental to enable
any person to claim basic rights such as a citizenship, freedom of movement and a range of other basic services like access to education and health care.

Family separation is another big issue in this context. We have seen how children are being separated from their mothers or from their siblings, sometimes based on generic assumptions according to their age. Countries of origin are often less willing to extend assistance to older children, who are perceived as possible security threats.

In countries involved in armed conflict, children above a certain age might get separated from their relatives upon screening. Some will be arrested and detained, possibly for their alleged association with an armed group. In any case, these children should be seen as victims and not only as perpetrators, and juvenile justice standards should apply to them.

An additional protection concern is the stigma attached to many of these foreign children: they seem to be labelled according to who their parents are, their ethnic origin, or their religion. Reintegration of this particular group will not be easy. Many of these children have witnessed considerable violence, some have had to take part in it, some have been badly injured during the conflict, almost all of them have missed out on years of education, and many have lost family members during the conflict or are without news of them.

Many questions are still open, starting with whether these children might be able to return to their country of origin: is return an option, with or without their parents and siblings? Some will not return as their identity cannot be proven, nor their relatives traced; some may have to return to a country that they have never been to before, or have no memories of; others might face a risk of having their fundamental rights violated if they return. Assessing what is in the best interests of these children is a challenge, but it is a necessary step to ensuring that the right course of action is chosen for each of them.

The ICRC focuses its efforts on identifying the most vulnerable children, notifying the embassies of their countries of origin about their situation if they so wish, re-establishing contact between family members, and ensuring that juvenile justice standards apply to those who are detained.

Children often represent a high proportion of victims and perpetrators in situations of violence that do not rise to the level of armed conflict, including urban violence. How does the ICRC adapt its response in urban settings where violence persists?

The ICRC’s response to urban violence is based on its “right to humanitarian initiative”, which is recognized in the Statutes of the International Red Cross and Red Crescent Movement for situations of violence that do not reach the threshold of an armed conflict and where IHL is not applicable. The right to humanitarian initiative implies that prior to setting up a humanitarian intervention, the ICRC offers its services and expertise to national authorities, in order to gain their support and to work in full transparency.
The ICRC has been increasingly trying to protect and assist people and communities affected by situations of violence that do not meet the threshold of armed conflict, such as urban violence in some contexts – for example, in Latin America and the Caribbean, due to the exceptionally high levels of urban violence prevailing there.

The effects of urban violence are undeniably chronic and pervasive, and encompass both direct and indirect humanitarian consequences that cannot be addressed by standard humanitarian programmes involving substitution of State structures or traditional development approaches. That is why partnerships have proven to be essential to ensure enhanced sustainability and relevance of the ICRC’s responses in such contexts. Indeed, partnerships with National Societies, but also with local and national authorities such as those responsible for health and education provision, have ensured the replication of initially localized, light-footprint interventions in larger urban areas or even in additional cities in various contexts, as has been the case in Brazil following a 2009–2014 pilot project in a number of Rio de Janeiro slums.19

The ICRC’s activities to respond to the humanitarian consequences of urban violence for children include promoting life skills and safe behaviour, particularly in schools, in order to reduce students’ exposure to risks; facilitating vocational training; and working with the authorities to help them improve living conditions and treatment of detained children. Moreover, particularly vulnerable groups, such as adolescent mothers and their children, are provided with health and psychosocial support tailored to their specific needs.

**What priorities and challenges are foreseen for the ICRC’s engagement with children in the coming years?**

The issues affecting children living in conflict-affected areas will not change any time soon, I am afraid. With recent developments, such as conflicts increasingly taking place in urban areas or the use of new methods of warfare, and the challenges they pose in terms of respecting the key IHL principles that should prevail during the conduct of hostilities, children will continue to suffer during conflicts.

I therefore believe that it is important for the ICRC to keep strengthening its ability to respond to children’s needs, to systematically mainstream child protection into its activities and ensure that whatever is done on behalf of children is based on a sound understanding of the specific issues children might face, and to make sure their voices have been heard in the designing of the relevant response.

In this year which marks the 70th anniversary of the Geneva Conventions and the 30th anniversary of the Convention on the Rights of the Child, it is more important than ever that States and parties to conflict uphold their obligations to protect children, who often pay too heavy a price during these armed conflicts.

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Keeping schools safe from the battlefield: Why global legal and policy efforts to deter the military use of schools matter

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Abstract

This article describes how schools are used for military purposes in today’s conflicts. It summarizes the latest data on the practice, before explaining how the military use of schools harms students’ and teachers’ safety and impedes students’ right to education. The article concludes by examining the diverse legal and military responses to this practice, and the foundation they lay for the 2015 Safe Schools Declaration and for further action.

Keywords: use of schools for military purposes, attacks on schools, education, armed conflict, children, Safe Schools Declaration.

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Introduction

Schools can, and should, be places of study and safety for children, even during war. The use of schools by armed forces, including as military bases, barracks, firing positions or munitions caches, may turn them into military objectives and thus render them lawful targets of attack during times of armed conflict.\(^1\) Military use of schools may therefore place students at risk of attack and interfere with their education. However, the practice of using schools for military purposes has only gained international attention in the past dozen years, and has received scant attention in academic journals.\(^2\) Yet the development of a consensus calling for an international response to the practice has been swift, culminating in the 2015 Safe Schools Declaration supporting the use of the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (Guidelines for Protecting Schools).\(^3\) The protections for schools from military use encouraged by

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1 Military use of schools is not explicitly prohibited under international humanitarian law. However, such use must be assessed in light of the obligations on parties to armed conflict to take all feasible precautions to protect the civilian population and civilian objects under their control against effects of attacks, the obligation to take special care in military operations to avoid damage to buildings dedicated to education, and rules affording special protection to children and their education in armed conflict situations. See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 52(2), 57(1), 58, 70, 77, 78; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Arts 4, 6, 28; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Arts 14, 17, 23, 24, 38, 50, 82, 89, 94, 132; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 38. Unless stated to the contrary, this article uses the term “armed conflict” as defined in international humanitarian law.


3 The Safe Schools Declaration is an inter-governmental political commitment through which States express support for protecting students, teachers, schools and universities from attack during times of armed conflict, ensuring the continuation of education during armed conflict, and the use of a set of concrete measures set forth in the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (Guidelines for Protecting Schools), intended to deter the military use of schools and to
the Safe Schools Declaration build upon a wide variety of earlier national efforts to ban or regulate the practice. Examples of military policies and domestic legal obligations to protect schools and universities from military use can be found around the world and, in the past century, predominately in the global South and countries with experience of armed conflict, indicating the feasibility of such protections even within the complexities of modern warfare. In light of the evidence of the negative consequences of using schools for military purposes, combined with evidence of the viability of common-sense efforts to deter the practice, these domestic examples of positive practice demonstrate that armed forces not only should, but can, implement the protections of the Safe Schools Declaration in order to avoid the use of schools for military purposes. Universal endorsement and implementation of the Safe Schools Declaration therefore offers a path to safer studies for children living in war zones.

This article draws upon the author’s own on-the-ground investigations in conflicts in Africa, Asia, Europe and the Middle East between 2009 and 2018 on behalf of the NGO Human Rights Watch (HRW), as well as the work of other researchers at the organization. It begins with an explanation of the practice of military use of schools, including a summary of the latest data on its prevalence. The various negative consequences of the practice for student and teacher safety, as well for the ability of students to access a quality education, are explained, drawing upon concrete examples. Then, the responses in different domestic policies and laws are presented, illustrating the substantial background upon which the Safe Schools Declaration builds, as well as the Declaration’s positive impact since its inception.
**Terminology**

The terms “military use of schools” and “use of schools for military purposes” are used interchangeably in this article. The terms refer to the practice in which State armed forces or non-State armed groups use school or university buildings and their premises in support of their military efforts, and includes using schools as barracks or bases, for offensive or defensive positioning, for storage of weapons or ammunition, for interrogation or detention, for military training or drilling of soldiers, as observation posts, as a position from which to fire weapons or to guide weapons to their targets, or for the recruitment of children contrary to international law. Such use will turn the school into a military objective when it makes an effective contribution to military action and when the school’s partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The term does not include situations in which forces are present to provide security when schools are used as election polling stations or for other purposes not related to armed conflict.

**Prevalence and scale of military use of schools**

The latest global survey by the Global Coalition to Protect Education from Attack (GCPEA) identified at least one incident of military use of schools or universities in each of twenty-nine countries between 2013 and 2017. Out of these, instances in twenty-four countries occurred in the context of an armed conflict (data based on the non-legal definition of armed conflict used by the Uppsala Conflict Data Program). That represents more than half of all countries with armed conflicts

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7 This definition is the author’s. It attempts to consolidate five efforts to define the practice, four of which the author contributed to: Global Coalition to Protect Education from Attack (GCPEA), Lessons in War: Military Use of Schools and Other Education Institutions during Conflict, 2012, p. 20; GCPEA, Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict, 2014, p. 4; GCPEA, Lessons in War 2015: Military Use of Schools and Universities during Armed Conflict, 2015, p. 20; GCPEA, Commentary on the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict, 2015, pp. 7–8. And see Office of the Special Representative to the Secretary-General on Children and Armed Conflict, Guidance Note on Security Council Resolution 1998, May 2014, pp. 10–11.

8 AP I, Art. 52(2); ICRC Customary Law Study, above note 1, Rule 8.

9 GCPEA, Education Under Attack: 2018, 2018, p. 39. The twenty-nine countries are Afghanistan, Burundi, the CAR, Cameroon, Colombia, Côte d’Ivoire, the DRC, Ethiopia, India, Iraq, Israel/Palestine, Kenya, Lebanon, Libya, Mali, Myanmar, Niger, Nigeria, Pakistan, the Philippines, Saudi Arabia, Somalia, South Sudan, Sudan, Syria, Turkey, Ukraine, Yemen and Zimbabwe.

10 The Uppsala Conflict Data Program uses a definition of armed conflict different from that used in international humanitarian law: “An armed conflict is a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths in one calendar year.” See Uppsala
(using the Uppsala Conflict Data Program criteria) during the time period. It also includes conflicts in the Americas, Africa, Asia, Europe and the Middle East. Therefore, whenever and wherever there is a conflict, there is a strong likelihood that schools are being used for military purposes. Armed forces may take control over entire school premises, displacing all the students; they may partially occupy facilities, sharing these spaces with students who hope to continue their studies in unused areas; or they may move into schools that have previously been abandoned due to the prevailing security situation.11

Although the practice of using schools for military purposes is widespread, it is difficult to obtain an accurate number of affected schools at the country level. For example, officials from the Ministry of Education and Science of Ukraine told this author in 2015 that they were aware that forces had used schools but they did not collect data on it.12 A member of Pakistan’s Human Rights Commission told HRW that keeping a tally of schools used by government forces was difficult since such use is sometimes temporary and many schools do not report when they are taken over.13

Moreover, some parties to an armed conflict actively conceal information on military use of schools. An Afghan school official told HRW that when he complained to the force occupying his school, “they chastised me and ordered me not to talk to anyone about the school being occupied, especially not to foreigners”.14 The desire for secrecy may be because members of armed forces or officials know that their use of a school could be unwelcome to some, or could attract criticism. A sergeant at a school in the Philippines conceded to this author that his unit’s presence on school grounds was “against the law”, but said it was justified because it was “with consent” of local officials.15

Despite these monitoring limitations, the GCPEA’s global survey provides an indication of the scale of military use of schools within certain conflicts. It notes six countries where at least forty instances of military use of schools were documented between 2013 and 2017: Afghanistan, the Central African Republic

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11 For example, soldiers entered School No. 4 in Krasnohorivka, Ukraine, one Saturday in either late August or early September 2014, and told the teachers who tried to return to school that they could not enter their school because it was now a military site. They made the teachers stand on the roadside, and delivered their personal belongings to them. HRW interviews with four teachers, School No. 4, Krasnohorivka, 6 November 2015. When the author visited Asma’s School in Sanaa, Yemen, soldiers from the First Armoured Division were living in two of the school’s three buildings, causing overcrowding for the girl students in the remaining building. Author site visit, 31 March 2012. One of the schools run by Ziauddin Yousafzai, the father of Malala Yousafzai, was occupied and used by Pakistani government forces while he and his family were displaced by the fighting in and around their hometown. Malala Yousafzai, I am Malala: The Schoolgirl Who Stood Up to the Taliban, Orion, London, 2013; “Class Dismissed: Malala’s Story”, New York Times, documentary, 2009.
Motivations for school use by armed forces

The reasons why combatants use schools vary from school to school. Common reasons are tactical considerations and apparent convenience in the moment. Possible tactical advantages include the solid construction of many school buildings. In many locations, schools also have boundary walls constructed of solid materials that may provide additional protection from certain forms of attack. Schools sometimes have multiple floors, even in areas where most construction is only one-storey, and can thus provide good vantage points for both surveillance and firing. In some places, schools are centrally located, which might protect from hit-and-run attacks or help control territory.

Convenience factors include the fact that schools may have electricity, water supply, kitchens, and toilets with the capacity for large groups of people. Government forces may perceive schools as government property and therefore readily available to them. A teacher at a school in the Philippines confided to this author, for example, that she felt “too shy” to ask soldiers, who had camped out in some of her school’s classrooms for more than seven months, to pay the electricity bill they had accrued. However, the aspects of using a school that may be perceived as conveniences may only appear to be so due to poor planning or bad logistics that have failed to identify feasible alternatives ahead of time, or due to a failure to adequately equip, supply and support troops.

Despite some apparent tactical advantages from using a school, there can also be military disadvantages to such use. For example, a member of the Free Syrian Army told the author that setting up inside schools could make it easier for government forces to attack, as the government had geospatial data on the location of schools. Moreover, when using schools for military purposes, armed forces may be perceived negatively by the local population, and it can escalate

16 GCPEA, Education Under Attack, above note 9, p. 39.
17 Ibid., pp. 263–265.
18 For example, an Afghan school official explained a common rationale: “Most of the houses in our area are mud houses, so the soldiers took control of ... the school, which was built out of concrete.” HRW interview with school official, Pul-e Khumri, Afghanistan, 25 April 2016. On file with author.
20 B. Sheppard, above note 15.
21 For more examples, see GCPEA and Roméo Dallaire Child Soldiers Initiative, Implementing the Guidelines, 2017, pp. 18–19.
22 HRW interview, 16 February 2017. On file with author.
tensions with the local community. The Colombian armed forces have acknowledged, for example, that the use of schools by troops often triggers accusations from the local population of forced displacement, theft, or physical and verbal abuse of children. Military use of schools may also attract condemnation from human rights organizations, criticism from the media, and scrutiny from the United Nations (UN) Security Council.

Negative consequences of military use of schools

Access to safe schools during times of war can provide students with not only an education, but also physical and psychological protection. Being able to routinely go to school and see friends and trusted teachers can give children a sense of normality. Schools can also be locations to provide assistance through, for example, feeding and vaccination programs that mitigate the humanitarian consequences of war. Information provided at schools can even save lives, such as the mine awareness briefings that the International Committee of the Red Cross (ICRC) provides to schools in eastern Ukraine. Military use of schools imperils all these benefits, while causing a variety of specific negative consequences that fall into two broad categories: consequences for students’ and teachers’ safety, and consequences for students’ access to a quality education.

The risks to students’ and teachers’ safety can come from both outside the school (from incoming attacks) and within (from abuses by fighters). Meanwhile, students’ education can be harmed when military use of schools causes students to

23 For example, on 23 April 2003, US soldiers took over a primary school near the centre of Fallujah, Iraq. Schools were scheduled to reopen on 29 April and tensions ran high as parents wanted the soldiers to leave. The troops were open to moving, but before they could withdraw, residents demonstrated outside the school. The demonstration turned violent and the US soldiers opened fire on the protesters, killing seventeen and wounding more than seventy. See HRW, Violent Response: The U.S. Army in Al-Falluja, 2003.

24 General Commander of the Military Forces, Military Order No. 2010124005981/CGFM-CGIN-25.11, 6 July 2010.


drop out of studies, which results in lower rates of attendance and transition to higher years of study, overcrowding and otherwise unsuitable learning environments, and lower-quality alternative education options for children displaced by the use of their schools. Girls and boys may experience these risks differently based on their gender. In addition to the risk of students and teachers being injured or killed as a result of military use of schools, the practice exposes important—and expensive—education infrastructure to damage and destruction. The dire state of many school buildings in conflict-affected areas means that even moderate damage can render them unusable. This section will further outline examples of these risks.

Student and teacher safety endangered by incoming attacks

When students continue their studies inside a school that is being used for military purposes, they may come under fire if armed forces of one party to the conflict target opposing forces present in a school or in its proximity. In the worst cases, students and teachers have been injured and killed in such attacks.

A few examples collected by HRW illustrate these dangers. In 2012, a student recounted to HRW how fighters from the militant group Al-Shabaab had set up a rocket launcher in the playground of his school in Somalia. When they fired toward government-held territory, return fire killed eight students. In 2016, a Saudi Arabia-led coalition bomb hit the only school for blind students in Sanaa, Yemen; a group of Houthi rebels had based themselves in the school. The bomb penetrated the building to a floor where ten children were sleeping, but did not explode. The strike wounded two staff members, one student, a local resident and a Houthi guard. And when Afghan government forces attacked Taliban forces inside a school in Dand-e Ghori while school was in session in 2009, the students fled in panic, and one suffered shrapnel injuries.

Student and teacher safety endangered by the presence of armed forces inside schools

The safety of students and teachers is also put at risk by proximity to weapons and munitions, physical and sexual abuse, forced labour, and recruitment by armed groups—all due to the presence of armed forces inside their school.


29 For example, in 2012, the Inter-Agency Standing Committee Education Cluster in South Sudan estimated that rehabilitating a primary school with eight classrooms after a period of occupation, replacing windows, doors, furniture and learning materials, and re-digging pit latrines, costs approximately $67,000. Global Education Cluster, South Sudan, “Briefing Note: Occupation of Schools by Armed Forces”, 2012.


31 HRW site visit and interviews, 6 January 2016. On file with author.

For example, in Taizz, Yemen, government soldiers occupied parts of the Superior Institute for Health Science in late 2011. They routinely fired from the school while it was in session, and pointed their weapons at students and teachers who objected to their presence.33 “We tried studying and forgetting the security forces were there, but they were scaring us every day with their shooting”, recounted a 22-year-old student.34 Students and teachers said they believed security forces shot and killed a man at the school gate when he came to register his son for classes.35 One week later, a dormitory guard was killed in crossfire between government and opposition fighters.36

When this author asked a 12-year-old boy in southern Thailand whether the soldiers based in his school ever carried weapons, he promptly answered by identifying their assault rifles as “M-16s” and added that he’d been allowed to touch them but not carry them.37

Fighters using schools have on some occasions forced students and teachers to work, even to the point of recruiting them into their forces. For example, an official from a village in the Democratic Republic of the Congo (DRC) where the school was used by M23 rebel forces told HRW: “Often, the M23 asks the teachers to help them find water, cut a tree, do random tasks. I ask the professors to justify their absences, and they tell me how they are taken to help construct M23 camps.”38

Soldiers installed in a school in the Philippines asked children to run errands for them. A school official shared how a parent complained that a soldier threatened to shoot a child during a dispute over whether the child had returned the correct change after a purchase. The military denied the incident.39 And in Somalia, Al-Shabaab militants have systematically used schools as recruiting grounds, selecting children they deem fit to serve as fighters, for domestic duties, or for forced marriage and sex.40

In these ways, the presence of fighters inside a school can lead to various human rights abuses of students and teachers.

Safety risks continue after school is vacated

Risks can remain even after a force has left the school. When this author visited a school in the DRC in July 2013, the latrines were closed because technicians had found rockets and boxes of ammunition left in them, apparently by the Congolese forces who had temporarily occupied the school. It took the

33 HRW telephone interviews with five students and three teachers, Taizz, Yemen, 22–23 October 2011.
34 HRW telephone interview with student, Taizz, Yemen, 23 October 2011.
35 HRW telephone interviews with students and teachers, Taizz, Yemen, 22–23 October 2011.
36 HRW telephone interviews with two teachers and a doctor, Taizz, Yemen, 25–26 October 2011.
38 HRW interview with prefect, Goma, DRC, 28 June 2013.
40 HRW, above note 30.
technicians seven months to remove the danger.\textsuperscript{41} In 2014, HRW researchers found several unexploded landmines on the grounds of a school in Ukraine, apparently ejected from the truck they were stored on when it was attacked while parked in the schoolyard.\textsuperscript{42} Thus, the dangers posed to students, and their exclusion from studies, can last longer than the period in which their schools are physically used by armed forces.

\textbf{Lower rates of enrolment, attendance, retention and transition}

Military use of schools can discourage students from enrolling. The principal of a school in a rural area affected by the conflict with Maoist guerrillas in India told this author how the government had approved adding a hostel to his school along with scholarships so that 200 girls not receiving an education could enrol. But, he explained, the presence of ten paramilitary police at the school ruined this goal:

The parents of these girls do not want their children to come here while the police are here. … Maybe they think there is a possibility of sexual misconduct or abuse. … I want to open the residential school because it will benefit the girls and the local villagers, but because of these police I cannot open it and it is a setback for these disadvantaged girls.\textsuperscript{43}

Children in conflict areas who do enrol in primary school are 20 percent more likely to leave before completion than students in countries not affected by conflict.\textsuperscript{44} The military use of schools can be a factor leading students to drop out early. For example, at Bibi Aina High School in Afghanistan, 1,170 boys were enrolled before Afghan security forces occupied the school in January 2016. A school official told HRW that although the security forces did not explicitly prohibit students from attending, regular gun battles at the adjacent military position scared off most students.\textsuperscript{45}

Transitions to higher levels of education can also be affected. At a high school in India, the government had approved the school expanding to teach the final two years of secondary education, the prerequisite for tertiary studies. However, due to space constraints caused by the presence of paramilitary police inside the school, these additional classes had not begun when this author visited. A student in the last available year of schooling said that he wanted to continue his studies, but the closest school offering senior classes was more than an hour away, and the cost of attending was prohibitive: “If I had money I would go … but since I don’t have money I won’t be able to continue.”\textsuperscript{46}

\textsuperscript{41} HRW visit to Institut Bweremana, DRC, 11 July 2013.
\textsuperscript{42} HRW interviews and visit, October 2014.
\textsuperscript{43} HRW interview with principal, Bihar, India, 14 June 2009.
\textsuperscript{44} UNESCO, \textit{Education For All Global Monitoring Report – The Hidden Crisis: Armed Conflict and Education}, 2011, p. 132.
\textsuperscript{45} HRW interview with school official, Pul-e Khumri, Afghanistan, 24 April 2016.
\textsuperscript{46} HRW interview with student, Bihar, India, 12 June 2009.
Psychosocial concerns

The presence of soldiers inside a school can cause fear and anxiety for students and teachers. A student at a school in the CAR that was being partially used by fighters told HRW, “I am scared to come to school. I am scared the [fighters] will attack me. I often ask myself, ‘Should I even bother to go to school? Is it worth the risk?’”

Teachers, too, can be nervous about attending school when there are armed men there. The quality of teaching may diminish as teachers are distracted or worried. “The teachers are not focusing on the teaching”, one mother at a school partially occupied by government forces in southern Thailand told this author.

Overcrowding

When students are displaced from a school that is being used for military purposes, it can cause overcrowding at nearby schools that accommodate them. When almost all the children left a school in one village in Thailand after government forces moved in, many enrolled in the next-closest government school. The alternative school had insufficient classrooms to accommodate the sudden increase, and students had to take turns using them.

Overcrowding can also occur when students must share a school’s facilities with soldiers. At a school the author visited in India, 700 students were supposed to study in just three classrooms after paramilitary police moved into the rest of the school. There were not enough chairs or even spaces to sit. “It is very difficult if you sit on the floor to write, or to take notes on what the teacher is saying”, a student said. Her classmate added, “When all of the students are at school, we are forced to sit outside in the hot sun.”

Inferior education quality at alternative sites

Sometimes alternative solutions are found for students displaced from their schools, but uniformly, the alternative sites that the author has researched seemed of poorer quality than the original sites.

In Pakistan, the Swat education department reported that the army had occupied the Ozbaka Government Primary School, a school for boys, in September 2016. Classes were held outside, in an area where temperatures can drop below freezing. In Ukraine, many students unable to attend their schools because of military use resorted to distance learning. Teachers provided

47 See also M. C. Brooks and E. Sungtong, above note 2.
48 HRW interview with student, Ngadja, CAR, 24 January 2017.
49 HRW interview with parent, Pattani, Thailand, 30 March 2010.
50 HRW interview with army official, Pattani, Thailand, 27 March 2010.
51 HRW interview with student, Bihar, India, 12 June 2009.
52 Ibid.
assignments and collected homework at the school or at students’ homes, and then used telephone, email and Skype to answer students’ questions. Students and teachers acknowledged that the quality of education children received through distance learning was inferior to that which they received through classroom learning.54

Gendered impact

Studies show that education outcomes for girls in countries affected by conflict are generally worse than for boys,55 and girls often drop out following occupation of a school. One reason is fear of sexual abuse by the soldiers in the school. At a school in Yemen, for example, according to the school’s officials, parents complained that they would not register their daughters at the school “because it’s a very sensitive issue having daughters with soldiers”.56

A 10-year-old girl in southern Thailand told this author that she did not like talking to the soldiers inside her school:

I am afraid of [the soldiers], because the soldiers are very touchy. They love to hold the children, and that’s okay for the boys, but for girls, we can’t allow men to touch our body. And I am not happy when the soldiers ask whether I have any older sisters and ask for their phone numbers.57

A mother who removed her daughter from this school said: “It is more dangerous for girls than boys, because girls these days now grow up so quickly. I fear that the girls will get pregnant by the soldiers.”58

But it is not just girls whose experience of militaries using their schools can be related to their gender; boys too can be particularly susceptible to specific problems. Troops may suspect that boys have intelligence about insurgent groups or could be sympathetic to such groups, and may be questioned about the comings and goings of people in the area, or about local inhabitants.59

Legal and policy precedent protecting schools from military use

Many countries have responded to the practice of military use of schools by implementing protections through legislation, jurisprudence, and military doctrine, law, policy, trainings and practice. Although examples can be found

54 HRW, Studying Under Fire: Attacks on Schools, Military Use of Schools during the Armed Conflict in Eastern Ukraine, February 2016, pp. 52–55.
56 HRW interview with school official, Sanaa, Yemen, 26 March 2012.
57 HRW interview with student, Pattani, Thailand, 30 March 2010.
58 HRW interview with parent, Pattani, Thailand, 30 March 2010.
59 For example, HRW interviews with student, Bihar, India, 12 June 2009; and teacher, Jharkhand, India, 2 June 2009.
from around the world, countries in the global South and countries with recent experience of armed conflict account for most examples.60

In 2004, when the United Kingdom was involved in wars in both Afghanistan and Iraq, its Ministry of Defence issued an updated Manual of the Law of Armed Conflict which prohibits committing hostilities against cultural property that is not being used for military purposes during non-international armed conflicts, but which notes that “as a corollary, the better view is that the law also prohibits … the use of cultural property for purposes which are likely to expose it to destruction or damage in armed conflict, unless there is no feasible alternative to such use”. The Manual defines cultural property as including institutions dedicated to education.61

In Colombia, an order from the commander-general of the military forces in 2010 – when the country’s armed forces were fighting two rebel movements – stated:

[I]t is a serious offence [when] a commander occupies or allows the occupation on the part of his troops of … public institutions, such as educational establishments, including colleges [and] schools … which causes an imminent risk for the protection of minors, noticeably affecting the guarantee of the fulfillment and respect of their rights.62

In 2012, South Sudan’s armed forces issued an order calling the occupation of schools “deplorable”, a violation of the law of the land, and added: “[Y]ou are depriving our children [of] much-needed education.” The order listed eight occupied schools and ordered them to be vacated, threatening “severe disciplinary actions” if they were not.63 The following year, two more orders prohibited “occupying schools” and outlined potential sanctions for violators, including referral to general court-martial and civilian criminal court.64

In May 2013, the defence minister of the DRC directed all members of the Congolese army to be instructed that anyone found guilty of requisitioning a school for military purposes “will face severe criminal and disciplinary sanctions”.65 In 2019, in what appears to be the first such law of its kind in the world, the Philippines criminalized the “occupation” of schools, even those temporarily abandoned by the community as a result of armed conflict. Sentences under the law range from fourteen to twenty years as well as a fine.66

60 For historical examples, see HRW, above note 4.
62 General Commander of the Military Forces, above note 24.
63 Order of Lieutenant-General Obuto Mamur Mete, Deputy Chief of General Staff for Moral Orientation, 16 April 2012.
64 General Order of General James Hoth Mai, Chief of General Staff, 14 August 2013.
66 Act Providing for the Special Protection or Children in Situations or Armed Conflict and Providing Penalties for Violations Thereof, Republic Act 11188, 10 January 2019, Sections 5(e), 9(b)(9).
Philippines have been occupied by troops in recent years in the context of various ongoing conflicts.67

Non-State armed actors involved in conflict have also seen the value in enacting policies protecting schools from military use. In 2014, the Free Syrian Army armed group made public “its official position prohibiting the militarization of schools”, that it fully supported the “demilitarization of all schools”, and promised accountability for members who violated this principle.68 The National Coalition of Syrian Revolution and Opposition Forces also declared in 2014 that it had a responsibility to refrain from using schools in support of the military effort.69 In 2018, two non-State armed actors in Iraq committed to “abstaining from using schools, or any other building used for the provision of education, for military purposes to avoid harm to children and educational personnel”.70 Indeed, a number of armed non-State actors have signed the “Deed of Commitment” for the protection of children developed by the NGO Geneva Call, which contains a commitment to “avoid using schools for military purposes”.71

The issue of protecting schools from military use has arisen not only during war, but also increasingly during the cessation of armed conflict. In a peace deal concluded between Sudan and the Sudan People’s Liberation Movement in 2002, both sides committed to “refrain from endangering the safety of civilians … by using … schools to shield otherwise lawful military targets”.72 The peace agreement that ended the civil war between the government of Nepal and Maoist rebels in 2006 included a commitment by both sides to “immediately put an end to such activities as capturing educational institutions and using them … and not to set up army barracks in a way that would adversely impact schools”.73 In 2011, this protection was further solidified when the Council of Ministers declared all schools “zones of peace”, and the education ministry promulgated guidelines on keeping schools free from armed activities.74 The 2015 ceasefire agreement between the Myanmar government and various ethnic armed groups included a

67 See, for example, HRW, “Philippines: Soldiers on the School Grounds”, news release, 30 November 2011; Jake Scobey-Thal, “We Told the Children Not to Enter”, Inter-Agency Network for Education in Emergencies, 31 January 2012; B. Sheppard, above note 15.
68 Declaration signed by President of Syrian Opposition Coalition and Chief of Staff of Supreme Military Council, Free Syrian Army, 30 April 2014.
69 National Coalition of Syrian Revolution and Opposition Forces, Declaration of Commitment on Compliance with IHL and the Facilitation of Humanitarian Assistance, 2014.
70 Ezidkhan Protection Forces, Declaration on the Commitment to Respect Humanitarian Norms during and in the Aftermath of Armed Conflict or Military Operations, 12 December 2018; Ninewa Guards, Declaration on the Commitment to Respect Humanitarian Norms during and in the aftermath of Armed Conflict or Military Operations, 12 December 2018. English translations provided to author by Geneva Call.
71 Geneva Call, Deed of Commitment under Geneva Call for the Protection of Children from the Effects of the Armed Conflict, 2010.
condition that all sides avoid using schools “as military outposts or encampments”, that they “avoid restrictions on the right to education”, and that they avoid “actions that would lead to the destruction of schools”. And the so-called “roadmap for peace” agreed between the government of Afghanistan and the Taliban in July 2019 includes a pledge to “ensure the safety” of public institutions such as schools and madrassas, and to “respect educational institutions, like schools and universities”.76

Attention to protecting schools from military use at the international arena

The earliest instance this author could identify of the military use of schools coming to the attention of the UN Security Council is in the year 2000, when the UN Secretary-General’s report on children and armed conflict made passing reference to schools in Kosovo having been “used as barracks by warring parties” and thereby having suffered damage. It was not until 2006 that the issue finally received the Security Council’s explicit concern, with the Secretary-General calling “the seizure and forced occupation of schools” by pro-government militia in Côte d’Ivoire “a major cause for concern”; stating that “the use of school buildings as army barracks or temporary shelters” by both sides in Nepal “impede[d] children’s access to education”; and noting that the Israel Defense Forces “had occupied” one school and “used” another school “as a detention centre and firing position, causing extensive damage”. The issue then began to feature more consistently in the Secretary-General’s reports, and became regularized in 2011 when the Security Council requested the Secretary-General “to continue to monitor and report … on the military use of schools … in contravention of international humanitarian law”. Twice since, the Security Council has called upon UN country-level task forces to “enhance the[ir] monitoring and reporting on the military use of schools”.80

In parallel, the UN General Assembly has begun to respond – if sporadically – to the practice since 2010, at times explicitly referring to obligations under international human rights law, and not just international humanitarian law, that may be infringed by military use of schools.81

76 Resolution of Intra Afghan Peace Conference, Doha, Qatar, 8 July 2019, provisions 5(b–c).
77 UN Secretary-General, Children and Armed Conflict, UN Doc. S/2000/712, 2000, p. 17.
78 UN Secretary-General, Children and Armed Conflict, UN Doc. S/2006/826, 2006.
81 UN General Assembly Resolutions on “The Right to Education in Emergency Situations”, UN Doc. A/64/L.58, 30 June 2010 (“[The General Assembly,] reminding all parties to armed conflict of their obligations under international law to refrain from the use of civilian objects, including educational institutions, for military purposes … [u]rges all parties to armed conflict to fulfil their obligations under international law … in particular their applicable obligations under international humanitarian law and international human rights law, including to respect … civilian objects such as educational institutions”); on “The
In 2015, two developments occurred that are likely to spur further domestic legal and policy efforts. First, on 29 May the Safe Schools Declaration was opened for endorsement at an international conference in Oslo, Norway. Included in the Declaration is a commitment to use the Guidelines for Protecting Schools. Second, on 17 June, the UN Security Council unanimously adopted a resolution expressing “deep concern that the military use of schools in contravention of applicable international law may render schools legitimate targets of attack, thus endangering the safety of children”, and “encourag[ing] Member States to take concrete measures to deter such use of schools by armed forces and armed groups”.82

There have subsequently been encouraging signs that military use of schools can be reduced. Each year since 2015 there has been a decrease in the number of UN-verified incidents of military use of schools globally, as included in the UN Secretary-General’s annual reports to the Security Council on children and armed conflict. Among the twelve countries included in the Secretary-General’s reporting that have endorsed the Declaration, incidents of those governments’ forces using schools decreased by more than a third overall between 2015 and 2018.83 The annual reports on children and armed conflict do not purport to capture all incidents of military use of schools, yet this downward trend is particularly encouraging because it coincides with improved monitoring of the phenomenon, something that often – initially at least – makes it appear as if violations are increasing.

Similarly, analysis by the GCPEA found that the overall reported incidents of military use of schools and universities declined between 2015 and 2018 in the twelve conflict-affected countries that endorsed the Safe Schools Declaration in 2015, from at least 160 incidents reported by UN, NGO and media sources in 2015, to at least eighty in 2018.84

83 Analysis of reports by the author and Alex Firth.
84 The GCPEA found that incidents decreased in six of the twelve countries (Afghanistan, the CAR, Iraq, Nigeria, Somalia and South Sudan); reported incidents remained the same in two countries (Palestine and Sudan); and only Niger saw an increase during the same time period. Reports of military use of schools were few and infrequent in Kenya, Lebanon and Mozambique, and the GCPEA was thus unable to determine any increase or decrease in these countries during 2015–18. GCPEA, “Practical Impact of the Safe Schools Declaration: Fact Sheet”, October 2019.
The focus of the international community on military use of schools in recent years has strongly influenced domestic policies. Upon Norway’s endorsement of the Safe Schools Declaration in 2015, the country’s Ministry of Defence announced that leasing agreements for objects owned by the armed forces but put at the disposal of the local population, including sometimes for education, would contain a cancellation clause in the event of an armed conflict on Norwegian territory. At the time of this writing, Norway is in the process of updating its Manual on the Law of Armed Conflict, presenting an opportunity for further concrete implementation of the Safe Schools Declaration’s commitments.

Following the CAR’s endorsement of the Safe Schools Declaration, the UN peacekeeping mission in the country issued a directive in 2015 directly replicating much of the text of the Guidelines for Protecting Schools, and stating that “the use of a school or university by a party to a conflict is not permitted.” In 2015 and 2016, schools occupied by peacekeepers were vacated, and in another instance peacekeepers turned down an offer to use a school for accommodation. Moreover, the directive reinforced the importance for the mission of protecting schools from military use, and in 2016, the mission successfully vacated five schools that were being occupied by armed groups in the country.

Denmark released its first Military Manual on International Law Relevant to Danish Armed Forces in International Operations in September 2016, before endorsing the Safe Schools Declaration in May 2017. The Manual states that “it is necessary … to exercise restraint with respect to the military use of children’s institutions, including … schools.” When an English-language translation of the Manual was released in March 2019, after Denmark’s endorsement, it contained footnotes referencing the Safe Schools Declaration as a source of this proposition.

In July 2017, the Sudanese Armed Forces issued a command order to all divisions to prohibit the military use of schools, and circulated guidance on schools in areas of active conflict. In 2019, New Zealand’s defence forces released an updated Manual of Armed Forces Law that references the Safe Schools Declaration’s Guidelines for Protecting Schools in a section on protecting...
and respecting schools and regulating the use and occupation of schools.92 In 2011, New Zealand’s defence forces shared with HRW an early draft of the provisions proposing new, explicit protections for schools from military use.93 That draft language was shared with the experts participating in the drafting process for the Guidelines for Protecting Schools, and influenced the final text of the Guidelines.94

The influence of the Safe Schools Declaration on Switzerland’s military policy appears clear. Just prior to the Second International Conference on Safe Schools in Argentina, the Swiss government made public a draft update to the Swiss Armed Forces manual on the law of armed conflict adding explicit language protecting schools from military use. They then finalized this addition on 1 May 2019, the same month as the Third International Conference on Safe Schools in Spain, which brought countries together to discuss implementation of the Declaration’s commitments.95

The Code of Conduct for the Palestinian National Security Forces in Lebanon, finalized in March 2019, also shows the influence of the process surrounding the Safe Schools Declaration. For example, the Code includes “special protections” for “schools and universities” – a phrase that mirrors the formulation in the Guidelines for Protecting Schools, even though there are no universities in the Palestinian refugee camps in Lebanon.96

94 Compare, for example, Guideline 4 with the draft manual’s proposal that if the use of a school by an opposing force turns a school into a military objective, then “wherever possible the commander of a New Zealand force is to demand that the opposing force cease its military use of the property within a reasonable time and may only attack the objective if the opposing force fails to do so. … [I]n planning an attack on a military objective which is, or may include, educational institutions which have lost their protection, the commander of the New Zealand force is to take all feasible precautions in the choice of means and methods of attack to avoid or minimise incidental loss to such property and is not to attack where the damage to such property would be excessive in relation to the direct military advantage anticipated from the attack considered as a whole.” This author was also involved in the expert consultations assisting the drafting of the Guidelines and can attest to the influence of the New Zealand draft manual in the drafting process.
95 Swiss Armed Forces, *Rechtliche Grundlagen für das Verhalten im Einsatz (Military Manual on Behaviour during Deployment)*, 2005, addition of 1 May 2019, translation in English available in HRW, above note 4: “Educational institutions are to be treated with particular caution. … Their military use should be avoided.”
96 Palestinian National Security Forces in Lebanon, Code of Conduct, 20 March 2019, Part 6, Art. 5: “The leadership of the Palestinian National Security Forces is committed to protecting … schools and universities during armed violence and clashes. Equally, the civilian character of … educational facilities should be preserved at all times. No attack on such facilities should be tolerated and concrete measures should be taken to avoid the military use of such institutions.” English translation provided to the author by Geneva Call. For another effort to protect schools from military use in Lebanon, see the written assurances from Palestinian armed groups operating in the Ain al-Helweh refugee camp in Lebanon to the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) that they would not violate the neutrality of UNRWA’s facilities, following days of fighting between rival Palestinian factions in early 2017, during which some UNRWA schools were occupied; HRW, above note 4.
New protections influenced by the Safe Schools Declaration may soon be on the way. Italy, Luxembourg and Slovenia have announced their intentions to update their military manuals and doctrine in order to implement the Safe Schools Declaration commitment to protect schools from military use.97 In Nigeria in December 2018, a working group of NGOs, UN agencies and other actors chaired by the Federal Ministry of Education, referencing Nigeria’s endorsement of the Safe Schools Declaration, submitted to the Ministry of Defence a proposed amendment to the country’s Armed Forces Act that, if it became law, would ban the requisition by the armed forces of buildings or premises used for educational purposes.98 And in Mali in early 2019, the Ministry of Education established a technical committee for the operationalization of the Safe Schools Declaration, including two representatives from the Ministry of Defence.99

The pace at which explicit protections for schools from military use have been codified in the period since 2015 appears unprecedented.100 But even to the extent that the impetus behind such efforts has been the Safe Schools Declaration, there has been considerable variety in the type of protection chosen to provide schools, from complete bans on their use to regulation of their use along the lines proposed by the Safe Schools Declaration, and to other complementary measures to deter the practice. The Guidelines for Protecting Schools urge countries to “determine the most appropriate method” to “encourage appropriate practice throughout the chain of command”,101 and countries have found various ways to do so, including military doctrine, military manuals, military orders, legislation and direct advocacy. Countries engaged in drafting or updating their trainings, doctrine and military manuals should draw inspiration from the efforts that have been made to date.

Conclusion

The fact that so many countries, including those currently or recently engaged in armed conflicts, have chosen to expressly prohibit or regulate the use of schools

97 Italy: Policy Commitments 207055 and 207069, World Humanitarian Summit, 2016; Luxembourg: Policy Commitment 213039, World Humanitarian Summit, 2016; and Slovenia: letter from Darja Bavdaž Kuret, State Secretary, Ministry of Foreign Affairs, Slovenia, to Tore Hattrem, State Secretary, Ministry of Foreign Affairs, Norway, 12 April 2016.
98 Proposed Amendment to Armed Forces Act, submitted by Ministry of Education-led Education in Emergencies Working Group Nigeria to Minister of Defence, 5 December 2018, Section 216(3) (“No premises or building or part thereof occupied for educational purposes or accommodation of persons connected with the management of school or vehicles and other facilities of educational institutions shall be requisitioned”), in letter from Nkiru Cynthia Osisioma, Deputy Director, Federal Ministry of Education, to Minister of Defence, 5 December 2018. On file with author.
100 Author’s analysis of dates of concrete measures to protect schools or universities from military use, collected by author for HRW, above note 4.
by their armed forces makes it evident that military needs can be met while protecting schools. The examples of how the military use of schools endangers students and teachers, and interferes with students’ right to education, demonstrate why such alternatives should be pursued whenever possible. Now that more than half the world has endorsed the Safe Schools Declaration and has thereby committed to using the Guidelines for Protecting Schools and “bring[ing] them into domestic policy and operational frameworks as far as possible and appropriate”, additional examples of concrete measures to deter the military use of schools should be anticipated in the coming years. Further endorsements of the Declaration – especially by the remaining countries whose armed forces have used schools or universities for military purposes in recent years in conflicts at home, abroad, or as peacekeepers – appear to be a particularly valuable step. But it will only be through implementation of the Safe Schools Declaration and other concrete measures to deter the military use of schools and universities that generations of future students will be able to study and learn in greater safety.

102 Safe Schools Declaration, above note 3, first commitment.
Safer cash in conflict: Exploring protection risks and barriers in cash programming for internally displaced persons in Cameroon and Afghanistan

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Abstract

As cash increasingly becomes an essential part of humanitarian assistance, it is critical that practitioners are aware of, and work to mitigate, exposure to protection risks among the most vulnerable recipients. This article presents findings from qualitative research exploring protection risks and barriers that arise in cash programming for internally displaced persons at high risk of violence and exploitation in Cameroon and Afghanistan. The authors conclude with recommendations for mainstreaming global protection principles into cash programmes, as well as key considerations for designing and implementing cash programmes in ways that minimize existing risks of harm and avoid creating new ones.

Keywords: cash-based interventions, protection, gender-based violence, intersectionality, internally displaced persons, persons with disabilities, older persons, conflict, Cameroon, Afghanistan.

Introduction

Cash is recognized as an essential part of humanitarian responses and is one of the fastest-growing forms of aid in humanitarian emergencies. Over the past decade, cash-based interventions (CBIs), programmes in which cash transfers or vouchers
for goods and services are directly provided to individuals, households or communities, have become an increasingly common strategy for supporting people displaced by conflict or natural disaster. CBIs are not a new form of relief—for example, American Red Cross founder Clara Barton used cash assistance during the Franco-Prussian war of 1870–71. Yet until recently, cash payments to the poor for social protection or disaster relief have largely been overlooked in favour of in-kind assistance. That began to change in the early 2000s, however, when, encouraged by the results of cash programming following the 2004 Indian Ocean tsunami, aid organizations began larger-scale implementation and evaluation of cash programmes. Additionally, the global financial crisis of 2008 accelerated the transition to cash-based forms of aid, as countries reduced generalized subsidies on food or agricultural inputs in favour of more targeted means of supporting their poorest. By 2016, CBIs had gained acceptance to such an extent that donors and humanitarian agencies attending the World Humanitarian Summit were highlighting cash assistance, multipurpose and otherwise, as a preferred aid modality thanks to its cost efficiency and ability to promote dignity and autonomy and enable people to prioritize their most urgent needs. At the convening of the Summit, over thirty of the largest organizations came to an agreement, referred to as the “Grand Bargain”, to reduce the humanitarian financing gap and increase aid to those in need. Participating organizations also committed to increasing the regular use of cash alongside service delivery, in-kind assistance and other strategies. Following the Summit, several donors and aid agencies made bold commitments to significantly increase the proportion of aid delivered through cash programming.

Research demonstrates that CBIs have positive impacts on food security, education and health, among other basic needs. Thus far, studies on cash programming in emergencies have focused primarily on assessing efficiency and effectiveness to meet basic needs when compared to food distribution and other

1 Cash Learning Partnership (CaLP), “Glossary of Terminology for Cash and Voucher Assistance”, available at: www.cashlearning.org/resources/glossary#Cash (all internet references were accessed in August 2019). Cash-based interventions can also be referred to as cash-based assistance or cash transfer programming.


6 Ibid.

7 S. Doocy and H. Tappis, above note 3.
forms of in-kind aid, and on factors that can facilitate or inhibit the achievement of these objectives. Yet research on how cash programming may impact recipients’ and non-recipients’ exposure to protection risks, particularly in areas affected by conflict, is scarce. A few studies address protection outcomes from cash programming in humanitarian settings. For example, a 2018 review on sectoral outcomes of CBIs in humanitarian settings by Harvey and Pavanello found a small amount of emerging evidence on positive protection impacts on child protection and on sexual exploitation and abuse of women. A 2015 review by Berg and Seferis examined protection outcomes of CBIs in both development and humanitarian contexts and found mixed results regarding the impact of cash programming on protection risks at the individual, household and community levels. The study showed that cash programming can (though does not necessarily) increase rates of intimate partner, gender-based and inter-generational violence, worsen stigma towards beneficiaries, and aggravate social tension in communities. A third desk review conducted by the International Committee of the Red Cross (ICRC) discussed the potential for CBIs to exaggerate existing household or community tensions, in particular when women are selected as beneficiaries without regard for gender and resource-control dynamics.

In general, however, most research focuses on children and on intimate partner or gender-based violence (GBV), as outlined by two of the aforementioned reviews, leaving protection concerns for other populations at

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8 Ibid., p. 17.
9 The term “protection” as utilized in this article is defined by the Inter-Agency Standing Committee (IASC) as “all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. International Human Rights Law (IHRL), International Humanitarian Law, International Refugee law (IRL))”. This definition has been utilized and is reflected in the Four Protection Principles outlined in the Sphere Handbook, and we appreciate that these principles reflect the essence of the IASC definition but add a more tangible and practical framework for the analysis of protection, as was required for this article. These principles are to (1) enhance the safety, dignity and rights of people, and avoid exposing them to harm; (2) ensure people’s access to assistance according to need and without discrimination; (3) assist people to recover from the physical and psychological effects of threatened or actual violence, coercion or deliberate deprivation; and (4) help people claim their rights. Finally, “protection risks” are therefore understood, and always in accordance with the IASC Protection Policy, as any type of violation of international humanitarian and human rights law, including violence, abuse, coercion and deliberate deprivation. See IASC, Protection in Humanitarian Action Policy, 2016, p. 2-3, available at: https://interagencystandingcommittee.org/protection-priority-global-protection-cluster/documents/iasc-policy-protection-humanitarian-action, and Sphere, The Sphere Handbook: Humanitarian Charter and Minimum Standards in Disaster Response, 2018, p. 36, available at: https://spherestandards.org/handbook/editions/.
10 See, for example, P. Harvey and S. Pavanello, above note 3; S. Doocy and H. Tappis, above note 3; Michelle Berg and Louisa Seferis, Protection Outcomes in Cash Based Interventions: A Literature Review, UNHCR, 2015.
13 See, for example, Emma Bell, Violence against Women and Cast Transfers in Humanitarian Contexts, UKAID, London, 2015; Jessica Hagen-Zanker et al., The Impact of Cash Transfers on Women and Girls, ODI, 2017; Michelle Berg, Hanna Mattinen and Gina Pattugalan, Examining Protection and Gender in Cash and Voucher Transfers, World Food Programme and UNHCR, 2013.
14 M. Berg and L. Seferis, above note 10, p. 46; P. Harvey and S. Pavanello, above note 3, p. 27.
risk of violence, abuse or discrimination largely unexplored. For example, there is a lack of research on older people or people with disabilities, as well as intersectional protection concerns like those experienced by women with disabilities. Further research is needed to understand how protection risks that emerge throughout the programme cycle could be mitigated though improved design, implementation and programme analysis.

The limited evidence on CBIs and protection is particularly concerning for cash practitioners who, in addition to having an ethical responsibility to mainstream protection across programmes and activities more generally, recognize the importance of protection in enhancing and improving programme outcomes. The Global Protection Cluster highlights four protection principles that should be taken into account in all humanitarian activities: (1) prioritize safety and dignity and avoid causing harm; (2) arrange for meaningful access to assistance and services without barriers; (3) set up accountability mechanisms through which affected populations can measure the adequacy of interventions and address complaints; and (4) support participation and empowerment and help people to claim their rights. These key principles should be integrated into the design and implementation of cash programmes, including in the process of participant selection, choice of mechanisms to deliver cash, and ongoing monitoring of programme activities.

Yet practitioners who attempt to implement such protection measures face several practical challenges. First, although there are a number of guidance documents for practitioners that address the need to consider protection risks in cash programming, these guides lack practical, actionable, user-friendly tools for assessing and monitoring protection risks. A scoping exercise conducted by the Human Rights Center (HRC) at the University of California, Berkeley School of Law found that the lack of concrete risk assessment tools can lead practitioners to conduct superficial assessments or rely on past experiences rather than carry out meaningful consultation with community members to obtain input into programme design. In addition, existing complaint-response mechanisms and brief post-distribution monitoring (PDM) surveys are generally not conducive to the disclosure of sensitive protection information, and therefore this information is rarely collected.

Second, specific groups may face greater barriers to accessing and participating in cash programming, or face higher protection risks because of

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15 See H. Slim et al., above note 12, pp. 29–30.
how their gender, age, disability and other socio-demographic factors can intersect with risk factors. Yet practitioners do not always recognize or take measures to address this reality. The Humanitarian Inclusion Standards for Older People and People with Disabilities define barriers as “factors that prevent a person from having full and equal access and participation in society”. These barriers include environmental factors, such as physical, information or communication barriers; attitudinal barriers, such as negative perceptions of certain groups and discrimination; and institutional barriers, such as discriminatory laws, policies or procedures. Such barriers can also increase vulnerability to protection risks, including various forms of violence, abuse, discrimination and exclusion from programming. Finally, there is growing recognition that standard categories of vulnerability used in eligibility criteria for targeting are too broad (for example, targeting women generally rather than older women or women with disabilities) and do not account for the intersecting and context-specific risk factors that affect cash recipients’ access to and control over resources. In order to ensure that cash safely and effectively reaches those most in need of support, new research must consider intersectionality when assessing risks and barriers in cash programming. Intersectionality takes into account that individuals may face compounded vulnerability or discrimination based on various factors and identities.

Evidence of protection risks and barriers associated with cash programming in humanitarian settings for particularly vulnerable groups is urgently needed in order to enable practitioners to design and implement safer cash programmes. According to the Global Protection Cluster, risks that do arise in CBIs are usually related to programme design rather than being inherent to the use of cash. Data on protection risks linked to the targeting process, delivery mechanisms and ongoing participation in cash programmes would not only improve understanding among cash and protection actors in the field, but would also serve as a foundation for developing more comprehensive tools to detect potential risks at the outset and throughout programme implementation. In the rapid move towards cash as a dominant aid modality, this research is

21 Ibid.
23 For more information, see Patricia Hill Collins and Sirma Bilge, Intersectionality (Key Concepts), Polity Press, Cambridge, 2016.
24 Building an evidence base to assess the costs, benefits, impacts, and risks of cash (including on protection) is one of the key commitments agreed to by signatories of the Grand Bargain. See ICVA, above note 5, p. 5.
26 The IRC used these research findings to develop the Safer Cash Toolkit, which includes risk assessment and monitoring tools to enable practitioners to effectively identify and address protection issues and barriers in cash programming for the most vulnerable populations in humanitarian crises. See IRC and USAID, Safer Cash Toolkit: Collecting and Using Data to Make Cash Programs Safer, Washington, DC, 2019.
needed to ensure that cash, with its many benefits, actually reaches those most in need in ways that minimize existing risks of harm and avoid creating new ones.

To this end, the HRC partnered with the International Rescue Committee (IRC) to conduct a qualitative study of protection risks and barriers in cash programming in conflict-affected settings. The study aimed to answer the following question: What protection risks and barriers arise in the targeting, delivery and use of cash in cash programming, including multipurpose cash, cash for food and cash for non-food items, for vulnerable populations in conflict-affected settings?

Specific research objectives aimed to identify and explore: (1) protection risks at the individual, relationship, community and societal levels; (2) barriers to receiving and using cash; and (3) design preferences of cash recipients. Using an ecological approach, the research sought to respond to the urgent needs of humanitarian agencies implementing cash programmes by examining the full range of multi-level protection risks and barriers (beyond intimate partner violence and other forms of GBV); applying an intersectional approach to include at-risk groups facing multiple, complex barriers and protection risks; and focusing on the experiences and perspectives of communities displaced by conflict.

**Methodology**

Between 2017 and 2018, HRC researchers collaborated with the IRC to conduct a qualitative study exploring protection risks, barriers and preferences related to cash programming, including multipurpose cash, cash for food and cash for non-food items, in humanitarian contexts. Focusing on the perspectives of conflict-affected communities, the study used focus group discussions (FGDs) and in-depth interviews with participants receiving multipurpose cash transfers through the IRC’s programmes. Researchers drew on the ecological framework for understanding the complex nature of violence, which includes individual, household, community and societal considerations. Questions focused on three key phases in the programme cycle: targeting (the process of being selected for the programme), delivery (the process of collecting cash) and use of cash (including decision-making and keeping and spending cash). In addition, researchers conducted key informant interviews with practitioners active in cash and protection programming in order to better understand protection concerns and the humanitarian response context in each country.

Afghanistan and Cameroon were chosen as research sites, as both countries represent settings of protracted conflict with volatile security situations, have large populations of internally displaced persons (IDPs), and offer diversity in geographic regions and cash programme design. Priority at-risk populations in

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27 Funding for the research was provided by USAID and the Office of US Foreign Disaster Assistance, whose primary mandate is to meet the needs of IDPs in situations of natural and human-caused disasters in countries outside the United States.
each location were selected in consultation with the IRC’s regional technical
advisers and country-level staff using ethically and methodologically sound
categories of vulnerability and taking into consideration common forms of
violence and other protection concerns in each context, populations most at risk,
and the data available on factors affecting vulnerability. In both locations,
young women (ages 18–29, who were viewed to be at higher risk of abduction by
armed groups), older women (age 50 and older) and female heads of households
(ages 30–50) were identified as priority at-risk groups. A fourth category of
“women with limited mobility” (ages 30–50) included people with physical
disabilities, injuries or chronic illness, while excluding people with intellectual and
psychosocial disabilities who could not ethically participate due to issues around
informed consent and a lack of trained professionals to conduct interviews with
this population. Finally, men (ages 18 and over) with a range of vulnerability
factors (including older men and men with limited mobility) were added as a
fifth group. These categories of at-risk groups employed an intersectional
approach to allow for the inclusion of individuals facing multiple, intersecting
barriers or protection risks.

Purposive sampling was used to recruit participants who were enrolled in
an active cash programme, had reached the age of majority and fit at least one of
the five categories of at-risk groups. In total, 211 participants took part in the
study, including 158 women and fifty-three men.

Research was conducted in close collaboration with local research teams,
who received a multi-day training in research methods, ethics and the study
protocol. Ethical approval was obtained both through the University of
California, Berkeley, and through relevant local institutions in both countries. In
total, research team members conducted nineteen FGDs with 155 participants
and fifty-six individual interviews with IDPs in four contexts. In addition,
researchers conducted thirty-four key informant interviews with cash and
protection practitioners, including twenty-three in Cameroon and eleven in
Afghanistan.

The HRC research team coded focus group and participant interview
transcripts, then analyzed the data and identified key themes that emerged in the
areas of protection risks, barriers, and preferences in targeting, delivery and
monitoring (including keeping and spending cash) by country. Data was also
analyzed by target group, as well as by age and gender across target groups to
identify relevant trends. Key informant interview notes were consulted to aid in
the interpretation and analysis of data.

The research methodology has a few significant limitations. First, in
selecting the target groups, researchers were limited to considering those factors
on which the IRC collects data as part of its targeting process such as age,
household composition and mobility issues including physical disability, injury
and chronic illness; other factors that might place people at high risk of violence,

28 In both contexts, researchers were limited to selecting categories of at-risk groups for whom data is
available and is collected by the IRC based on its targeting process and categorizations of vulnerability.
exploitation and discrimination were not considered due to the lack of available data to enable ethical identification and recruitment. Second, the IRC was involved in the recruitment of the research teams and of research participants, potentially impacting both researchers’ willingness to report adverse outcomes and participants’ willingness to share negative experiences related to the IRC’s cash programming. Third, the security situation restricted access and the amount of time that researchers could spend in some locations, which in turn limited the length of some interviews. Finally, qualitative findings are context-specific and not necessarily generalizable to broader populations or regions beyond those included in this study. It should also be noted that the findings are based on beneficiary knowledge and perceptions and may not be reflective of existing IRC programme procedures.

### Overview of cash programmes in the two displacement contexts

**Cameroon**

The Far North region of Cameroon has been regularly affected by violence since Boko Haram’s insurgency commenced in 2014. Since then, frequent suicide bombings, kidnappings and armed raids of villages have resulted in widespread population displacement, sustained military operations, and the periodic closure of borders and trade routes with Nigeria and Chad. According to the International Organization for Migration’s latest Displacement Tracking Matrix survey, the Far North now hosts over 240,000 IDPs. In addition, approximately 104,880 Nigerian refugees reside both within and outside of Minawao IDP camp.

Research sites selected for this study included two villages in the department of Mayo-Sava—one in Mora District, and one in Kolofata District—which, at the time of the study, hosted 59,506 IDPs, the second-largest number in

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the Far North region.31 Both villages are regularly affected by security incidents, though the site in Kolofata is particularly volatile. The programme in Mora was a cash for food assistance programme with approximately 1,500 beneficiaries and included five monthly disbursements, the first in the amount of 56,000 Central African francs (CFA) (around $100) and the remaining four at 42,000 CFA (around $75). In Kolofata, the IRC implemented a multipurpose cash programme for basic needs with 140 beneficiaries that included six monthly disbursements,32 the first in the amount of 47,000 CFA (around $84) and the remaining five at 24,000 CFA (around $43).

When undertaking beneficiary selection, IRC Cameroon uses a community-based beneficiary selection process and scores each household for inclusion in the programme based on community-endorsed vulnerability criteria. Cash is disbursed using mobile money through the carrier Orange, and each participating household is given a mobile phone and SIM card. Each month cash is credited to participants, who receive notification of the disbursement via text message and can withdraw their cash at a mobile money transfer agent location of their choice. Following each cash disbursement, the IRC conducts PDM surveys to better understand spending patterns and unmet needs. The IRC uses feedback mechanisms, including community-based complaint committees, a hotline and feedback boxes, for receiving and responding to community concerns as they arise.

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<th>Focus groups</th>
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<td>Young women (18 or 21–29)</td>
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<td>Older women (50+)</td>
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<td>Female heads of households (30–50)</td>
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<tr>
<td>Women with limited mobility (30–50)</td>
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<td>7</td>
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<tr>
<td>Men with any vulnerability</td>
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<td><strong>Total</strong></td>
<td><strong>9</strong></td>
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31 Ibid.
32 According to CaLP’s “Glossary of Cash Transfer Programming”, a multipurpose cash grant/multipurpose cash assistance is defined as “a transfer (either regular or one-off) corresponding to the amount of money a household needs to cover, fully or partially, a set of basic and/or recovery needs”. Unrestricted transfers can be used entirely as the recipient chooses (i.e., there are no direct limitations imposed by the implementing agency on how the transfer is spent). See CaLP, “Glossary of Cash Transfer Programming”, available at: www.cashlearning.org/downloads/calp-updated-glossaryfinal-august-2017update.pdf.
Afghanistan

Modern Afghanistan has a long history of displacement which can be traced back to the late 1970s, when nearly 6 million Afghans fled conflict between communist and mujahideen forces. Protracted inter-ethnic clashes limited the numbers of refugees who were able to return to the country until 2001, when US and allied forces overthrew the Taliban government, allowing more than 4.6 million registered refugees to return to the country. Voluntary and involuntary returns have increased since 2015, as neighbouring countries grow weary of caring for Afghan refugees and the Afghani government struggles to meet their needs. Meanwhile, as of 2017, more than 1.5 million people (nearly 5% of the population) in thirty-one of Afghanistan’s thirty-four provinces had been internally displaced due to ongoing conflict between State and non-State armed groups such as the Taliban and the Islamic State group, and to a lesser extent, by international security forces. In addition, areas of the country have been heavily impacted by recent droughts, earthquakes, flooding and subsequent landslides, creating dual causes of displacement for Afghans already impacted by conflict.

The IRC implements cash programming for emergency response in eight regions in Afghanistan, including Nangarhar and Herat. Depending on the funding source and geographic area, cash programmes may either be multipurpose for basic needs or have a specific focus such as food or non-food items. In both study locations, programme participants received a one-time amount of 6,000 or 15,000 afghanis (AFN) (approximately $80–$198) for non-food items over a period of two months. The payments were given to eligible families in Nangarhar affected by armed conflict between Islamic State, Taliban and government forces, and to eligible families in Herat affected by drought and armed conflict between Taliban and government forces.

To be eligible for cash programming in Afghanistan, displaced persons must register with the Afghan Ministry of Refugees and Repatriations. The IRC then targets eligible households using either blanket distributions or list-based distributions. In both cases, a household assessment using the Household Emergency Assessment Tool is completed for each household as documentation and used to confirm eligibility for list-based disbursements. Once registered, households receive a phone call letting them know where and when disbursements may be collected. Recipients arrive at cash distribution centres the following day, stand in line, show identification documentation, and receive cash disbursements in an envelope. IRC staff monitor activities, including distribution, on the day of disbursement, and conduct PDM as follow-up with cash recipients.

35 IDMC, above note 34.
Complaints, including protection concerns, may be submitted any time either in person to IRC staff or via a hotline.

**Findings**

While our research examined protection risks, barriers and preferences related to cash programming, it also explored a number of positive outcomes of cash disbursements at the individual, household and community levels in Afghanistan and Cameroon. At the individual and household levels, many respondents reported improvements in health, nutrition and housing, as well as being able to purchase much-needed home goods and clothing, pay children’s school admissions fees, purchase identification for themselves and their family members, and even, on occasion, start small businesses. A large number of respondents reported that relationships in their families had improved thanks to reduced household stress related to cash flow.

At the community level, respondents reported improved relationships with their neighbours and community members as they could return loans and no longer needed to rely on neighbours for gifts or favours. Additionally, many said they were pleased that they could share disbursements with their extended family and neighbours to improve those people’s lives as well. In general, a majority of respondents across target groups in both countries stated that they preferred cash over any other aid modality and expressed deep gratitude to the IRC for providing cash assistance.

“We thank the IRC because thanks to them we are living in good houses and we are well-fed”, said one male focus group participant from Cameroon. Another added, “The capacity to solve my family needs brought back my dignity and the respect of my children.”

**Cameroon**

**Targeting: Unintended exclusion, community tension, and bribery**

Many respondents highlighted the exclusion of vulnerable community members from cash programming as a fundamental protection risk. In humanitarian settings, where people have been displaced by conflict and may lack access to food, adequate shelter and other basic needs, exclusion from cash assistance can exacerbate protection risks by increasing vulnerability to exploitation and abuse. Many respondents shared stories about vulnerable people in their communities who they felt should be prioritized for receiving cash but had not been enrolled

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37 Quotes throughout this article come from interviews conducted during the research and are on file with the authors.
in the programme, such as widows with many children, older men and women, people with disabilities, and households with a member who has a chronic illness. In one focus group, several men noted that less than half of the people on the list of eligible participants were selected to participate in the programme when, in fact, they felt that some of those excluded were among the most vulnerable in their community. As one young woman in the cash for food programme in Mora said:

I also have a neighbour who is displaced and blind and doesn’t have an ID card. They took his name, but he has never received cash. Even today he asked me if you are here to take people’s names. He tries to cope selling beans. I would want [the IRC] to help him.

In addition to the perceived exclusion of many individuals on the list of eligible participants, some vulnerable community members were not included on the list at all. Respondents noted that a primary reason for the exclusion of eligible community members from the list was the lack of sufficient opportunities for registration, which resulted in indirect discrimination against certain groups, such as those who work during the day or were otherwise away from their homes. Respondents reported that many people who were eligible for the cash programme missed the opportunity for registration because it occurred when they were away from their homes, or during harvest season when they were working on farms. A young woman in Mora said of her neighbour:

When the names were taken, her husband was sick. She was at the hospital with him. Even the cash for the hospital she couldn’t pay, and unfortunately, her husband died. Today, she cannot even eat, and she has four small children.

Echoing these concerns, key informants working in cash programming also expressed the need for a mechanism for ongoing programme registration for new arrivals to the community who have been displaced or people who become eligible when their circumstances change during the programme, after the beneficiary selection process has been completed. In general, informants spoke about the inherent challenge of targeting in a context of limited resources where so many people are socio-economically vulnerable.

Respondents across target groups also pointed to the barrier of insufficient, inaccessible information about the programme, which resulted in a limited understanding of the targeting process. Many said they did not understand why they had been selected for the programme. Some attributed their participation to luck or the will of God. This confusion seemed to contribute to increasing community tension. For example, a few respondents reported that community members who were not receiving cash were angry and jealous of them because they did not understand why their neighbours had been enrolled in the programme and they had not.

Bribery was also cited as a protection risk in the targeting process. A few young women shared experiences of village authorities asking for money in exchange for registering them to participate in the cash programme. In addition
to impacting dignity, bribery can be considered a protection risk as it can also expose individuals to threats or retaliation if they reject direct requests from figures of authority.

Delivery: Violence, theft, and physical, information and communication barriers

Respondents frequently cited fear of attack by Boko Haram as a significant protection risk during travel to collect cash from mobile money providers, as it limits participants’ mobility. Many, particularly young women, said that such travel is simply too dangerous and therefore they send male intermediaries instead. In addition to fearing attack by members of Boko Haram, ongoing conflict in the area has created a general climate of fear and insecurity, which is also affecting cash distribution processes and beneficiaries’ safety. Said one respondent, “Anyone can attack you, and they will say it’s Boko Haram.”

Many respondents spoke of increased risk of attacks, home break-ins and village raids on the dates of cash distribution. Particularly alarming was the large number of people who reported that they and other programme participants sleep “in the bush” rather than in their homes to avoid being attacked or robbed once they receive their cash or the text message notifying them that their cash is available for pick-up. Some people return during the daytime each day while sleeping away from their villages, while others return to their villages only after they have been able to spend the money on food and other goods. Some respondents explained that temporarily leaving their homes on distribution days was a common practice in their community. As one man explained, “The day we receive the money, we all sleep in the bush to avoid the worst.”

Respondents explained that everyone in the area is aware of the date that cash is distributed. A couple of people noted that youth affiliated with Boko Haram live in their village, and that when cash is available at the end of every month, word travels quickly throughout the community and surrounding areas. One respondent reported that on the day of distribution, Boko Haram raided their entire village.38 Another said,

The children who are in the bush with Boko Haram are just waiting for information about those who have money in the village. As you can see, there is no police station here in the village. They come in the night to kill you. By the time the police intervene, you are already dead, my son.

38 The IRC has requested that the following statement be included: “The IRC had in place mechanisms to both proactively and reactively collect information about these types of incidents in the area where this statement was collected; no such type of incident was identified during the period in which the research took place. It is possible that the incident may have happened in another time period or location or in cash distributions organized by other humanitarian stakeholders.” The HRC can neither confirm nor deny the accuracy of this statement, as these records were not available to HRC researchers.
Some respondents said they would prefer if texts notifying participants of cash disbursements were not all sent on the same day, as this would be more discrete and would help decrease threats to their safety.

In addition to the above protection risks, respondents identified several barriers that make it challenging for them to pick up their cash from mobile money distribution locations. Several people, especially older women, felt that cash pick-up points were too far away from their homes. This physical barrier was cited most frequently among respondents in Kolofata, where there are no Orange Money providers in the area. Kolofata residents are required to travel to Mora or Maroua (at least 25 kilometres away), along a route where security incidents are common.

Some respondents felt that collecting their cash from mobile money agents was manageable. However, others felt that mobile money agents should deliver cash to their village or preferred to receive cash cards to be able to withdraw cash directly in their village in order to reduce reliance on intermediaries and reduce security risks. “If the IRC can make it, it is good … because when we go to Mora, it is risky”, one young woman said. “Those people know there is money, so we have to lurk, to be careful, because even on the bike you can be attacked. They can even cut your hand to take your phone.”

Due to the physical barrier of distance to cash distribution points in an environment of insecurity, many programme participants – young women, older people and people with disabilities in particular – relied on intermediaries to pick up their cash for them. Respondents noted that intermediaries are often their sons or brothers, or a young man is designated to pick up the cash for many people in the community. A few said that relying on intermediaries is challenging because they have to wait too long to receive their cash; intermediaries generally do not deliver the cash to recipients immediately upon returning to the village, and respondents recounted waiting as long as twenty-two days after the distribution. One person reported being scolded and disrespected when following up with the intermediary to request receiving their cash sooner. In addition, some intermediaries either expected a tip or charged a commission for picking up the cash. Finally, respondents noted that reliance on intermediaries increases the risk of theft, as they explained that intermediaries may switch the SIM card in participants’ phones so that they can keep the SIM associated with the cash in order to steal future disbursements.

The physical barrier of distance was exacerbated by other factors. Some respondents said that the mobile money agents located nearby did not always have cash available, requiring them to travel long distances to other mobile money agents located further away. Others reported that they were denied payments of cash by mobile money agents when they attempted to pick up their cash. Several respondents reported having to travel long distances to mobile money agents in order to avoid the higher fees charged by those nearby. Some mobile money agents charge higher fees for shorter wait times, a cost many are willing to pay to access their cash immediately and to avoid security risks. As one young woman from Mora said:
Here at [the village in Mora], if you receive 100,000 CFA and you want to withdraw it, instead of cutting 500 CFA, for example, they will say those who want their money fast should pay 5,000 CFA or 10,000 CFA. But those who are clever wait until those who are in a hurry receive it, and after, they can normally collect their money.

Respondents also highlighted that limited technological literacy increases reliance on intermediaries, exposing people to protection risks. Some noted that mobile money is often not appropriate or conducive to the needs of people with limited technological literacy, such as community members who have never used mobile money or do not know how to use mobile phones. Some respondents shared that older community members often face information barriers because they do not know how to use mobile money and cannot access information about their cash. They said that older women, in particular, often ask young men in the community for assistance with checking their text message notifications. In some cases, youth take advantage of this situation by switching out the SIM cards so that they can receive future disbursements of cash or by stealing participants’ new phones. As one young woman explained: “Older women who did not go to school call those young people and ask for help to go and withdraw their money, and that is how they change the SIM, and the women will no longer receive the cash.”

Other communication barriers reported in the delivery process included not receiving text messages that cash was available and blocked SIM cards.

Use of cash: Theft and household and community tension

Beyond the targeting and delivery processes, respondents spoke of theft as an ongoing protection risk during their participation in cash programming. Some respondents shared stories of SIM cards or phones being stolen from cash recipients in their communities, noting that older women are often targeted for theft. Many people explained that they were afraid to keep cash on them, particularly in Kolofata, where they felt likely to be attacked and robbed or to have their homes broken into at night by members of Boko Haram or other community members. As mentioned above, several respondents said that they spend their cash as soon as they pick it up, or sleep outside of their homes until they have spent it.

As noted above, respondents explained that it is challenging to keep their cash safe in this context, noting some key barriers. A few said that they did not have a lock box at home for safely storing their cash. Some women with limited mobility said that they preferred to keep goods instead of cash in their homes. In order to keep their cash safe, older women often give their cash to a young person to hold; in some instances, however, the young person has stolen the cash. One woman said that she immediately hands the cash over to her husband to keep it safe, while another explained that she keeps the money away from her husband in order to keep it safe for the household. “When I take that money”,

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one female head of household said, “I put part of it in a safe place and I buy food for everybody daily. If I give all this money to my husband, he can waste it all and give me nothing.”

Some respondents suggested ways to mitigate the risks of theft and keep their cash safe, such as issuing lock boxes with the first cash disbursement or, as two respondents suggested, increasing police or military presence on distribution dates (which they felt was the reason for fewer incidents of theft in the village in Mora than in the village in Kolofata). However, many cash actors do not recommend increasing the presence of the police and military, as this could raise other protection risks.

Despite barriers to keeping cash safe and clear protection concerns, most people preferred to continue receiving cash (as opposed to a different modality) and felt that they could manage the associated risks. A few said that they would prefer bank cards over mobile money in order to withdraw their money at their own convenience without the need for intermediaries, while two women stated that they preferred food distribution over cash because they felt that it was safer and that there was less pressure to share it with neighbours, other community members and other wives in the household. As one woman from Kolofata put it,

I prefer rice, one cup and a half in the morning and in the evening per child. This way, we will be able to eat. As my husband went to Yaoundé to work as a motorbike rider, distributing that money with my three co-wives is a source of problems.

At the household level, very few respondents shared experiences of changes in relationship dynamics and associated protection risks. However, some men said that participation in cash programmes had eased household tension related to expenses and improved decision-making with their wives, as they now discussed and planned how to spend their money together. One young woman from Mora said:

Before, there were problems in our households. When the wife asks for some cash to pay the children’s school fees, the husband gets angry and says: “Where do you want me to get the cash?” And the wife replies, “If you, the husband, do not know where to find cash, where do you want me to find that cash?” But since the IRC came with the cash assistance, everything is okay. There is peace, and our children are going to school.

In contrast, key informants implementing cash programmes reported observing increased household tension, anger from men in the community, and incidents of domestic violence in situations where women were the direct cash recipients. They noted that community leaders were angry and very vocal about women being targeted in their community because it is the role of men to manage and make decisions about money. Issues of domestic violence and household tension did not arise in interviews and FGDs with respondents; however, as noted by key informants, this may be due to the fact that in this context domestic and sexual violence are taboo subjects, survivors and their families are highly stigmatized,
and the disclosure of physical and sexual violence may put a survivor at risk of further harm.

At the community level, some respondents reported that community members who had not been selected for the programme were angry or jealous of them. Although some people felt that the ability to share the cash with their neighbours was a primary benefit of their participation in the programme, others explained that sharing the cash with non-participants was necessary to mitigate community tension.

Inadequate communication regarding the duration of cash programmes was a key barrier that led to situations of increased vulnerability for many cash recipients. Several people said they felt that their cash disbursements ended suddenly and without warning, creating household and community tension and other challenges because they were unable to adequately prepare for this transition. For example, some people mentioned that they had taken on financial obligations that they were subsequently unable to afford, which created tension with landlords, who were evicting people from their homes or businesses when they could no longer afford to pay rent on time. “Because of the assistance”, said one man, “we took on a commitment that we can no longer fulfill since the IRC has ceased to pay us without warning. This brought us back into a debt situation that we thought we had left.” A few men said that the sudden end to their cash disbursements had also created tension with their wives and children, who did not believe that the cash programme had ended and suspected that the men were using the cash in other ways, such as spending it on themselves or on another woman. As one man put it,

According to our wives, the IRC is transferring us money every month since it was agreed to transfer the cash assistance at the end of every month. They don’t trust us when we tell them that the assistance didn’t come. This situation discredits us in front of our wives.

Finally, several women, primarily female heads of households, said that the amount of cash they received each month was insufficient to meet their basic needs. This was especially true for those with family members living with a chronic disease or those who needed to spend the money on housing.

Afghanistan

Targeting: Exclusion, bribery, extortion and mistreatment

Similar to Cameroon, respondents in Afghanistan reported that the perceived exclusion of persons from cash programming was a common protection risk in their communities, as an inability to meet basic needs placed many IDPs at

39 The number of cash transfers and the duration of the programme are generally communicated to participants through an orientation following enrolment in the programme per standard operating procedures.
further risk of exploitation and abuse. Most people said they knew of poor IDP families—many of whom were widows, orphans, older people, ill, or had a disability—who had been told they were eligible to participate but had never been contacted to complete registration processes or receive assistance. Most felt this was because of corruption by village leaders or government officials. A few said it was common for government officials to collude with village leaders or NGO employees to put ineligible people on lists of eligible participants in exchange for a portion of the funds. Likewise, some said that village leaders selected as moderators by NGOs were bypassing IDPs perceived as vulnerable and placing non-eligible, “powerful and wealthy”, “well-off” or high-ranking friends and family on lists instead, sometimes in exchange for some of the cash. As in Cameroon, a few respondents pointed to insufficient information as a barrier, which led to misunderstanding of the targeting process. For example, at least two respondents mentioned that a “mediator” (either a village leader or an NGO surveyor) was necessary to receive cash and that those who did not know mediaters simply did not receive assistance. As one man said,

Some honest people should be selected as officials, whether in the government or NGOs, to survey transparently… there should not be [poor people] left behind. … There were some rich people who already had villas, flats, houses of their own – the well-off people. They received the contributions.

Respondents frequently mentioned communication barriers creating a lack of transparency around who was selected for cash programming, why, and how. Many felt this made it difficult for IDP families to determine when they were simply considered ineligible to receive cash transfers or when they were the victims of corruption. In general, Afghan respondents felt strongly that cash programmes should prioritize those displaced by conflict and natural disaster, the poor, widows, orphans and those raising orphans, the homeless, older people who cannot work, people with disabilities, households with family members killed by armed groups (in particular, male family members), and women with husbands who have a drug addiction.

Bribery and extortion by village leaders and government officials was also seen as a significant problem by a few respondents who stated that those selected as moderators by NGOs frequently demanded 30–50% of cash disbursements in exchange for signatures for necessary registration paperwork. In addition, respondents spoke about village leaders demanding a 30–50% tax after families received their disbursements and/or accepting bribes of 30–50% to refer people for cash programming. If no payment was made, village leaders refused to include IDPs on lists of eligible persons given to NGOs and government officials refused to submit IDPs’ applications for registration. A few respondents even went so far as to say that they knew of incidents where village leaders or government officials had taken IDPs’ identification cards and offered to register on their behalf, only to use the cards to collect disbursements for themselves, their friends and their families. IDPs were told that the cards were lost or could not be processed. As one older woman said,
My neighbours are also migrants and are very poor people. The village elders took their money and deceived them. They took the immigrants’ national ID cards and told them that they will take their national ID cards to the Refugee Directorate. There was no assistance. It was gone.

Key informants also emphasized the challenges related to ineligible people (referred to as “fake cases”) being added to lists of eligible persons, people bribing government officials to include them on cash disbursement lists, and instances of favouritism, with reliance on community leaders to determine eligibility.

A few respondents mentioned ways to mitigate risks of corruption during targeting, including that organizations should rely on three or four types of community leaders such as clergy, heads of villages and heads of village councils, and that officials should seek out IDPs and guide them through the registration process rather than expecting IDPs to register themselves.

Among other protection risks in targeting, some respondents mentioned having experienced harsh and abusive treatment by officials when they registered for assistance. They reported that officials challenged them about their migration status, bullied them, made them cry, lost their paperwork multiple times, or simply turned them away every time they came to register, coming up with various excuses about the right people not being present or being busy or in meetings. Consequently, some respondents reported having to return to register multiple times.

One got into a physical altercation with officials after his registration was delayed for more than three months. He reports being held down by security staff, beaten, and threatened with imprisonment until an official discovered that someone had tampered with the phone number attached to his registration. Many respondents mentioned delays with the registration processes that significantly stalled cash disbursements critical for meeting basic needs, placing the respondents at further risk of exploitation and abuse. Similarly, a few respondents mentioned that NGO surveyors visiting communities would survey only a portion of eligible households and would not return to finish in spite of promises to the contrary.

**Delivery: Theft and violence by armed groups and physical, information and institutional barriers**

Fear of theft of cash disbursements was common among respondents, especially women. Many expressed fear of having their cash stolen on their way home from distribution centres by pickpockets, strangers on the street, rickshaw drivers, or people with substance use issues. As one female head of household said,

> I told you those females [NGO employees], they handed over the money to my hand very respectfully. I hoped that nobody would stop me on my way or give me poisonous food to steal my money from me. I am a young woman.

Most respondents hid the cash on their person, in pockets or in string purses around their necks to avoid loss. Two recipients were pickpocketed on the journey home. This was in line with key informants’ beliefs that the primary protection
concerns during cash delivery were related to risks and difficulties, especially for women, older people and people with disabilities, encountered during travel to collect cash at distribution centres, including theft by other individuals.

Most concerning, at least three beneficiaries felt that their participation in cash programming put them at risk of extortion and retaliation by armed groups such as Islamic State and the Taliban, via taxation, kidnapping or murder, though key informants emphasized that this is a challenge with all forms of humanitarian intervention. One woman reported that after collecting cash, her husband received a series of calls from Taliban militants threatening his life because he had taken cash from “infidels” and asking him to meet them to receive more cash—a request that she felt was a plot to take his life as they had his brother’s and nephew’s. The man has not left his home since.

Many respondents, in particular men and younger women, preferred that their distribution be made directly to a bank account and a bank card issued so that the money was safe, could be accessed at the recipient’s convenience and would be closer to their home communities, thereby also decreasing transportation costs. However, key informants stressed that this was not possible in many contexts, especially the most remote or difficult to access. As in Cameroon, a few respondents also felt that discretion around the timing of disbursements could decrease theft. As one said,

The assistance is provided in order to help us. … Nobody should be able to take it away from us. For instance, if it is transferred through a bank, give us a Kabul Bank card. We can go to a bank and take cash from there anytime we have any problem to spend it. Last time when I received the cash, I was in the city. I put the cash in my pocket. Otherwise, someone would have stolen it from me. There was an old man with me last time. A woman had stolen his money from his pocket. If he had gone to a bank, a bank is safe. Kabul Bank is safe. We can easily go there to take cash. This way is much better.

Additionally, many respondents reported physical and information barriers to accessing or locating distribution centres in order to collect cash disbursements. A few with mobility difficulties could not travel to collect disbursements, and family members sent in their place were not given the promised cash. Many respondents, especially men, struggled to locate distribution centres as they were unfamiliar with the area and had difficulty interpreting local addresses given to them by NGO staff over the phone.

We did not face any problem during the distribution event. However, I had trouble finding the distribution site. The reason was that we are newly migrated to that area, and we are not familiar with the names of the place. The address was provided to me, but that was strange and unknown to me; therefore, I could not find the site easily.

A few other recipients mentioned that they were called to collect their cash, but were told on arrival that there was no money, that the office had been shut down, or that contributions had stopped.
If respondents successfully arrived at the distribution centres, many faced institutional barriers on arrival, causing significant delays in collecting cash. A few discussed the risks of harm related to dysfunctional procedures and long wait times to collect cash on distribution days, including the loss of a full day’s wages and health challenges due to sun exposure endured while waiting in line. One man told us:

It is a problem because waiting causes us to lose wages for a day… for one, two or three hours we are waiting in hot weather. On very warm days, I saw many people – they are unconscious because of the hot weather, and they are waiting and standing for hours. If they give us facilities it will be very good for us.

A few respondents expressed the perception that the cause for these delays was that staff prioritized friends and family for collection, bringing them to the front of queues to collect their distributions ahead of, or instead of, eligible recipients; meanwhile, eligible recipients were told that collections were delayed or closed. To help address this, a few respondents said it would be useful to assign appointment times in order to shorten wait times and avoid the loss of a full day’s wages, while a few others felt that the most vulnerable recipients (older people and people with chronic diseases) should be prioritized to collect disbursements first.

In general, respondents pointed to insufficient information as a key barrier to understanding the programme. As one woman with limited mobility said,

Six thousand [AFN] is not much to worry about whether I could keep it or not. If there is someone who gets a salary, 6,000 is less than his pocket money, sister. For poor people like us, 6,000 AFN is not enough to feed our family for a month. If we spend it on food, we can’t feed our family with 6,000.

In general, most respondents from all groups found that cash disbursements were too small to meet their basic needs, leaving them at increased risk of exploitation and abuse. People indicated that work is difficult to find, housing and land is expensive, and they have incurred significant debt to meet their basic needs. Many preferred that payments be made in regular, monthly instalments over an extended period of time. While others, in particular women, preferred that non-cash items, such as stoves or food, be given with cash disbursements to extend the cash, a few preferred alternative support modalities altogether, such as housing, shelter or rent assistance and help with children’s school fees.

**Use of cash: Theft and exploitation, household and community tensions**

Only a few respondents reported incidents of theft; however, a number of women, female-headed households and women with limited mobility expressed fear that their cash would be stolen. Many respondents did not have lock boxes or bank accounts for safekeeping and mentioned hiding cash on their person, in clothing, or giving it to family members with lock boxes or to male family members to hold on their person. Many people, especially female heads of households, mitigated this protection risk by simply spending the money quickly to ensure
that it was not stolen. A few said they avoided telling people they knew about the disbursement to protect themselves from theft. As in Cameroon, respondents mentioned both discretion around timing of disbursements and lock boxes distributed with cash disbursements as interventions that could successfully prevent theft and help participants feel safer. As one older woman told us,

*I kept a part of it [the cash] in my house to pay my house rent and purchased other things that were necessary for my house. I handed over the rest of it to my daughter so I would be able to receive it back whenever I need it. I can’t take money to my house at nights. … I gave it to my daughter because I had no box. I had nothing to keep it in.*

Several respondents described barriers to keeping and spending cash safely. Many feared they would lose cash disbursements as they did not have bank accounts or lock boxes and had to carry the cash on their person. For many, especially older women and women with limited mobility, illness, debt, back-rent and other basic needs frequently caused them to spend their entire disbursement as soon as the cash was acquired. Finally, several respondents felt that shopkeepers, rickshaw drivers and landlords were exploiting them because they were known to be recipients of cash and did not know how much items would normally cost for bargaining purposes. As one man said,

*I bought a kilo of Dashlama [candy] for 50 AFN. I didn’t know anywhere else to go. Now I [buy] a kilo of Dashlama for 30 AFN. This is the problem. A stranger in a city is worried to be left starving. I purchased a bag of flour for 1,300 AFN. Then I found that its price is 1,100. There are so many problems.*

For many respondents, cash disbursements had the unintended effect of increasing household and community tensions. One young woman’s husband was verbally abusive when he found out that she had travelled alone to collect her disbursement.40 A number of other women reported that male family members took cash disbursements or demanded unsuccessfully that they be given the cash to manage on behalf of the family. A few expressed fear that if male family members found out about the disbursement, they would take the cash from them. One female head of household told us:

*I have a father-in-law who is the slave of money. He came to quarrel with me as soon as he heard an organization has helped me. He said, “You have received a lot of money. Give me the money this time.” … I have a brother. He is a little bit frank. He also argued with me inside my house. He said, “Pay me more for my house rent because the organization helps you.”*

Among men, one mentioned that the cash disbursement had caused trouble with his brother, while another mentioned that his relationship with his wife deteriorated after the money was spent.

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40 Under Taliban rule, women were not allowed to travel without a mahram, or male blood relative, accompanying them. This practice persists in many parts of the country.
At the community level, a number of respondents, particularly women with limited mobility, said that their neighbours were angry or upset when they heard about the disbursement and that several demanded a portion of the cash. Neighbours accused a few recipients of bribing someone to get themselves onto distribution lists and demanded to know who they had to call or bribe to add themselves. Most concerning, one older woman had a neighbour threaten to kill her son if she did not split the money:

> My relatives, my friends and whoever I knew, they all got happy [when the cash was received]. I have neighbours. … They were saying to each other that I have received this amount of money and other equipment. Two of them came and asked me to split it with them before someone comes and kills your son. I was worried a lot. They told me the village elders know that I have received cash and other equipment and my house is surveyed. Fortunately, no one has taken my money.

Several respondents also said that cash disbursements caused difficulty with extended family. Relatives demanded a portion of the cash received and, in at least three cases, started gossip that female recipients had prostituted themselves for the cash. Several said that money lenders who learned they had received cash would verbally abuse and harass them until they paid back their loans.

**Discussion**

As humanitarian agencies increasingly turn toward cash as a tool in their responses—which can be a life-saving intervention for people displaced by conflict—it is critical to ensure that cash safely and effectively reaches those who are most in need, particularly people facing multiple forms of discrimination or barriers to programme participation. Our research does not conclude that multipurpose cash, cash for food or cash for non-food items in humanitarian assistance is inherently risky or more risky than any other modality of assistance delivery. Rather, as with any other modality, a thorough investigation of potential risks and mitigation measures should be considered throughout the programme cycle.41 Our research in Cameroon and Afghanistan highlighted numerous protection risks in the targeting, delivery and use of cash, including the exclusion of vulnerable community members, violence and theft by armed groups and others, bribery, and community tension. The research also identified key barriers to participation, such as inadequate information about the programme, distance to distribution sites, limited technological proficiency and a lack of strategies or resources for keeping cash safe. Based on the research findings from both countries, the following recommendations draw upon the global protection

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41 This is aligned with findings from previous research on the topic. See, for example, Sarah Bailey and Paul Harvey, *State of Evidence on Humanitarian Cash Transfers*, ODI, 2015, p. 3.
principles to offer key considerations for designing and implementing cash programmes in ways that minimize harm.

Prioritizing safety and avoiding causing harm

Humanitarian actors are obligated to mitigate any potential risks of physical or psychosocial harm that may be caused by interventions. Aid distribution in settings of active conflict always presents some level of additional risk. In both countries, respondents expressed fears of attack by armed groups directly related to their participation in the programme. At the same time, the majority noted their preference for cash over other aid modalities and reported critical benefits such as improvements in their health, nutrition and housing, and in their ability to send their children to school, to purchase ID for themselves and their family members, and on occasion, to start small businesses. In order to design safer cash programmes from the outset, in addition to building programmes on principles of conflict sensitivity, it is essential to conduct a comprehensive risk assessment to identify potential risks of physical and psychosocial harm and develop mitigation strategies, and continuously monitor these risks in all phases of the programme cycle. The IRC’s Safer Cash Toolkit, informed by this study, includes three tools and guidance to collect and analyze data on protection risks and develop mitigation measures. The IRC monitors and mitigates risks throughout programme implementation through the use of accessible community feedback channels that inform participants about programme adjustments such as complaints hotlines and ensuring that a complaints officer is present at the time of cash distributions to receive reports of issues from participants. The IRC also conducts exit interviews and post-distribution monitoring surveys with a sample of programme participants about their experiences during and after the programme, and uses this data to develop risk mitigation measures in future programming. Mitigation strategies can include a broad range of measures such as the careful selection of programme features (duration and amount of the transfer) to mitigate context-specific safety risks, community engagement strategies, training workshops, efforts to ensure inclusion and accessibility of programming (transportation stipends, accessible communication materials, etc.), and security measures.

Risk assessments should obtain information about context-specific gender norms and household decision-making dynamics to inform the targeting process and mitigate the potential for household tension and intimate partner violence. Key informants at NGOs implementing cash programmes noted that they make efforts to target women in the household as the direct recipients of the cash as they believe women are more likely to spend the money on critical items such as doctor’s visits, school fees and food. However, many key informants stated that practitioners need to gain a better understanding of the impact of targeting women on household dynamics and the risks of GBV, and need guidance on how

42 IRC and USAID, above note 26.
best to monitor this during programme implementation. Similarly, some respondents in Afghanistan reported increased household tension, while key informants working in cash and protection programmes in Cameroon reported observing increased household tension, anger from men in the community and incidents of domestic violence in situations where women were being targeted as direct cash recipients. A few informants in both countries felt that the decision to target women in the household was irrelevant or insignificant because women most often hand the money over to men in order to keep it safe in this context. Many key informants highlighted the need for both men and women to participate in cash programme information sessions, and the need for counselling services and greater community sensitization efforts and messaging to mitigate any tension or backlash as a result of women directly receiving the cash.

Risk assessment during programme design and monitoring procedures should also consider how to diffuse community tension in order to improve the safety of cash programming. In both contexts, respondents expressed that their participation in cash programming led to tension in their communities, including anger and jealousy, as well as pressure to share their cash with neighbours. Key informants also discussed the role of cash programming in exacerbating tensions between host communities and displaced communities where members of host communities were not included in cash programming despite their own situations of extreme poverty. To reduce community tension and the potential for exploitation, cash practitioners should ensure that community members fully understand the beneficiary targeting and selection process through information sessions and dissemination efforts, and should consider including members of the host community in vulnerability assessments and targeting processes.

Finally, drawing on the findings of this research, practitioners should ensure that risk assessment and monitoring activities are designed to identify common multi-level protection risks during cash delivery. Specific efforts should be made to assess and mitigate protection risks related to notifications of distribution, such as keeping notifications discrete and staggering distribution dates. At distributions, additional security personnel could bolster safety and monitoring and evaluation staff could evaluate whether there is adequate shade and water through the use of standard checklists. In addition, based on community feedback, cash actors should consider locating cash pick-up points as close to the community as possible in conflict-affected settings to reduce distances travelled and long waits to receive cash, and safety risks along travel routes and at cash pick-up locations should be assessed and mitigated where feasible. When assessing and selecting delivery mechanisms such as cash cards, mobile money or direct cash distribution, protection risks, particularly for individuals at high risk of violence or facing heightened barriers to participation

44 For practical tools and guidance on how to assess, mitigate and monitor protection risks in cash programming, see IRC and USAID, above note 26.
in programming, should also be assessed and mitigated. Finally, cash actors should consider strategies for helping participants to keep cash safe, such as lock boxes or security tips in cash programme orientations.

Ensuring meaningful access

Ensuring meaningful access to cash assistance involves both prioritizing those most in need and reducing barriers to participation for individuals or groups particularly vulnerable to discrimination or exclusion. In both Cameroon and Afghanistan, respondents felt that some of the most vulnerable members of their communities had been excluded, and key informants noted several challenges related to the vulnerability assessment and targeting processes. While some challenges will require changes to major institutions (such as the procedures of government ministries), some practitioners felt that the targeting process should be harmonized across agencies, with a few people noting that common vulnerability criteria, based on the government’s social protection strategy or policy, should be used across NGOs implementing cash programmes. In general, however, stakeholders are increasingly recognizing the need to move away from broad, standard categories of vulnerability which do not account for the heterogeneity within groups and the fact that some individuals within those categories are more vulnerable than others, though this can be difficult to implement in practice in the context of resource constraints, high needs for large segments of the population, and the short-term nature of humanitarian programming. In addition, there is a need to identify and link vulnerability to concrete protection risks and barriers, and apply measures to mitigate these, rather than assuming the inherent vulnerability or contributing to the victimization of certain groups. Vulnerability changes by location and over time and should be assessed on an ongoing basis using an intersectional approach to identify the multiple, complex protection risks and barriers to programme participation for individuals.

At the programme design stage, risk assessments should obtain input from diverse community members and aim to identify the barriers, needs and preferences involved, and where possible, tailor cash programming to meet the needs of groups at high risk of discrimination, violence or exclusion. From the outset, they should assess which modalities (cash, vouchers or in-kind) and available delivery mechanisms (mobile money, cash cards or cash) are most appropriate for, and enable the participation of, different populations. For example, older people with limited technology literacy face information and communications barriers in accessing mobile money. In Afghanistan, women have greater difficulty collecting cash because of the distances to disbursement centres, the need to find escorts and the fact that many lack national ID cards. Although it is not always feasible to have multiple modalities available in one area or programme, it may be possible to provide some accommodations to reduce barriers for those most at risk. For example, cash could be brought closer and directly distributed to people with limited mobility and female heads of households who cannot travel long distances to cash collection points. Assessments should aim to identify
environmental, attitudinal and institutional barriers, and these should inform the design of programmes in order to facilitate direct access to programme information, registration opportunities, distribution notifications and cash collection points. Further, greater coordination with other programmes is needed to ensure that cash practitioners can refer socio-economically vulnerable people to other specific programming for which they might be eligible.

Accountability

Given the significant protection risks identified in both contexts, as well as the variability between contexts, effective mechanisms for monitoring participants and enabling them to report concerns, complaints or protection-related incidents are imperative to implementing safer cash programmes and ensuring accountability in aid to affected populations. PDM tools should collect data on protection risks and inform adaptations to programme design where needed. Recognizing that brief surveys rarely foster the disclosure of sensitive protection information, cash actors should also consider other methods, such as periodic FGDs, in-depth interviews and community consultation, to allow for more in-depth exploration of sensitive issues such as increasing household or community tensions related to cash disbursements.

Cash practitioners should ensure that effective community reporting mechanisms, such as hotlines, complaint boxes, and community-based committees, allow for barriers (such as long wait times or high fees to access cash) to be reported. In addition, these channels should allow for the safe and confidential disclosure of sensitive protection issues such as extortion, discriminatory treatment or acts of violence, and should be linked to immediate responses. As noted by key informants, greater collaboration between cash and protection practitioners is needed to ensure timely referrals of protection cases that arise in cash programming. The findings of this research confirm the need to mainstream protection in cash programming wherever possible, such as including protection indicators in cash monitoring and evaluation frameworks and including minimum standards for safe cash programming in standard operating procedures for interagency cash working groups. Finally, training and capacity-building of cash actors on protection issues and concepts, as well as potential protection risks and mitigation strategies in cash programming, are urgently needed.

Participation and empowerment

While the IRC made efforts to engage communities at all research sites to some extent in both the targeting and monitoring of cash programming, protection risks and barriers due to lack of information arose in both Cameroon and Afghanistan. In order to support the empowerment, capacity development and participation of all community members, practitioners should seek their input from the outset and ensure that programmes are designed to enable the full participation of socio-economically vulnerable groups in programme activities.
Efforts should be made to ensure that all community members have access to information, while maintaining the confidentiality of programme participants. Increased transparency and ongoing information-sharing with the community—particularly regarding programme objectives, eligibility and targeting, programme registration opportunities, and programme structure, including disbursement amounts—can reduce barriers to participation. Measures should also be taken to increase confidentiality for participants, reduce reliance on intermediaries and enable more direct participation by all eligible participants, or if this is not possible, to increase oversight of intermediaries and develop strategies to reduce theft and other associated risks. Further research is needed to better understand the protection risks and mitigation strategies that might work well in certain contexts and for specific vulnerable groups.

**Conclusion**

This research aimed to fill a gap in global knowledge around protection risks and barriers that may arise for certain vulnerable groups during cash programming in humanitarian contexts. The results from conflict-affected contexts in two countries found that barriers to participation and protection risks, including violence, theft, bribery and community tension, may arise at all phases of the cash programming cycle, from the initial targeting to the delivery to and use of cash by participants, and that these may disproportionately impact socio-economically vulnerable groups. However, it is important to note that the research findings and recommendations do not point to a shift away from CBIs. Rather, given the many critical benefits of cash programming and the community and donor preferences for this form of aid, it is essential to ensure that adequate measures are in place to prevent and reduce harm to recipients and increase their feelings and experiences of security at every step of the programme cycle. As the application of CBIs increases, practitioners must thoroughly examine barriers to participation, identify the potential risks of cash programming, and develop mitigation strategies during programme design and implementation in order to ensure that programmes are achieving the maximum positive impact for vulnerable populations in humanitarian crises. This requires increased investment in protection mainstreaming and further research on protection risks and outcomes for specific vulnerable populations and across various contexts, to complement the increased commitment to cash-based programming globally.
Lex Innocentium (697 AD): Adomnán of Iona – father of Western jus in bello

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James W. Houlihan practiced law in the Irish midlands for forty years. On his retirement he completed an MA and PhD at University College Dublin. His book, entitled Adomnán’s Lex Innocentium and the Laws of War, based on his PhD thesis, is due for publication by Four Courts Press, Dublin, in the summer of 2020.

Abstract

This article is concerned with an Irish law dating from 697 AD, called Lex Innocentium or the Law of the Innocents. It is also known as Cáin Adomnáin, being named after Adomnán (d. 704), ninth Abbot of Iona, who was responsible for its drafting and promulgation. The law was designed to offer legislative protection to women, children, clerics and other non-arms-bearing people, primarily, though not exclusively, in times of conflict. Today, the laws of war fall into two categories: those attempting to regulate when it is lawful or just to go to war, now called jus ad bellum, and those attempting to limit the awful effects of war by stipulating how it should be properly conducted (for instance, in providing for non-combatant immunity), now called jus in bello. By proscribing the killing and injuring of non-arms-bearing people, Lex Innocentium is an in bello law, and by virtue of its being the first known such law, Adomnán, its author, is the father of Western jus in bello.

Keywords: Adomnán, Lex Innocentium, Law of the Innocents, Cáin Adomnáin, laws of war, early medieval Ireland.
Introduction

Those involved in international humanitarian law (IHL), whether in its enactment, implementation or enforcement, must wonder from time to time how the issues with which they are concerned were treated in former eras. After all, problems of non-combatants (used here in the colloquial sense) in times of war, and how to treat prisoners of war and the wounded and sick, are not new— they are as old as warfare itself. The Geneva Conventions of 1949 and their subsequent protocols represent the modern interpretation of the *jus in bello* concept and give it legislative expression. Surely the idea that non-combatants, for instance, should have some form of protection or immunity in the course of conflict must have existed from the earliest times? Dr Ahmed Al-Dawoody has pointed to references in the Qur’an and other early Islamic legal texts which address issues very similar to those covered by the Geneva Conventions, and studies have examined efforts made in other societies such as the Pacific nations and Somalia. But what of the Christian West?

Historians of the laws of war have pointed to the Peace of God (Pax Dei) movement in the tenth and eleventh centuries as the earliest example of *in bello* considerations being given a measure of legislative attention in the West. A series of church councils in various parts of present-day France proscribed acts of violence against churches, unarmed clergy and poorer lay persons, and unprotected women. The ordinances of these councils, of course, do not meet modern understandings of what constitutes a *jus in bello*. They vary considerably from council to council; they often include extraneous material such as strictures on errant clergy; and, like *Lex Innocentium*, they do not apply exclusively to violence during the course of war. It is fair to say, however, that “[t]he goal of the Peace movement was to protect the ‘civilian’ victims of warrior violence”. In recognizing the non-combatant and in affording him or her a measure of protection in times of strife, the Pax Dei movement justly takes its place in the history of *jus in bello*. It is an expression of the concept that war and violence


should be confined to those who bear arms and that those who do not should not be molested and should have protection under the law.

As we shall see, this is the concept underpinning Lex Innocentium, as it is the concept, given expression in Part IV of Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, underpinning that part of jus in bello/IHL in the modern world which dictates that wars should be fought by the armed forces on either side and that civilians should not be involved. It is this shared concept that links Lex Innocentium, Pax Dei and modern IHL, although they differ hugely in the societies in which they operate. All three, however, applied the concept to the circumstances of violence and warfare pertaining in their societies at the time, and with which they had to contend. Some may be surprised that historians have found Pax Dei to be the first legislative expression of this concept in the Christian West, but this writer can confirm their finding (excepting, of course, Lex Innocentium) after an extensive study of such sources as classical authors including Aristotle and Cicero, the Christian Gospels, late Antique legislation, early church councils, the Church Fathers, the so-called Barbarian Laws, and acta of the Merovingian church councils and Carolingian capitularies. The absence of in bello is largely explained by the dominance of ad bellum thinking in early western thought; this was reinforced by the influence of St Augustine, whose just-war attitudes were primarily concerned with the question of when it was just to go to war, with significantly less emphasis on right behaviour during the course of war. The right to go to war (ad bellum) dominated at the expense of considerations of moral conduct during the course of war (in bello). In fact, the distinction between the two was not made. The way was not clear for the full expression and development of in bello thinking until the period of raison d’état in the late eighteenth and early nineteenth centuries, as described by Carl von Clausewitz in his On War. With an acceptance of the sovereign’s inherent right to wage war, ad bellum thinking became, for a while, redundant, thus leaving a space for thinking on what was acceptable behaviour during the course of the wars that sovereigns chose to wage, or jus in bello.

The purpose of this article is to bring to the attention of the IHL community, and the wider public, an Irish law dating from 697 AD which, in many ways, anticipated that thinking and, indeed, the thinking behind the

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5 See James W. Houlihan, *Adomnán’s Lex Innocentium and the Laws of War*, Four Courts Press, Dublin, forthcoming, Chaps 1 and 2, including citation of the sources, for a detailed analysis.
9 R. Kolb, above note 6, p. 2.
Geneva Conventions themselves. Historians of the laws of war are largely unaware of *Lex Innocentium*, but some other historians who have referred to it have compared it to the Geneva Conventions, with one making the observation that “it is thus far from hyperbolic exaggeration to liken *Lex Innocentium*, concerned as it was with the effects rather than with the fact of war, to the Geneva Conventions”. Before studying in a little detail this “early Geneva convention” it is necessary, in order to understand its terms and the background in which it operated, to take a brief look at certain aspects of the Irish world of the late seventh century that produced it, and at its author, Adomnán. Its provenance will then be established, including the fact and place of its enactment and the surviving manuscripts containing its terms. The law’s core provisions will be considered, from which its *in bello* credentials will be manifest. Some suggestions will then be made, by way of explanation, as to why an *in bello* law emerged, so uniquely, from late seventh-century Ireland. Finally, the position will be summarized and some conclusions will be drawn.

**Setting the scene**

Ireland was never formally part of the Roman Empire, and this fact alone made it different in many respects from the rest of Western Europe, although it had not been totally isolated. It was a rural society; there were no cities, at least initially. Power structures, both ecclesiastical and secular, also differed from those in continental Europe. By the seventh century, a characteristic of church organization in Ireland was the model based on monastic (broadly defined) institutions. Iona (on the west coast of present-day Scotland), of which Adomnán was abbot from 679 to 704, was founded by St Columba in about 563. By the time of his death, Columba had been responsible for the establishment of a number of monastic foundations both in Ireland and in northern Britain. As a

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10 One notable exception is Matthew Strickland, “Rules of War or War without Rules? Some Reflections on Conduct and the Treatment of Non-Combatants in Medieval Transcultural Wars”, in Hans-Henning Kortüm (ed.), *Transcultural Wars from the Middle Ages to the 21st Century*, Akademie Verlag, Berlin, 2006, pp. 114–117. Unfortunately Strickland was not aware that the text of *Lex Innocentium* was available.


consequence, there existed a network of authority and communication linking these monasteries on both sides of the Irish Sea. In his capacity as Abbot of Iona, Adomnán was therefore a powerful and influential figure in late seventh-century Ireland. Indeed, Iona is described as holding “an island-wide, quasi-metropolitan or quasi-archiepiscopal jurisdictional prerogative”. Gradually, many of the larger monasteries acquired the characterization of urban settlements. They were economic and population centres, sometimes being the sites of temporary or seasonal markets. When Adomnán came to Birr (not part of the Columban confederation), in the middle of the island of Ireland, to promulgate his law in 697, he came to one such centre.

The fundamental political division and the basis of secular power in seventh-century Ireland was the tuath. This term covers both the basic geographical entity – i.e., the block of land – and the people, or kindred, or sept involved. The tuath was central to the maintenance of social and genealogical relationships. The laws defined rights and obligations by reference to an individual’s or category of individuals’ place in the tuath. Within the tuath, the king ruled and the various lesser members had clearly defined positions in reference to him. There were well over 100 such petty kingdoms. These small, lesser kingdoms were themselves part of a hierarchy of kingdoms comprised of larger tuatha, regional and sub-regional kingdoms and provincial kingdoms. There were five provinces, whose boundaries changed from time to time, but which were, in our period in the late seventh century, Ulster (north, but then confined to the northeast), Munster (south), Leinster (east), Connacht (west) and Mide (midlands).

Another unusual feature of seventh-century Ireland was its complex relationship with the Latin language. While there was, presumably, some knowledge of Latin in pre-Christian Ireland, particularly for trade purposes, the introduction of Christianity in the fifth century brought with it not just the language, Latin, but also its literature and intellectual tradition. In fact, writing in Irish, which flourished by the end of the seventh century, was a product of the introduction of the Latin alphabet, although there was a pre-existing limited vernacular literacy, as evidenced by the ogham inscriptions. But writing in Latin

14 C. Etchingham, above note 13, p. 222.
18 E. Johnston, above note 13, p. 72.
20 E. Bhreathnach, above note 17, p. 40.
also flourished during the course of the seventh century, as did the intellectual training it necessitated. The result was a high level of scholarship in such subjects as exegesis, grammar and computus. What was different about the Irish was that they learned Latin as a foreign, albeit specifically Christian, language rather than as a spoken form of Latin, gradually evolving into one or another of the Romance languages. This relationship with Latin, it is submitted, was fundamental to, and a major defining factor in, producing the Ireland of the late seventh century, of which the Venerable Bede could write, in a reference to foreign students coming to Ireland for learning,

Quos omnes Scotti libentissime suscipientes, victum et cotidianum sine pretio, libros quoque ad legendum et magisterium gratuitum praebere curabant. [The Irish welcomed them all gladly, gave them their daily food, and also provided them with books to read and with instruction, without asking for any payment.] It is fair to say, therefore, that the Ireland of the late seventh century was, with regard to learning, relatively advanced in Western European terms.

Irish society in the seventh century was regulated by a long-established, detailed and comprehensive set of laws. These laws covered all the normal concerns of society, except, of course, prior to Adomnán’s intervention, laws regulating the conduct of warfare. They constitute what has been described as early medieval Europe’s largest corpus of vernacular laws. Usually, fines were stipulated, with the unit of value being a cumal (a female slave or three milch cows). Society was hierarchical and inegalitarian. Central to the operation of the legal system was the concept of honour price, a system that placed a value on each category of person within the hierarchy. The king, lord, cleric and poet were of a higher rank and had higher honour prices as a result. Lesser ranks included the freeman and the unfree. Offences against a high-ranking person attracted a
higher penalty for the same offence than against a person of lower rank. Dependents, including a man’s wife, son or daughter, normally had an honour price of half the man’s honour price; they did not have an honour price in their own right. The exception to this was the position of children under seven—Bretha Crólige, an Old Irish legal text, reads: “The son of a king and the son of a commoner have the same honour-price up to seven years.” An unusual level of protection was therefore accorded to very young children. The oath of a person of high rank automatically outweighed that of a person of lower rank, and evidence from a female was not acceptable, except in exceptional circumstances. Adomnán, as we shall see, took on this deeply entrenched system in his Lex Innocentium and provided protection to a new category of person, the innocent or non-combatant, regardless of rank. It is therefore important to always remember that, in the early Irish society confronted by Adomnán, some people were more valuable than others. As well as gaps and deficiencies in the protection provided to some women and children, there was no specific provision for them as non-combatants per se.

Apart from the law contained in the law texts, there was a second type of law known as cán law. This was enacted law as distinct from customary law. The cán originated from the laws enacted at the óenach (fair) by the king for his tuath. These laws sometimes applied to an entire province and occasionally to all of Ireland and those parts of Britain under Irish influence. Lex Innocentium was expressly enjoined upon “the men of Ireland and Britain”, and, as we shall see, recognized non-combatant status and filled the lacunae in vernacular law.

Any outline of the nature of Irish society in the late seventh century must include a recognition that it was a violent society. What might be considered low-level violence, in medieval terms, was endemic. It is very difficult to say whether Irish society was more or less violent than contemporary neighbouring societies. The lack of a central authority in Ireland to compel observance with the law is sometimes seen as a source of violence because petty kings were required to take it upon themselves to ensure that the terms of judgments were implemented and act as enforcing sureties on behalf of clients (usually their freemen or lesser kings), thus leading to raiding, feuding and low-level warfare. An analysis of the chronicles for the 100-year period up to and including 697 reveals a recording of 187 acts of violence including killings, battles, sieges, burnings, laying waste, storming, slaughters, engagements and skirmishes. On the other hand, the system of local legal enforcement was not unique to Ireland, and not entirely a source of disorder and violence. In Francia, as in every early medieval kingdom,
the ruler exercised authority over a limited range of issues. Most were settled locally by violent action or the threat of it. In fact violence, as a self-regulating system, could have positive rather than negative effects on social order. This has been referred to as “the law of self help.” It is important to understand that there were no standing armies, and that all adult laymen (laici) in seventh-century Ireland were entitled and obliged to take up arms and “may be viewed as potential soldiers”, or as one historian put it, “it would have been as difficult a prospect for Adomnán as for us to identify a civilian or non-combatant element among them”. Their involvement would include participation in all levels of violence, from that connected with the collection of a debt right up to that involved in an expansionary expedition or the repelling of an invader. The point at which lower-level violence became “warfare” was never defined. There was no need for such a definition, and, as will become clear, because of the nature of violence and warfare in his society, Adomnán intended his law to apply in all circumstances. This state of affairs would have been known to all members of seventh-century Irish society and would not have required specific mention in the law. Clearly the frequency of this type of violence was a concern, and it was imperative to regulate it, on an agreed basis among participants, and to lay down accepted parameters such as the non-involvement of non-combatants.

This, then, is the context in which Adomnán introduced his law – but what of Adomnán himself? As we have seen, he was Abbot of Iona, ninth in succession to Iona’s founder Columba. He was head of a powerful and influential confederation of monasteries. Furthermore, he belonged to the same Úi Néill sept as Loingsech mac Óengusso – who became King of Tara and, as such, the leading claimant to the kingship of Ireland, in 695 – and clearly had close links with him.

The work for which Adomnán is best known today is Vita Columbae, his “Life of Columba”, not only for what it tells us about Columba, but also as one of the most valuable sources for the study of early medieval Ireland generally. It has been and continues to be an inexhaustible quarry from which historians draw nuggets of valuable information, not least about Adomnán himself and his mindset. It is of particular interest to note that Adomnán devotes four of his chapters to stories about Columba’s involvement with miscreants who have offended against “innocents” and in which he adopts an unusually harsh and

39 Máirín Ni Dhonnchadha, “The Lex Innocentium: Adomnán’s Law for Women, Clerics and Youths, 697 AD”, in Mary O’Dowd and Sabine Wichert (eds), Chattel, Servant or Citizen: Women’s Status in Church, State and Society, Institute of Irish Studies, Belfast, 1995, p. 59.
41 See J. M. Wooding et al. (eds), above note 11, for a modern assessment.
vehement tone. What did Adomnán mean by the term “innocents”? It is clear from a reading of the relevant chapters that he meant people in society who do not bear arms. Chapter II.25 is headed “Again Concerning Another Persecutor of Innocents”. This chapter concerns the slaying of a young girl by “a cruel man, a pitiless persecutor of innocent folk”. The immediately preceding chapters relate to violence against men who have undergone sacramental penance and, as such, would have been under the protection of the church and would not bear arms. As will be clear from paragraph 34 of *Lex Innocentium*, Adomnán included these men in his definition of innocents. The word *innocentia* derives from *innoc(u)us* or *innoce(n)s*, in English “innocuous”, not capable of causing harm. When juxtaposed against the remainder of society, men of full age who were expected to bear arms, the terms “innocents” and “non-combatants” were, in Adomnán’s time, synonymous.

Unfortunately, sources tell us nothing of the violence towards innocents that occurred in the years leading up to 697. The chronicles are silent as to the killing of innocents in the many violent incidents that are mentioned. Given human propensities, it is unlikely that there were none. It is more likely that the chronicles did not record such incidents because they were outside their scope and/or contrary to their desired style. Furthermore, it is extremely unlikely that Adomnán would have initiated a law for the protection of innocents if there was no need. As with so much of early medieval history, there are large and frustrating gaps in our information.

It is likely that Adomnán did not complete the writing of *Vita Columbae* until after his return to Iona from Birr in the summer of 697. At that time the Irish annals were being compiled in Iona and scholars consider that Adomnán, as Abbot of Iona, would have had an input into their content and, indeed, into the description of his law in the annals, as *Lex Innocentium*. Compared to the absence of references to non-combatants in the other sources referred to above, Adomnán’s explicitly articulated awareness is remarkable.

**Provenance**

Historians know of the enactment of the Law of Innocents from an entry in the *Annals of Ulster* for the year 697:


43 *Vita Columbae*, Chap. II.25.

44 J. E. Fraser, above note 11, p. 98.


47 J. W. Houlihan, above note 5, Chap. 3.

Adomnanus ad Hiberniam pergit et dedit Legem Innocentium populis.
[Adomnán proceeded to Ireland and gave the Lex Innocentium to the peoples.]49

The law came to be known as Cáin Adomnáin, but it was first referred to as Lex Innocentium, the Law of the Innocents, a term that is found in the earliest contemporary annal reference, the Annals of Ulster. The text of the law is known from two surviving manuscripts: a fifteenth/sixteenth-century manuscript in the Bodleian Library, Oxford (Rawlinson MS. B 512, pp. 48–51), and a copy made by Michéal Ó Cléirigh in 1627, now held in the Bibliothèque Royale, Brussels (O’Clery MS. 2324-40, pp. 76–85).50 Both copies can be traced to the same exemplar, a now lost dossier known as the “Old Book of Raphoe”, which itself cannot date from before the late tenth or early eleventh centuries, at a considerable remove from Adomnán’s own time. The text of the law, as we now have it, is a compilation consisting of a number of layers that were added from time to time over a period of 300 years, from the seventh to the late tenth or early eleventh century.51 Kuno Meyer, when he first edited and translated the text, divided it into paragraphs, numbered 1 to 53. All subsequent editions by modern scholars adopt the same paragraphing. All scholars are agreed that the first twenty-seven paragraphs date from about 1000 AD. While the bulk of the remaining paragraphs are written in Old Irish, 1–27 are written in Middle Irish. Paragraphs 28–32, 33 and 50–53 are considered to be discrete strata, with some scholarly debate as to their respective dating. This leaves paragraphs 34–49 as representing the core of the law, as drafted by Adomnán in 697, that is the subject of this article.52

Before examining these sections in detail, the exceptional list contained in paragraph 28 of the law merits our consideration. It is a list of ninety-one names of those who are stated to have guaranteed the law, forty clerical leaders and fifty-one lay. Included are all the primary ecclesiastical leaders, headed by the sage-bishop of Armagh, and lay leaders, headed by Loingsech mac Óengusso, described as King of Ireland, followed by the kings of the provinces and all the main sub-kings. Amongst the lay guarantors giving support to the claims of extra-territorial jurisdiction are Euchu úa Domnaill, identified as King of Scottish Dál Riada,53 and Bruide mac Derilei, King of the Picts (Cruithentúath).54 It is in paragraph 28 also that we learn that the place of enactment was Birr. It can be concluded that this

51 M. Ní Donnchadh, above note 45, p. 16; G. Máirkus (trans.), above note 11, p. 2.
52 J. W. Houlihan, above note 5, Chap. 5.
54 Ibid., p. 214.
paragraph dates from sometime between 722 and the end of the century, but is based on a list of names contemporary with the meeting in Birr in 697.\footnote{See \textit{ibid.}, pp. 178–221.}

**The core text**

In paragraphs 34–49 of the law, what Thomas Charles-Edwards calls “the sober legal text of the original edict”\footnote{T. M. Charles-Edwards, “Early Irish Law”, above note 32, p. 337.} is immediately evident. The language used and the tightly drawn legal phraseology mark these paragraphs out from the others. The law is stated in sixteen precise sections (in the modern legal sense of the term as applied to a section of an act). For instance, the term \textit{forus cána}, or a derivation of it, meaning “the enactment of the law”, is used in five of the paragraphs to tell the reader the content of the law.\footnote{Paragraphs 34, 36, 39, 41 and 48. See T. M. Charles-Edwards, above note 11, p. 562, n. 134.} This direct terminology is not used in any of the other strata of the text. In its language, the approach taken is what would be referred to today as a no-nonsense approach. We do not know the procedure followed in Birr in 697. It is likely that these paragraphs were read out to the assembly from a platform, erected in a suitable location outside the curtilage of the monastery.\footnote{It is thought that the ruined church in Church Lane, Birr, is the location of the early monastery. See Caimin O’Brien, \textit{Stories from a Sacred Landscape: Croghan Hill to Clonmacnoise}, Offaly County Council, Offaly, 2006, p. 73.} This would be the only means by which the contents could be made known to those attending. It has been suggested that even by 697, there was in existence, as standard, an approved form and technical vocabulary.\footnote{T. M. Charles-Edwards, “Early Irish Law”, above note 32, p. 336, n. 28.} It is reasonable, therefore, to conclude that a written document containing the provisions of the law was produced in Birr, and that a list was made of the names of those who were its guarantors.\footnote{A beautifully scripted and decorated manuscript, bound in leather and written on vellum, containing the terms of the law, is housed in Birr public library and is available for public viewing. It was made by a local artist, Margaret Maher, under the tutelage of calligrapher, Timothy O’Neill, on the occasion of the 1,300th anniversary of the promulgation of \textit{Cāin Adomnáin} in 1997 and was intended to replicate, as far as possible, how a written manuscript of the law would have looked in 697.}

34.
This is the enactment of the Law of Adomnán in Ireland and in Britain: the immunity of the church of God with her familia and her insignia and her sanctuaries and all the property, animate and inanimate, and her law-abiding laymen, with their legitimate spouses who abide by the will of Adomnán and a proper wise and holy confessor. The enactment of this Law of Adomnán enjoins a perpetual law for clerics, and females, and innocent youths until they are capable of killing a person, and of taking their place in the túath, and until their drove be known.\footnote{M. Ní Dhonnchadha (trans.), above note 50, p. 62.}
Before specifying crimes and penalties, paragraph 34 sets out the objective of the law. It is to provide immunity from violence for stated classes of persons, namely clerics, females, and innocent youths until they reach manhood, along with lay people, presumably penitents, who are subject to a confessor, and church property. All of these categories would have been recognizable as non-combatants or innocents because they do not bear arms. Clearly, church property also requires protection, the unarmed clerics not being in a position to defend it. This paragraph explains and, indeed, defines the meaning of the term *Lex Innocentium* used in the annals. For anybody asking, either today or thirteen centuries ago, what was the Law of the Innocents, this is the answer, provided in this opening paragraph of its legal text. This is its view of itself. It purported to be, and saw itself as, a law for the protection of non-combatants, and it contains, it would appear, the first legislative definition of what today is referred to as a “non-combatant” and was then called an “innocent”. This, in essence, is its link to modern IHL, which also seeks to protect the non-combatant in times of conflict. A modern statute, incidentally, is drafted in much the same way, usually by providing a preliminary paragraph or preamble indicating the intention of the legislation. This paragraph also stipulates the territorial jurisdiction of the law, Ireland and Britain. Presumably, by “Britain”, the text refers only to those parts of the island of Britain over which Iona had influence.

It is worth examining a little further the final part of this paragraph relating to innocent youths. Clearly it is stipulating the point at which young men cease to be innocents. It is when they are capable of killing a person and taking their place in the *tuath*. On leaving the category of “innocents”, they automatically become combatants; there is no other status available to them, unless they become clerics or penitents. The above translation of the final words “and until their drove be known” differs from that used by Meyer, which reads “and their (first) expedition is known”; by Márkus’, “and till their first armed conflict is known”; and by Ó Néill/Dumville, “and until their (first) expedition is made public”. This, then, is the distinction between innocent and combatant.

35. Whoever wounds and kills a clerical student or an innocent youth in transgression of the Law of Adomnán, eight *cumals* and eight years of penance for it for every hand involved, up to three hundred, one *cumal* and one year of penance for it for each one from three hundred to a thousand,

62 “For-tá forus inna Cána-sae Adomnáin bithcáin for clérchu ocus bancsála ocus maccu encu co-mbat ingníma fri guin duine ocus co-mbat inbuití fri tuaith ocus con-festar a n-immérgi.” See P. P. Ó Néill and D. N. Dumville (eds and trans.), above note 50, p. 37.

63 For Adomnán’s inclusion of penitents among his innocents, see J. E. Fraser, above note 11, p. 98.


67 G. Márkus (trans.), above note 11, p. 20.

68 P. P. Ó Néill and D. N. Dumville (eds and trans.), above note 50, p. 36.
and it is the same fine for the one who commits it and the one who sees it and does not prevent it to the best of his ability. If there be inadvertence or ignorance, half-fine for it, and there shall be an oath-equivalent that it is inadvertence and ignorance.69

Paragraph 35 goes on to stipulate penalties for offences committed against two of the categories indicated in 34, clerical students and youths.70 These penalties are designed to fill the lacunae in the protection offered by existing law. For instance, the vulnerable position of children between the age of 7 and manhood is dramatically improved by prescribing an eight-
cumal penalty for their killing. It is of particular interest that the law covers violence carried out not only by individuals but also by large numbers of people, making specific provision for armies of up to 300 men and of between 300 and 1,000. It is suggested that the involvement of such numbers of people, having regard to the population and nature of battle in our period, clearly constitutes warfare.71 We are left in no doubt that Lex Innocentium was an in bello law. It was not, of course, an exclusively in bello law; nor, indeed, was the body of laws that emerged from the Peace of God councils. Both sought to provide protection to innocents arising from violence, in all circumstances, including in the course of what today would be called military operations. Paragraph 35 goes on to anticipate and provide for onlooker’s liability by stipulating an increased penalty for a defaulting onlooker, over and above the sanction imposed under vernacular law. It is interesting to note that vernacular law exempted certain categories of person from the obligation to intervene – i.e., “clerics and women and boys and those who are not able to wound or protect or forbid and senseless persons and senile persons”.72 These people were unarmed and therefore unable to intervene; they were innocents. All others were presumed to be armed and capable of intervening; they were combatants.73

Paragraph 36 fulfils the objective in paragraph 34 to provide protection for the church and churches. The next three paragraphs might be loosely called enabling clauses – essentially, they are procedural and facilitate the operation of the law, dealing with such matters as judges, pledges and sureties.74 Paragraph 40 clarifies who is to be entitled to the fines in the cases of clerics and youths.

70 It should be noted that Ní Dhonnchadha’s translation reads “wounds and kills”, whereas Meyer, Máirkus and Ó Néill/Dumville all read “wounds or slays (kills)”. Ní Dhonnchadha explains her wording by pointing out that the penalties refer to death, not to injury (above note 64, p. 214). The text in Old Irish reads “Nech gonus ocus marbus...”. It is easier to make sense of the provision following Ní Dhonnchadha.
72 F. Kelly, above note 29, p. 353.
73 For a detailed discussion of the relevant vernacular Irish text, see J. W. Houlihan, above note 5, Chap. 3.
74 See ibid., Chap. 5, for further details.
41. The enactment of the Law enjoins that payment in full fines is to be made for every woman that has been killed, whether a human had a part in it, or animals or dogs or fire or a ditch or a building. For in cáin-law every construction is to be paid for, including ditch and pit and bridge and hearth and step and pool and kiln and every hardship besides, if a woman should die on account of it. But one-third is remitted for fore-maintenance if it be a senseless person that die on account of it. Of the other two-thirds, one-third belongs to whomsoever is entitled to it.

42. Whatever violent death a woman die, excepting that which results from an act of God or proper lawful union, it is to be paid for in full fines to Adomnán, including slaying and drowning and burning and poison and crushing and submerging and wounding by domesticated animals, and pigs and cattle. If it be the first crime on the part of the cattle, or the pigs, or the dogs, they are to be killed at once and half-due of the human hand for it. If it be not the first crime, payment is made in full fines.75

Paragraphs 41 and 42 deal with violent deaths of women and address the commitment given in paragraph 34 to legislate for their protection. Paragraph 41 appears to be concerned with the killing of women inadvertently.76 In both paragraphs the payment of “full fines” is stipulated for the killing of a woman—that is, the full seven cumals fine. There appears to be some doubt as to whether the éраic, the fixed penalty under vernacular law of seven cumals for the killing of a freeman, regardless of rank,77 was payable for the killing of a woman.78 One way or the other, the introduction of a seven-cumal fine by Adomnán was a major step in the provision of protection for women.79 It is also of the utmost significance that under the terms of paragraph 42, this fine in its entirety was to be payable to Adomnán, thus bringing women’s welfare, in a special way, under his protection. By virtue of this revolutionary provision, women are given protection in their own right rather than as a wife or daughter linked to a male’s honour price. They are now to have at least equal status with men in terms of the value of their lives under the law.

The struggle to change attitudes, as we know from similar struggles in the modern world, must have been immense, and is reflected in the Middle Irish preface

75 M. Ní Dhonnchadha (trans.), above note 50, pp. 64–65, for both paragraphs 41 and 42.
76 There may be some question about this. While eDIL (the electronic Dictionary of the Irish Language) would suggest that the word used in the text, ro-marbthar, would translate as “has been slain”, and this is followed by both Meyer and Ó Néill/Dumville, Ní Dhonnchadha prefers “has been killed” (above note 64, p. 230), as does Márkus, thus enabling a distinction to be made between paragraphs 41 and 42.
77 F. Kelly, above note 29, p. 126.
78 M. Ní Dhonnchadha, above note 45, p. 22. Payment of the éraic for the killing of women is mentioned in the law tracts: see, for instance, F. Kelly, above note 29, pp. 78, n. 79, 134, n. 71.
79 If it was already payable, this new fine would be in addition.
to the text.\textsuperscript{80} In paragraph 42, “Adomnán envisioned a panoply of horrors arising from war”,\textsuperscript{81} which are listed out in detail. These provisions were, of course, designed to provide protection for women from violence in all circumstances including in warfare, but not confined to it. The detailed listing of types of violence is required, it is suggested, to pre-empt possible excuses or defences. It is noteworthy that no provision is made in paragraph 42 for deaths caused by large numbers of people, as was done for clerics and youths in paragraph 35. In view of Adomnán’s obvious concern for women, it is unlikely that this was omitted by design. Did the provisions of 35 carry over into 42? We have no idea today as to whether each paragraph would have to stand on its own merits. These questions can be asked; it is unlikely that they can be answered. While it is a little confusing that Adomnán deals with deaths caused by dangerous domestic animals in 42 rather than 41, it is interesting to note that he makes the same distinction between animals which attack for the first time and those that have exhibited a prior “vicious propensity” as was made in modern Irish law of dogs up to recent times.\textsuperscript{82} Though paragraph 41 appears to be concerned with the inadvertent killing of women only and is therefore somewhat marginal for us, it does illustrate Adomnán’s attitudes. It is remarkable that he is concerned with “the workplaces of women, and of servile women in particular”.\textsuperscript{83} It is most noteworthy that Adomnán stipulates that the full fine will not be paid to him in the case of the death of a senseless woman and directs that one third of it should go to those who have cared for her in life and one third to whoever would be entitled under the law (as distinct from Adomnán’s law). Apart from compassion, this illustrates Adomnán’s concern not to undermine the position of the mentally ill in society and of those who care for them.

Paragraph 43 refers to two concepts found in vernacular early Irish law. The first is what would today be called counterclaiming, and the second could be called, in modern parlance, agency fees.

44.
One eighth of everything small and large to the familia of Adomnán for the wounding of clerics and innocent youths. If it be a non-mortal wound that anyone inflict on a woman or a cleric or an innocent youth, half seven cumals from him, fifteen séts from [related] fine (kindred) and unrelated fine for their accompliceship. Three séts for every white blow, five séts for every spilling of blood, seven séts for every wound requiring a staunch, a cumal for every injury requiring attendance and the leech’s fee besides. It amounts to half of the fines for murdering someone if it be more serious than that. If it

\textsuperscript{80} Paragraphs 16–27. For an English translation of these paragraphs, see G. Markús (trans.), above note 11, pp. 12–16.
\textsuperscript{81} J. E. Fraser, above note 11, p. 95.
\textsuperscript{83} M. Ní Dhonnchadha (ed. and trans.), above note 64, p. 230.
be a blow with the palm or the fist, an ounce of silver for it. If it be a livid or red mark or a swelling, six scripuli and one ounce [of silver] for it. Women’s hair-fights, five wethers for it. If it be woman-combat with degradation, three wethers for it.84

Paragraph 44 is notable in that it again, like paragraph 34, pulls together the three main categories of innocents, women, clerics and youths, and sets out the penalties that are to be imposed on anyone who uses violence towards them resulting in a variety of injuries short of death. It appears that the general principle for these offences is that one eighth of the stipulated fine is added on to cover Adomnán’s collection fee, thus ensuring that the injured party enjoys the maximum compensation.85 The fines are carefully graded according to the gravity of the injury, from the minor offence of a white blow, which leaves no mark, to a serious injury requiring the attendance of a physician, and on to more serious injuries which attract fines amounting to half the fines for murder.86 While many of these offences appear to be domestic in nature, they were envisaged as equally arising in the course of inter-sept conflict, all of which septs had subscribed to the law and had agreed to be answerable to Adomnán and his community for breaches.

45. Men and women are equally liable, then, for all fines small and large from this up to woman-combat, except [where it results in] outright death. For this is the death that a woman deserves for her killing of a man or a woman, or for ministering poison from which one dies, or for arson, or for digging beneath a church, to wit, to be put in a boat of one paddle at a sea-marking out at sea, to [see if she will] go ashore with the winds. Judgement on her in that regard [belongs] with God.87

Paragraph 45 continues the theme of crimes committed by women and makes a significant concession to them in respect of penalty for some serious crimes which would, if committed by a man, warrant the death penalty. These crimes include the killing of a man or a woman by a woman, murder by poisoning, arson and undermining the structure of a church. For lesser crimes, men and women are to be liable for the same penalties. It has been suggested that the

84 M. Ní Dhonnchadha (trans.), above note 50, p. 65.
85 M. Ní Dhonnchadha, above note 45, p. 27. It should be noted that Ní Dhonnchadha’s translation reads “for the wounding” and she is followed by Ó Néill/Dumville (above note 50, p. 44), whereas Meyer translates as “slaying” (above note 50, p. 29), as does Márkus (above note 11, p. 22). The sentence in the text reads “Ochtmath caich bicc ocus caich móir do muntir Adomnán di guin clérech ocus mac n-ennac” (P. P. Ó Néill and D. N. Dumville (eds and trans.), above note 50, p. 45). From the point of view of making sense of the paragraph, “slaying” seems correct on the basis that “wounding” is covered for women, clerics and children in the second sentence and it is already clear that the entire fine and not one eighth is payable to Adomnán (paragraphs 41 and 42) for the killing of women, hence their exclusion from the first sentence. See F. Kelly, above note 29, pp. 131–133, for wounding generally.
87 M. Ní Dhonnchadha (trans.), above note 50, p. 66.
equivalent of a death penalty for digging under a church must imply a seriously criminal objective, or perhaps it reflected the sacrilege involved. Rather than the death penalty, the offending woman should be put in a boat with only one paddle and be towed out to sea for a mile or so, and be set adrift, at the mercy of the winds. (The text says that she is to be provided with a pot of gruel.) God’s judgement will determine her ultimate fate, not man. This is a remarkable concession by Adomnán, surely reflecting some view on his part regarding an inherent difference in women’s relationship with violence relative to men’s.

Paragraphs 46 and 47 deal with secret killing, which in early medieval times was viewed as being more serious than open killing. The next two paragraphs, 48 and 49, are, like 37, 38 and 39, procedural in nature. They do not contain substantive laws but rather detail a practical aspect of the process of levying and collecting the fines. Once again Adomnán is at pains to clarify the finer details of the workings of his law and so to avoid any misunderstandings that might undermine its effectiveness.

**Why Ireland – why 697?**

One might wonder why a law such as this emerged, quite uniquely, from Ireland in the late seventh century. There were many factors present in Irish society of that time, some unique to Ireland, which, taken together, facilitated and encouraged the making of an *in bello* law. Clearly, there was an obvious need for such a law – otherwise Adomnán would not have drafted it and would not have gone to such pains to win acceptance for it. Furthermore, at that specific time, there was a fortuitous confluence of ecclesiastical and lay power in the persons of Adomnán and his kinsman Loingsech, King of Ireland. The enabling infrastructure was there in the form of a monastic confederation with an existing nationwide organization, and an established and widely accepted legal system. The latter accepted the inevitability of violence and adopted it into its enforcement system through the “law of self help”. Two other factors merit further consideration.

Ireland was, broadly speaking, free from the threat of invasion from outside. This was not the case elsewhere. From Greek and Roman times there was always an “enemy at the gate”, and this was deeply ingrained in the psyche of many societies, whether those enemies were barbarians, non-Christians or

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88 M. Ní Dhomhnaill (ed. and trans.), above note 64, pp. 239–240.
90 This is inadvertently omitted from Ní Dhomhnaill’s translation. It is included in G. Márkus (trans.), above note 11, p. 23; and P. P. Ó Néill and D. N. Dumville (eds and trans.), above note 50, p. 44.
91 M. Ní Dhomhnaill (ed. and trans.), above note 64, p. 243; and see F. Kelly, above note 29, pp. 219–221, on setting adrift generally.
93 See J. W. Houlihan, above note 5, Chap. 7, for a detailed analysis.
heretics.\(^{94}\) In Adomnán’s own time, Visigothic Spain was under threat from the forces of Islam and due to collapse in 711.\(^{95}\) No one questioned the justness of the cause in wars against these “other” peoples. \textit{Jus ad bellum} considerations applied to the exclusion of \textit{jus in bello}. It is of considerable interest to note that the Peace of God movement in Francia emerged at a time when, briefly, the warrior class was freed from a preoccupation with any perceived threat from outside.\(^{96}\) Such violence as existed was among themselves, and non-combatants were suffering. This demanded \textit{in bello} legislation and, because of the absence of external threat, society had the space to address it. It is clear, therefore, that external threat did not produce conditions conducive to \textit{in bello} law-making, whereas conditions in late seventh-century Ireland, as in late tenth-century Francia, where there was no “enemy at the gates”, did.

In a society where “honourable warfare” was acceptable,\(^{97}\) and each king was entitled, as of right, to initiate it, it is not surprising that markers would be laid down as to how it should be conducted. One is reminded of the conditions that emerged in eighteenth- and nineteenth-century Europe, the period of \textit{raison d’état}, where it came to be considered legitimate for the sovereign to wage war, almost as an extension of diplomacy, by virtue of his or her sovereignty.\(^{98}\) This rendered redundant the concept of \textit{jus ad bellum}, and allowed \textit{jus in bello} to be developed. Seventh-century Ireland was similar, to the extent that the right of a king to attack his neighbour could not be challenged, thus allowing and encouraging the adoption of a \textit{jus in bello}. Again, this is the prism through which \textit{Lex Innocentium} must be viewed: a coming together of the leaders of a society to make distinctions between what was justified and not justified, and to lay down ground rules for the conducting of violent interactions between themselves—interactions which all of them, without exception, knew would continue. In contrast to some societies, there was little expectation or reliance on a king’s peace being imposed from above.\(^{99}\) In fact, that expectation would inhibit a society from coming together to enact a law such as \textit{Lex Innocentium} because the hoped-for king’s peace would render it unnecessary.\(^{100}\)

These and many other factors combined to make seventh-century Irish society fertile ground for a \textit{jus in bello}. As always however, these factors are not, in themselves, a sufficient explanation, without the active intervention of an individual. “Cometh the hour, cometh the man” is as apt a truism in our search for an explanation of \textit{Lex Innocentium} as in any other historical study that might come to mind. It is probable that there were factors in the 1860s that would have

\(^{94}\) W. C. Brown, above note 37, p. 20; C. Wickham, above note 17, p. 43.
\(^{95}\) C. Wickham, above note 17, pp. 139–149.
\(^{96}\) T. Head and R. Landes, above note 3, p. 10.
\(^{98}\) R. Kolb, above note 6, p. 2.
\(^{100}\) \textit{Ibid.}, p. 71. Brown argues that Charlemagne “made new claims about the power of central authority to regulate the use of violence” which countered the “far older norms that were still well entrenched among the Franks, namely the norms surrounding the personal right to violence and violent vengeance”.

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helped in the formation of what became the International Committee of the Red Cross, but a historian of those events would be aware that the decisive factor was the initiative taken by Henry Dunant following his experience of the aftermath of the battle of Solferino in 1859. Similarly, a scholar of Lex Innocentium, and the jurisprudence of warfare in general, seeking an explanation for the emergence of a *jus in bello* from late seventh-century Ireland will see as the primary answer Adomnán and his intervention in Irish affairs in 697. Whether he acted, like Dunant, in response to a traumatic personal experience cannot be known for certain, although this is suggested in a number of Middle Irish sources. The prologue to *Lex Innocentium* and, in particular, paragraphs 6–15 explain the circumstances which impelled Adomnán to introduce his law. Adomnán and his mother Rónnat are described as arriving at the aftermath of a battle in Brega, in present-day County Meath, where scenes of the most awful violence are encountered.

Of all they saw on the battlefield, they saw nothing which they found more touching or more wretched than the head of a woman lying in one place and her body in another, and her infant on the breast of her corpse. There was a stream of milk on one of its cheeks and a stream of blood on the other cheek.

Historians have speculated that these oft-repeated tropes reflect a tradition, which had gained currency by the tenth century, that Adomnán had had a personal experience which inspired him to introduce his law—that he had had a “Solferino moment”. It is reasonable to conjecture that only a significant shock resulting from a first-hand personal encounter, similar to that experienced by Dunant, would be sufficient, firstly, to instil in Adomnán his singular awareness of innocents and, secondly, to motivate him to undertake the exceedingly onerous task of their protection. For Adomnán to be so aware of innocents, he must have experienced for himself the horror of their involvement in the carnage of war, rather than having been informed of it by others. This is particularly remarkable against a background of the complete absence of any similar awareness being apparent in other sources, Irish or continental. Here and there, provisions for the protection of widows and orphans are found, but none for the non-combatant


102 For an English translation of these paragraphs, see G. Markús (trans.), above note 11, pp. 11–13.

103 Ibid., p. 11.

104 M. Ó Dhonnchadh (ed. and trans.), above note 64, p. 33.


106 See H. R. Loyn and John Percival (eds and trans.), *The Reign of Charlemagne: Documents on Carolingian Government and Administration*, Edward Arnold, London, 1975, where Charlemagne did take widows, orphans and “humble folk” or “less powerful people” under his protection. See, for example, the following capitularies: Mantua 1, 781, p. 50; Concerning the Saxons 1, 797, p. 54; General Capitulary for the Missi 5, 30 and 40, Spring 802, pp. 54, 76–77, 79; Special Capitularies for the Missi 15, 802, p. 81; Aix 2, 802–03, p. 82.
per se until the Peace of God movement. That awareness, that concept, in its explicit expression, belonged to Adomnán.

Summary and conclusions

This article draws a parallel between Lex Innocentium and modern jus in bello. The analysis of any legal document is difficult – the interpretation of a modern statute requires the skills of a legal expert, well versed in the broader legal context in which the statute is intended to operate, and it is common for such experts to differ in their interpretations. When the statute in question is thirteen centuries old and survives in incomplete copies, often containing errors, made seven and eight centuries after the law’s promulgation,107 and the surviving sources for information on the legal system itself in which the statute was intended to operate are incomplete and inadequate,108 interpretation is perilous in the extreme. Add to that the thought processes, attitudes and prejudices accumulated over those thirteen intervening centuries in the modern mindset, and the capacity to understand becomes even more limited. It is not surprising, therefore, that at times, contradictions and apparent incoherences in the detail of the law are perceived. In broad terms, however, there are constants, and violence and killing is one of them. The concept of the non-combatant is another, and the notion that such an innocent should have a degree of immunity from violence exists today as it did, without doubt, in the mind of Adomnán in 697. As stated above, he was Abbot of Iona when the annals were being written there at the end of the seventh century, and it has been suggested that he would have taken an active interest in the content of the chronicle. He would, therefore, have chosen to call his law Lex Innocentium. His singular concern for the innocent, for those who do not bear arms, is further manifested in his recounting of episodes in Vita Columbae concerning innocents, written almost contemporaneously with his visit to Birr in 697.

While we must speculate about many aspects of Adomnán’s law and may not always be correct in that speculation, the fact that it was a law for the protection of those who do not bear arms cannot be doubted. This is clear not only from the name given to it in the annals, Lex Innocentium, but also from the declaration of intent in paragraph 34, which was followed through in the subsequent paragraphs with specific provisions for each class of innocent and careful detail on how the law would operate in practice. It is also clear that the law envisaged this protection applying not only in circumstances of violence generally, but also in war and in warlike situations, and each of its provisions must be read as applying in all such contexts. Mention is made in paragraph 35 of up to 1,000 men, which would constitute a substantial army in early medieval Ireland, where the warfare of the day was carried out by smaller bands of warriors. Adomnán recognized the

107 A quick glance through P. P. Ó Néill and D. N. Dumville (eds and trans.), above note 50, where attention is drawn to the differences in the two surviving texts, the omissions and mistakes, makes this clear.
difference between these warriors, being the bulk of males of full age in circumstances where a standing army did not exist, and those in society who did not bear arms. He articulated this difference, defined it by setting out who were innocents, and enshrined it in legislation which was designed to protect them. In his determination to protect innocents, Adomnán broke the mould in which pre-existing vernacular law had been cast; this was the magnitude of his task. In defiance of the legal system existing in his own time, he created a new category of person under the law: the innocent, the non-combatant. Rank was the underlying principle that underpinned the rest of the entire edifice of early Irish law. Adomnán disregarded it, by stipulating fines for death and injury which were to apply equally to all victims. All women and young men between seven and manhood were put on an equal footing with freemen under the law. While all categories were brought under Adomnán’s protection, women were treated in a special way, by the stipulation in paragraph 42 that all fines for their violent deaths were to be paid to Adomnán.

It is arguable that Augustine of Hippo, with his ideas on just war, can be seen as the father of *jus ad bellum* in the Western tradition. It is far from “hyperbolic exaggeration” to see Adomnán of Iona as the father of *jus in bello*, Birr as an early Geneva and *Lex Innocentium* as an early Geneva Convention.
Deciphering the landscape of international humanitarian law in the Asia-Pacific

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Abstract
The 70th anniversary of the adoption of the Geneva Conventions on 12 August 1949 provided an opportunity for reflection on international humanitarian law (IHL). This article continues that reflection and presents some fresh scholarship about and from the Asia-Pacific region. The region’s plurality leads to a complex and diverse landscape where there is no single “Asia-Pacific perspective on IHL” but there are instead many approaches and trajectories. This fragmented reality is, however, not a mess of incoherence and contradiction. In the following pages, the author argues for and justifies the following assessments. The first is that the norm of humanity in armed conflict, which underpins IHL, has deep roots in the region. This, to some extent, explains why there is no conceptual resistance to IHL, in the way that exists with the human rights doctrine. The second is that there has been meaningful participation of certain States from the region in IHL law-making. Thirdly, some Asia-Pacific States are among those actively contributing to the development of new or emerging areas relevant to IHL, such as outer space, cyberspace and the protection of the environment in armed conflict. This leads to the unavoidable issue of contradiction. How is it that in a region where such findings can be made

* Thanks to Sandy Sivakumaran and Roger Clark for their helpful suggestions.
(i.e., where there is discernible positivity towards the norm of humanity in armed conflict), there are so many armed conflicts with very serious IHL violations emerging? Should we reflect in a more nuanced way on “norm internalization” and “root causes”? These issues will be considered in the second section of the article. This examination leads to a third and final section, a concluding reflection on what all of this reveals about IHL in the Asia-Pacific. The real challenge for progressive humanitarianism, the author contends, is to traverse disciplines and to build on work done in, on and from the region in order to develop more informed and nuanced approaches to understanding the countries and societies of the region, moving on to study the process of norm internalization, and then developing creative and meaningful strategies for strengthening the links between that internalization, actual conduct on the ground, and norm socialization in the wider community.

**Keywords:** Asia-Pacific, international humanitarian law, perspectives, diversity, pluralism, norm of humanity in armed conflict, norm internalization, root causes, contradiction, contribution.

On the face of it, the four Geneva Conventions of 1949 have a 100% success rate, with all 196 States having committed themselves to abide by their terms. A generalist reader may be tempted to believe that all States have a common approach to international humanitarian law (IHL). The more discerning reader, however, knows that being party to the Geneva Conventions does not, unfortunately, equate with adherence to their provisions. States demonstrate vastly differing degrees of implementation and enforcement and have different understandings of certain concepts and terms. Self-identifying as democratic and human-rights-respecting is no guarantee against inhumanity, as the US-led “war on terror”, in several of its manifestations including renditions and Abu Ghraib, confirmed. The docket of the European Court of Human Rights evidences that some European States engaged in armed activities are not living up to what should be a collective vision of humanity at all times, whether in peace or in war.

What of the Asia-Pacific region? Like the rest of the world, the nations of the region are now all party to the Geneva Conventions, but while some States have

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1 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1951); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1951).


3 Many a quarrel has been and continues to be had over what the geographical concept of “Asia” entails. The present work views the “Asia-Pacific” region as including the countries of South, Southeast and East Asia, which are indisputably part of “Asia”, as well as the countries that are indisputably part of the Pacific Island nations. It does not include the countries of “Central Asia” (e.g. Turkmenistan) and those that are actually part of the “Middle East” (e.g. Iraq). This notion is obviously different from the
long implemented these in domestic law; others were late joiners, and a number of them have maintained substantial reservations or entered declarations or understandings that colour their engagement. Simon Chesterman has shown how Asia’s ambivalence towards international law is manifested through under-participation and under-representation. A plurality of perspectives from the region about wider international law is borne out in articles published in the *Indian Journal of International Law*, the *Chinese Journal of International Law*, the *Korean Journal of International and Comparative Law* and the *Asian Journal of International Law*. New works, such as *The Oxford Handbook of International Law in Asia and the Pacific* and *Asia-Pacific Perspectives on International Humanitarian Law*, present expert views on and from the Asia-Pacific region and reveal great diversity, with no all-encompassing single perspective. These publications take a non-linear, non-mechanical approach based on discrete topics within broad clusters of issues, indicating that efforts to decipher the region’s pluralism are not best facilitated by an intellectual straitjacket which diminishes the existence, meaning and value of diversity. They draw out two dominant features: firstly, conservatism and a tendency towards the centuries-old notion of the all-powerful State that rejects external scrutiny or controls, and secondly, diversity and fragmentation in terms of normative approach and practice.

Acharya rightly asserts that Asia is not “one”, and that there is no singular idea of Asia. Why should there be a single perspective in a region that is not drawn together into a grouping such as the European Union, which has common approaches and even coordinates external action in certain areas? The groupings that do exist, such as the Association of Southeast Asian Nations (ASEAN), the South Asian Association for Regional Cooperation and the Pacific Islands Forum are sub-regional, decentralized and of a loose nature. This reflects the reality that the countries of the region are diverse, in terms of ethnicity, religion, culture, United Nations’ “Asia-Pacific” grouping, which includes countries that are geographically not part of Asia (e.g. Cyprus and Saudi Arabia) and locates two countries that are in the Pacific region (Australia and New Zealand) in the “Western European and Others” grouping.

5 For example, Brunei acceded in 1991 and Myanmar in 1992.
6 For example, Australia, Pakistan, Vietnam, the Republic of Korea and China. Vietnam’s reservations to the Geneva Conventions are extensive – see: https://tinyurl.com/r67wv3k.
8 Available at: www.springer.com/law/international/journal/40901.
9 Available at: https://academic.oup.com/chinesejl.
10 Available at: https://brill.com/view/journals/kjic/kjic-overview.xml.
11 Available at: www.cambridge.org/core/journals/asian-journal-of-international-law.
history, legal systems, political structures, security situations, socio-economic development and roles in the international community. The accident of being neighbours or being located within a man-made geographical concept does not mean that they have, or should have, the same perspectives on or approaches to IHL. Take the degree of embedding of IHL in the armed forces. Australia and Indonesia may be direct neighbours, but their militaries’ approaches to IHL are profoundly different. The nations of Oceania, Australasia and Southeast Asia have rejected nuclear weapons, but four of the world’s nuclear powers are from the Asia-Pacific: two from East Asia (China and North Korea) and two from South Asia (India and Pakistan). And Japan, the one and only country to have borne the brunt of nuclear weapons in armed conflict, has a surprisingly nuanced approach to the prohibition of nuclear weapons. IHL in the Asia-Pacific region is very much contextualized, depending on factors such as country, local and international politics, culture, religion, time frame, political doctrine, actors and situation of violence. These factors obviously mean that assertions about IHL in the Asia-Pacific are not absolutely or equally applicable to every single country in the entire region. Universality seems only to relate to regional participation in the Geneva Conventions and the Convention on the Rights of the Child.

The uncovering and analysis of the complex and large-scale realities of IHL application in such a large swathe of the globe is not facilitated by applying rigid academic approaches such as tracking a single, narrow technical issue (e.g., the implementation of the duty to take precautions in attack) across every single country. The present author has, instead, drawn from close scrutiny of the literature, in particular the most recent and authoritative, and applied the experience of years of working in and on the region. In this way, it has been possible to extract convergence in perspectives and approaches. This method is not exceptional, but the endeavour is in itself an original contribution, and it facilitates an innovative entrée into deciphering the Asia-Pacific’s complex IHL landscape. The result is that the author is able to argue the following. First, the norm of humanity in armed conflict, which underpins IHL, has deep roots in the


17 See further below for the Japanese submissions during the advisory proceedings on the Legality of the Threat or Use of Nuclear Weapons and the complex interplay between Japanese culture, martial practices and IHL.

This, to some extent, explains why there is no conceptual resistance to IHL in the region, in the way that exists within the human rights doctrine. Second, there has been meaningful participation of States from the region in IHL law-making, both in terms of treaties and custom. Third, some Asia-Pacific States are actively contributing to the development of emerging or evolving areas relevant to IHL, such as weapons, outer space, cyberspace and the protection of the environment in armed conflict. Given the fragmented reality of the region, this leads inexorably to the issue of contradiction. How is it that in a region where there is discernible positivity towards the norm of humanity in armed conflict, there are so many armed conflicts with very serious IHL violations emerging? What happened to norm internalization? These issues will be considered in the second section of the article. This examination leads to a third and final section, a concluding reflection on what all of this reveals about IHL in the Asia-Pacific.

The nature of IHL in the Asia-Pacific is such that the present author does make some cautious generalizations; the grounds for making them are presented for the reader’s consideration in the first section, and the contradictions are addressed in the second. This paper is about the Asia-Pacific experience, and the author is not suggesting that such features are unique to this part of the world. It should also be obvious that the present work attempts to make sense of a complex situation. The approaches of many regional States, large and small, powerful and less so, are referenced in this paper. However, some States have practice that is more accessible, and the author has obviously had to exercise some selectivity for a publication of this nature. Readers should examine the cited sources for the details and reasoning that cannot be presented in this article.

Assertion 1: The norm of humanity in armed conflict has deep roots in the Asia-Pacific region

The countries of the Asia-Pacific region do not display conceptual or ideological animosity towards the norm that requires humanity in armed conflict, in contrast to their well-documented ambivalence about human rights. There is also nothing to suggest that IHL, as a collection of specific rules arising from that one fundamental norm, is seen as a foreign project imposed on the region. Review of the submissions during the International Court of Justice (ICJ) advisory proceedings on the Legality of the Threat or Use of Nuclear Weapons and the

19 This paper adopts Axelrod’s behavioural definition: “A norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way.” He argues that “[n]orms often precede laws, but are then supported, maintained, and extended by laws”, Robert Axelrod, “An Evolutionary Approach to Norms”, American Political Science Review, Vol. 80, No. 4, 1986, pp. 1097, 1106.
21 Written submissions: Democratic People’s Republic of Korea (DPRK), India, Japan, Malaysia, Marshall Islands, Nauru, New Zealand, Palau, Samoa and Solomon Islands (responses to submissions by Nauru and Solomon Islands), available at: www.icj-cij.org/en/case/95/written-proceedings. Oral submissions:
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory reveals that Australia, Bangladesh, the Democratic People’s Republic of Korea (DPRK), India, Indonesia, Japan, Malaysia, the Marshall Islands, Nauru, New Zealand, Pakistan, Palau, the Philippines, Samoa and the Solomon Islands presented themselves as great humanitarians and champions of the IHL regime. There were, however, some nuances. Japan, very interestingly, held that “the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation” and repeatedly emphasized the necessity of nuclear disarmament and a desire to promote nuclear disarmament, but studiously avoided discussing the legality of the use of nuclear weapons. Hirose explains that Japan takes a “realistic approach” because under the Japan–US Security Pact, Japan benefits from the so-called “nuclear umbrella” of the United States, and this has become an indispensable component of Japan’s security policy. Taking these positions, along with others, into account, the ICJ’s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons determined that the “fundamental rules [of IHL] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”. However, the rhetorical public embrace of humanitarianism illustrated above goes far back in time for some Asia-Pacific States. We can see something more sophisticated than a simplistic belief in a moral duty “to be kind to the needy”. Some of the earliest participants in IHL treaties and arrangements have been from the region. Three of the twenty-six participating nations in the Hague Peace Conference in 1899 were from the Asia-Pacific region: Siam, China and Japan. Siam, one of Southeast Asia’s great Buddhist warrior kingdoms, began to engage in IHL treaty participation as long ago as 1899, becoming party to Hague Convention II on the Laws and Customs of War on Land (1899), Hague Declaration IV (2) concerning Asphyxiating Gases (1899) and Hague Declaration IV (3) concerning Expanding Bullets (1899). The Thai Red Cross Society was founded in April 1893 as the Red Unalom Society, before the nation became a party to the then Geneva Convention. In fact, Yeophantong explains that King

23 S. Hirose, above note 16, p. 446.
24 Ibid.
27 For Thailand’s treaty participation, see the International Committee of the Red Cross (ICRC) database, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=TH.
Vajiravudh of Siam was open to merging both Western legal and political ideas with Buddhist values: he published a volume on international law in 1914, which included a substantial section devoted to explaining the laws of war.29 That engagement has continued to the present Thailand, which is a signatory to the Arms Trade Treaty (2013)30 and was one of the first States to sign and ratify the Treaty on the Prohibition of Nuclear Weapons (TPNW) on 20 September 2017, the first day it was open for signature.31

Humanitarian ideas do indeed have “deep roots in most Asian societies, being the products of complex social and religious systems”.32 Yeophantong argues that key influences on the evolution of humanitarian thought and practice, at least in the Southeast Asian region, are (1) communitarianism, meaning a shared existence with resulting common social obligations; (2) religion, faith and non-religious belief systems; (3) political theories on statecraft and just war; and (4) identity and security politics.33 Humanity in warfare in many cultures of the region predates the positivist IHL framework that emerged in Europe in the nineteenth century, and even the Western European chivalric culture in which too many scholars situate the roots of humanitarianism in armed conflict.34 India, China and Japan will be considered in the following paragraphs, but they do not stand alone. The many ethnic groups of the Indonesian archipelago35 and the Pacific islands36 had their own laws of war. Humanitarian concerns in war can be identified in Hinduism,37 Buddhism38 and Sikhism.39 For years, experts have been writing about an Islamic international law, with areas such as Islamic

29 Ibid.
33 P. Yeophantong, above note 28, p. 76.
35 Fadilah Agus et al., Hukum Perang Tradisional di Indonesia, Universitas Trisakti, Jakarta, 1999.
humanitarian law, the Islamic *jus ad bellum* and the Islamic *jus in bello*.\(^{40}\) Islam has played a major role in some conflicts in the region, such as in Indonesia’s Aceh.\(^{41}\) From the work done in the Philippines by Santos Jr and others, we can see that the common points between the Islamic law of war and IHL have provided a basis for dialogue with some Islamist fighters, notably the Moro National Liberation Front and the Moro Islamic Liberation Front, although not the more hard-line Abu Sayyaf group.\(^{42}\)

A closer examination of India, China and Japan explains further why, at an intellectual and cultural level, the concept of humanity in war has traction in the region. The use of force in ancient India was highly regulated. Sinha explains that “[i]n ancient times … the laws of war were designed to bring out the best and not the worst of human traits”.\(^{43}\) Largely based on *Manu’s Code of Law* (*Manava Dharmaśāstra* or *Manu Smriti*), which started to be compiled around 200 BC from earlier sources, these rules included the following:

1. “a warrior (*Kshatriya*) in armour must not fight one who is not so clad”;
2. “one should fight only one enemy and cease fighting if the opponent is disabled”;
3. “aged men, women and children, the retreating, or one who held a straw in his lips as a sign of unconditional surrender should not be killed”;
4. it was prohibited to attack “the fruit and flower gardens, temples and other places of public worship”;
5. “poisonous weapons should not be used, inasmuch as they involve treachery”; and
6. it was prohibited to use weapons that cause unnecessary suffering, such as poisoned or barbed arrows.\(^{44}\)

China is another country with an ancient tradition of humanitarianism in philosophy and the military sciences that predates Henry Dunant and even medieval European knights, so the advent of modern IHL was conceptually acceptable there.\(^{45}\) Some of these rules have been identified as far back as the

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\(^{43}\) M. Sinha, above note 37, p. 110.


\(^{45}\) For more on China, see Ru Xue, “Humanitarianism in Chinese Traditional Military Ethics and International Humanitarian Law Training in the People’s Liberation Army”, in S. Linton,
Spring and Autumn Period (770–476 BC) and the Period of the Warring Kingdoms (475–221 BC). These were eventually recorded, and two sources are particularly well known: Sun Tzu’s *The Art of War* and Sima Rangju’s *The Precepts of War*. *The Art of War* counselled a strategic approach reconciling fighting, a necessary evil, with Taoist principles. It recommended that (1) captured soldiers should be kindly treated and kept alive; (2) it is better to recapture an entire army than to destroy it, and to capture an entire regiment, a detachment or a company than to destroy them; and (3) the skilful leader subdues the enemy’s troops without any fighting. *The Art of War* described the noble commander as one who obtained victory with minimal violence, including to the enemy fighters; “a commander should not seek the total annihilation of the enemy”. Rangju’s work is “considered by all as a code of war which codified rules of law on warfare in Ancient China”. Scholars have also documented other ancient rules and practices concerning humane treatment of the disabled, the wounded, the sick and the dead in war. The Russo-Japanese War of 1904–05 saw the establishment of the Shanghai International Red Cross Committee (which became the Red Cross Society of China in 1912). 1904 was also the year that China became a party to the Geneva Convention of 1864. Of the other early treaties, China is party to Hague Convention III on Maritime Warfare (1899), Hague Declaration IV (1) prohibiting Projectiles from Balloons (1899), the Hague Convention on Hospital Ships (1904), the Geneva Convention on the Wounded and Sick (1906), and Hague Convention XI on Restrictions of the Right of Capture (1907). Today, China is also party to Additional Protocols I and II to the Geneva Conventions (AP I and AP II), and hosts the East Asia Delegation of the International Committee of the Red Cross (ICRC). Since November 2007, China has had a national committee on IHL as well as academic institutions dedicated to the study of IHL (for example, at Wuhan and Peking universities). As for practice, Ru Xue argues that the People’s Liberation Army (PLA) has long embraced humanitarianism in war, and has an active programme of IHL instruction.
Japan’s notorious inability to reconcile traditional practices with the international protection regime for prisoners of war (PoWs) in World War II has obscured a far more complex picture. Sun Tzu’s *Art of War*, with its Taoist principles balanced with shrewd pragmatism, was first introduced to Japan in the eighth century by the monk Kibino Makibi; “Since then, ‘Art of War’ has received the devoted attention of political and military leaders of Japan”. Knutsen has shown how in the fourteenth and fifteenth centuries, Japanese masters of *Heiho* (the Art of War) were catalysts for the dissemination of Sun Tzu’s teachings within the warrior community. These teachings are said to have influenced Japanese military philosophy in World War II, including the surprise attack on Pearl Harbour in 1941.

IHL is about humanitarianism, and Japan’s earliest IHL treaty participation dates back to its participation in the 1864 Geneva Convention, in 1886. The Japanese Red Cross Society was founded in 1877 as the Hakuaisha, or Philanthropic Society, to provide humanitarian assistance during a domestic armed rebellion. It later changed its name to the Japanese Red Cross Society and joined the Red Cross family in 1887. Japan indicated agreement with the principles of IHL by becoming party to almost all the IHL treaties between 1899 and 1907. Furthermore, Japan was the first Asian country to participate in the International Conference of the Red Cross and Red Crescent (the fourth, held in Karlsruhe, Germany). The Empress Shôken Fund, created in 1912 by the Empress of Japan, has since then been allocating grants to National Red Cross and Red Crescent Societies for projects involving disaster preparedness, health care, blood transfusion services, young people and first aid. Today, it is hard to deny that Japan’s humanitarian credentials in East Asia continue to be tainted by the shadow of World War II, but even so, the country presents itself as a

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59 Y. Hirama, above at note 57.
62 See above note 61.
63 See ratification table at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalBCountrySelectedxsp?xp_countrySelected=CN.
64 See *ICRC Newsletter*, No. 11, above note 61, p. 6.
champion of IHL and actively urges States from the region to enter into the Additional Protocols.66

These three country illustrations – India, China and Japan – do not stand in isolation. In 1996, Judge Weeramantry from Sri Lanka reminded the world about Hinduism’s two pivotal morality epics, the Ramayana (the story of Rama’s journey) and Mahabarata (The Great Chronicle of the Bharata Dynasty); these are morality tales involving profound reflections on human nature, law and justice, including the norms and practices of fighting in accordance with Manu’s Code.67 Hinduism (and also Buddhism, which has not been discussed in the preceding section due to lack of space) spread beyond India.68 Scenes from both epics are memorialized on stone inscriptions and adorn temples across Southeast Asia, from the oldest Hindu kingdom of the region (Funan, spanning parts of today’s Vietnam, Cambodia and Thailand) to Pagan (Burma/Myanmar), Angkor Wat (Cambodia), the temples of Bali (Indonesia) and Ayodhya (Thailand). The Ramayana and Mahabarata have been adapted for local audiences in Burma/Myanmar, Thailand, Cambodia, Laos, peninsular Malaysia, Java and Bali, “and the story continues to be told in dance-dramas, music, puppet and shadow theatre throughout Southeast Asia”.69 As for the dissemination of Sinic approaches to armed conflict, Sun Tzu’s teachings influenced Chinese fighting for centuries and have been traced in Mao Tse Tung’s own instructions; both inspired the operational approaches of modern Chinese, North Korean and Vietnamese armed forces.70 The Art of War’s influence in Japan has previously been considered. The use of Sun Tzu’s military strategies and tactics by the North Vietnamese general Vo Nguyen Giap, notably in the areas of knowledge of oneself and the foe, use of deception, and use of the strategic goal of breaking the enemy’s will, has been well studied.71

66 Also see Hitomi Takemura, “The Post-War History of Japan: Renouncing War and Adopting International Humanitarian Law”, in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.


71 The Art of War apparently became an American military education staple after the Vietnam War (for example, the Marine Corps teaching on strategic warfighting is founded on ideas about manoeuvre warfare taken directly from The Art of War): see “The American Experience and Sun Tzu: Highlights of Ways Americans Have Felt the Impact of Sun Tzu’s Philosophies”, available at: www.artofwarsunztru.com/america_experiences_sun_tzu.htm. See also Mark McNeilly, Sun Tzu and the Art of Modern Warfare, Oxford University Press, New York, 2014, pp. 11, 12, 21, 114; Mark Cartwright, “The Art of War”, Ancient History Encyclopedia, available at: www.ancient.eu/The_Art_of_War/.
Assertion 2: There has been meaningful participation in IHL law-making in the Asia-Pacific region

Treaties

The historic engagement of Thailand, China and Japan in the early IHL treaties has already been considered above.

Scrutiny of the three volumes of the *Final Record of the Diplomatic Conference of Geneva of 1949* show that some Asia-Pacific States were active in the crafting of the Geneva Conventions. The Conference took place at the start of the age of decolonization, and eight out of the fifty-nine participating States (13.5%) were from the Asia-Pacific: Australia, the Republic of the Union of Burma, China, India, New Zealand, Pakistan and Thailand. The Philippines did not participate officially, but was present and signed all four Conventions. Ceylon, later to be known as Sri Lanka, took the same approach, but it did not sign the fourth Convention on civilians. The extent of the Asia-Pacific countries’ participation ranged from light (Thailand) to active (Pakistan, Burma, China) to very active (Australia, New Zealand, India) engagement. Some delegations were one-person (e.g. Burma), while others were on the large side (e.g. China). Participation of the Asia-Pacific States took various forms. Several delegations were represented in leadership positions and on committees. Colonel W. R. Hodgson, head of the Australian Delegation, was appointed first vice-president of the whole Conference. India’s Sir Dhiren Metra chaired Committee I on the Wounded and Sick and Maritime Warfare Conventions, and Pakistan was a member of this committee. Thailand and Burma were on the Coordination Committee. Delegations from India and Pakistan assisted in the work of the Medical Experts Committee.

Two of the many activities of Asia-Pacific States at the conference can be cited at some length to show that these States’ participation in the making of the Geneva Conventions was genuine, and not ornamental. The first is the combined effort by India and Burma to seek to replace the red cross on a white background with a single new emblem that could be accepted by all as being neutral, thus avoiding the need for exceptions such as the red crescent, the Persian lion, and the Star of David that Israel was seeking. India’s proposal had been voted down in Committee I. General Tun Hla Oung, the Burmese delegate, tabled its re-examination in the Plenary Assembly, alternatively suggesting an amendment to Article 31 to the effect that all red symbols on white grounds whose use had been

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72 The definitive study is Sandesh Sivakumaran, “Asia-Pacific States and the Development of International Humanitarian Law”, in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.
73 *Final Record of the Diplomatic Conference of Geneva of 1949*, 3 vols, Federal Political Department, Berne, 1949 (Diplomatic Conference Final Record). See the following footnotes for specific references.
duly notified should be given recognition as distinctive emblems. General Oung then addressed himself to “a vast majority of delegates of this Conference who belong to one definite race and one definite religion”. He claimed that he, like everyone else (possibly not including the Israelis, who were apparently being contradictory), wanted to remove multiplicity of emblems. With the existing symbol being a reversal of the Swiss flag, General Oung cautioned against the use of “national emblems in the international field”, and of religious signs. Speaking to “a religious feeling” and pressures from home about the “religious significance of the red cross”, he explained: “I cannot now conscientiously go back to my country and to my men and tell them that it has no religious significance.” General Oung and India lost the battle of the emblem. Today, we still have the red cross on a white background as the visible sign of protection in IHL, the red crescent continues to be formally recognized as having the same function, and since 2005 the red crystal has been available for situations where the existing emblems are not acknowledged.

Despite being Burma’s one and only representative, General Oung’s voice is to be heard repeatedly across the records, bringing incision, directness, command of documents and real-life experiences of what it was like to be a soldier and a prisoner of war (PoW). General Oung also provides the second example of the engagement of Asia-Pacific delegates in the 1949 process. He submitted a motion to reject the whole of common Article 2A (later to become common Article 3). The motion was rejected and Article 2A was adopted by thirty-four votes to twelve, with one abstention. General Oung spoke forcefully and at unusually great length against the existing draft, describing it as an incitement and encouragement to insurgency. It was “an Article which happens to be one of the longest, vaguest and most dangerous to the security of the state in the Convention”. In addition to his opposition to the regulation of non-international armed conflicts (NIACs), General Oung also identified, with immense foresight, weaknesses in the draft that would come to haunt IHL for years to come and would only be clarified in the celebrated Tadić decision. General Oung noted that “no attempt has been made to define the phrase ‘armed

78 Ibid.
79 General Oung was at that time the only Burman to have been educated at Sandhurst, and had been a prisoner of war held in Rangoon Jail by the Japanese. He was deputy inspector-general of police and chief of the Criminal Investigation Department at the time of the killing of Burma’s independence leader, Aung San. In August 1949, he was appointed deputy supreme commander of the Burmese Armed Forces. Shelby Tucker, Burma: Curse of Independence, Pluto Press, London, 2001, p. 150.
80 See S. Sivakumaran, above note 72, pp. 120–121.
81 19th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 337.
82 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 330.
83 International Criminal Tribunal for the former Yugoslavia, The Prosecutor v. Duško Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.
conflicts not of an international character”.84 He observed that, through the phrase “parties to the conflict”, the insurgent party was being, “rightly or wrongly, given a place in international law”,85 an issue that would re-emerge at the Diplomatic Conference of 1974–77 and which led to AP II being stripped of the language “parties to the conflict”.86 After referring to the words “each Party to the conflict shall be bound to apply”, General Oung posed the question: “May I ask how it is proposed to bind the rebels?”87 This is, of course, a question that is still giving the international community difficulty today.88 He also opined that the simple fact of having such an article in an international convention “will automatically give the insurgents a status as high as the legal status which is denied to them”.89 It was a far-sighted intervention, but common Article 3 was adopted and did go on to become what is arguably the most important provision in all of IHL.90

There were many other interventions from Asia-Pacific countries. For example, in the Plenary Assembly on the wounded and sick convention, New Zealand revisited earlier concerns with Article 22.91 There had been long discussions in Committee I about the status of medical personnel and chaplains after capture, and New Zealand delegate Mr Quentin-Baxter again suggested amendments to the Committee’s text, but these were rejected.92 Representing China in Committee III on civilians, Mr Wu considered that even after the conclusion of hostilities or the occupation, protected persons should not be transferred to a country where they had legitimate reasons to fear persecution. The granting of asylum to political refugees was in accordance with international usage.93 Mr Wu, in the same committee, pointed out that placing “the offence of destruction of property under the title of reprisal would minimise the crime of wanton destruction and sheer vandalism”, and sought for the provision’s omission, or alternate formulation. He expressed his concern to alleviate the suffering of war victims, and in principle he supported a Soviet amendment that “provided for the prohibition of destruction of all categories of property except in the case of military necessity”.94

84 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 329.
85 Ibid.
87 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 329.
89 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 330.
91 Diplomatic Conference Final Record, above note 73, Vol. 2(B), p. 214.
92 Ibid.
94 Committee III on Civilians, 12th and 13th Meetings, in Diplomatic Conference Final Record, above note 73, Vol. 2(A), p. 651.
The Asia-Pacific role increased in the 1974–77 discussions on revising the Geneva Conventions. The region’s numbers had been significantly boosted by the decolonization process, and the Conference was famously able to expand the application of IHL in AP I to peoples engaged in armed conflicts in the exercise of their right to self-determination.\(^{95}\) Several provisions of AP I are linked to this extension. One of them is Article 44, loosening the principle of distinction in certain situations. Kittichaisaree charts the evolution of greater protection for “freedom fighters” in international law, and notes how during the negotiations, North Vietnam, North Korea and Pakistan insisted that guerrilla fighters in national liberation situations need not distinguish themselves; “otherwise, they would be subjected to counterattacks and overwhelming repression by the latter’s better equipped armed forces”.\(^{96}\)

Ironically, AP I, ratified globally by 174 States, has not been very popular in a region that has also had its fair share of post-liberation internal conflicts.\(^{97}\) The dwindling number remaining outside the Protocol include Bhutan, Burma/Myanmar, India, Indonesia, Malaysia, Marshall Islands, Nepal, Singapore, Sri Lanka, Thailand, Pakistan and Tuvalu. Of those that are party, there are reservations/declarations/understandings from Australia, China, Japan, Mongolia, the Philippines and the Republic of Korea.\(^{98}\) New Zealand entered a substantial interpretative declaration.\(^{99}\)

There is another noteworthy example of the region’s contribution to IHL treaties. Sivakumaran observes how the delegate for Pakistan is often given credit for “saving” AP II.\(^{100}\) As many know, this instrument had been through a difficult drafting process, and there was much disagreement about NIACs. During the Conference, a decision was taken to negotiate two protocols in committee, one for internal and one for international armed conflicts (IACs). However, “the day before the adoption of Protocol II by the Conference in plenary session, the draft submitted by the committees was considered to be too detailed and was

\(^{95}\) Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1979).

\(^{96}\) Kriangsak Kittichaisaree, “International Humanitarian Law and the Asia-Pacific Struggles for National Liberation”, in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 149.

\(^{97}\) Ibid.

\(^{98}\) For more, see Suzannah Linton, “International Humanitarian Law and International Criminal Law”, in S. Chesterman, H. Owada and B. Saul (eds), above note 12.

\(^{99}\) The declaration addressed the situations to which Article 44(1) could apply (only in occupied territory or in armed conflicts covered by Article 1(4)); the meaning of “deployment” in para. 3(b); the responsibility of military commanders and others responsible for planning, deciding upon or executing attacks to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time in relation to Articles 51 to 58 inclusive; the meaning of “military advantage” in Articles 51(5)(b) and 57(2)(a)(iii); and the meaning of “total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage” in Article 52. See ratification table at: https://tinyurl.com/rxdvj4w.

\(^{100}\) S. Sivakumaran, above note 72, p. 21.
There was genuine concern about the possibility of not being able to agree a protocol for NIACs. The delegation from Pakistan then played an important role in facilitating the adoption of a “simplified draft”. The Pakistanis canvassed other delegations and submitted amendments to the Committee draft, and eventually submitted a compromise draft protocol. The last-minute intervention led to AP II being adopted. Even so, this protocol is even more warily regarded in the Asia-Pacific than AP I. There are 169 States Parties, but Asia-Pacific States comprise almost all of those remaining outside: Bhutan, Burma/Myanmar, India, Indonesia, Kiribati, Malaysia, the Marshall Islands, Nepal, Papua New Guinea, Singapore, Sri Lanka, Thailand, Tuvalu and Vietnam.

The Asia-Pacific contribution can also be seen in the matter of nuclear weapons, which have a particular resonance in the region. Not only were the world’s first atomic bombs used in wartime against the cities of Hiroshima and Nagasaki, but nuclear weapons came to be tested by the United States, the United Kingdom and France in the Pacific and Australia, with devastating environmental and human consequences. As a result, the affected and neighbouring nations have long been vocal in their opposition to nuclear weapons and testing. The Pacific Island nations have been instrumental in anti-nuclear treaty-making processes, notably the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT), the 1996 Comprehensive Nuclear Test Ban Treaty and the TPNW (not in force).

Litigation has ranged from New Zealand and Australia’s challenge of French nuclear tests to the most recent attempt,
that of the Marshall Islands against India, Pakistan and the United Kingdom.\textsuperscript{107} New Zealand, fuelled by an active civil society movement, played a pivotal role in the so-called “World Court Project” which led to the ICJ’s 1986 Advisory Opinion on the threat or use of nuclear weapons.\textsuperscript{108} The Pacific Island States and ASEAN have declared their regions to be nuclear-weapons-free zones.\textsuperscript{109} However, as noted in this article’s introduction, the situation is more complicated. The wider region is home to four nuclear powers, and Japan’s approach as a victim State is notable. Japan is party to the NPT as a non-nuclear-weapon State, yet the Japanese government refused to participate in the negotiations for the TPNW and voted against it when it was adopted at the UN General Assembly in July 2017.\textsuperscript{110} Singapore was the only participating country to abstain from the TPNW. However, Singapore is part of the ASEAN nuclear-free zone and stands against nuclear weapons; the abstention was because of unhappiness about the short time frame, and the failure to include Singaporean proposals.\textsuperscript{111} And of course, the Asia-Pacific’s nuclear-weaponized States, most notably North Korea, India and Pakistan, continue to pose acute threats to regional and global well-being.\textsuperscript{112}

The Vietnam War provides a final example of a conflict in the region that played a major role in the development of IHL.\textsuperscript{113} The legal issues that arose were many, including:

\begin{enumerate}
\item\textsuperscript{107} ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Decision (Preliminary Objections), 5 October 2016, \textit{ICJ Reports} 2016; ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Decision (Jurisdiction of the Court and Admissibility of the Application), 5 October 2016, \textit{ICJ Reports} 2016; ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Decision (Jurisdiction of the Court and Admissibility of the Application), 5 October 2016, \textit{ICJ Reports} 2016. The first-hand litigator’s account – in R. Clark, above note 16, pp. 213–218 – is particularly insightful.
\item\textsuperscript{108} ICJ, above note 25. Much insight into the role of the Pacific islands is contained in Roger S. Clark and Madeleine Sann (eds), \textit{The Case against the Bomb: Marshall Islands, Samoa, and Solomon Islands before the International Court of Justice in Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons}, Rutgers University School of Law, Camden, NJ, 1996. On the role of civil society in New Zealand, see Catherine Dewes, “The World Court Project: The Evolution and Impact of an Effective Citizens’ Movement”, PhD thesis, University of New Zealand, 1998, on file with the author.
\item\textsuperscript{109} The treaty details are at note 16.
\item\textsuperscript{110} S. Hirose, above note 16, p. 451. Hirose also emphasizes the testimony of the mayors of Hiroshima and Nagasaki at the ICJ in 1995, to show the disconnect between politicians and ordinary people on the matter of nuclear weapons. \textit{Ibid.}, p. 448.
\item\textsuperscript{111} Statement by Ms Andrea Leong, Delegate to the 72nd Session of the UN General Assembly Thematic Discussion on Cluster One: Nuclear Weapons, 12 October 2017.
\item\textsuperscript{112} See the collection of seventeen reflections in the Australian National University’s 2017 publication on “Nuclear Asia”, available at: https://asiapacific.anu.edu.au/sites/default/files/News/nuclear-asia-publication-web.pdf.
\item\textsuperscript{113} Keiichiro Okimoto, “The Viet Nam War and the Development of International Humanitarian Law”, in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.
1. whether IHL was applicable in the first place (North Vietnam challenged IHL’s applicability to what it called a war of aggression) and, if so, what kind of conflict it was (i.e., an IAC between North and South Vietnam, a NIAC, a national liberation struggle, or an internationalized or mixed conflict);
2. whether the IHL rules in force at the time were adequate in protecting civilians and civilian objects;
3. whether the IHL rules of the time could adequately regulate means and methods of warfare that were employed during the conflict; and
4. how combatants captured while fighting clandestinely should be dealt with under IHL.

These questions would later feed into the development of IHL. Another important example is the environment. Sir Kenneth Keith, who took part in the negotiations at the 1974–77 Diplomatic Conference on behalf of New Zealand, has recalled how environmental issues had become a matter of international concern in the years leading up to the Conference:

It is also true of course that the widespread use of Agent Orange and other defoliants in Viet Nam were having an impact as well. That haunting photograph of the young girl running down the road naked after she had been bombed with napalm is an iconic image of the Viet Nam War and had a huge impact on the international community. There was a sense that, in a general way, quite apart from armed conflict, the environment was being threatened and specifically in relation to some of the methods that were being used in Viet Nam and Laos at the time of the Diplomatic Conference.114

Some of the practices during the Vietnam War “directly prompted States to develop new rules of IHL”.115 Concretely, the American use of napalm “significantly influenced the subsequent development of IHL to regulate the use of incendiary weapons”.116 The most striking example in terms of treaty law is of course Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (on incendiary weapons).117 Also, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted a year before the Additional Protocols, “was an important development in preventing the use of environmental modification techniques, such as the cloud seeding operations

115 K. Okimoto, above note 113, p. 179.
116 Ibid., p. 179; see also pp. 167, 170–172, 174–175, 178.
during the Viet Nam War”.

In AP I, Article 35’s direct line to the use of defoliants in the Vietnam War is well known. Some of the other rules adopted in AP I, such as the protection of civilians and civilian objects from direct as well as indiscriminate attacks, the principle of distinction, and the rules on attacking works or installations containing dangerous forces and the status of captured combatants, also link to experiences from this conflict.

Custom: Opinio juris and State practice

There has been both invisibility and visibility in respect of custom in the Asia-Pacific region.

World War II notoriously played out in enormous swathes of the region, with countless atrocities. After the war was over, there were many war crimes trials. Readers of this journal will know about Nuremberg and that tribunal’s poor relation, the underestimated International Military Tribunal at Tokyo, which tried on the leaders of Japan apart from the emperor. But until recently, few knew about the approximately 2,300 war crimes proceedings in more than fifty locations (not counting trials of collaborators) by ten different authorities including the returning colonial administrators, the Philippines and China, with trials spread out over a ten-year period: around 5,700 Japanese, Koreans and Formosans were prosecuted, with approximately 4,500 found guilty and just over 900 executed. This was evidence of opinio juris and State practice from the Asia-Pacific region and could have been used for identifying the content of concrete rules of customary international law to be applied at the ad hoc international tribunals that began operating in the 1990s. Some of these cases, had they been considered, could


have resulted in different analysis and outcome. Sadly, it is only in the last ten years or so that this wealth of opinio juris and State practice from the World War II trials has been brought out of the dusty archives by scholars.\textsuperscript{123}

To what extent was the practice and opinio juris of Asia-Pacific States considered in the ICRC’s Customary Law Study?\textsuperscript{124} Sivakumaran reports on a mixed picture.\textsuperscript{125} The Study “made good use of the practice of Asia-Pacific States and there was representation of States generally”,\textsuperscript{126} but the domestic case law of Asia-Pacific States on matters of IHL “appears to be less prominent than the case law of other states”.\textsuperscript{127} An electronic search of the Study’s citations of random Asia-Pacific countries reveals that Australia was cited 508 times, the Philippines 168 times, Indonesia 136 times, China 114 times, India ninety-eight times, Bangladesh seventy-nine times, Malaysia seventy-four times, Sri Lanka twenty-eight times, Thailand sixteen times and Myanmar nine times. By way of further comparison, the United States was cited 952 times, and the United Kingdom 626 times. This does not correlate to the depth of engagement with armed conflict. Sivakumaran provides one plausible explanation: readily available military manuals have a significant role in making national practice accessible for inclusion in such evaluations of customary IHL.\textsuperscript{128}

The then newly adopted Geneva Conventions were tested in the Korean War of 1950–53, and practice in relation to repatriation of PoWs led to a softening of Geneva Convention III’s Article 118 on repatriation of PoWs. Article 118 is based on the assumption that PoWs would be eager to return home and provides that PoWs “shall be released and repatriated without delay after the cessation of hostilities”.\textsuperscript{129}


\textsuperscript{123} See above note 122.

\textsuperscript{124} ICRC Customary Law Study, above note 119.

\textsuperscript{125} S. Sivakumaran, above note 72, pp. 126, 137–138.

\textsuperscript{126} \textit{Ibid.}, p. 137.


\textsuperscript{128} S. Sivakumaran, above note 72, p. 138.

\textsuperscript{129} Unjustifiable delay in the repatriation of PoWs became a grave breach under AP I’s Article 85(4)(b).
None of the parties had ratified the Geneva Conventions at that stage, but they made unilateral declarations pledging to abide by the terms of the Conventions.\textsuperscript{130} Kim argues:

To some extent, and despite their pledges, all sides behaved as if the convention did not exist. … [T]he soldiers of both sides seemed not to know what a POW was, the rights that a POW had, and the way that impacted on how the individual soldier could behave towards the POW.\textsuperscript{131}

The practice was, in other words, abysmal. Against this backdrop, the issue of PoWs who do not wish to be returned or repatriated or wish to seek asylum arose, delaying the reaching of an armistice.\textsuperscript{132} The problem was that Geneva Convention III does not contain a provision that is the equivalent of Article 45(4) of Geneva Convention IV protecting civilians; it has no protection against \textit{refoulement}. What it does have is a provision that sick and wounded PoWs cannot be repatriated against their will, but this is obviously not the same thing as a prohibition against \textit{refoulement}.

Thousands of North Korean and Chinese PoWs did not want to be returned home. The United States, negotiating for the United Nations (UN) force in its command role, argued that there should be freedom of choice for the individual PoW; the Communists took a literal reading of Article 118 and insisted that they had the right to have all their PoWs returned, regardless of the personal wishes of individuals.\textsuperscript{133} As the negotiations were going on, the UN General Assembly adopted Resolution 610 (VIII) on 3 December 1952, affirming that unwilling PoWs should not be forced back to their home countries.\textsuperscript{134} Rifts in the UN coalition led to South Korea’s prime minister, Syngman Rhee, unilaterally liberating more than 27,000 North Korean PoWs who did not wish to be repatriated.\textsuperscript{135} The compromise reached on PoWs was set out in Article III of the Panmunjom Armistice Agreement of 27 July 1953.\textsuperscript{136} All the sick and injured PoWs who insisted on repatriation were to be returned home with priority, and “each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture”\textsuperscript{137}

\textsuperscript{131} \textit{Ibid.}, p. 371.
\textsuperscript{133} For consideration of the PoW issue from the US perspective, see Walter G. Hermes, \textit{United States Army in the Korean War: Truce Tent and Fighting Front}, Center of Military History, US Army, 1992, Chaps VII, VIII, XVIII, XIX.
\textsuperscript{134} Also see Richard Baxter, “Asylum to Prisoners of War”, \textit{British Year Book of International Law}, Vol. 30, 1950, p. 489.
\textsuperscript{137} \textit{Ibid.}, Art. III, para. 51.
In international law, subsequent State practice can affect the way that treaty provisions are interpreted. The practice on voluntary repatriation of PoWs that began in the Korean War does appear to have adapted the interpretation of Article 118 beyond its text. Sassòli asserts that State practice has continued to develop in the direction of respecting the PoW’s wishes. This confirms the ICRC’s Customary Law Study, which reports that the ICRC’s practice of requiring repatriation to be voluntary is accepted by States. The practice has developed to the effect that in every repatriation in which the ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC’s conditions for participation, including that the ICRC be able to check prior to repatriation (or release in case of a non-international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released).

The Vietnam War, discussed in the previous section in relation to treaties, also features strongly in the ICRC’s Customary Law Study. It has been considered in relation to the identification of rules such as Rule 44 (“Due Regard for the Natural Environment in Military Operations”), Rule 75 (“Riot Control Agents”), Rule 45 (“Causing Serious Damage to the Natural Environment”), Rule 54 (“Attacks against Objects Indispensable to the Survival of the Civilian Population”), and Rule 23 (“Location of Military Objectives outside Densely Populated Areas”).

**Assertion 3: Some Asia-Pacific States are contributing to emerging or evolving areas relevant to IHL: The examples of weapons, outer space, cyberspace and the protection of the environment in armed conflict**

The Geneva Conventions were agreed years before the majority of Asia-Pacific States gained their independence. As many know, the lack of global participation in the making of older treaties has for some time been the subject of criticism from this part of the world. Doctrinally, new States are bound by international


141 This is strongly tied to the movement known as TWAIL (Third World Approaches to International Law). The voluminous literature associated with this movement includes Bhupinder S. Chimni, International Law and World Order, 2nd ed., Cambridge University Press, Cambridge, 2017; Sundhya Pahuja,
law that exists at State creation; in relation to multilateral treaties such as in the area of IHL, they may either join without reservation, join with lawful reservations, or not become party.142

The 1970s provided the first opportunity for many emerging nations to shape new treaties governing armed conflict, including in the area of weapons control. We have already seen how the Additional Protocols bear the imprint of the Asia-Pacific region. Another example is the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention, CWC), which was negotiated through several decades in the Conference on Disarmament.143 Chemical weapons are of course not a new challenge, but this treaty was a radical revision of outdated treaties. During its war against China in the 1930s and 1940s, Japan employed chemical weapons against enemy combatants and civilians, including riot control agents, phosgene, hydrogen cyanide, lewisite and mustard agents.144 It also launched biological attacks where plague-infested fleas were released on Chinese cities such as Ningbo; it released plague-infested rats into other urban areas, and deliberately spread diseases through “field tests” and by handing out contaminated food items.145 There were also the notorious human experiments carried out by Unit 731 outside Harbin in Manchuria.146 Despite Chinese efforts, these crimes were not prosecuted at Tokyo, and were later addressed by the USSR and China in domestic proceedings.147 Ironically, when the negotiations for the Conference on Disarmament started, Japan was one of the four Asia-Pacific


States participating, but not China. During the decades of the negotiations, chemical weapons were allegedly used in several Asia-Pacific armed conflicts. Dunworth argues that Australia played an important role in the negotiations for the CWC. She cites Australia’s 1988 Chemical Weapons Regional Initiative, which attempted to promote “broader regional support for the future Convention” and to assist the ASEAN and Pacific Island countries in their preparations for implementation, as well as its hosting of the 1989 Canberra Conference aimed at engaging with the chemical industry about the treaty, and in March 1992, its proposal of a compromise text that facilitated the adoption of the treaty text.

Today, evolving technologies are leading to emerging issues that provide fresh opportunities for Asia-Pacific States to shape the direction and content of the law, and IHL is relevant to some of these areas. Outer space is an example. The advances in both civilian and military-related space technology over the years since Sputnik was launched have been astounding. Investment into developing capabilities in outer space has become a priority across the Asia-Pacific region, particularly in China, India and Japan. Freeland and Gruttner observe that “the shift towards small satellite technology has drawn the interest of other Asia-Pacific nations such as South Korea, Pakistan, Singapore and Viet Nam.” Running alongside these developments are fears that outer space will be used to facilitate armed conflict and may become a theatre of war. This obviously raises the issue of IHL’s applicability in outer space.

It is well known that the law of outer space is thin, vague and subject to different interpretations, and that the laws of war are inherently, although not exclusively, territorial in their application. Can they be calibrated for space, in the way that they have been for naval warfare? In light of all the activity in space, it is astounding that there is not even an agreed notion of where space begins. Freeland and Gruttner argue that the definitional ambiguities urgently need to be clarified, ideally in the form of treaty norms: clear definitions are needed for concepts such as “space weapons”, “military uses” and “peaceful purposes”. They also identify “a divergence of views as to the interplay between the relevant principles that might apply to an armed conflict in space, as between the international laws of space and the existing jus in bello principles”. Given the increase in strategic and militarized use of outer space (this is not the same as the weaponization of outer space, although the linkage is obvious), “the lack of clarity gives rise to a heightened sense of uncertainty and (perceived) threats to security”. Freeland and Gruttner argue that existing treaties are not sufficiently robust in laying down “absolutely specific rules or incentives to prevent an arms race in outer space, let alone a conflict involving (and perhaps “in”) space

148 T. Dunworth, above note 143, pp. 269–270.
149 Ibid., p. 269.
150 Steven Freeland and Elise Gruttner, “Critical Issues in the Regulation of Armed Conflict in Outer Space”, in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.
151 Ibid., p. 195.
152 Ibid., p. 189.
153 Ibid.
although the object and purpose of the space law regime is directed towards peaceful activities.”

Some Asia-Pacific States have been supporting a new treaty. China, Vietnam and Indonesia were among the six States that joined with Russia in submitting a working paper to the Conference on Disarmament in 2002 on ‘Possible Elements for a Future International Legal Agreement on the Prevention of the Deployment of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects’. In 2008, this was developed by China and Russia into a draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects. This emphasizes outer space as a weapons-free zone, defines terms such as “weapons in outer space” and proposes a mechanism to establish measures of verification of compliance with the Treaty. This, of course, sits rather interestingly alongside China’s remarkable investment into developing military capabilities in space in recent decades. In 2007, China caused international concern when it was able to destroy one of its own satellites by using the SC-19 direct-ascent anti-satellite system. It has a specialized structure within the PLA, the Strategic Support Force, which is responsible for the development and execution of the PLA’s space capabilities and also its cyber- and electronic warfare capabilities. By contrast, the remaining two of the 2002 trio, Indonesia and Vietnam, are newcomers to outer space. However, Indonesia has since 2013 had a National Space Law which makes a direct link between its space ambitions and the defence of the nation, and authorizes the Ministry of Defence to utilize all of the nation’s space assets in the event of a national emergency or for the sake of national defence and security. As for Vietnam, it supports the policy of “no first placement of weapons in outer space” in the absence of a legally binding international agreement aimed at eliminating the weaponization of outer space, the predictable arms race that will follow, and the transformation of outer space into a venue of armed confrontation.

154 Ibid., p. 195. There are efforts under way to improve the legal situation. The leading endeavour is the Woomera Manual project, named after a village in south Australia that has long been associated with Australian and multinational military space operations. The project is spearheaded by the universities of Adelaide, Exeter, Nebraska and New South Wales – Canberra. The experts involved are working on developing a manual that objectively gathers, articulates, clarifies and streamlines existing international law applicable to space exploration, development and militarization. The project website is available at: https://law.adelaide.edu.au/woomera/.


156 The draft treaty was updated in 2014 and can be viewed at the website of the Chinese Ministry of Foreign Affairs, available at: https://tinyurl.com/w7kubqx.


158 Ibid.


Another area attracting attention from certain parts of the region is cyberspace, meaning an “environment composed of physical and non-physical components, characterized by the use of computer units and electromagnetic spectrum to store, modify and exchange data through a computer network”.161 The invention and development of the Internet, relying on cyberspace, has opened a new vista for hostile and harmful activity in the private, public and mixed spheres. Hacking into computers for the purposes of spying may be done by individuals for private purposes, and it may be done by individuals on behalf of a State. Viruses and worms may be planted in computers, and when activated these may or may not result in physical damage. The WannaCry ransom attack in 2017 affected computers around the world and has been tied to North Korea,162 and there was also the NotPetya malware attack, blamed on Russia.163 “Cyber-war” is a term used to describe the computer-based attacks that have happened against national institutions in Estonia, Georgia and Ukraine, all alleged to have been conducted by Russia.164 There is at present no global agreement that regulates cyberspace, although there are some regional-level agreements such as the Convention on Cybercrime, also known as the Budapest Convention on Cybercrime.165 Not surprisingly, as is the case with outer space, the question of whether and how IHL can apply to cyberspace is controversial on multiple levels. The laws of war have traditionally been territorial, tied to land, water and air space, but have been extended to conflict on the high seas. Cyberspace, like outer space, is a new frontier.

China is regularly mentioned in discussions about international hacking, malware and cyber-attacks, and their global regulation. The Chinese academic Binxin Zhang identifies “a dividing line between the ‘East’ (arguing that IHL does not apply to cyberspace) and the ‘West’ (arguing that IHL applies to cyberspace)”, with China and Russia often taking the same position on the Eastern side of the line.166 The Chinese position, explains Zhang, is more concerned “with the resort to self-defence by more powerful States against cyber-

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164 D. Shesgreen and B. Theobald, above note 162.
165 Convention on Cybercrime, ETS No. 185, 23 November 2001 (entered into force 1 July 2004).
attacks, and not to specific IHL issues *per se*, because recognizing the applicability of IHL “would be an acknowledgement of the possible existence of armed conflict in cyberspace”. China actually provides an interesting example of an Asia-Pacific State deliberately shaping the legal trajectory with practice: the government has been issuing regulations, declarations and statements, and making domestic laws setting out a clear position that cyberspace should be used only for peaceful purposes. China’s *opinio juris* is being demonstrated through public emphasis on the need to prevent a “cyber arms race”, expressions of reluctance to accept the applicability of IHL and other existing regimes in cyberspace, and advocating “that cyberspace should only be used for peaceful purposes, and that discussion about the use of force in cyberspace would give rise to the militarisation of cyberspace”.168

Finally, we can see the imprint of the region in the evolving area of environmental protection in armed conflict. In July 2019, the International Law Commission (ILC) provisionally adopted on first reading twenty-eight legal principles aimed at enhancing protection before, during and after armed conflicts (that is, throughout the entire conflict cycle). This is not going to be a binding document. Even so, the principles are a landmark in the journey towards enhanced protection of the environment and natural resources in armed conflict. Some of the principles have certainly been progressive and consequently contentious. The draft goes beyond environmental damage to include misuse of environmental resources, covers both IAC and NIAC, extends the Martens Clause to environmental protection, draws from IHL’s concept of protected zones, and envisages designation of significant environmental and cultural areas as protected zones. It addresses the particular situations of indigenous people and mass displacement, illegal exploitation of natural resources in armed conflict, the restoration of the environment after armed conflicts and the responsibility of States. The draft does not directly address the responsibility of non-State armed groups, or corporate responsibility as such (“due diligence” and “liability” are the preferred terms, and the relevant principle simply makes a recommendation to States).

Over the six years that the project has been on the ILC’s programme of work, several Asia-Pacific States have consistently played an active role: Singapore, Palau, the Federated States of Micronesia,

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167 B. Zhang, above note 166.
168 Ibid.
170 For example, Singapore, UN Doc. A/C.6/70/SR.23, para. 122, expressing concern about phrasing the principles in too absolute terms that went beyond what it considered to be a reflection of customary international law; UN Doc. A/C.6/70/SR.23, para. 121, urging that the ILC should concentrate on analyzing how IHL relates to the environment, cautioning about the implications of addressing human rights as part of the topic, and expressing concerns about including NIACs within the scope of the principles.
171 For example, Palau, UN Doc.A/C.6/70/SR.25, para. 27, offering examples of national and regional practice in the form of legislation, case law, military manuals and cooperation through the SIDS Accelerated Modalities of Action (SAMOA) Pathway.
172 For example, Federated States of Micronesia, UN Doc. A/C.6/73/SR.29, para. 147, expressing support for the then draft principle 19 (on the general obligations of an Occupying Power to respect and protect the
Vietnam, Malaysia, the Republic of Korea and New Zealand. Some, such as Malaysia and the Republic of Korea, contributed to the discussions and shared their national and international experience – for example, national legislation, military practice, and international commitments through treaties and other legally binding documents. A particularly meaningful contribution was made by the Federated States of Micronesia, when it provided a thirty-one-page document with its views on the importance of protecting the marine environment in armed conflict. Micronesia also explained its position on a number of international rules and principles, for instance:

- that the “no-harm principle” applies in armed conflict “including during the build-up to actual military hostilities and after those hostilities end”;
- that “hazardous wastes” produced by military activities of Parties (e.g., military vessels with intact and flammable fuel caches that are decommissioned and subject to scrapping) are subject to the conditions and obligations of the [Basel] Convention, whether such wastes are produced before, during, or after armed hostilities; and
- that the obligations of the Stockholm Convention “persist for its Parties during all temporal phases of an armed conflict – i.e., during actual armed hostilities as well as in the build-up to and aftermath of those hostilities”.

For example, Vietnam, UN Doc. A/C.6/70/SR.25, para. 41m expressing concern about the inclusion of NIACs; UN Doc. A/C.6/70/SR.25, para. 42, stressing the need to address rehabilitation efforts, toxic remnants of war and depleted uranium; UN Doc. A/C.6/70/SR.25, para. 40, suggesting that the draft principles should explore environmental impact assessments for deploying weaponry.

For example, Malaysia, UN Doc. A/C.6/73/SR.30, para. 67, stressing that “environmental issues were not limited to the natural environment; they included human rights, sustainability and cultural heritage”; UN Doc. A/C.6/73/SR.30, para. 73, commenting in relation to the then draft principle 20 (on the use of natural resources), expressing support for the requirement to engage in sustainable use of natural resources, and underlining the importance of the principles of permanent sovereignty over natural resources and of self-determination, which provide the general framework for the administration and use of an occupied territory’s natural resources by an Occupying Power.

For example, Republic of Korea, UN Doc. A/C.6/73/SR.30, para. 29, stressing the importance of ensuring that the ILC’s work in this area remains in line with the existing rules of IHL; UN Doc. A/C.6/73/SR.30, para. 31, welcoming the tackling of the protection of the environment in NIACs; UN Doc. A/C.6/69/SR.27, para. 73, emphasizing that the principles should address NIACs.

For example, New Zealand, UN Doc. A/C.6/70/SR.25, para. 102, stressing that reparation and compensation for the post-conflict phase should be included, and expressing support for the then draft principle II-4 prohibiting reprisals against the environment.


Some of these States, such as Vietnam, Japan and the Federated States of Micronesia, have had experiences of severe environmental damage in armed conflict that gives their input particular resonance. Reflection on the selection of views expressed (see notes 170–179) confirms the plurality of perspectives from across the region. Some, such as Singapore, take a conservative approach, while others, like Vietnam, Malaysia and Micronesia, are willing to push the boundaries and develop the law that exists as well as to fill existing gaps with fresh rules. The engagement of the identified States has been sustained, indicating genuine commitment to shaping this matter, and we can expect that they will continue to try to influence the draft principles as they move to the General Assembly for debate, and will be active in the ILC’s consultation process prior to the second reading.

What of the contradictory IHL practice?

The author has thus far argued and justified three assertions: (1) the norm of humanity in armed conflict, which underpins IHL, has deep roots in the region; (2) there has been meaningful participation by some States from the region in IHL law-making; and (3) several Asia-Pacific States are among those actively contributing to the development of new or emerging areas relevant to IHL, such as outer space, cyberspace and the protection of the environment in armed conflict. It is then obviously necessary to address the paradox of how this positivity can exist in conjunction with the region’s many armed conflicts, and its problematic implementation of IHL. The list of barbarity is long and includes the horrors of World War II, decolonization-related atrocities such as the Indonesian war of independence, Pakistan’s devastation of breakaway Bangladesh in 1971, the atrocities of the Khmer Rouge in Cambodia from 1975 to 1979, the crimes in occupied East Timor from 1975 to 1999, the perpetual ethnic conflicts and the persecution of the Rohingya in Burma/Myanmar, and the decades-long struggle in Northern Sri Lanka, culminating in the government’s unrestrained military annihilation of the Tamil Tigers in 2009. Saul’s work on terrorism adds another dimension in clearly showing how many regional States have been twisting the conceptualization of terrorism beyond recognition to allow draconian powers to be deployed against a much broader category of persons in armed conflict, while Lassée and Anketell show how one State, Sri Lanka, attempted to distort IHL in order to justify its conduct of hostilities against the Tamil Tigers and the Tamil civilian population.183

How can we reconcile this depressing picture with what has been demonstrated in the preceding parts of the present article? One way of theorizing the inconsistency is to see a hierarchy of accepted fundamental norms in the region, and due to incomplete internalization of the humanitarian norm, the sovereignty norm – as understood by those in power – is able to trump in armed

conflict. As long ago as 1949, the representative to the Geneva Conference of the newly independent Republic of the Union of Burma articulated the approach that would come to reflect the views of many other States in the region, and in his own country, up to the present:

I do not understand why foreign governments would like to come and protect our people. Internal matters cannot be ruled by international law or Conventions. We say that external interference in purely domestic insurgency will but aggravate the situation, and this aggravation may seriously endanger the security of the State established by the people. Each Government of an independent State can be reasonably expected to treat its own nationals with due humanity, and there is no reason to make special provisions for the treatment of persons who had taken part in risings against the national government as distinct from the treatment of other offenders against the laws of the State.184

This captures the core aspect of the so-called “ASEAN way” that is now crystallized in the ASEAN Charter’s Article 2(2).185 The ten member States have pledged allegiance to the “fundamental importance” of “respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States”, “non-interference in the internal affairs of ASEAN Member States” and “respect for the right of every Member State to lead its national existence free from external interference”. Textually, the ASEAN Charter bears resemblance to the UN Charter (Preamble and Article 1)186 and the Friendly Relations Declaration,187 but the practice of ASEAN States and their regional organizations has always been to prioritize Westphalian notions of statehood above all else.

Sovereignty concerns are manifested in the tardy Southeast Asian ratification of the two Additional Protocols that has already been discussed. There continues to be a definite chill in respect of aspects that potentially encroach on independence, sovereignty or territorial integrity, or that smack to these States of Western neo-colonialism. These aspects are, of course, subjectively evaluated by each State.188 In practical terms, this frostiness can be seen in responses to certain issues in other branches of international law that have an impact on IHL:

184 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 330.
186 Charter of the United Nations, 1 UNTS XVI, 26 June 1945, as amended.
external threats of accountability against political leaders, in particular the immunities of heads of State;\footnote{As an illustration, see Statement by Mr David Low, Delegate to the 71st Session of the United Nations General Assembly, on Agenda Item 78 on the Report of the International Law Commission on the Work of Its Sixty-Eighth Session (Cluster 3: Chapters X, XI and XII of A/71/10), Sixth Committee, 1 November 2016, para. 4.}


- Security Council referrals to the International Criminal Court\footnote{See, for example, Statement by Mr Wang Guangya (China), 5,158th Meeting of the Security Council, UN Doc. S/PV.5158, 31 March 2005, p. 5.} and the Court’s exercise over non-States Parties;\footnote{See, for example, Statement by Mr Nambiar (India), 4,568th Meeting of the Security Council, UN Doc. S/PV.4568, 10 July 2002, p. 14; Statement by Mr Vinay Kumar (India), 6,778th Meeting of the Security Council, UN Doc. S/PV.6778, 5 June 2012, pp. 12–13; Statement by Mr Dilip Lahiri (India), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 16 June 1998, para. 10; Statement by Mr Wang Guangya, above note 191. However, on 26 February 2011, China did not exercise the veto and India voted in favour of UNSC Res. 1970 referring the situation in Libya to the ICC. China also declined to veto the referral of Sudan to the ICC in UNSC Res. 1593 of 31 March 2005.}


The particular understanding of sovereignty that results from these patterns has been dubbed \textit{Eastphalian} by scholars since Sung Won Kim first coined the phrase...
in 2009.\textsuperscript{195} It is not as simple as the geopolitical ambitions of powerful States such as India and China or claims to be seeking to make international law more international. It is about encouraging Asian countries to look to themselves for solutions that cannot be found in the present framework, using the different approaches from the region, such as Confucian communitarianism. Eastphalia is not about dismantling the existing order, based as it is on established concepts, rules, principles and structures underpinned by international law. The emphasis on maintaining the State as a leviathan is, of course, not the only possible reason for the apparent disconnect with the implementation of humanitarianism in armed conflict. There are different reasons why norms that seem to be internalized are obeyed, violated or adapted, and they do not necessarily involve rejection of the norm itself. However, understanding what is going on is extremely important work that must be encouraged and tested in the contradictory landscape of the Asia-Pacific. For example, tapping into Axelrod’s seminal games theorizing in relation to an evolutionary approach to norms, Villatorro and his co-authors have confirmed fluidity in the way that States relate to norms, and that this can be a process of ongoing change, even of mutation. The notions of process and movement are important, and this seems to match what we see in the Asia-Pacific region. Academics have argued that “norm internalization is not an all-or-none phenomenon, but a multi-step process which consists of degrees and levels characterized by different mental ingredients”; it is a “flexible phenomenon, allowing norms to de-internalized, automatic compliance blocked, and deliberation restored in certain circumstances”.\textsuperscript{196} Importantly, Villatorro and his co-authors point out that even internalized norms “are not inexorably bound to remain as such” and that they can evolve over time, including under extreme conditions.\textsuperscript{197} If this understanding of norm dynamics is indeed correct when applied to the IHL hotspots of the Asia-Pacific, it offers an important new approach to strengthening norm internalization and compliance, and for designing interventions that are more effective.

The norm internalization avenue should be considered along with other attempts to rationalize and understand some of the egregious behaviour that has arisen in a number of Asia-Pacific IHL situations. For example, the present author recently analyzed wartime military sexual enslavement in the region, focusing on three of the most ignominious manifestations of the phenomena: the so-called “comfort women” of World War II, the abuse of Bangladeshi girls and women during the break-up of Pakistan in 1971, and the criminal and inhumane


\textsuperscript{196} See, for example, Daniel Villatoro et al., “Self-Policing through Norm Internalization: A Cognitive Solution to the Tragedy of the Digital Commons in Social Networks”, \textit{Journal of Artificial Societies and Social Simulation}, Vol. 18, No. 2, 2015, available at: \url{http://jasss.soc.surrey.ac.uk/18/2/2.html}.

\textsuperscript{197} \textit{Ibid.}, para. 1.5.
treatment of sexually enslaved women and girls in occupied East Timor. That study identifies commonalities between these geographically and temporally diverse phenomena, and these commonalities allow for a broader understanding that is important for control of behaviour and prevention of abuses. Notably, the three phenomena all share aspects of the root causes identified in modern scholarship, such as all illustrating symbolic or representative sexual violence that is meant to humiliate the wartime opponent through the victim, and sexual violence as a concrete strategy of war, to reward fighters and boost morale. Three other features are clearly identifiable from this study: problematic institutional handling of sex and aggression in the armed forces; linkage to historical precedents and institutional cultures that socialize their members and influence their behaviour; and differing conceptions of what good leadership entails. In Burma/Myanmar, Indonesia, Sri Lanka, the Korean Peninsula and the Southern Philippines, there are more than enough cases for a generation of multidisciplinary researchers to carry out work that facilitates our understanding of root causes and of why there has not been a complete internalization of the norm of humanity in armed conflict, and that helps us to develop insights and approaches which can really make a difference to limiting the man-made harms that occur in armed conflict.

Concluding reflections

The region clearly has a roughly textured and multifaceted relationship with IHL, and its underlying norm of humanity in armed conflict. We have seen that there is no single Asia-Pacific perspective on IHL and that there are contradictions in approach and practice. However, we have also seen that this does not mean that the region does not have a significant and varied contribution to make. On the contrary, the broad acceptance, at an intellectual and cultural level, of the norm of humanity in armed conflict has facilitated a meaningful contribution to IHL law-making, and engagement in new areas of actual and potential application. In addition to the contributions pointed out in this paper, McCormack argues that the region can offer significant experience and expertise ... in relation to effective national implementation of IHL; engagement with non-state armed groups ... to increase awareness of and respect for IHL; and drawing on the experience,

200 S. Linton, above note 15.
201 I. Lassée and N. Anketell, above note 183.
202 H. Kim, above note 130.
203 S. M. Santos Jr, above note 42; S. M. Candelaria, above note 127.
The present contribution suggests that the non-linear process of norm internalization may be one reason for the contradiction between conceptual or rhetorical acceptance and actual practice on the ground in many Asia-Pacific armed conflicts. This may explain how it is that sovereignty, another norm of great importance, is able to trump the norm that requires humanity in armed conflict. This enigma is not necessarily a “problem” but could be seen as simply a feature of social and political existence. The region actually presents diverse and complex situations that do require more “thinking outside of the box” and non-linear approaches. Linked to this is the reality that the wealth of regional practice in armed conflict should not be dismissed for being an IHL disaster zone. The dense practice with high levels of atrocity undeniably presents a schizophrenic picture, but it also provides case studies for deeper reflection on and understanding of human behaviour in armed conflict. This study discussed one example, military sexual enslavement, spanning three paradigmatic case studies spread out over some sixty years. From that, we have seen that there are more common than unique features. Broad and trans-disciplinary country-specific studies – for example, in the atrocity-rich conflicts of Burma/Myanmar, Sri Lanka and Indonesia – will surely yield exceptional insight, going well beyond the simplistic belief that dissemination and more enforcement are what is needed. Such studies can also be brought together for comparative purposes, and to identify shared features that warrant a common approach in the effort to facilitate norm acceptance and atrocity prevention.

The humanitarian community around the world has just commemorated and reflected on the 70th anniversary of the Geneva Conventions. The work that is emerging from the region shows that the challenge of the Asia-Pacific is not really that the region needs to be disseminated to about IHL or “capacity-developed” on humanitarianism in armed conflict. The countries of the region are not unaware of IHL, and it is misguided to approach their conduct in armed conflict as if it were all about ignorance. It may be hard for those who hold to a vision of the “civilizing” role of laws adopted in Geneva and The Hague to accept, but this part of the world has much to offer the world of IHL, such as humanitarianism from its countries’ cultures and religions, and the demonstrable expertise of a growing community of practitioners and academics. The real challenge for progressive humanitarianism is to traverse disciplines and build on recent important scholarship in order to develop more informed and nuanced approaches to understanding the countries and societies of the region, moving on to study the process of norm internalization, and then to develop creative and meaningful strategies for strengthening the links between that internalization, actual conduct on the ground, and norm socialization in the wider community.

Medical care in armed conflict: Perpetrator discourse in historical perspective

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Abstract

Although the Geneva Conventions have been successively revised since 1864, norms regarding the protection of medical care have been frequently disregarded. Despite current claims of international humanitarian law in crisis, comparing historic levels of violations with contemporary incidents is quantitatively challenging. Reviewing past reactions and justifications used by perpetrators of attacks on medical care can, however, be revealing. Based on a series of emblematic cases, qualitative analysis of perpetrator discourse can contribute to a better understanding of why the protection of medical care in armed conflict continues to be problematic to this day, notably through the rationales given for attacks, which have remained remarkably consistent over time.

Keywords: perpetrator discourse, attacks on medical care, international humanitarian law, Geneva Conventions, International Committee of the Red Cross, Médecins Sans Frontières, Franco-Prussian War, World War I Hospital Ships, Second Italo-Ethiopian War, Second Sino-Japanese War, Nigerian Civil War.

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Targeting of medical care: “Inherent to the conduct of hostilities”?

Having witnessed the consequences of Red Cross field hospitals bombed by the Italian Air Force in 1930s Ethiopia, an exasperated delegate of the International Committee of the Red Cross (ICRC) reflected on the challenges of protecting medical care in “a small war … a purely colonial affair”.1 He fretted over the long-term implications of the bombing and machine-gunning of neutral Red Cross ambulances by a “civilized country” and could not imagine the Geneva Convention being respected in the next European war.2 Writing over thirty years later about blockaded Biafra and faced with a deliberate attack on yet another hospital, a Red Cross official was more resigned. It was suggested that the targeting of hospitals “since the war in Ethiopia to the conflict in Vietnam” had become so frequent that “some consider these practices as inherent to the conduct of hostilities”.3

In the context of repeated bombadments, the cynicism underlying these comments is understandable. But if the norms surrounding the protection of medical care have been historically and repeatedly disregarded in multiple contexts, it is reasonable to ask how this reconciles with the development of international humanitarian law (IHL), a body of law successively revised and expanded to increase protection for medical staff and victims. By looking specifically at how violations of the Geneva Conventions have been justified by the perpetrators themselves, it should be possible to shed some light on the persistence of such attacks over space and time, and why attacks on medical care in armed conflict have been so difficult to arrest.

Examples of violations of the laws of war protecting medical care can be found in almost all conflicts post-1864 Geneva Convention, seeming to confirm what one observer has described as the “lack of substance behind claims of sanctuary or, at the very least, their contested status in the midst of fast-moving tactical war operations”.4 Put more succinctly, especially as concerns medical neutrality, the red cross emblem has likely been “misused in every war since the founding of the Red Cross”, including deliberate violations in order to secure “military gains”.5 Accepting that IHL has been frequently challenged is, however, difficult to square with more recent claims of an accelerated and pervasive deterioration in norms. When analysts today provocatively ask whether the “rules

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2 Ibid.
3 ICRCA, B AG 202 147-008.08, “Bombardement de l’hôpital d’Owa Omamma au Biafra”, 27 December 1968 (author’s translation).
of war” are a thing of the past,⁶ or the former director-general of the World Health Organization (WHO) states that “healthcare is under attack now more than ever”,⁷ it is important to understand the historical baseline for such references.

This is not to dispute the current severity or frequency of attacks on health care. Be it in Syria, Yemen or many other conflict settings, there is a depressing array of data documenting the attacks on medical staff and infrastructure. As an entry point to the subject matter, the research for this paper has leaned heavily on initiatives like Médecins Sans Frontières’ (MSF) Medical Care Under Fire and Not a Target campaigns, the ICRC’s Health Care in Danger project, WHO’s Attacks on Health Care initiative, and the Safeguarding Health in Conflict coalition, to name just a few.⁸ But despite the recent attention given to such attacks, historical analysis to support contemporary claims that health care is more under attack today than in the past is lacking. And attempting to answer questions of deterioration of respect for the laws of war over time is fraught with methodological challenges.

The accounting of war casualties is already notoriously difficult, especially as to what constitutes a targeted attack or collateral damage. Even within a limited time frame and focus, “deficiencies in the extent and methods of reporting” proved problematic in attempting to quantify attacks on health care between 1989 and 2008.⁹ Integrating variables such as the “increased numbers of aid workers in the field” without any record of actual exposure is likewise difficult, and highlights the danger of pointing to a single “global trend”.¹⁰ This is not to disregard quantitative research, but rather to note that results can be easily prejudiced by different factors, from what actually constitutes an incident to the techniques used to collect data. Within a single organization like MSF, “ambiguous definitions without any consistency between sections” has resulted in “significant reporting bias”.¹¹

Compounding issues of data collection and analysis in attempting to determine whether IHL was better applied or respected in the past is the challenge of comparing epochs. Juxtaposing radically different contexts and typologies of attacks, in terms of incidents and frequency, risks producing distorted or irrelevant generalizations.¹² The same might be said for the

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⁶ Refers to a panel discussion, “Rules in War – A Thing of the Past?”, hosted by the Center for Strategic and International Studies, 10 May 2019.
propensity of perpetrators to respond to accusations when confronted with different forms of public pressure, combined with the increased and rapid availability of information over time. The comparative application of the Geneva Conventions is also problematic given that this has never been static; rather, the Conventions are living documents periodically revised to expand the scope of protections to different categories of victims and forms of conflict. Basically, as there is no consensus on how to calculate the disregard for medical neutrality and corresponding attacks today, the task of comparative historical analysis is made significantly more difficult.

By focusing on perpetrator discourse, the challenges of incongruous data collection and the comparison of different historical periods can be partially addressed. This is not to argue that qualitative analysis of the narratives used to justify violations of IHL can quantitatively answer the question of whether “protections for wartime medical care are more or less respected than in the past”.13 Rather, by exploring the responses of those accused of targeting wartime medical care, the present study will highlight the obvious: that these attacks have long existed, at times on a massive scale. More importantly, through the analysis of the often public rationales for such attacks, a contribution can be made to understanding why ensuring the protection of medical care has proven so difficult, both historically and in contemporary conflicts.

Key to this research has been an internal paper that emerged from the Medical Care Under Fire project, entitled “Attacks on MSF Hospitals: The Discursive Practices of Perpetrators” and dating from November 2016. The objective at the time was to “acquire a better understanding of the discursive practices of perpetrators and their blame-avoidance strategies”, very much in reference to MSF’s experience in Afghanistan, Syria, Yemen, South Sudan and Ukraine. The classification scheme identified four main positions with multiple nuances. The first two, “remaining silent” or “not taking a position, stalling or avoiding the discussion” are trickier to document historically. However, the third category, “admitting involvement”, either through some form of apology or attempted justification for the attack, can be particularly revealing, as can the fourth position, “denial of involvement”, when combined with a narrative to reinforce a rejection of responsibility.14

This frame of “discursive practices” will thus be applied to a series of historical case studies, all dating from the advent of the 1864 Geneva Convention and presented chronologically. The Franco-Prussian War demonstrates the challenges of ensuring a basic understanding and diffusion of early Convention statutes. An analysis of the attacks on hospital boats in World War I benefits from the well-documented arguments used by the belligerents when attempting to justify their respective transgressions. The ICRC Archives (ICRCA) in Geneva contain a wealth of information on both Ethiopia in the 1930s and Biafra in the 1960s; this

13 ICRC, “Call for Papers: Historical Perspectives on Medical Care in Armed Conflict”, 24 October 2018.
information has been well-trodden by other researchers, although to a lesser degree as concerns the discourse surrounding attacks on medical care. The Second Sino-Japanese War, meanwhile, reveals some of the challenges, and eventual ineffectiveness, of attempting to secure protection through the spontaneous co-opting of the Red Cross name and emblem.

This selection of contexts is by no means intended to be comprehensive, and some of the omissions are glaringly obvious – notably, additional examples from World War II and post-colonial States in the Middle East. Indeed, some of the choices can be considered opportunistic and partially based on the resources available. The case studies can however be perceived as emblematic of at least some of the challenges involved when applying the “laws of war” from the late nineteenth century onwards. Following the case studies, two concluding sections will briefly look at other historical examples and further avenues of research, while also attempting to highlight some of the broader trends in perpetrator discourse relevant to contemporary attacks on medical care.

Numerous other caveats to the research should be noted from the start. The focus is almost entirely on hospital attacks, given the highly symbolic nature of hospitals as protected structures. This is done in the full knowledge that “attacks on health services can take many forms, including kidnappings, robberies, threats etc”, and that this is only one aspect of the broader violence which takes place against civilians and humanitarian actors. The identification of the perpetrator is a contemporary challenge that can directly influence the nature of the resulting protest, but in the context of this paper, the aggressor is generally obvious. Finally, none of the case studies are intended to cover all aspects of the selected conflict; rather, they look specifically at perpetrator discourse for comparative value.

It should hardly be surprising that no party to a conflict will willingly admit to a premeditated targeted or indiscriminate attack. Yet if it is “difficult to ascribe attacks against health care facilities to a single pattern of aggression and clear lines of responsibility”, let alone intentionality, some of the tactics used by those responsible to escape blame do share similarities. The lessons such historical analysis provides can help us to understand why the protection of medical care in armed conflicts remains problematic to this day.

A “perfect outbreak” of red crosses: The Franco-Prussian War (1870–71)

The Franco-Prussian War of 1870–71 marked the first conflict where the Geneva Convention was applicable to both sides. From the outset, a pattern of

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15 Ibid.
16 In contemporary terms, “the perpetrator” can refer to States, coalitions or non-State armed groups.
17 P. Calain, above note 12.
18 The Geneva Convention was applied during the Second Schleswig War of 1864 and the Austro-Prussian War of 1866, but these can be considered “semi-experiments” as only the Kingdom of Prussia had signed the Convention. Bertrand Taithe, Defeated Flesh: Welfare, Warfare and the Making of Modern France, Manchester University Press, Manchester, 1999, p. 165.
accusation and counter-accusation by the belligerents over non-respect of the Convention was established, reinforced by propaganda campaigns during and after the conclusion of hostilities. Misuse of the red cross emblem was particularly controversial, and was repeatedly exploited as both a rationale and retrospective justification for attacks on medical care. This reflected a lack of knowledge around the Convention and difficulties in applicability given the rapid territorial advance by the Prussians. Indeed, despite the proliferation of Red Cross flags around French towns and villages, either in the hope of slowing down the Prussian army or providing a measure of protection, the attacks continued, along with their indignant responses.19

The challenges faced by a nascent Red Cross during this period have been described as “the teething problems of Dunant’s noble invention”.20 Of the original three proposals that emerged from A Memory of Solferino, all were in place: volunteer societies, including national incarnations in France and Germany; a recognized and agreed-upon emblem for identification and protection; and, of course, the treaty itself, providing protection to military hospitals and medical personnel.21 Applying Article 5 of the 1864 Convention, however, would prove especially challenging. This essentially stated that a property could be entitled to neutrality and thus protection through the “presence of any wounded combatant receiving shelter and care”.22 Combined with an exemption from billeting and war levies, in a context of active combat and foreign occupation, there was an obvious temptation for the civilian population to try and secure the advantages of protection afforded by the Convention.23

In terms of attacks on medical care, it was during the initial invasion, as opposed to occupation, that most abuses occurred. The International Committee president at the time, Gustave Moynier, later wrote that ambulances close to the action were particularly exposed, but while they were “damaged on numerous occasions”, this could be explained as a “hazard of war”.25 It should be noted that in the context of the time, “ambulance” was a fairly ambiguous term and could refer to “field ambulances, mobile ambulances, station ambulances, fixed ambulances or depots for wounded and even ambulances attached to a hospital of one of the Parties to the conflict”.26

19 R. Baudendistel, above note 5, pp. 102–103.
20 B. Taithe, above note 18, p. 155.
22 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864 (1864 Geneva Convention), Art. 5.
23 Ibid.
24 It was only in 1876 that the International Committee formally adopted the name International Committee of the Red Cross, hence the use of the former at the time of the Franco-Prussian War.
26 In addition to the French and German versions, medical support came from twelve National Aid Societies for the Nursing of the Sick and Wounded in the Field (as National Red Cross Societies were then known): Austria, Belgium, Great Britain, Holland, Italy, Luxembourg, Norway, Portugal, Russia, Spain, Sweden and Switzerland, as well as the United States, despite not yet having a Society. Victor Segesvary, The Franco-Prussian War of 1870–1871: The Birth of Red Cross Solidarity, Editions L’Age D’Homme, Geneva, 1971, pp. 8, 10–11.
However, while there were obvious dangers to having overlapped or uncoordinated medical services operating close to the fighting, a primary cause of infractions was deemed general “ignorance” by Moynier. A central committee in Berlin distributed 80,000 copies of the Geneva Convention in two languages, accompanied by a short explanatory document; nothing similar occurred on the French side, despite “the Convention being unknown, even among doctors and generals who should have been the first to be instructed”.27 The International Committee, operating an International Agency for Aid to Wounded Military Personnel out of Basel for the duration of the conflict, described the French medical establishment as “badly organized” from the start.28 This was compounded by the rapid defeat of the French armies, which “almost entirely paralysed” France’s medical activity, whereas the German ambulances were better equipped and “enjoyed the advantages of an advancing army”.29

The combination of ignorance around the Convention and a dynamic military situation certainly led to the perpetration of common wartime atrocities. Bertrand Taithe has described a pattern of the French “neutralizing” structures near the front lines but where “medical staff ignored the Genevan rules and did not wear suitably stamped Red Cross armbands”.30 As the designated ambulance was transformed by the French into an isolated stronghold that the Prussians needed to destroy in order to advance, medical staff and soldiers either “died in action or were executed soon afterwards”.31

Even more problematic was the “perfect outbreak” of Geneva flags, a reference to the red cross emblem.32 While the French army did not secure the protections afforded to neutral medical services by the Geneva Convention, “civilians appropriated the most immediately applicable ‘war insurance’ measures it contained”.33 Red Cross flags were systematically placed on homes to “protect them from projectiles” or, “with the approach of enemy troops, as a guarantee against lodging them”.34 As a further measure, “hospitality was given to one or two wounded”,35 and everyone wanted the wounded under their roofs. As a result, “the Germans on arrival saw only houses where the Red Cross flag blocked their entry”.36 Put more succinctly by the British ambulance operating out of the

27 G. Moynier, above note 25, p. 5.
28 V. Segesvary, above note 26, p. 37.
29 Ibid.
30 B. Taithe, above note 18, p. 159.
31 Ibid.
32 A British ambulance found the flying of neutral country flags more useful because “experience had taught us to have more faith in its rainbow crosses than in all the Geneva flags that were waving in the city, for there was a perfect outbreak of them”. Emma Maria Pearson and Louisa Elizabeth Mclaughlin, Our Adventures during the War of 1870, Richard Bentley & Son, London, 1871, p. 149.
33 B. Taithe, above note 18, p. 171.
36 G. Moynier, above note 25, pp. 42–43.
castle of Plessis-lèz-Tours, “it was supposed to be a means of securing [the French houses] from occupation by the Germans. In many instances it failed.”

To receive the benefits and protection of neutrality, *ad hoc* ambulances must not only receive wounded soldiers, but must also treat them. However, if the nuances of Article 5 were lost on the French public, the Prussians did not hesitate to accuse the French of “abusing the system by claiming right of sanctuary for individual houses”, particularly when the “hospitals” contained only one or two injured soldiers. The French, meanwhile, accused the German military of reneging on their commitments to the Geneva Convention by shelling protected structures.

The German National Aid Society had already announced at the outbreak of war that an ambulance required at least twenty beds to be considered legitimate. And while the newly declared Third Republic declared “at least six wounded” to be the minimum in September 1870, “in most parts of French towns in which the Germans entered” each inhabitant continued to believe they had the right to place a Red Cross flag on the door or window.

Unlike the chaos seen with mobile ambulances early in the conflict, or indeed the spontaneous transformation of entire towns into “neutralized” medical establishments, direct attacks on stationary hospitals were “relatively rare” but did result in more formal responses. According to the French, during the bombardment of Beaugency on 8 December 1870, the Ursulines convent containing 150 French and German wounded received fourteen shells. The German artillery general subsequently claimed that as soon as he became aware that the convent was being hit, the targeting was adjusted to avoid the structure. And complaints that hospitals were being shelled during the siege of Paris provoked “formal denials by the Germans” that the destruction was intentional.

Aside from the direct attacks on hospitals and ambulances, other breaches of the Convention included frequent pillaging and attacks on protected individuals as well as other misuse and abuse of the emblem. Both sides compiled extensive lists of violations, the rule-breaker always being the antagonist. A German newspaper captured public disillusionment by describing the Geneva Convention

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37 E. M. Pearson and L. E. Mclaughlin, above note 32.
38 B. Taithe, above note 4, p. 43.
39 *Ibid*.
40 G. Moynier, above note 25, pp. 23–24.
42 The list is lengthy, and includes extreme examples such as parts of the 300-strong Irish Ambulance transforming itself from nurses to soldiers on arrival in Le Havre; the use of the emblem to transport munitions and treasuries; the “murder or attempted murder of doctors and nurses, both by the French and the Germans”; and the less offensive distribution of the Red Cross armband to facilitate the evacuation of the wounded. See J.-C. Buzzati and C. Castori, above note 34, p. 15; G. Moynier, above note 25, pp. 11, 16.
43 For example, shortly after the war, a German publication cited twenty-one recorded firings on German medical staff, and a further thirty-one offences deemed intentional. See *Les Violations de la Convention de Genève par les Français en 1870–1871 : Dépêches, Protocoles, Rapports etc*, Editeurs Charles Duncker, Berlin, 1871, pp. 13–15.
as “humanitarian bull”, and Prussian Chancellor Otto von Bismarck openly contemplated withdrawing his support for a treaty “so profoundly ignored by Germany’s enemies”.44

Underlying and buttressing the accusations and counter-accusations was a not particularly original jingoism. In one description of the attack on the French ambulance of Saône-et-Loire in January 1871, we are told: “[N]ever have the laws of humanity, never have the grand and generous principles of the Geneva Convention, since the beginning of this barbaric war, been so indignantly and cruelly trampled underfoot.”45 According to another author, now that the Prussians “shoot doctors, no quarter shall be given”.46 Bismarck, meanwhile, railed against the French press “systematically inoculating” the population against abuses by their own army, “nourishing their ideas of superiority and their pretensions of supremacy over other peoples”.

Even the International Committee recognized that the German wounded were less exposed to bad treatment from the opposing force than by an “ignorant and fanaticized” local population.48

From the perspective of those who drafted the Geneva Convention, there was still cause for optimism after the war. While the reality of violations during the conflict was “undeniable”, it was opined that the great majority of abuses would not have taken place “if the belligerent governments had taken measures to prevent or punish”.49 And if unjustified protection might have been sought by both belligerents and citizens, this was largely because “the Convention was insufficiently known or totally ignored”.50

A more cynical observer would note that the neutrality and protection of medical care might have received lofty words, but this was secondary to military necessity. For both the French and the Germans, “barbarism” was the other’s domain, and each side “presented the conflict as the struggle of civilisation against the barbarians”.51 In exceptional cases an accusation might lead to the perpetrator’s formal denial, but more often a counter-accusation or justification followed. While violations of the Geneva Convention were well documented by both sides, whether intentional or otherwise, for propaganda purposes the surrounding rhetoric became another tool to dehumanize the enemy.

48 G. Moynier, above note 25, p. 44.
50 J.-C. Buzzati and C. Castori, above note 34, p. 18.
51 B. Taithe, above note 18, p. 163.
Floating targets: Hospital ships in World War I (1914–18)

The intentional sinking of hospital ships during World War I was a dramatic illustration of the systematic targeting of medical care during a conflict (although the number of hospital ships lost pales in comparison to those of merchant shipping). Comparatively speaking, however, there is a curious dearth of research on the subject, especially as the press of the day used the losses as a “powerful anti-Germanic propaganda weapon”. Occurring primarily around the British Isles and Eastern Mediterranean in a context of large-scale maritime blockades, these attacks led to periodic attempts at denial or shifting the blame. But much like in the Franco-Prussian War, brutality was primarily justified by accusations of the enemy refusing to respect the rules of the 1906 Geneva Convention.

Hospital ships are essentially “floating hospitals”, often requisitioned commercial vessels. Their protected status under the second Geneva Convention was the result of a long and somewhat torturous process. The importance of extending the land provisions of the original treaty to naval warfare was recognized early on and the relevant articles laid out at a Diplomatic Conference in 1868. But while the provisions were largely recognized, it was not until 1899 that the Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention was formally adopted. Further revisions resulted in a completed document in October 1907, based on the 1906 Geneva Convention, that “laid down the conditions under which hospital ships were entitled to immunity from attack and under which they had to be respected in time of war”.

Of the main provisions from the expanded treaty, Article 1 designated as hospital ships “those solely with a view to assisting the wounded, sick and shipwrecked” and whose function was duly “communicated to the belligerent powers” prior to use, before or during hostilities. Article 3 states that they are to be “respected and exempt from capture”, while Article 4 notes that the sick and wounded should be accepted “without distinction of nationality” and that governments should “undertake not to use these ships for any military purpose”. Article 5 describes the presentation of military hospital ships, “painted white outside with a horizontal band of green about a metre and half in breadth” (illuminated at night), flying their national flag and the Red Cross flag.

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52 Although not addressed in this paper, mines also represented a danger to all shipping and caused significant damage. Germany was accused of violating the Hague Convention by laying mines in international waters. Stephen McGreal, The War on Hospital Ships: 1914–1918, Pen & Sword Maritime, Barnsley, 2008, pp. 7, 43.


55 Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 18 October 1907, Arts 1, 3, 4, 5.
along with an additional national flag if from a neutral state. Furthermore, while no circumstances are envisioned where a hospital ship can be sunk, belligerents do have the right to “control and search them”.

Within months of the war’s outbreak, the latter clause became a point of contention. On 18 October 1914 the registered German hospital ship *Ophelia* was boarded and searched, as laid out in the Convention. Despite claims of innocence from Germany and accusations of British piracy, the ship was brought back to a British port. Pointing to suspicious behaviour and evidence of secret codes received, the British eventually declared the *Ophelia* a “lawful prize” as it had been found to be acting as “a scout or a spy for the enemy”. This incident became a reference point and was regularly raised by Germany when it was later accused of intentionally targeting Allied hospital ships.

The first recorded attack of the war on a hospital ship took place on 1 February 1915 when a German submarine fired a single torpedo at the British ship *Asturias* while on route to Le Havre, despite it being daylight and with Red Cross markings “clearly visible”. Denounced for violating the “absolute respect due to hospital vessels”, the incident is significant not so much for being the first of what would become an increasingly frequent occurrence, but rather for the German reaction. Communicating via the German embassy in Washington, the Germans apologized for mistaking the vessel for a transport, noted that the torpedo did not explode, and pointed out that the attack was abandoned as soon as the *Asturias* was recognized as a hospital ship.

Attacks were not limited to British hospital ships. The Turkish government admitted responsibility for sinking the Russian hospital ship *Portugal* on 17 March 1916, claiming that it was mistaken for a transport in the “uncertain morning light”. After a second Russian hospital ship, the *Vpered*, was torpedoed and sunk in July of the same year, Russia retaliated by refusing to recognize the Turkish hospital ship *Bulgaria*. Nor were the perpetrators limited to the Central Powers – on 18 March 1916 the Austro-Hungarian hospital ship *Elektra* was torpedoed by an “Entente allied submarine”, with the French later admitting that the ship was attacked in error despite the “prescribed visible marks”.

The sinking of the British *Britannic* on 21 November 1916 encapsulated many of the claims and counter-claims that were emerging from attacks on hospital ships. Germany initially denied responsibility, blaming a Turkish submarine recently purchased from the German navy and all the while suggesting that the *Britannic* was being used as a troop transport. It was also initially unclear

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56 Ibid.
57 Ibid.
58 “Hold German Hospital Ship: British Authorities Say the Ophelia was Really a Scout”, *New York Times*, 22 May 1915.
59 S. McGreal, above note 52, pp. 28–32.
60 J. H. Plumridge, above note 54, pp. 36, 44.
63 Ibid.
if the Britannic was torpedoed or hit a mine until the German newspaper Kieler Zeitung published a statement on 3 December 1916 claiming that the ship was indeed “transporting fresh troops for our enemies” and that if it had been otherwise “our submarines would never, of course, have torpedoed her”.64 The British response was to publish a list of all passengers, note Britain’s observance of the Geneva and Hague Conventions, and repeat that British hospital ships “carry neither personnel nor material other than that authorized by those Conventions” 65

A new period of intensity arrived with the resumption of unrestricted submarine warfare from 1 February 1917. Although the implications went far beyond the already much-infringed neutrality of hospital ships, the German government made specific mention of medical care at sea. In a memorandum three days earlier, enemy governments, “especially the British Government”, were accused of using hospital ships for military purposes and thereby “violating the Hague Convention regarding the application of the Geneva Convention to maritime warfare”.66 Numerous examples were provided, especially regarding the transport of troops and munitions “under the hypocritical cloak of the Red Cross”.67

Consequently, while it asserted that it was “entitled” to free itself from the treaty obligations, the German government submitted that it would continue to respect the Convention “for reasons of humanity”.68 However, Germany would henceforth ban hospital ships from the main theatre of war (essentially the southern part of the North Sea and the English Channel), and any vessel entering this area would be “considered as belligerent” and “attacked without further consideration”.69

The British response contained a rebuttal for each accusation, notably around the “excessive use of hospital ships” during the Gallipoli campaign and changes in hospital ship registration “with supposed intention to deceive”, a measure more likely to increase the risk of attack than anything else. Regarding troop and munition transport, the British chided the Germans for having been deceived by the “fallacious deductions of their witnesses”.70 The crux of their argument, however, rested on Article 4: that unlike during the Ophelia incident, “German submarines and other warships have never once exercised the right of

65 S. McGreal, above note 52, p. 118.
66 “III. – Diplomatic Correspondence: Memorandum of the German Government Respecting the Misuse of Enemy Hospital Ships”, in Unknown Author, above note 64.
67 Ibid.
68 Ibid. Continued accusations that the British used hospital ships for the transport of troops and munitions led to the German barred zone being extended to include the Mediterranean Sea on 26 May 1917. The Germans stated that they would “regard all hospital ships in these waters as enemy vessels of war and would attack on sight”. S. McGreal, above note 52, p. 158.
69 Ibid.
70 “III. – Diplomatic Correspondence: Memorandum of the British Government in Reply to German Allegations of the Improper Use of British Hospital Ships”, in Unknown Author, above note 64.
inspecting British hospital ships”.71 Instead of verifying their assumptions, they “proceeded to the extreme step of ruthlessly attacking innocent hospital ships engaged in their humane task of serving the sick and wounded”.72

The ICRC also weighed in with a note of 29 January 1917 which referred to the new German strategy as being “in contradiction to the humanitarian conventions which [Germany] has pledged itself solemnly to respect”.73 After reviewing the agreed-upon conditions for hospital ship accreditation and “right of search”, it was emphasized that irrespective of suspicions, there is “in no case any right to sink a ship and expose to death the hospital staff and the wounded”.74

Despite such interventions, a further eight hospital ships were torpedoed before the Armistice of 11 November 1918.75 These included the Asturias, which did not survive a second attack on 20 March 1917. Taking the place of the apology two years earlier, there were the now familiar recriminations. A German wireless message noted how remarkable it would have been that the “English in the case of the Asturias should have abstained from their customary procedure of using hospital ships for the transport of troops and munitions”.76

Nor was the Allied reaction comparable to that seen earlier in the war. While mass casualties in France and Belgium might have been acceptable in a “war of attrition”, attacks on hospital ships provoked public anger that was duly exploited to justify new levels of violence. This was the context of the British and French aviation bombing of the German town of Freiburg, an action that produced “satisfactory results”.77 And if there was any doubt over the justification, high explosives were accompanied by leaflets stating in German: “As reprisal for the sinking of the hospital ship Asturias which took place on the night of 20th/21st March 1917.”78

More pragmatically, the continued sinking of hospital ships provoked responses other than simple reprisals. When the Donegal and Lanfranc were sunk on 17 April 1917, the British referred to both as hospital ships, but only one carried Red Cross insignia. This was subsequently explained as a necessity given that the habitual markings “render[ed] them more conspicuous targets for German submarines”.79 In fact, the “entire status of hospital ships” was being reconsidered by the British government, with certain vessels being withdrawn from the list of hospital ships for their own protection.80 In the propaganda war, this was taken as further proof of “British unscrupulousness”.81

71 Ibid.
72 Ibid.
73 “I. – The First Year: The Verdict of the Red Cross”, in Unknown Author, above note 64.
74 Ibid.
75 J. H. Plumridge, above note 54, p. 42.
76 “I. – The First Year: The ‘Donegal’ and the ‘Lanfranc’”, in Unknown Author, above note 64.
77 Ibid.; S. McGreal, above note 52, p. 144.
78 S. McGreal, above note 52, p. 141.
80 Ibid.
81 S. McGreal, above note 52, p. 150.
The radically different narratives that emerged from each sinking of a hospital ship continued to grow further apart as the war neared its end. This was particularly obvious when the Llandovery Castle, a Canadian hospital ship sailing from Halifax to Liverpool, was torpedoed on 27 June 1918. Afterwards, lifeboats were shelled and rammed, leaving twenty-four survivors; eighty-eight medical staff and 146 crew were lost.82 While journals such as the South African Nursing Record expressed their horror by suggesting that nothing was to be done with the “beast” but “annihilate him completely”, the German government initially denied involvement before alternating between a mine theory or a justified torpedo attack.83 The Essen newspaper Rheinisch-Westfälische Zeitung simply noted that “the vessel probably struck a mine, but even if she was torpedoed it was probably rightly done, as most overseas hospital ships are armed”.84

Justifications for attacks on hospital ships, and the corresponding condemnation, became so intertwined with wartime propaganda that teasing out the actual facts is a challenge. The sinking of hospital ships early in the war has been described as “casual atrocities” when compared with the Germans’ decision to “sink hospital ships systematically in their ‘blockaded zone’”.85 By 1918 it was clear that the time for apologies for errors was long past, and attempts at denying involvement were half-hearted at best. It was not so much a question of admitting responsibility but rather a matter of repeating ad nauseam the consequences of the enemies’ own transgressions.

Yet if reprisals for violations of the Geneva Convention by the enemy were the rationale for the continued targeting of medical care, any reflection on perpetrator discourse cannot be separated from the context. And in terms of tactical effectiveness, however brief, the renewal of unrestricted submarine warfare not only crippled the resupplying of Allied forces but also revived the possibility of a German victory. The broader military prerogative inevitably took precedence over humanitarian considerations, even more so in a war of attrition.

“Wake up Geneva”: The Second Italo-Ethiopian War (1935–37)

The Second Italo-Ethiopian War marked the final chapter in the European colonization of the African continent. It is often remembered for the failures of the League of Nations, the club to which Ethiopia had only grudgingly been admitted, and Italy’s use of chemical weapons.86 In the repeated targeting of Red

82 J. H. Plumridge, above note 54, p. 46.
83 S. McGreal, above note 52, pp. 204–205.
84 Such views persisted with the war crimes trial in Leipzig addressing this specific incident. The “continual reports of British abuse of hospital ships” were noted, while the defence denounced the “hunger blockade” and stated that “it was necessary to destroy the men and women in the lifeboats in order to prevent them from reaching their homes and re-joining the war against the Fatherland”. Ibid., pp. 205, 222–225.
85 “I. – The First Year: The ‘Vperiod’”, in Unknown Author, above note 64.
86 “… primarily the blister agent sulphur mustard”; see Lina Grip and John Hart, “The Use of Chemical Weapons in the 1935–36 Italo-Ethiopian War”, SIPRI Arms Control and Non-proliferation Programme, October 2009.
Cross hospitals, the conflict also provides some of the more blatant examples of attacks on medical care. In attempting to explain and frequently justify those attacks, Italian political and military officials often fell into caricature. Playing on widespread sympathy for European tutelage over the continent, and tolerance for Italy’s colonial war, the occasionally fine line between propaganda and the propagation of outright lies was explicitly and repeatedly crossed.

Both Italy and Ethiopia had ratified the 1929 Geneva Convention at the time of the conflict, the latter only months before the Italian invasion on 3 October 1935. Much as the 1906 Convention attempted to address past weaknesses, notably by reducing non-combatant initiatives to help the wounded to “more reasonable proportions” than that seen in conflicts such as the Franco-Prussian War, the 1929 version reflected the recent experience of World War I. Of particular relevance to the Italo-Ethiopian War was the greater precision given to the use of the red cross emblem, notably that it should only be used “to indicate the medical formations and establishments and the personnel and material protected by the Convention”.

There are varying estimates on the number of Red Cross hospitals bombed during the conflict. Rainer Baudendistel reviewed lists compiled by the Ethiopian government, the League of Nations and other researchers to settle on seventeen incidents, including “seven direct bombings”. He went on to identify three separate phases of the war regarding Italian attitudes and actions towards the Red Cross. An initial period of roughly two months saw “encouraging signs” that the Italian Air Force was “complying with international humanitarian law”. A second phase covering December 1935 to March 1936 included much of the fighting and attacks on the Red Cross. A final phase leading up to the occupation of Addis Ababa saw no further attacks, arguably because very few field hospitals remained functional, and those left working did so “under camouflage and escaped detection from the air”.

As combat operations increased from late 1935 onwards, it is worth highlighting some of the major incidents that would establish patterns of attack and retrospective rationales. When the Italian Air Force bombed the town of Dessie on 6 December 1935, the ostensible target was Haile Selassie and parts of the Ethiopian leadership, the emperor having arrived the previous week to direct the war effort. In an action that prefigured the strategic bombing of World War II, initial casualty estimates were of fifty dead and 200 wounded. With the first bombs having fallen on the hospital of the American Adventist Mission,

87 Ethiopia ratified the 1929 Geneva Convention on 15 July 1935. This was the third revision of the original 1864 Geneva Convention.
88 1906 Geneva Convention.
90 R. Baudendistel, above note 5, pp. 117. It should also be noted that although the capital was occupied on 5 May 1936, fighting continued up until the last major battle on 19 February 1937 in Gogetti.
91 Ibid., pp. 118–119.
92 Ibid.
questions were immediately asked about intentionality. The head of the American mission had little doubt, noting that while the Italians “might not have seen the Red Cross flags over the tents”, those on the hospital roof were “certainly easily visible at 6,000 feet up”. He went on to note that they might have been targeting the nearby Italian Consulate, occupied by the emperor, but in that case “their aim must have been very bad, as not a bomb fell anywhere near it”.

While the ICRC considered the Convention violations in Dessie to be “flagrant”, its language was cautious and referred to the hospital bombing as “a horrible error”. Diverging views between the ICRC’s Geneva headquarters and the two field-based delegates, notably around the degree of Italian intentionality, were not yet entrenched. The Ethiopian emperor was more definitive: noting that the bombings of Red Cross hospitals were “incontestably violations of international law”, he asserted that events in Dessie represented yet another transgression by Italy that should be communicated to member States of the League of Nations.

Concerned by bad press over their civilizing mission, the Italians’ response was twofold. On the one hand, damage to protected medical structures was questioned. A flight report was duly manipulated to demonstrate that the Red Cross sign “was intact” the day after the bombing. And more cynically still, blame was shifted to the Ethiopians. The Italian Ministry of Foreign Affairs added the retroactive observation that in Dessie, “all was covered with Red-Cross signs including the army camps and even the airfield”. This fit with a long-standing Italian campaign on the misuse of the emblem that began as early as October 1935 and had particular resonance with the ICRC. Having already expressed concerns over similar rumours in Harar after being informed that “almost everyone paints a red cross on their roof”, it took months for field delegates to demonstrate the contrary.

Justifying subsequent events in Melka Dida would prove more difficult. On 30 December 1935, a Swedish Red Cross field hospital was bombed despite flying the Red Cross flag, the Abyssinian flag and the Swedish flag “in accordance with regulations”, along with “easily visible” Red Cross flags spread on the ground. The preliminary count included twenty-eight patients killed in their beds, and a further fifty patients and ambulance staff wounded. In examining the scene of the bombing, the ICRC delegate noted that “of all the parts of the frontline that I

95 Ibid.
98 R. Baudendistel, above note 5, p. 124.
99 Ibid., p. 125.
100 Ibid., p. 104.
102 M. Junod, above note 94, p. 47.
have seen with my own eyes, no place was bombed with greater intensity than the Swedish Ambulance”.  

Already on 22 December there had been overflights during which the Swedish tents had been “machine-gunned”. Nobody was injured at the time, and the later survivors assumed it had been in error. Then, in a seemingly unrelated event, an Italian pilot and observer made an emergency landing on 26 December “somewhere behind Abyssinian lines and the natives killed him”. Accompanying the bombs four days later were leaflets printed in Amharic, signed by Italian General Rodolfo Graziani, stating: “You have abandoned international law. Our pilot was captured, and you cut off his head and killed him. … For this, you will get what you deserve.”

Graziani’s demand for revenge was immediately downplayed after the attack, and a new justification of “half-truths and simple lies” was constructed. Key to the new argument was the purported presence of Ethiopian military leaders “who had sought illicit protection of the Red Cross”. During exchanges with the Swedish minister in Rome, bad visibility was also added to the list of justifications. Graziani’s explanations were repeated in Italian propaganda, especially via the media. The latter tended to present the Swedish bombing as an “indignant” ruse attempting to throw “shadows of suspicion and doubt on the Italian Army”.

The ICRC delegate Dr Marcel Junod, after visiting the bombing site, was far more categorical with his analysis, and dismissive of Italian justifications. Compared to the “accidental” bombardment of the American Adventist Mission, he stated, “it seems obvious that the massacre of the Swedish ambulance at Malka Didaka was premeditated”. More specifically, the delegate pointed to the preceding overflights, confirming that there were “no armed men in this ambulance and there was no risk of being fired upon”. Meanwhile, the “decapitation” of an Italian officer used to justify the bombardment was an “odious lie intended to cover a veritable act of piracy”.

There was at least some awareness in the Italian leadership that attacking the Red Cross hospitals could be counter-productive. Mussolini himself noted that while he was “in favour” of a harsh war, in attracting “criticism from all over the world …
we are only making our task more difficult”. Orders were duly given to “respect all Red Cross installations” wherever they may be, but in practice, military expediency continued to take precedence and the attacks continued.

While the public rationales varied, they largely focused on the themes described above, especially around the misuse of the red cross emblem. The Ethiopians were repeatedly accused of using the emblem to “protect military material” and to “camouflage their own positions”, in addition to field hospitals being transformed into shelters for their military leaders.

Underlying accusations against the Ethiopians’ inability to conform to the requirements of the Geneva Convention was a racial construct sadly not out of place in the 1930s and fitting with the Italians’ civilizing claim. In describing the “savage and bloodthirsty” murder of Italian labourers on 13 February 1936, the Italian government noted that this was simply the latest in “a series of systematic and barbarous crimes which not only arouse irrepressible horror, but bear witness to the uncivilized condition of Ethiopia”. When the authenticity of “presumed bombardments” could not be denied, when Ethiopian misuse of the red cross emblem was not credible, the uncivilized nature of the adversary was put forward. This was the crux of Mussolini’s claim as Addis Ababa was about to fall to Italian forces: “The missionaries of the different Red Crosses have been killed or wounded by the Abyssinians who are too backward to be able to respect emblems.”

Meanwhile, the impact on medical operations was nothing short of catastrophic. Following a bombardment in Woldia in January 1936 that destroyed well-marked medical supplies, Major Bourgogne of the Ethiopian medical service cabled the ICRC, demanding: “Wake up Geneva as is evident Italians making special target of any Red Cross.” While the ICRC was not entirely convinced this particular attack was intentional, an update to headquarters did note that both locals and Red Cross staff “shared the opinion of Major Burgoyne”. A mitigating measure is described where “patients are brought daily outside at around 7 am and placed under trees a reasonable distance from the Red Cross emblems”; the report then states that the Red Cross risks becoming “the laughing stock of the country”.

Over the coming months, individual ambulances and field hospitals took the more obvious step of simply removing the emblem as “the Italians are taking the Red Crosses as targets during their operations and bomb them wherever they...

114 R. Baudendistel, above note 5, p. 138.
115 Ibid.
116 Ibid., p. 160.
122 Ibid.
find them”. As the head delegate noted, it was difficult for the National Red Cross Societies (National Societies) to do any differently as he had “no desire to see members of Red Cross ambulances assassinated for reasons of stubborn doctrine”. By the end of April 1936, most National Societies had been bombed or had ceased to function, with the exception of the Norwegians.

Despite concerns at ICRC headquarters of antagonizing fascist Italy, protests were sent to the Italian Red Cross. In one response, the answer was limited to forwarding a newspaper clipping that described the destruction of ambulances in World War I by all sides. The message was clear: how can one be condemned for acts committed by all? The Italian Red Cross delegate in Ethiopia helpfully summarized the attitudes of his compatriots in noting that “nothing was expected from the Red Cross in Geneva”, while the National Societies and doctors were “mercenaries, sell-outs and against us”.

Unsuccessful attempts by the Red Cross to negotiate a level of protection from Italian bombardments in Ethiopia inevitably led to disillusionment among its staff. Propaganda and manipulation of facts, patently false to those on the ground, could only contribute further to that disillusionment. Questioning of eyewitness accounts of Red Cross field hospitals being intentionally targeted, and the blaming of the “Abyssinian barbarian” for their own violations of the Convention to justify those acts, took place in a much broader struggle. The failure to mitigate the risks to providing medical care, and the Red Cross’s own sad irrelevance, was neatly captured by the head ICRC delegate: in such a conflict, he said, there was “no possibility of caritas inter arma, it’s all-out war, pure and simple, with no distinction between soldiers and civilians”; and as for the Red Cross, “it’s hardly surprising that it has been swallowed up along the way”.

A footnote to total war: The Second Sino-Japanese War (1937–45)

Given the scale and duration of the conflict, and especially the well-documented attacks on all civilian structures, the Second Sino-Japanese War might seem an odd addition to an analysis of perpetrator discourse specifically focused on medical care. It illustrates the challenge of singling out the protection of hospitals in contexts where entire cities are razed. Nevertheless, a pattern of accusations did emerge shortly after the Japanese invaded on 7 July 1937. And as their forces...
extended inland to Nanking, seat of the Nationalist Government of the Republic of China, mutual recriminations shifted to include Japanese propaganda intended to counter a narrative of atrocities that certainly included structures ostensibly protected by the Geneva Convention.

Japan had a well-organized National Society and had ratified the 1929 Geneva Convention on 18 December 1934.130 Shortly after the outbreak of hostilities, the Japanese Red Cross actually refused an ICRC offer of support as it had sufficient preparation “for all eventualities”.131 Despite China having also acceded to the 1929 Convention, in addition to being more amenable to external support, the ICRC considered the protection of the Red Cross by both parties to be “extremely difficult”.132 The Shanghai-based delegate concluded early on that the “mentality of Orientals” meant they were incapable of “our way of thinking”.133 Both parties were “mutually accusing each other of abusing the Red Cross”, acts that the delegate “would not put [his] hand in the fire to say [were] not the case”.134

In practice this resulted in the two countries’ National Societies sending their respective reproaches via Geneva, which were then duly forwarded to the accused party. The list was long. Initial accusations came from the Japanese, charging the Chinese with “indescribable atrocities” against Japanese civilians in Tongzhou.135 This was followed in quick succession by claims that three Japanese hospital ships had been bombed or shelled between 29 August and 12 September 1937.136 The dropping of Chinese incendiary bombs on a Red Cross hospital during the Battle of Shanghai was likewise relayed on 20 October 1937.137

The Chinese Red Cross also launched “strong protests” at the attack on medical structures by the Japanese military, such as the Chenju Red Cross hospital on 18 August 1937.138 Its primary complaints, however, involved the targeting of ambulances “despite flags and insignia”, a frequent occurrence resulting in the destruction of seven from a fleet of thirty by the end of August.139 Many of the exchanges included denials by both belligerents, and despite evidence to the contrary, the analysis of the ICRC resembled that of the

130 Note that Japan had signed but not ratified 1929 Convention relative to the Treatment of Prisoners of War.
133 Ibid.
134 Ibid.
138 This includes incidents on 19, 23 and 30 August 1937. ICRCA, B CR 217-1, 1-105, “Telegrammes Retélégraphié par la Ligue des Sociétés de la Croix-Rouge”, 29 August 1937.
139 Ibid. (author’s translation). Protests against Japanese atrocities, including the bombing of hospitals supported or run by the Chinese Red Cross, were likewise relayed in the press during this same period. See “Les Japonais ont bombardé le camp de la Croix-Rouge”, Argus International de la Presse, 4 September 1937; “Nous sommes revenus au temps des barbares: Emouvant appel de Madame Chiang-Kai-Shek”, Argus International de la Presse, 18 September 1937; “Deux communications chinoises à la S.D.N. sur les bombardements des non-combattants et des villes ouvertes, l’emploi des balles dumdum et des gaz toxiques par les Japonais”, Argus International de la Presse, 18 October 1937.
early stages of the Italo-Ethiopian War: that violations of the Convention were “less the result of bad intentions than negligence”.140

The occupation of Nanking by the Imperial Japanese Army dispelled any pretence of “negligence” in the targeting of medical structures, even as the destruction went far beyond that of hospitals. Already by November 1937, and with the Nationalist army in retreat, information was relayed from the American Red Cross that trucks and railway cars evacuating the wounded from Shanghai to Nanking were being “consistently attacked by Japanese planes”.141 Due to “bombs and machinegun fire”, half of all transports were destroyed, and movement could only proceed at night. Of the 1,500 patients who survived the journey, all were septic “because of [the] impossibility of giving them early attention”.142 With the arrival of Japanese forces imminent, it was observed on 10 December 1937 that the Chinese staff had fled the University of Nanking Hospital and that “bodies were everywhere – clogging the rooms, corridors, and even exits”.143

By the evening of 13 December 1937, the Japanese army controlled the entirety of Nanking. The remaining foreigners had already formed the Nanking Christian War Relief Committee and established a “safety zone” that initially provided sanctuary to 100,000 displaced. They renamed themselves the International Red Cross Committee for Nanking and took charge of the former military hospitals at the Ministry of Foreign Affairs, the Ministry of Railways and the Ministry of War, in addition to the University of Nanking Hospital.144 The Japanese military commander was informed of these developments by letter the following day and given assurances from the self-appointed Committee that all men at these sites had been disarmed and that the buildings would only be used “for hospital purposes”.145

Regardless, on 14 December 1937 the Japanese army broke into the hospital at the Ministry of Foreign Affairs, forbade access to medical staff and eventually removed wounded soldiers, who were “marched out and systematically shot”.146 The process was repeated at the other hospitals until only the University of Nanking Hospital remained functional, although it too was looted and saw patients “either bayonetted or shot”.147

141 ICRCA, B CR 217-3, 201-400, internal update to Geneva, 11 November 1937.
142 Ibid.
144 ICRCA, B CR 217-3, 201-400, Secretary of the International Red Cross Committee for Nanking to ICRC Delegate in Hankow, 22 December 1937.
146 I. Chang, above note 143, p. 125.
The massacres carried out in Nanking, including those specifically targeting medical care, initially provoked steps by the Japanese to limit international exposure. The ICRC delegate in China was repeatedly refused access. It was only in mid-1938 and from the comparative safety of Hong Kong that he was able to escape censors and forward the “Nanking Report” to Geneva. This document provides a daily journal of the “complete anarchy” of Japanese occupation in December 1937, describing a “city laid waste, ravaged, completely looted, much of it burned”. However, news had already filtered out well before the report made it to Geneva, notably via three American journalists who had remained in Nanking during the early stages of the occupation. In addition to publishing detailed accounts, newsreel was also smuggled out, leading the Japanese military to “seal off the city to prevent other reporters from coming in” and “impede the return of foreign diplomats”.149

The emergence of reporting from Nanking in the world press was followed by international condemnation. It was no longer enough to limit foreign witnesses, and initial celebrations in Japan over the conquest of the Chinese capital shifted to an intensified propaganda campaign intended to demonstrate a more humane reality. The authors of the “Nanking Report” noted that already by the end of December, Japanese newspapers were claiming that “stores were rapidly opening up and business was returning to normal”. Meanwhile, the city had been emptied of Chinese looters and “peace and order now reigned”. These two angles would be repeated in the months to come. The picture presented was essentially that of a benevolent victor being welcomed by spontaneous crowds ever grateful for their liberation, while the supposed “outrages” were the result of uncooperative Chinese often acting at the behest of foreigners.152

The interchange of reporting and propaganda stemming in part from the carnage in Nanking largely overshadowed the noted attacks on hospitals. Initial plans for an ICRC delegate to “make known the location of Red Cross units and warn against their bombardment” had come to naught. With the ICRC underfunded and understaffed, a single delegate had eventually been sent “principally as … an observer”, and the posting was abandoned after 1939. Nevertheless, basic patterns did emerge as several tactics were used to avoid responsibility for breaches of the Geneva Convention. Neither side admitted involvement, and each accusation was followed by a counter-accusation. During the Japanese occupation of Nanking, when documentary evidence of violations could no longer be denied, a counter-narrative was propagated that shifted blame to the victims.

148 ICRCA, B CR 217-4, 401-600, “Nanking Report” accompanying internal update to Geneva, 2 May 1938. The Report was drafted by members of the local International Red Cross Committee for Nanking and was considered “authentic” despite being unsigned due to the risk to the authors.

149 I. Chang, above note 143, pp. 144–147.


151 Ibid.151

152 I. Chang, above note 143, pp. 149–153.


154 Ibid.
More broadly, the fate of protected medical structures in the Far East was lost in the sheer scale of civilian suffering, culminating in the use of atomic weapons in Hiroshima and Nagasaki in 1945. In an unusual step, there was an early attempt by the ICRC in Geneva to remind the belligerents of their obligations to the 1907 Hague Convention regarding the targeting of civilians and related infrastructure.\textsuperscript{155} This was perhaps the most likely indicator of the shape of future conflicts, and the ICRC delegate in China stated as much before his departure. In his view, the potential for mass destruction of entire populations should become a central issue for the ICRC “as modern armies are becoming more and more murderous, and as bombing raids are taking a more sinister and horrible form”.\textsuperscript{156}

More honoured in the breach: The Nigerian Civil War (1967–70)

When the Republic of Biafra declared independence from Nigeria on 30 May 1967, the international legal context had evolved considerably. Earlier incarnations of the Geneva Convention made no mention of “civilians”, and rather referred to “unarmed inhabitants, non-combatants and the enemy or occupied population”.\textsuperscript{157} Following the atrocities of World War II, such as those described in occupied China, the fate of civilian populations became a specific subject of IHL through Geneva Convention IV of 1949. As relevant for the Nigerian Civil War was Article 3 common to the four Geneva Conventions, which extended coverage to “conflicts not of an international character”.

These innovations would prove controversial in Biafra despite Nigeria having ratified the 1949 Conventions and Biafran leader Odumegwu Ojukwu agreeing to abide by its principles. Over the course of the conflict, which would last until the capitulation of Biafra in January 1970, both sides would be accused of instrumentalizing humanitarian aid and conducting massacres.\textsuperscript{158} Relations between the Nigerian military government and the ICRC were particularly tense, with access to the blockaded territory a point of friction requiring constant negotiation.\textsuperscript{159} Receiving less attention was what can be described as the systematic targeting of hospitals by the Nigerian Air Force. In this regard a familiar pattern emerges, beginning with a chaotic mix of apology and denial by those responsible, eventually shifting to accusations of misinformation and attempts to justify the incidents.

ICRC delegates identified at least sixteen occasions where medical structures were attacked in Biafra as the Nigerian State attempted to suppress the secessionist

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\textsuperscript{155} ICRCA, B CR 217-4, 401-600, letters to Ministry of Foreign Affairs for the Imperial Government of Japan and Ministry of Foreign Affairs for the Republic of China, 5 March 1938.
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\textsuperscript{156} C. Moorehead, above note 44, p. 368.
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\textsuperscript{158} C. Moorehead, above note 44, p. 617.
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Although the circumstances in each case differ, a closer inspection of the correspondence surrounding some of the incidents is revealing both for the Nigerian government’s position and the subsequent reaction. Mary Slessor Hospital in Itu was a particularly flagrant example. Located on a hill and isolated from other dwellings, consisting of four main buildings “each distinctly marked on the roof with a Red Cross”, the long-established hospital was bombed on 23 January 1968, resulting in severe structural damage and six deaths. In a letter of protest to the Nigerian government, an ICRC delegate noted the unlikelihood of error given that the attack occurred in plain daylight and was carried out “by highly skilled experts” against a “distinctly recognizable hospital”. A subsequent memorandum suggested that only a well-founded suspicion that the hospital was being used for military purposes could provide a reasonable explanation.

The response from the Federal Military Government was relatively apologetic even as other possible scenarios were broached. According to the Nigerians, poor weather pointed to a simple “mistake”, or unscrupulous rebels were “taking advantage” of the Red Cross to secure protection. Regardless, a degree of responsibility was accepted; the “Commander-in-Chief was very distressed” about the attack and was well aware that such acts were “contrary to the spirit of the Geneva Convention”. Looking to the future, an internal investigation was launched to avoid a “recurrence of the serial raids on hospital establishments”.

Complaints over the attack in Itu were not limited to the ICRC. But while anger from organizations like the Biafran National Red Cross might not be especially surprising, another more disturbing rationale was raised. Despite a commitment to keep “military installations away from hospital locations”, along with the “necessity” of using the red cross emblem for medical structures, the Biafran authorities suggested that marking hospitals actually made them a target. Such fears were reiterated by the Overseas Council of the Church of Scotland, a sponsor of the Mary Slessor Hospital. Given the circumstances of the attack, not

160 ICRCA, B AG 202 147-008.01, “Reference: Bombing, Strifing [sic] of Hospitals and Civilians”, internal update to Geneva, 26 February 1968. By February 1968 the ICRC Delegate and Special Representative to Biafra had identified eleven medical structures that had been attacked. Subsequent reports and analyses reveal five further incidents (the ICRC Community Hospital in Awo-Omamma being targeted twice).


162 Ibid.

163 ICRCA, B AG 202 147-008.05, “Memorandum Concerning the Protection of Both Civilian and Military Hospitals in Time of War and Armed Conflict”, sent to the Federal Military Government of Nigeria from the ICRC, 7 February 1968.

164 ICRCA, B AG 202 147-008.05, letter from Permanent Secretary to Federal Military Government, 7 February 1968.

165 Ibid.

166 Ibid.

167 ICRCA, B AG 202 147-008.05, “Letter of Protest”, Moses M.K. Iloh, National Secretary, Biafran National Red Cross, to ICRC, 10 February 1968. The same letter noted the “distressing fact that the country [the United Kingdom] which sponsored Nigeria’s admission into the International Red Cross is today sponsoring her acts of genocide”, including in its recent confirmation “that she was still supplying arms to Nigeria”.
only could there be no doubt that it was “deliberately aimed against the hospital”, but it was being “questioned very gravely whether it was wise to use the well-known emblem recognized by States throughout the world”. In a precursor to today’s claims of IHL in crisis, the Scots suggested that few States, in the event of war, would “honour a Convention which is now somewhat out of date”.

Within the ICRC, especially field delegates, there seems to have been little doubt that the hospital raids were “absolutely deliberate”. Indeed, determining that the sites targeted were scenes of active combat would seem to depend on “whether one considers the whole of Biafra as a battle zone”. Objections to the Federal Military Government consequently became less ambivalent. In another letter of protest from May 1968, the ICRC delegate-general for Africa noted that attacks on hospitals had continued despite the federal authorities having on several occasions “publicly declared that the pilots had been ordered to stop attacking and bombing civilian targets”. Corroborated accounts of the “apparently deliberate bombing of civilian population and the air-attack against hospitals and first-aid stations in disregard of the Red Cross emblem” were duly relayed. And as with previous protests, the relevant violations of the Geneva Conventions were underlined in legal terms.

As accusations against the Nigerian Air Force increased in frequency and severity, the response from the Nigerian government became equally intransigent and defensive. Responding to yet another protest over an air raid, this time “deliberately aimed at the ICRC Aboh Hospital” on 19 October 1968, the Ministry of External Affairs was dismissive. In addition to not understanding the reasoning behind the protest, given that there was “no damage to ICRC
property or loss of life”, the Ministry noted that delegates were not qualified to say if there were “military targets in the area”.176 Then turning on the offensive, the Ministry issued a vague warning. Noting that the ICRC’s earlier “partisan actions and pronouncements” had provoked severe strain on relations with the government, the Ministry stated that the former should “refrain from any actions” which could lead to a further deterioration.177

The following incidents led to actions that were unlikely to assuage the Nigerian government. Field delegates had already been arguing to “bring these acts to the notice of the public”.178 When the ICRC Community Hospital in Awao-Omamma was bombed on 9 December 1968 and again on 5 January 1969, killing seven people and “badly injuring” at least ten Red Cross staff, there was a move to public denunciation. The usual letters of protest noted the “characterized violation of the principles of the Geneva conventions”, and in both cases these were followed by press releases.179 A 7 January communication noted that it was the second time in a month that “this hospital had been deliberately attacked by the Nigerian Air Force”.180

Decrypting the Nigerian response to repeated accusations of having targeted hospitals is not easy. While a pro-government local radio station boasted that “hospitals have been attacked or will be attacked”,181 concurrent broadcasts from Lagos “kept denying that Nigerian Air Force planes were attacking civilians and hospitals”.182 The mixed messages continued with public claims from General Yakubu Gowon denying “such raids” while his own administration discreetly acknowledged “mistakes” such as Mary Slessor Hospital in early 1968.183

Easier to trace is the positioning of the Nigerian government as both the hospital attacks and the war itself dragged on. An “Operational Code of Conduct for Nigerian Armed Forces” had existed since 1967 and was explicit: “hospitals, hospital staff and patients should not be tampered with or molested”.184 Although more honoured in the breach, reference to the Code of Conduct and the strict instructions “not to bomb any non-military targets” became a ready-

177 Ibid.
182 Ibid.
183 ICRCA, B AG 202 147-008.05, letter from Permanent Secretary to Federal Military Government, 7 February, 1968.
made answer whenever the government was confronted with a new accusation of transgression.\textsuperscript{185}

Two other angles emerged that bear a striking resemblance to the earlier case studies. Already in mid-1968, General Gowon had alluded to “secessionists using hospitals and other protected sites to store arms, munitions and troops”.\textsuperscript{186} Nearly a year later, and while still “categorically rejecting any charges of indiscriminate bombings”, the Nigerian officials openly referred to the “deliberate policy of the rebels” of hiding in population centres.\textsuperscript{187} And perhaps more ominously for the ICRC, the Federal Military Government also claimed to be “a victim of scurrilous propaganda”.\textsuperscript{188} If indeed civilians were hit, the bombings “could only have been accidental” and the resulting casualties “grossly exaggerated”.\textsuperscript{189}

Essentially the full range of perpetrator discourses was now almost covered in a single conflict, fluctuating from admission to denial, interspersed with retrospective justifications enveloped in nefarious plots ostensibly aimed at discrediting the Nigerian State. The presence of inconvenient international observers highlighting these incongruences was hardly welcome. Put another way, while the Biafrans had “quickly perceived that the surest road to victory was to draw in international support”, Nigerians were “anxious to keep the world out”.\textsuperscript{190} As one of the most visible international humanitarian actors, this pointedly included the ICRC.

In a context where humanitarian aid was arguably used to maintain a rebellion, at least from the Nigerian government’s perspective, commitments to the Geneva Conventions were at best a periodic distraction. At worst, the red cross emblem arguably increased vulnerability to attack, and certainly did not supersede military prerogatives.

\textbf{No shortage of precedents… and precursors}

It has been argued that, aside from justifying military action as a response to terrorism, contemporary attacks on hospitals in Yemen, Syria and Afghanistan have “more differences than similarities”.\textsuperscript{191} Given the disparity of examples and epochs presented in this paper, searching for commonalities would seem an even

\textsuperscript{186} ICRCA, B AG 202 147-008.02, internal update to Geneva (Note confidentielle No. P-5), 28 May 1968 (author’s translation).
\textsuperscript{188} Ibid.
\textsuperscript{189} Ibid.
\textsuperscript{190} C. Moorehead, above note 44, p. 618.
more futile exercise. Nevertheless, there are rationales that repeat themselves, in the case studies and elsewhere, pointing to broader trends in both historical and contemporary conflicts.

As this brief survey of perpetrator discourse has demonstrated, the categories of justifications used by perpetrators may have varied in time and place, but they are still recognizable. These include genuine or contrived ignorance of the Geneva Conventions, admissions of responsibility in the form of “mistakes”, denial of facts, colonial or dehumanizing representations of the enemy, misinformation, blame-shifting, and accusations of partiality. Keeping these points in mind, there is no shortage of historical examples in which to delve more deeply. Or, as an ICRC official noted following the bombing of another hospital in Biafra, there are “many precedents … beyond the incidents of recent months”.

Ignorance around the basic tenets of the 1864 Convention was hardly limited to the Franco-Prussian War. The original statutes were deemed largely irrelevant in the 1877–78 Russo-Turkish War, which saw hospitals “systematically shelled”. Volunteer doctors at the time argued that there was “no doubting” the Russian intentions as “shell after shell fell in our vicinity”. Similar conclusions were drawn regarding the 1899–1902 Boer War, in which proper attention “had not always – or even very often – been paid to the Geneva Convention”. In addition to hospitals receiving fire from both sides, the British commander Lord Kitchener demonstrated his understanding of nascent humanitarian law by attempting to attach “his personal military carriage on to the back of a Red Cross train”.

Hospital ships also have an under-explored history prior to World War I. In the context of the soon-to-be-finalized protections granted in naval warfare, the first “real test” came in the 1904–05 Russo-Japanese War. While both parties “mainly adhered to their agreements”, the Japanese were accused of firing on Russian hospital ships, acts they denied. And in a similar episode to the German Ophelia ten years later, the Russian hospital ship Orel was captured, accused of “providing other non-medical services to the Russian fleet in ways that amounted to use for military purposes”.

Beyond the limited example of the Second Sino-Japanese War presented in this study, there is unsurprisingly a wealth of material documenting violations of IHL during World War II that merit a separate study altogether. Recognizing that civilian structures were not afforded protection by the Geneva Convention at the time, the advantages of singling out hospital attacks in the midst of broader

193 B. Taith, above note 4, p. 42.
194 Stafford House Committee for the Relief of Sick and Wounded Turkish Soldiers, Report and Record of the Operations of the Stafford House Committee, Russo-Turkish War, 1877–78, Spottiswoode & Co., London, 1879, p. 50.
195 C. Moorehead, above note 44, p. 147.
196 Ibid.
violence against a civilian population are questionable, especially given the difficulties of isolating specific narratives on protected medical structures.

The promulgation of the 1949 Geneva Conventions theoretically resolved this dilemma, although at the time of the 1950–53 Korean War, neither belligerent had proceeded to ratification. While the war is remembered in ICRC lore more for the extreme challenges linked to prisoners of war and their repatriation, misinformation around attacks on medical care was rampant.\(^{198}\) Despite labelling the ICRC a “capitalist spy organization”, the Chinese leadership did not hesitate to accuse the Americans of “bombing well-marked Red Cross hospitals in the North” when convenient.\(^{199}\) There were also unsubstantiated accusations of bacterial warfare and demands for the ICRC to investigate, presaging a similar move during the 1962–70 North Yemen Civil War.\(^{200}\) In addition to attacks on the red cross emblems by the Egyptian Air Force, the use of chemical weapons resulted in a disinformation campaign with strong parallels to those used to discredit hospital attacks.\(^{201}\) In this case it was spectacularly, and falsely, claimed through the Egyptian media that the ICRC had corroborated mass and simultaneous death “from tuberculosis on the Saudi-Yemen border rather than toxic gas”.\(^{202}\)

Events during the Vietnam War, particularly the late 1960s and early 1970s, likewise merit further examination. The confiscation or destruction of National Liberation Front/Viet Cong medical supplies by American and South Vietnamese forces when coming across camouflaged or underground hospitals has been well documented.\(^{203}\) In terms of perpetrator discourse, the bombing of Bach Mai Hospital in December 1972 could be instructive. After initially denying that American bombs had hit the 950-bed hospital, a Pentagon spokesman subsequently acknowledged “some limited accidental damage”.\(^{204}\) But while Hanoi reported “massive destruction” in its own propaganda, the American government added an element of doubt while continuing to express regret.\(^{205}\) Essentially, the Americans claimed that no definitive version of events was...
possible as damage could have been caused “by bombs, by downed American or North Vietnamese aircraft or by falling antiaircraft missiles”. The latter comments sound remarkably like assertions of the “fog of war” by the United States following its internal investigation of the bombing of MSF’s trauma hospital in Kunduz, Afghanistan, on 3 October 2015. Analysis of public statements immediately after this attack also echoes many of the tactics outlined in this research. Contradictory explanations shifted from “collateral damage” and “self-defence” justifications to a “mistake” and “deep regrets”. Insinuations from Afghan officials that the hospital represented a legitimate target resemble even more closely the retrospective justifications repeatedly used in the historical case studies above. In this instance, the Afghan officials argued that the attack on a medical structure was justified by the presence of wounded Taliban fighters, invalidating a basic premise of the Geneva Conventions since 1864.

To continue with the original frame of analysis outlined at the beginning of this paper, a brief observation of other contemporary attacks on medical care reveals historical precedents. Saudi Arabia has responded to accusations of having targeted hospitals in Yemen with a discourse that includes both denials and admissions of error, even as it accuses opposition Houthis of storing munitions on protected sites. In Syria, outright denials over the targeting of medical care by Russian and Syrian officials has been accompanied by attempts to discredit the accusers through misinformation campaigns. Unlike the majority of the conflicts presented in the case studies above, the non-international character of current wars combined with the presence of coalitions arguably makes it easier for perpetrators of attacks to shift blame and dilute responsibility.

In reality, all the case studies presented allude to attempts at excluding groups and hospitals from the protections outlined in the Geneva Conventions, even as the circumstances and rationales differed widely. This is the broader trend evident in conflicts today that most clearly has historical precedent, especially apparent in the discourse of those accused of attacks on medical care. If the current counterterrorism narrative attempts to define who is not covered by IHL, its antecedents include similar purported exclusions, be they barbarians, uncivilized natives or those responsible for seditious rebellion.

206 Ibid.
207 M. Montani, above note 14.
Countering narratives of inevitability

Returning to the case studies, and moving beyond tactical parallels, there are some additional points that bear repeating, none more obvious than the unforgiving reality of “military necessity”. A harsh view of the evolution of the Geneva Conventions would have this consistently positioned as the “dominant value of the laws of war”.210 In all the cases reviewed, and irrespective of the rationale or cover employed, humanitarian principles were ultimately jettisoned when they potentially hindered the attainment of a military objective.

In terms of discourse itself, the use of propaganda to dehumanize an enemy is hardly a revelation. An intriguing aspect of the presented case studies, however, is that violations of the Geneva Conventions, whether factual or contrived, were used to justify further violations, namely attacks on hospitals. IHL became a periodically useful addition to the information wars that accompany conflicts. A curious transition could also be seen in the reactions and justifications given by belligerents after hospital attacks. When admissions of responsibility did occur, it was usually in the early stages of hostilities, before positions eventually hardened. At that point, accusations were either dismissed, or attempts were made to justify an attack by pointing to the enemy’s own transgressions.

A similar semantic shift was apparent in the narratives that emerged from Red Cross representatives. “Mistaken” or “accidental” bombings became less ambiguous, and the more provocative terms of “deliberate” or “targeted” attacks were used. However, this aspect must also be nuanced with the different attitudes historically displayed by the ICRC depending on whether a conflict was fought between European nations or not. Perpetrator discourse cannot be entirely separated from the political and cultural context. The relative complacency demonstrated by the ICRC towards Italian justifications of attacks in Ethiopia, or scepticism over Japanese and Chinese faculties to integrate the principles of the Geneva Conventions, were very much grounded in Western colonial attitudes of the day.

Finally, a coping mechanism emerged in several cases. When the red cross emblem itself was considered a risk or was actually used to facilitate the targeting of a medical structure, it was simply removed.211 This could be seen with ambulance crews preferring their national flags in the Franco-Prussian War, the British removing Red Cross markings from hospital ships in World War I, or the pragmatic local initiatives in Ethiopia. Even in Biafra there were suggestions of dispensing with the red cross on hospitals given the number of repeated attacks. Ironically, the removal of an emblem was also used on occasion by perpetrators of attacks to reinforce arguments that the enemy was no longer abiding by the Convention, therefore once again justifying their own actions.


211 As described in the case of Nanking, appropriation of the Red Cross name and emblem had no impact. Arguably a contemporary parallel can be found in the recourse to underground hospitals in parts of opposition-held Syria.
If there is a lesson to be learned from this brief survey of perpetrator discourse, it is certainly not that the Geneva Conventions are a dysfunctional relic of the past or have been systematically ignored. An article that focuses on the reaction of those responsible for attacks on medical care has an inevitable bias, highlighting abuses rather than the innumerable times IHL has been respected and lives have been saved. And irrespective of past and ongoing violations, the Geneva Conventions were and remain a very practical tool as operational space is negotiated. For a humanitarian organization like MSF, this includes a normative approach that refers directly to the “principle of the sanctity of medical space”, but also a far more pragmatic approach which accepts the “transgression of standards and laws during conflicts as inevitable”. Perpetual negotiation and renegotiation in each specific context, including knowledge of domestic law, are the essential counterparts to IHL.

Recognizing that transgressions of the laws of war are inevitable should by no means be interpreted as meek compliance. The cynicism periodically seen in the case studies from those who experienced attacks on medical care often reinforced attempts at improving protection measures, even when the nature of the attacks was directly disputed in the discourse of the perpetrators. This points to additional avenues of research not fully explored in this article, notably the normative and especially pragmatic attempts made to ensure that hospitals could continue to function in conflict zones, or the impact on corresponding negotiation strategies on the part of humanitarian organizations. Frustrations over the impunity of the perpetrators were likewise only touched upon; this issue has long been identified as a fundamental weakness of IHL, and merits closer attention given its resonance today.

The lack of historical perspective when condemning contemporary attacks on medical care is also striking. MSF’s recent assertion that “attacks have gone from random and opportunistic to considered and strategic” lacks nuance, and such a statement could be applied to any of the case studies presented in this paper. The same can be said of the suggestion that medical care impartially provided to the enemy “becomes a justification for violence against health personnel”. Rather than an erosion of IHL, protection norms have always been contested. Meanwhile, in terms of perpetrator discourse, the tactics used are remarkably consistent. The sharing of GPS coordinates might have partially replaced the red

213 Ibid.
214 As noted in the case study of the Franco-Prussian War, the then president of the International Committee was convinced that the belligerent governments must “punish” transgressors of the Geneva Convention. G. Moynier, above note 25, p. 44. The Leipzig war crimes trial after World War I and the Nigerian government’s internal investigations in Biafra were also mentioned but were not analysed in detail.
215 MSF, above note 10.
cross emblem as a protective measure, but the concrete risks undertaken are unaltered, as is the rhetoric used after an attack. Denials, mistakes, partial admissions, justifications based on misuse of a structure, or counter-accusations all have historical foundations.

Reflecting in 1984 on the bombardment of four MSF hospitals in Afghanistan by Soviet aircraft between November 1981 and January 1982, the then MSF president suggested that the reason was a combination of the “material support” provided to the population and the fact that “we are inconvenient witnesses”.217 He then went on to assert that attacks on medical care are “a burning issue today”.218 With nearly four decades of hindsight, this “burning issue” clearly predates Soviet Afghanistan, and remains equally relevant for those attempting to respond to conflicts through the provision of impartial and neutral medical assistance today. The targeting of medical structures might still be considered by some to be inherent to hostilities, but this is nonetheless a narrative to be countered, including through a better understanding of the justifications and rationales buried in perpetrator discourse. At the very least, cutting through perpetrator rhetoric can serve as a timely reminder of existing commitments and protections under IHL. The fragile and often infringed neutrality of medical care was and continues to be at stake.

218 Ibid.
What’s new in law and case law around the world? Protection of children in armed conflict

Thematic update on national implementation of international humanitarian law, 2014–2019*

The update on national legislation and case law is an important tool for promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL). This edition of the update will focus on concrete measures that States have taken in recent years on the thematic subject of this issue of the Review: strengthening the protection of children in armed conflict domestically and regionally. Children are especially vulnerable to armed conflicts and need special safeguards from the numerous dangers they face during armed hostilities and to help them rebuild their lives after the end of the conflict.

ICRC Advisory Service

The ICRC’s Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law. Working worldwide, through a network of legal advisers, to supplement and support governments’ own resources, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with specialized legal advice and the technical expertise required to incorporate IHL into their domestic legal frameworks;¹ (iii) to collect and facilitate the exchange of information on national implementation measures and case law;² and (iv) to support the work of committees on IHL and other entities established to facilitate the IHL implementation process.
In its first part, the update will include relevant information related to accession and ratification of instruments providing for the protection of children in armed conflict, especially the Convention on the Rights of the Child and its Second Optional Protocol on the Involvement of Children in Armed Conflict. The second part of the update will include a compilation of domestic laws, case law and national and regional programmes and policies which have been introduced by States between 2014 and 2019 in order to strengthen the protection of children exposed or vulnerable to conflict-related abuse and mistreatment.

Figure 1. Map depicting the number of legislation or case law updates related to the protection of children in armed conflict during the period of 2014–19, discussed below. The boundaries, names and designations used in this map do not imply official endorsement, nor express a political opinion, and are without prejudice to claims of sovereignty over the territories depicted.

**Update on the accession and ratification of IHL and other related international instruments**

Universal participation in IHL and related treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict. In the period under review,

* This selection of national legislation and case law has been prepared by Antoana Nedyalkova, Legal Associate at the ICRC Advisory Service on International Humanitarian Law, with the collaboration of regional legal advisers.

1 In order to assist States, the ICRC Advisory Service proposes a multiplicity of tools, including thematic fact sheets, ratification kits, model laws and checklists, as well as reports from expert meetings, all available at: www.icrc.org/en/war-and-law/ihl-domestic-law (all internet references were accessed in January 2020).
three international conventions and protocols related to the protection of children in armed conflict were ratified or acceded to by nineteen States. In addition to the 1977 Protocol Additional (II) to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts, the other treaties are the 1989 Convention on the Rights of the Child and the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. The period 2014–19 marks a notable adherence to the 2000 Optional Protocol, bringing the number of its States Parties to 170. This Protocol provides that its States Parties should take all feasible measure to ensure that individuals under the age of 18 are not mandatorily recruited into their armed forces or into armed groups distinct from the armed forces of a State, that such individuals are not used in hostilities, and that the minimum age for voluntary recruitment into States’ national forces be raised from 15 years. The widespread ratification of and accession to the 2000 Optional Protocol contributes to the strengthening of the protection of children below the age of 18 from direct exposure to the dangers of armed conflicts through their recruitment or participation in hostilities.

The following table outlines the total number of ratifications of and accessions to IHL treaties and other relevant international instruments related to the protection of children in armed conflict, from mid-January 2014.

<table>
<thead>
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<th>Convention</th>
<th>State</th>
<th>Ratification/accession date</th>
<th>Number of parties</th>
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<td>Palestine</td>
<td>4 January 2015</td>
<td>168</td>
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2 For information on national implementation measures and case law, please visit the ICRC Database on National Implementation of IHL, available at: www.icrc.org/ihl-nat.
3 To view the full list of IHL-related treaties, please visit the ICRC Treaty Database, available at: https://ihl-databases.icrc.org/ihl.
4 Available at: https://tinyurl.com/rfzps94.
### 1989 Convention on the Rights of the Child

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<td>27 September 2018</td>
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<td>Myanmar</td>
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### 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

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<th>State</th>
<th>Ratification/accession date</th>
<th>Number of parties</th>
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5 Available at: https://tinyurl.com/yb3fzjh8.
6 Available at: https://tinyurl.com/y9fl7l6c.
National implementation of international humanitarian law

The laws and judicial decisions presented below were either adopted/promulgated/entered into force by States or delivered by domestic courts between 2014 and 2019. They demonstrate a commitment on the part of States to respect IHL and to protect children from the devastating effects of armed conflict. The majority of these laws include a particular focus on preventing and combating the recruitment of children into State forces and armed groups, or their use in hostilities. The countries covered are Afghanistan, Algeria, Austria, Bahrain, Bulgaria, Canada, Chad, Colombia, Estonia, France, Germany, India, Indonesia, Kyrgyzstan, Myanmar, Niger, Norway, Peru, the Philippines, Syria, Tajikistan, Tunisia, Turkmenistan, Ukraine, the United Arab Emirates and the Member States of the Economic Community of West African States (ECOWAS).

This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments collected by the International Committee of the Red Cross (ICRC) relating to the implementation of rules of IHL pertaining to the protection of children in armed conflict. The full texts of these laws and case law can be found in the ICRC’s Database on National Implementation of IHL.7

2014

Canada

Prohibiting Cluster Munitions Act, S.C. 2014, c. 278

On 6 November 2014, the government of Canada adopted the Prohibiting Cluster Munitions Act. The purpose of this Act is to implement Canada’s commitments under the Convention on Cluster Munitions of 2008. The preamble of the Cluster Munitions Convention states that its States Parties are concerned that cluster munition remnants kill or maim civilians, including women and children, and while adopting this Convention, they are bearing in mind United Nations (UN) Security Council Resolution 1612 on Children in Armed Conflict.9

Chad

Presidential Ordinance No. 001/PR/2014 on Child Soldiers10

On 4 February 2014, the president of the Republic of Chad signed an Ordinance prohibiting and repressing the recruitment and use of children in armed conflicts.

Article 1 of the Ordinance prohibits the participation and involvement of children in armed conflict, as well as their enlistment of any nature in the State

7 See above note 2.
8 Available at: https://tinyurl.com/ugibasc.
9 The text of Resolution 1612 is available at: https://tinyurl.com/rdr6ko9.
10 Available at: https://tinyurl.com/u8m25tu.
armed forces or armed groups. Article 2 of the Ordinance provides for imprisonment of five to ten years and fines for persons who have recruited or facilitated the enlistment or use of children in the State armed forces or in armed groups.

Estonia

*Act Amending the Penal Code and Other Related Acts*\(^\text{11}\)

On 3 July 2014, the Act Amending the Penal Code was promulgated in Estonia. The amendment, which prohibits both the recruitment of children in armed forces and their engagement in acts of war, entered into force on 1 January 2015.

Under Article 102(3) of the Penal Code, acceptance or recruitment of a person younger than 18 years of age in national armed forces or armed units distinct from the national armed forces, or in engagement in acts of war, is punishable by one to five years’ imprisonment. The same act, if committed by a legal person, is also punishable by a fine.

In its report to the Committee on the Rights of the Child (G1618889), Estonia clarified the following: “[A]lthough under certain circumstances the active members of the Defence League may be considered as members of the armed forces, the restrictions applicable to junior members exclude such status. Engagement of minors, including junior members of the Defence League in direct acts of war will also remain prohibited.”\(^\text{12}\)

Indonesia

*Law No. 35 of 2014 on the Amendment of Law No. 23 of 2002 on Child Protection*\(^\text{13}\)

Law No. 35 was adopted on 17 October 2014, amending several provisions in Law No. 23 of 2002 on Child Protection. The main amendment is related to heavier criminal sanctions for sexual abuses against children.

Article 1.1 of the 2014 Law defines a child as anyone who is below 18 years of age. It also maintains the Article 15 provision under which children shall be protected from being involved in armed conflict or war. The exemplary memorandum to this particular provision stresses that such protection should be implemented both directly and indirectly in order to ensure the protection of children’s physical and psychological welfare.

Further, Article 76H stipulates that recruiting or using children for military purposes is prohibited. This prohibition, as stated in Article 87, carries a maximum penalty of five years’ imprisonment or a fine of up to 100 million rupiah ($7,000).

\(^{11}\) Available at: [https://tinyurl.com/w4oox64](https://tinyurl.com/w4oox64).


\(^{13}\) Available at: [https://tinyurl.com/velb458](https://tinyurl.com/velb458).
2015

Algeria

*Law No. 15-12 on Child Protection*\(^{14}\)

On 15 July 2015, the president of Algeria promulgated Law No. 15-12 on Child Protection.

The Law refers to the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. It calls for global protection of children’s rights, but also provides for the protection of children in the family, at school or in the street.

Under Article 2 of the Law, a child is anyone who has not attained the age of 18. Under the same provision, the Law defines the term “child in danger” as a child who is a refugee or a victim of sexual exploitation, armed conflicts or other cases of disturbance and insecurity, as that child is considered to be exposed to danger under the present Law.

Moreover, under Article 6 of the Law, the State guarantees the protection of the rights of the child from physical or sexual attacks, or attacks on his or her morale. Moreover, in situations of emergency, disaster and armed conflict, the State shall take all appropriate measures to establish the necessary conditions for the protection of the child’s life and development, and to ensure his or her education in a sound and proper environment.

Bulgaria

*Law on the Implementation of the Convention on Cluster Munitions and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*\(^{15}\)

On 24 November 2015, the National Assembly of Bulgaria adopted the Law on the Implementation of the Convention on Cluster Munitions and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Anti-Personnel Mine Convention). The purpose of the Law is to implement Bulgaria’s commitments under the two Conventions.

Article 30(1) of the Law defines victims as all individuals who have perished or suffered physical or psychological trauma, economic loss or difficulty in the enjoyment of their human rights as a result of the use of cluster munitions, anti-personnel mines and their remnants under the jurisdiction or control of the Republic of Bulgaria. Under Article 30(2), the spouses, children or parents of those individuals mentioned in Article 30(1) are also considered victims.

\(^{14}\) Available at: [https://tinyurl.com/u7tfchg.](https://tinyurl.com/u7tfchg.)

\(^{15}\) Available at: [https://tinyurl.com/sc9k3nv.](https://tinyurl.com/sc9k3nv.)
The preamble of the 2008 Convention on Cluster Munitions states that its States Parties are concerned that cluster munition remnants kill or maim civilians, including women and children, and that while adopting this Convention, they are bearing in mind UN Security Council Resolution 1612 on Children in Armed Conflict. The preamble of the 1997 Anti-Personnel Mine Convention states that its States Parties are determined to put an end to the suffering and casualties caused by anti-personnel mines and to the killing and maiming of innocent civilians, especially children.

India

*Juvenile Justice (Care and Protection of Children) Act 2015*

The Juvenile Justice (Care and Protection of Children) Act was adopted on 30 December 2015 and promulgated on 1 January 2016. The Act provides for a number of measures to be taken to ensure the proper care, protection, development, treatment, social reintegration, child-friendly adjudication, and rehabilitation of children alleged and found to be in conflict with the law, and children in need of care and protection.

Under Article 2(14)(xi) of the Act, a “child in need of care and protection” is defined as a child “who is victim of or affected by any armed conflict, civil unrest or natural calamity”.

Article 83(1) of the Act provides for criminal sanctions for the recruitment or use for any purpose of children by self-styled militant groups designated as such by the central government. This provision potentially expands the prohibition under Article 4 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which only prohibits and criminalizes the recruitment and use of children *in hostilities.*

Tajikistan

*Law of the Republic of Tajikistan No. 1196 on the Protection of the Rights of the Child*

Law No. 1196 on the Protection of the Rights of the Child was promulgated in Tajikistan on 18 March 2015.

Under Article 1 of Law No. 1196, a child is as an individual who has not attained the age of 18. The Law generally provides for the protection of the rights and freedoms of children, including their right to life, freedom, inviolability, honour, dignity, identity, health care, freedom of speech, property, dwelling, education, labour and rest. It also protects the rights of children in special

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16 See above note 9.
17 Available at: [https://tinyurl.com/vgjqs5y](https://tinyurl.com/vgjqs5y).
18 India has been a party to the Convention on the Rights of the Child since 11 December 1992, and to its Second Optional Protocol since 30 November 2005.
19 Available at: [https://tinyurl.com/ue6qq2x](https://tinyurl.com/ue6qq2x).
educational institutions for minors, the rights of child refugees on the territory of Tajikistan, the rights of orphaned children and children without parental care, and the rights of disabled children, and it protects children from illegal movement across the State border.

Article 26 of Law No. 1196 prohibits the participation of children in hostilities and armed conflicts, as well as the creation of children’s paramilitary groups, and the spreading of war propaganda and violence among children. The State is obliged to take all possible measures to ensure the protection of the rights of children in zones of hostilities and armed conflict and to take care of them. Children are to be provided with material, medical and other assistance, and, if necessary, should be placed in institutions for orphans and children left without parental care, or in institutions of the educational sector.

Tunisia

Organic Law No. 2015-26 of 7 August 2015 relating to the Fight against Terrorism and the Repression of Money Laundering

On 7 August 2015, the president of Tunisia promulgated Organic Law No. 2015-26 relating to the Fight against Terrorism and the Repression of Money Laundering.

The Law places the State’s efforts in these areas within the framework of respect for human rights and IHL. Article 2 of the Law provides for respect by the authorities responsible for its application of international, regional and bilateral conventions ratified by Tunisia in the field of human rights, the protection of refugees and IHL.

Under Article 10 of the Law, the perpetrator of a terrorist offence as provided for under the Law shall receive a maximum penalty if the offence was committed through the use of a child. This provision is without prejudice to the application of mitigating circumstances specific to children, who are subject to Tunisia’s Code on the Protection of Children in accordance with Article 3 of the Law.

Turkmenistan

Law of Turkmenistan on the Introduction of Amendments and Modifications to the Criminal Code of Turkmenistan

On 3 December 2015, the president of Turkmenistan promulgated the Law on the Introduction of Amendments and Modifications to the Criminal Code of Turkmenistan. The Law introduces into the Criminal Code eleven new articles under Chapter 21, which is titled “Crimes against Peace and Security of Mankind”.

The newly introduced Article 167(6) provides for criminal sanctions for crimes in violation of norms of IHL in times of armed conflict. In particular,

20 Available at: https://tinyurl.com/sgvmgdgw.
21 Available at: https://tinyurl.com/reh256n.
Para. 5 of this provision criminalizes the recruitment of individuals under the age of 15 in the armed forces and allowing their participation in hostilities. In addition, para. 6 of the same provision prohibits the recruitment of individuals under the age of 18 into armed groups that are distinct from the armed forces of the State, or the use of such individuals in hostilities as members of armed groups.

2016

Norway

*Act on Military Service and Service in the Armed Forces (Defence Act)*

The Act on Military Service and Service in the Armed Forces was adopted on 12 August 2016 and came into force on 1 July 2017 in Norway.

Article 4 of the Act, titled “Restriction on Service for Those Under 18 Years of Age”, provides that persons who are under the age of 18 and serve in the Norwegian Armed Forces should not be trained to participate in combat-related activities, that they are not eligible for extraordinary service (defined in Article 17 (3) of the Act), and that they will immediately be excused from service in situations where Norway is involved in an armed conflict, is threatened by one, or when the Armed Forces have commenced force generation.

The same amendment was also introduced into the former Military Service Act (LOV-1953-07-17-29, Article 4) and into the Military Service Regulations (FOR-2010-12-10-1605, Article 3(3) as modified by FOR-2014-12-19-1730).

Peru

*Supreme Decree Approving the Protocol for the Care of Persons and Families Abducted by Terrorist Groups (Supreme Decree No. 010-2016-MIMP)*

On 29 July 2016, the Supreme Decree Approving the Protocol for the Care of Persons and Families Abducted by Terrorist Groups entered into force. Under Article 3 of the Protocol, its main objective is to promote the restitution of the rights and autonomy of people (including children, adolescents and families) rescued from the control of the remnants of the armed group party to the non-international armed conflict between 1980 and 2000.

Under Article 4 of the Protocol, the Prosecutor’s Office specialized in terrorism crimes is competent to determine who is beneficiary of the programme. Beneficiaries are sorted into three groups: children and adolescents in alleged abandonment, adults alone, and adults with children and adolescents (families). Among others, people suspected of taking part in terrorist activities may not benefit from the programme.

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22 Available at: https://tinyurl.com/qsbsp7y.
23 Available at: https://tinyurl.com/ycr29fes.
Under Article 6, the Protocol will be implemented with an approach that takes into account the best interests of the child.

Under Articles 9.1 and 9.3 of the Protocol, during the rescue operation and during the emergency stage, police and armed forces shall protect the rights of children with disabilities. Children under three years of age and nursing infants shall remain with their mother or, if not, with their father. Unaccompanied children will be put under the care of other families within the rescued group.

Under Article 9.9, the Ministry of Education is tasked with providing children with preparation sessions for formal, intercultural and bilingual education, paying special attention to the educational needs of these children in coordination with personnel in charge of their mental health in order to avoid revictimization.

Tunisia

Organic Law No. 2016-61 of 3 August 2016 on the Prevention and Fight against Trafficking in Persons

On 12 August 2016, the president of Tunisia promulgated Organic Law No. 2016-61 of 3 August 2016 on the Prevention and Fight against Trafficking in Persons. Under Article 1, the purpose of the Law is to prevent all forms of exploitation to which people, especially women and children, may be exposed, to combat trafficking, to punish the perpetrators, and to protect and assist victims. It also aims to promote national coordination and international cooperation in the fight against trafficking in persons within the framework of international, regional and bilateral conventions ratified by Tunisia.

Article 2(1) of the Law defines trafficking in persons in a broad manner, making its provisions applicable both in times of peace and in war. In addition, Article 2(2) of the Law defines “situation of vulnerability” with particular reference to, inter alia, children. In Article 2(5), the Law also addresses practices similar to slavery, which include the exploitation of children in criminal activities or in armed conflict, the adoption of children for exploitation of any form, and the economic or sexual exploitation of children in the course of their employment.

In Article 4, the Law provides for the application of Tunisia’s Criminal Code, Code of Criminal Procedure, Code of Military Justice and other relevant texts to the offences of trafficking in persons and related offences provided for in the Law. Children are subject to the provisions of Tunisia’s Code on the Protection of Children.

Under Article 5 of the Law, the consent of the victim will not be considered in the assessment of a potential offence committed through the means falling under the definition of trafficking in person under Article 2(1). In addition, where the victim is a child, the means of committing an offence under the Law is not restricted to the means listed in Article 2(1).

Available at: https://tinyurl.com/rh9j38b.
Chapter II (Articles 8–26) prescribes the punishment for the perpetrators of offences under the Law. Under Article 23, an aggravated punishment is imposed on the perpetrator when the victim is a child.

Ukraine

_Law of Ukraine on Amendments to Some Legislative Acts of Ukraine on Strengthening Social Protection of Children and Supporting Families with Children_25

On 26 January 2016, the president of Ukraine promulgated the Law on Amendments to Some Legislative Acts of Ukraine on Strengthening Social Protection of Children and Supporting Families with Children (Law on Amendments). The Law amends the Family Code of Ukraine, the Law on the Protection of Childhood and other laws by adding provisions on the protection of children in difficult circumstances, orphans or other categories of children that require special protection.

The amended Article 30 prohibits the participation of children in hostilities and armed conflict, including their recruitment, financing, material support, and training for the purpose of being used in armed conflicts of other States or violent acts aimed at overthrowing State power or violating territorial integrity. The provision also prohibits the use of children in hostilities or armed conflicts and their involvement in militarized or armed groups not provided for by the laws of Ukraine. Under the amended Article 30, the State should take all necessary measures to prevent the recruitment and use of children in hostilities and armed conflicts, to identify such children, and to release them from military service. It also designates the governmental body responsible for dissemination of information on the topic.

Furthermore, the Law on Amendments introduces Article 30(1) into the Law on the Protection of Childhood. Article 30(1) applies to children in zones of hostilities and armed conflict, as well as to children who have suffered as a result of hostilities or armed conflict.

The Law on Amendments also amends Article 32 of the Law on the Protection of Childhood. The amended article obliges the State to take all necessary and possible measures to search for children who have been illegally taken abroad, including in connection with circumstances related to hostilities and armed conflict.

Finally, the Law on Amendments introduces a new sentence in Article 4(1) of the Law on Ensuring the Rights and Freedoms of Internally Displaced Persons, which provides that every displaced child, including those who are unaccompanied, receives a certificate for internally displaced persons following the appropriate procedure.26

25 Available at: https://tinyurl.com/sjmc5kk.
26 In this regard, it should be noted that under Article 1(1) of the Law of Ukraine on Ensuring the Rights and Freedoms of Internally Displaced Persons, internally displaced persons are Ukrainian citizens, as are foreigners and stateless persons who are legally in the territory of Ukraine and have the right to
2017

Ukraine

Resolution of the Cabinet of Ministers of Ukraine on Adopting the Procedure for Granting the Status of a Child Affected by War and Armed Conflict

Based on Article 30(1) of Ukraine’s Law on the Protection of Childhood, on 5 April 2017 the Cabinet of Ministers introduced a new legal status for children who suffer from the effects of the armed conflict in Ukraine. The preamble of the Procedure states that it has been elaborated to protect children who experience any type of violence in the course of ongoing hostilities in the Ukraine. The Procedure lays down the mechanism for obtaining the status of a child affected by war and armed conflict. Under Article 3 of the Procedure, this status can be obtained by any individual who, as a result of hostilities, suffers physical injuries, physical or sexual abuse, kidnapping, recruitment in armed groups, illegal detention or captivity, or psychological abuse, and who has not attained the age of 18 at the time the events occur. In Article 2(3), the Procedure gives a very broad definition of psychological violence that can be understood as any kind of suffering experienced due to living in, or relocation or displacement from, the conflict area. The remaining provisions set out the list of documents necessary to obtain the status, the authorities responsible for the approval of the documents, and the persons authorized to submit such documents in the interest of a child.

United Arab Emirates

Federal Decree Law No. 12 of 2017 on International Crimes

On 18 September 2017, the president of the United Arab Emirates promulgated Federal Decree Law No. 12 of 2017 on International Crimes. The Law establishes national jurisdiction over four categories of international crimes. Chapter I contains a provision on the subject matter jurisdiction of the State courts under the Law. Chapter II provides the definition of genocide and crimes against humanity, as well as the applicable punishment for certain modes of the commission of those crimes. Chapter III provides the definition of a number of war crimes, committed in both international and non-international armed conflict, and provides the applicable punishment for each crime. Chapter IV provides the definition of the crime of aggression and the applicable punishment.

In relation to the protection of children, Article 2(5) of the Law criminalizes as an act of genocide the forcible transfer of children of a protected group to another permanently reside there, and who have left behind or abandoned their place of residence as a result of, or to avoid the negative consequences of, conflict, temporary occupation, widespread violence, violation of human rights, or natural or man-made disaster.

27 Available at: https://tinyurl.com/suhxofc.
28 Available at: https://tinyurl.com/tkzaalz.
group. Article 6(1) of the Law criminalizes as a crime against humanity acts of enslavement, including trafficking in persons, in particular women and children.

Finally, Article 17 criminalizes as a war crime the compulsory or voluntary conscription or enlistment of children under the age of 15 into armed forces or their use for active participation in hostilities. The provision applies in, or in connection with, both international and non-international armed conflicts.

2018

Bahrain

Decree Law No. 44 of 2018 on International Crimes

Decree Law No. 44 of 2018 on International Crimes entered into force in Bahrain on 6 October 2018.

The Law establishes national jurisdiction over four categories of international crimes. Chapter 1 contains general provisions on the application of the Law, Chapter 2 contains provisions relating to individual criminal responsibility, and Chapter 3 relates to the definition of the crimes of genocide and crimes against humanity. Chapter 4 contains provisions on war crimes, in particular war crimes consisting in the use of prohibited methods and means of warfare, war crimes against persons, war crimes against property and other rights, and war crimes against humanitarian missions and distinctive emblems. Chapter 5 contains provisions on the crime of aggression.

In relation to the protection of children, Article 13(e) of the Law criminalizes as a crime against humanity acts of enslavement, including trafficking in persons, in particular women and children. Article 15(a) of the Law criminalizes as an act of genocide the forcible transfer of children of a protected group to another group.

Article 23 criminalizes the compulsory or voluntary conscription or enlistment of children under the age of 18 into armed forces or their use for active participation in hostilities. The provision applies in, or in connection with, both international and non-international armed conflicts.

Niger

Law No. 2018-74 on the Protection and Assistance of Internally Displaced Persons

On 10 December 2018, the National Assembly of Niger approved the Law on the Protection and Assistance of Internally Displaced Persons. The Law contains specific provisions on the protection and assistance of displaced children.

Article 2(1) of the Law defines internally displaced persons as persons or groups of persons who have been forced or obliged to flee or abandon their

29 Available at: https://tinyurl.com/tr4r52x.
30 Available at: https://tinyurl.com/wkk5xuj.
homes or places of habitual residence, in particular after, or in order to avoid the effects of, armed conflicts, situations of widespread violence, human rights violations, and/or natural or man-made disasters, and who have not crossed the territorial borders of Niger. Article 2(11) of the Law defines a child as an individual under the age of 18.

Article 19 of the Law contains specific provisions on the assistance of children and their treatment in accordance to their specific needs related to health, nutrition, education, access to health care in general and in cases of sexual violence.

Article 30(2) of the Law criminalizes the recruitment of internally displaced children and forcing or permitting them to participate in hostilities. In addition, Article 30(3) provides for the criminalization of the abuse or exploitation of displaced children, and Article 30(4) criminalizes the kidnapping, hostage taking, sexual slavery or any other form of sexual exploitation of internally displaced persons, and in particular internally displaced children.

2019

Afghanistan

Law on Protection of Child Rights

On 5 March 2019, the president of Afghanistan endorsed the Law on Protection of Child Rights, ratified by the Cabinet of Afghanistan on the same day.

Article 3 of the Law defines a child as a person who has not completed the age of 18.32 Under Article 12 of the Law, every child has a number of basic rights, including the right to live; to be protected from any forms of discrimination; to health and access to health-care services; to learning and education; to freedom of speech and expression; to family; to prevention from recruitment in military and semi-military services; to protection against any form of torture, excruciation, inhuman or insulting punishment, and cruel actions; to benefit from the rights of the suspect and the accused, and from fair trial; to be protected from being used in immoral or sexual acts; and to be protected against kidnapping and trafficking. These rights are elaborated on in subsequent provisions.

Article 34 of the Law provides for an obligation of relevant ministries and government organizations to undertake necessary measures to achieve physical and mental rehabilitation of a child who is harmed, inter alia, due to armed conflicts.

Article 75 of the Law prohibits the recruitment of children and using them in military forces, including the Ministries of Defence and Interior Affairs and the General Directorate of National Security Forces, or forces of other organizations with a military structure. Such recruitment or use is considered a violation of a child’s human rights and is subject to criminal prosecution.

31 Available at: https://tinyurl.com/t7cgvzd.
32 This means that adulthood is attained on the individual’s 19th birthday.
Article 76 of the Law provides an obligation to relevant ministries and governmental organizations to observe IHL, especially rules related to children. Such ministries and organizations are obliged to prevent the use and recruitment of individuals who have not completed the age of 18 in the armed forces and their participation in armed conflicts. They are also obliged to take necessary action to ensure the protection of children affected by armed conflict.

**Kyrgyzstan**

*Criminal Code of the Kyrgyz Republic*

The new Criminal Code of the Kyrgyz Republic was adopted by the Parliament on 2 February 2017 and entered into force on 1 January 2019.

Article 182 of the Criminal Code prohibits the transfer of individuals under the age of 18 into zones of armed hostilities or armed conflict on the territory of another State, including by a parent or another person entrusted with responsibility over the minor.

The Criminal Code introduces its new Chapter 53, titled “War Crimes and Other Violations of Laws and Customs of Warfare”. Article 392(6) of this Chapter prohibits the recruitment of individuals under the age of 18 in the armed forces or permitting such individuals to take part in hostilities. In addition, Article 392(7) criminalizes the recruitment of individuals under the age of 18 in armed groups that are distinct from the armed forces of the State, or the use of such individuals in hostilities as members of such armed groups.

**Myanmar**

*Child Rights Law*

On 23 July 2019, the president of Myanmar enacted the Child Rights Law.

Under Article 3(d) of the Law, a child is anyone under the age of 18. Chapter 17 of the Law is entitled “Children and Armed Conflict” and contains several provisions dealing with children affected by armed conflict. Article 60 sets out the obligation of State bodies and agencies, as well as of non-State entities, in relation to the protection of children affected by armed conflict and their rights. Such obligations include preventing physical and sexual violence and the recruitment and use of children in armed conflict, and ensuring the treatment, rehabilitation, education and reintegration of children affected by armed conflict. In addition, under Article 60(b), all children affected or displaced by armed conflict are considered victims.

Article 61 of the Law criminalizes the recruitment and use of children in armed conflict, physical or sexual violence against children, attacks on educational institutions or hospitals, and obstructing the receipt of humanitarian aid.

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33 Available at: https://tinyurl.com/wv4sbc8.
34 Available at: https://tinyurl.com/qpg5ynu.
assistance. Article 62 of the Law sets out the rights of children in armed conflict, including their entitlement to protection against physical violence, neglect, exploitation and sexual violence, abduction and detention, as well as their right to assistance as victims affected by armed conflict.

Article 63 of the Law prohibits the recruitment or enlistment of individuals under the age of 18 into the armed forces of the State or their use in hostilities. Article 64 of the Law prohibits the recruitment or use of individuals under the age of 18 in hostilities by non-State armed groups.

**Philippines**

*Special Protection of Children in Situations of Armed Conflict Act*35

The Special Protection of Children in Situations of Armed Conflict Act was promulgated in the Philippines on 10 January 2019 and came into force on 25 January 2019. Recognizing the vulnerable status of children, especially those in situations of armed conflict, the Act declares children as “Zones of Peace” and mandates the State to provide them with special protection.

Section 2 provides that it is the policy of the State to provide special protection to children in situations of armed conflict from all forms of abuse, violence, neglect, cruelty, discrimination and other conditions prejudicial to their development. It also provides, *inter alia*, for the full implementation of IHL and human rights treaties providing for the protection of children; for the respect of the human rights of children at all times; for the prevention of the recruitment and use of children in armed conflict;36 for the provision of effective protection and relief to all children in situations of armed conflict; and for ensuring the right to participation of children affected by armed conflict in all of the State’s policies, actions and decisions concerning children’s rescue, rehabilitation and reintegration.

In accordance with Section 3, the Act applies to all children involved in, affected by, or displaced by armed conflict.

Under Section 5(g) of the Act, a child is defined as a person below the age of 18 or a person of 18 years or older who is unable to fully take care of or protect himself or herself or act with discernment because of physical or mental disability. Furthermore, Sections 5(i), (j) and (k) define “children affected by armed conflict”, “children involved in armed conflict” and “children in situations of armed conflict” respectively.

Section 7 of the Act provides a broad range of rights applicable to children in armed conflict, most significantly the right to be treated as a victim. It also

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35 Available at: https://tinyurl.com/rgsruhd.
36 Section 5(c) of the Act defines “armed conflict” as armed confrontations occurring between government forces and one or more armed groups, or between such groups, arising in the Philippine territory. This includes activities which may lead up to or are undertaken in preparation for armed confrontation or armed violence that put children’s lives at risk and violate their rights. The Act does not seem to apply to children affected by international armed conflict.
guarantees the protection of the civil, political, economic and social rights of children.

Section 8 of the Act specifies the measures that the State is to take to prevent the recruitment, re-recruitment, use, displacement of, or grave violations against children involved in armed conflict.

Section 9 of the Act provides for criminal sanctions for a number of violations committed against children in the context of armed conflict. These include killing, torture, rape and gender-based violence, cruel, inhuman or degrading treatment or punishment, abduction or hostage-taking, the use or involvement of children in armed conflict in any capacity, refusal or denial of humanitarian access or assistance and food blockading, as well as arrest, arbitrary detention or unlawful prosecution of children allegedly associated with armed groups or government forces. Sections 13–21 provide for the investigation and prosecution of the acts penalized under the Act.

Section 22 directs the State to institute policies, programmes and services for the rescue (including the recovery from armed groups or government forces), rehabilitation and reintegration of children in situations of armed conflict.

Section 28 of the Act provides for dismissal of criminal cases against children involved in armed conflict, and their immediate referral to the social welfare authorities for rehabilitation and reintegration programmes. Additionally, Section 31 provides for the retroactive application of the law to persons who have been convicted or are serving sentence at the time of the effectivity of the Act but who were below 18 at the time of the commission of the offence.

Case law

Austria

Supreme Court Judgment 13.02.2018 14 Os 116/17

On 13 February 2018, the Austrian Supreme Court confirmed the conviction (issued by the Regional Criminal Court of Graz on 2 June 2017) of four defendants (two couples) for, among other charges, torturing their eight children by taking them into a territory controlled by the non-State armed group Islamic State (IS).

In December 2014, the four defendants travelled to Syria with their children, aged between 2 and 11 years. There they lived in territory controlled by IS, where the children were exposed to violent propaganda and extreme acts of violence on a daily basis, including public executions in the form of beheadings and stoning. The children were also subjected to a system of radical Islamic education. The defendants were charged with and found guilty of psychological torture pursuant to Article 92(1) of the Austrian Criminal Code. They were also convicted for membership of a terrorist organization and of a criminal

37 Available at: https://tinyurl.com/s5lxtzp.
organization. The Supreme Court, however, repealed the first-instance decision on trial costs, which has been sent back for a new hearing before the Regional Criminal Court of Graz.

Canada

*Désiré Munyaneza Case, Quebec Court of Appeals, 22 May 2014*  
On 7 May 2014, the Court of Appeal of Quebec upheld the conviction of Désiré Munyaneza, a Rwandan citizen arrested and prosecuted in Canada under the Crimes against Humanity and War Crimes Act of 2000, for seven counts of genocide, crimes against humanity and war crimes committed during the 1994 Rwandan genocide.

The appeal arose from the judgment delivered by the Superior Court of Quebec in 2009, which found Munyaneza guilty of war crimes, crimes against humanity and genocide. After classifying the conflict in Rwanda between 1 April and 31 July 1994 as non-international, the Court found that Munyaneza had intentionally murdered, sexually assaulted and looted the homes of a number of individuals from the Tutsi ethnic group who had not participated directly in hostilities. Many of the victims were children or below the age of 18 years.

The Court of Appeals affirmed Munyaneza’s sentence of life imprisonment.

Colombia

*Decision No. C-007, Constitutional Court, 1 March 2018*  
Judgment C-007-18 was delivered by the Colombian Constitutional Court on 1 March 2018.

The Constitutional Court reviewed Amnesty Act 1820 of 2016 (*Ley 1820 de 2016*), which concerned the realization of one of the points of the 2016 Peace Agreement concluded between the Colombian government and the former armed group the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC). Under this point, most members of FARC were granted amnesties, with the exception of those accused of having committed war crimes, crimes against humanity and genocide, which may include extrajudicial executions, hostage taking and other serious deprivations of liberty, torture, enforced disappearance, rape and other forms of sexual violence, child abduction and recruitment of minors.

In its analysis, the Constitutional Court reiterated its position that the war crime of child recruitment includes both direct and indirect types of participation in armed conflict, which reflects the position of the International Criminal Court on the matter.

38 Available at: [https://tinyurl.com/supdx06](https://tinyurl.com/supdx06).
40 Available at: [https://tinyurl.com/tlb5gw](https://tinyurl.com/tlb5gw).
Additionally, the Court stated that as of 25 June 2005 (the date of entry into force in Colombia of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict), the age limit for the prohibition of child recruitment in Colombia is 18 years. Before the entry into force of the Optional Protocol, it was prohibited to recruit children under the age of 15 years. In both cases, the Court based its position on an analysis of IHL standards, doctrine, customary IHL and the principle of the best interest of the child. On this basis, the Court concluded in para. 484 of the Judgment that the prohibition on recruiting children under the age of 18, applicable in Colombia as of 25 June 2005, “is a matter of customary law”.

Lastly, the Constitutional Court concluded that child recruitment was a crime not eligible for amnesty or a decision not to bring criminal prosecution against former FARC members under Amnesty Act 1820.

Germany

*Decision OVG 10 S 43.19, Higher Administrative Court for Berlin-Brandenburg, 6 November 2019*41

On 10 July 2019, the Berlin Court of First Instance issued a decision, ruling that Germany’s Ministry of Foreign Affairs should repatriate from the Al-Hol camp in Syria the German wife and three children of a suspected fighter of the non-State armed group Islamic State. The Court held that the children’s right to be repatriated back to Germany stems directly from Article 2(2) of the German Constitution, on the right to life and physical integrity. The decision was appealed.

The Higher Administrative Court for Berlin-Brandenburg rendered the final decision on the case on 6 November 2019. The Court decided that Germany is under an obligation to return the children to Germany, together with their mother, in order to protect the integrity of the family unit. It did not question that the respondent (the Federal Republic of Germany) has in principle a wide margin of appreciation as to how it protects fundamental rights and does not require a specific procedure for the return. It noted, however, that Germany has previously found ways to repatriate children from Al-Hol, despite its lack of access, through the assistance of “a non-governmental organisation” (para. 48). It also held that circumstances will make return difficult, but not impossible (para. 49).

In relation to the repatriation, the Court recognized the right and duty of the State to protect citizens on German territory in case of a concrete risk. However, it did not consider it sufficiently concrete that the federal public prosecutor is conducting an investigation against the applicant in the case on suspicion of membership of a terrorist organization abroad, or that “IS women” in general may have committed war crimes.

41 Available at: https://tinyurl.com/ved3scp.
Other relevant highlights

Canada

*Regulations Implementing the United Nations Resolutions on Mali, SOR/2018-203*

On 9 September 2017, the UN Security Council adopted Resolution 2374 creating a sanctions regime targeting actors derailing the Agreement for Peace and Reconciliation in Mali. The Regulations adopted by the government of Canada on 10 October 2018 implement into Canadian domestic law the sanctions regime imposed by the Security Council. The Regulations prohibit persons in Canada, and Canadians outside Canada, from knowingly dealing in the property of certain persons designated by the Security Council. These measures apply to persons responsible for or complicit in, or having directly or indirectly engaged in, the use or recruitment of children by armed groups or armed forces in violation of international law.

Economic Community of West African States (ECOWAS)

*ECOWAS Child Policy 2019*

The ECOWAS Child Policy 2019 is a legally binding regional policy that provides a broad-based structure and policy direction for ECOWAS member States in their common regional and international aspirations towards fulfilling child rights in West Africa. The imperative for a regional child policy stems from ECOWAS member States’ commitment to fulfilling their obligations towards children in accordance with the Revised ECOWAS Treaty of 1993 and its associated instruments. Article 4 of the Treaty guarantees the fundamental principles of human rights in accordance with the provisions of the African Charter on Human and People’s Rights. With respect to child well-being, all ECOWAS member States have ratified and domesticated the UN Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990). A child is defined as any person below the age of 18, unless the laws of a particular country set the legal age for adulthood lower.

The Child Policy raises a number of concerns about the vulnerability of children affected by armed conflict or other crisis situations in West Africa. These concerns include internal and cross-border displacement and difficulties in tracing children and unifying them with their families. In addition, children suffer serious consequences as a result of frequent violations of treaty and customary rules of IHL—sexual violence, indiscriminate or disproportionate attacks, detention, unlawful recruitment, unlawful denial of access to humanitarian assistance, and attacks on health-care and educational facilities. According to the Child Policy, activities of non-State armed groups against

42 Available at: https://tinyurl.com/rcxualq.
children, such as abduction, sexual and gender-based violence, or the use of children in acts deemed to be terrorist, are a matter of grave concern for the region. Another concern raised by the Policy is severe traumatization and possible stigmatization suffered by children in post-conflict situations and the complexity of providing appropriate rehabilitation and reintegration for child survivors of armed conflict.

In this respect, Goal 3 of the Policy is the protection of children from all forms of violence, abuse and exploitation, as well as providing them with access to prevention and response services. Objective 1 of Goal 3 is the adoption by each ECOWAS member State of relevant laws and policies, as well as the establishment of institutions to support prevention and response actions that will protect children in the region from violence, abuse and exploitation in compliance with international and regional legal frameworks. In this respect, member States are required to ratify and domesticate all relevant international legal instruments establishing standards of child protection within and outside the context of an armed conflict, to formulate and implement appropriate national policies and action plans in accordance with specific commitments in relation to the protection of children affected by armed conflict, and to establish relevant national mechanisms.

Objective 2 of Goal 3 requires States to ensure that international standards are met in relation to children in detention, and that detention is only used as a last resort. To that end, States are required to implement international standards relating to juvenile justice and promote specific policies for children in conflict, to end detention of children for immigration purposes, and to establish functioning alternatives to detention.

Objective 4 of Goal 3 requires key community institutions to develop increased positive attitudes to social protection programmes for children.

**France**

*Instruction on the Care of Minors on Their Return from Terrorist Groups’ Areas of Operations (in Particular the Iraqi–Syrian Area)*

The Instruction on the Care of Minors on Their Return Home from Terrorist Groups’ Areas of Operations was adopted in France on 23 February 2018.

The Instruction organizes the care of minors upon their return to French territory from terrorist groups’ areas of operations and provides for specific support adapted to their individual situations. The system is largely based on existing legislation and seeks to mobilize all State services on this issue, to improve their coordination with the departmental councils responsible for the care of these children, and to specify how the existing legal mechanisms interact in order to provide the most adapted support and ensure longer monitoring. The Instruction specifies how the children are to be taken care of upon their return, in particular in terms of both physical and medico-psychological assessment and

43 Available at: [https://tinyurl.com/wrugowt](https://tinyurl.com/wrugowt).
support, schooling, specific training of professionals in charge of support, coordination, and assessment and monitoring guidelines. A monitoring committee for the system is set up under the supervision of the Ministry of Justice and the Ministry of Solidarity and Health, the secretariat of which is provided by the General Secretariat of the Inter-Ministerial Committee for the Prevention of Crime and Radicalization.

Norway

*Action Plan against Radicalization and Violent Extremism*\(^{44}\)

On 10 June 2014, the government of Norway published an Action Plan against Radicalization and Violent Extremism. The Action Plan aims at preventing radicalization and at giving returning foreign fighters and their families necessary and special follow-up.

The Action Plan identifies the cases in which the Ministry of Children, Equality and Social Inclusion and other governmental organs will be responsible for undertaking measures in relation to children and youths in danger of, or having suffered as a result of, radicalization and violent extremism. Preventive measures include holding dialogue conferences for young people, support for voluntary organizations working to prevent radicalization and violent extremism, developing a scheme to provide guidance to parents and guardians who are concerned for their children in this respect, and a number of measures to prevent radicalization and recruitment through the Internet. Reactive measures include developing trauma-focused treatment for returning children and youths who have taken part in military actions abroad as foreign fighters or are family members of foreign fighters.

Syria

*Law No. 11, Addendum to the Penal Code Regarding the Involvement of Children in Hostilities*\(^{45}\)

On 24 June 2013, the Syrian Parliament approved an amendment to the Syrian Criminal Code in relation to the involvement of children in hostilities. The Syrian Arab Republic ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict on 17 October 2003. The amendment modifies Article 488 of the Criminal Code by establishing in Article 1(1) a punishment of ten to twenty years’ temporary hard labour and a fine for any person recruiting a child under the age of 18 for the purpose of involving him in hostilities or in other related acts such as carrying arms, equipment or ammunition. The same sanction applies to persons recruiting a child to use him as a human shield or for any form of assistance to the

\(^{44}\) Available at: [https://tinyurl.com/rewkgsl](https://tinyurl.com/rewkgsl).

\(^{45}\) Available at: [https://tinyurl.com/smb6rn9](https://tinyurl.com/smb6rn9).
perpetrators or other acts in hostilities. A penalty of lifetime forced labour is foreseen if the child suffers from a permanent disability as a result of his participation in hostilities, or if he was sexually abused or given drugs while being recruited. Under Article 1(2), the death penalty is foreseen for cases where a child dies as a result of his involvement in hostilities.
Children and war
doi:10.1017/S1816383120000193
People not politics: Reflections on the 33rd International Conference of the Red Cross and Red Crescent

Interview with Balthasar Staehelin
Deputy Director-General, International Committee of the Red Cross*

The International Conference of the Red Cross and Red Crescent (International Conference) is the supreme deliberative body of the International Red Cross and Red Crescent Movement (the Movement). Established in 1867, it is a global forum that highlights the privileged dialogue and relationship between the components of the Movement (namely the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC), and 191 National Red Cross and Red Crescent Societies (National Societies)) and States Parties to the Geneva Conventions. Together, these bodies examine and decide upon humanitarian matters of common interest and any other related matters.

The 33rd International Conference was held in Geneva from 9 to 12 December 2019, and gathered together 2,393 representatives from 187 National Societies, 170 States and 77 observer organizations, as well as representatives from the ICRC and IFRC. Eight resolutions were adopted by consensus addressing a range of critical issues, such as national implementation of international humanitarian law (IHL), restoring family links while respecting privacy (including as it relates to personal data protection), women and leadership, tackling epidemics and pandemics, addressing mental health and psychosocial needs, and disaster law.¹

* This interview was conducted in Geneva on 18 February 2020 by Lucia Cipullo, Head of Project for Movement Meetings, ICRC.

¹ You can find the resolutions in this issue of the Review. All official documents and decisions of the Conference can be found on the Conference website at www.rcrcconference.org.
Balthasar Staehelin has served as the Deputy Director-General of the ICRC since August 2012, before which he undertook several diverse roles with the ICRC across the globe. This is the second International Conference at which he has played an instrumental role on behalf of the ICRC in guiding the strategic development, preparation and delivery of the Conference. Following the successful completion of the 33rd International Conference, Balthasar kindly shared his views on this unique forum.

The 33rd International Conference was held last December and was the second Conference you have overseen in your time as Deputy Director-General at the ICRC. How did it compare with the 32nd International Conference in 2015?

The International Conference takes place in a four-year cycle, and each time we try to build upon what came before; the lessons we learned, the experience we had. The greatest focus of the 32nd International Conference was on IHL, particularly at the political level and in relation to the compliance process. While IHL remained at the centre of the 33rd International Conference in 2019, we also discussed other pertinent issues – from digital transformation and restoring family links, to mental health, to climate change, and to migration and displacement – all while maintaining a sense of clarity in the structure of the Conference. We managed to attract the attention of a high number of States, National Societies, and organizations participating as observers. We had a significantly high degree of engagement, and I believe this is because we tried – and succeeded – to do things differently.

We set the scene on newer topics, such as trust in humanitarian action. It was the discussions around trust that really made the difference, in my opinion. By having the topic of trust on the table, we demonstrated how this is a conference that can examine issues which aren’t framed in any other forum. Trust is an issue that will stay with us, and one that I hope other humanitarian events will also be inspired to explore. It is an issue that is connected to bigger operational challenges for the Movement, and one which I believe we succeeded in grounding as a priority issue for future editions of the Conference to take forward.

Four years ago, the global humanitarian stage was already crowded with different events, and the International Conference has had to continue competing for space. In a previous interview with the Review, you said this multitude of events actually helped to reinforce the position and profile of the International Conference.² Do you still think this is the case?

Absolutely. While the International Conference must be connected to the outside world, what this multitude of events demonstrates is that there is no other

platform like the Conference. There is no other platform where you have civil society organizations meeting with States on an equal footing, with equal voting rights. If we tried to establish such a platform today, I am not sure we would succeed. Moreover, we must remember that States do not come as member States to the United Nations or otherwise— they come as High Contracting Parties to the Geneva Conventions. The Conference is deeply connected to IHL. We must not forget that. We must protect, and promote, the precious space to interact in this unique constellation. Of course we want and need to engage with observers, especially when it comes to the thematic discussions, and we must show that we are not operating in isolation. We saw this with the challenge of the Global Refugee Forum following immediately after the 33rd International Conference. What is critical for us, however, is the balance between protecting the unique nature of this forum while at the same time remaining cognizant of the outside world and demonstrating the connections with other processes.

Many have said that the current multilateral environment is not ripe for reaching consensus. What impact has this had on decisions taken at the International Conference in 2019? What does it mean for the future of the Conference as a vehicle for creating soft law?

Empirically speaking, if one observes the current multilateral environment it is clear that reaching consensus is becoming increasingly difficult. The Statutes of the Movement state that the International Conference should endeavour to adopt its resolutions by consensus, and I believe we must retain this element. In today’s polarized geopolitical environment, to have the capacity to bring together almost all the States in the world, together with National Societies, to have discussions on difficult humanitarian topics, and to be able to reach consensus, is an incredible feat and not to be underestimated. We managed to have a people-centred approach at the 33rd International Conference, which was also largely the case due to the fact that discussions must abide by the Fundamental Principles of the Movement. So here we had the opportunity—and the obligation—to transcend political divisions in order to focus on what we can do for people affected by war and crises.

The ambition to reach consensus, however, does mean that it can be difficult to go as fast or as far as some would have liked on specific issues. For instance, it was difficult to reaffirm consensus on fundamental formulations pertaining to IHL adopted without difficulties at previous International Conferences, but we did nevertheless achieve consensus on concrete and practical measures that we must all take to better implement and enhance respect for IHL. We also managed to tackle an important issue which is at the heart of our Movement, on maintaining and restoring family links whilst managing crucial data protection challenges. This issue is deeply connected to that of trust, and despite the lengthy negotiations we managed to come up with a solid resolution that is a step in the right direction—and one which sets the tone for how we can
protect and reinforce fundamental services that the Movement offers to the world. This also points to the fact that the soft-law instrument of resolutions remains an important and viable outcome of the Conference.

**An enormous amount of work was undertaken throughout the preparatory process in 2018-19, which sought to deliver a Conference that is engaging and focused, and which demonstrated that feedback from previous Conferences was taken on board. Do you think this was achieved?**

This is one of the dimensions that I am very proud of and where I feel that the organizers have really managed to introduce interesting new practice which has added value. The ICRC and IFRC, as co-organizers of the Conference, together with the Standing Commission as trustee of the Conference, have built on intensive consultations with the Permanent Missions in Geneva and with National Societies around the world to create sustained engagement throughout an 18-month preparatory process. We have made the most of this engagement and created an environment where there was a genuine sense of trust, ownership and “no surprises”.

We introduced a significant novelty with the Preparatory Meeting, which was held last June and open to all Conference members. This meeting was an opportunity not only to go through the draft resolutions and explain the background and purpose of the text, but also to understand and gain a good grasp of the issues from the Conference members’ perspectives. We sought to understand, and ideally refine, most issues prior to the official negotiations at the Conference itself.

The Preparatory Meeting allowed States and National Societies to hear each other’s positions in advance, which in turn allowed us to have a far more serene Conference and a better process in the drafting committee. The tone, engagement and constructive nature of the Preparatory Meeting greatly contributed to the success of the Conference. We received feedback that we could have gone further with our communication regarding changes made to the final text of the draft resolutions, and on how decisions were taken between the Preparatory Meeting and when the official documents were shared. We have heard this very well, and will take it on board when we prepare for the 34th International Conference in 2023.

In terms of “doing things differently”, I also want to highlight that this was the first time the Conference took strides to be as inclusive and accessible as possible. In addition to the physical and structural adjustments that were made at the venue, we had sign language interpretation during the main plenaries, and audio transcription available for the first time in the history of the Conference. This really sets the tone for us as a humanitarian movement, and is something which we really want to showcase. We hope other event organizers will follow suit.

We took some daring decisions in terms of how we balanced the more protocol-driven side of the Conference with sessions that allowed for
more participatory debate. We gave greater space to our desire to have more interactive, engaging sessions, rather than static and more formalistic plenaries. Some might argue that this comes at the cost of high-level political engagement, but these are choices we make, and views can be different. Many have told us in the past that they would not like to have a static conference and want more engagement. We now have to carefully analyze whether we struck the right balance, and must continue doing our best to be as attuned as we can to the needs of the Conference members.

**How can the ambition for a focused, coherent Conference be balanced with the need to reflect the immense scope of the Movement’s work, and the challenges that the Movement faces on the ground?**

First of all, I want to be clear that the Conference cannot be monothematic. If we look at the Movement Statutes for guidance, there is a clear focus on IHL – and I cannot imagine a conference where IHL would not be central in one shape or another. At the same time, however, we must bring to the forefront different issues, including some which we may not even fully understand yet. The Health Care in Danger initiative is an earlier example of this: something which started with observations of Red Cross staff in the field, with concerns about real day-to-day issues about respect for our medical mission. What is important to maintain is that we first observe the issues on the ground, then bring them to the higher level to find solutions. We can find a mix of subjects which have matured, and which capture best practices – together with subjects that are emerging and need to be better understood. The challenge that will always remain, however, is how to retain a high degree of focus and coherence, but ensure that we are addressing the diverse scope of the Movement’s work and – perhaps more importantly – the far-reaching humanitarian needs on the ground. The richness of the Movement is an asset for humanity but, coupled with the dilemma I’ve just mentioned, it remains a challenge for the Conference organizers.

**There has been pressure to transform the International Conference into THE premier global humanitarian forum. How do you see such a transformation, and is it necessary in order for the Conference to remain relevant?**

The Conference must shine beyond the Movement and States – it must help to influence a larger agenda. I want to come back to the example of Health Care in Danger. This was first framed at the International Conference and is now a recurrent issue of concern at the UN Security Council. It is an example of how the International Conference can, and must, shape the humanitarian agenda beyond the Movement.

I don’t think the International Conference should necessarily be the only exclusive humanitarian gathering in the world. It should constructively engage
with other, more specialized forums, in which specific issues are discussed. This isn’t a quest to have a monopoly on humanitarian dialogue – and the rhythm of the Conference’s four-year cycle doesn’t allow for this. Rather, success is measured by shaping the debate on the right issues at the right time, and ensuring that we have an International Conference which is inclusive of the voices that we need to shape such a debate. Where I believe we can still do better is to have the voices of affected people more present in this debate.

Finally, the International Conference must maintain the specific connection between High Contracting Parties to the Geneva Conventions and the Movement. We don’t want to dilute this specificity. We could not dilute this into a larger conference – we would lose out. The Movement needs a moment with the High Contracting Parties to discuss and resolve and decide upon issues of common concern.

**What is your message for future editions of the International Conference?**

My message would be that this is a fantastic forum, and one which is also a huge responsibility that has been given to the Movement. It is an enormous privilege to meet all the States of the world on an equal footing, and it is truly astounding that such a forum exists in today’s world. We must make the absolute most of it, and not lose sight of the opportunity to use the Conference as a vehicle to better serve people who need assistance, and who need protection. We have an extremely precious instrument, and we must make sure that the focus remains on the people, not on politics.
Resolution 1  Bringing IHL home: A road map for better national implementation of international humanitarian law
Resolution 2  Addressing mental health and psychosocial needs of people affected by armed conflicts, natural disasters and other emergencies
Resolution 3  Time to act: Tackling epidemics and pandemics together
Resolution 4  Restoring family links while respecting privacy, including as it relates to personal data protection
Resolution 5  Women and leadership in the humanitarian action of the International Red Cross and Red Crescent Movement
Resolution 6  Act today, shape tomorrow
Resolution 7  Disaster laws and policies that leave no one behind
Resolution 8  Implementation of the Memorandum of Understanding and Agreement on Operational Arrangements dated 28 November 2005 between Magen David Adom in Israel and the Palestine Red Crescent Society
Resolution 1 of the 33rd International Conference of the Red Cross and Red Crescent

BRINGING IHL HOME: A ROAD MAP FOR BETTER NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

The 33rd International Conference of the Red Cross and Red Crescent,

reaffirming that international humanitarian law (IHL) remains as relevant today as ever before in international and non-international armed conflicts, even as contemporary warfare presents new developments and challenges,

recalling that IHL, as applicable, must be fully applied in all circumstances, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict,

recognizing that the efforts carried out by States and the components of the International Red Cross and Red Crescent Movement (Movement) to eliminate or minimize dire humanitarian consequences of armed conflicts could also contribute to addressing the root causes of conflict and its various consequences,

recalling that persons taking no active part in the hostilities shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria,

recognizing that women, men, girls and boys of different ages, disabilities and backgrounds can be affected differently by armed conflict, and that these differences need to be considered when implementing and applying IHL, in order to safeguard adequate protection for all,

stressing that the best interests of the child as well as the specific needs and vulnerabilities of girls and boys should be duly considered when planning and carrying out military training and humanitarian actions, as appropriate,

highlighting that 2019 marks the 70th anniversary of the adoption of the 1949 Geneva Conventions, welcoming their universal ratification, and expressing the hope that other IHL treaties will also achieve universal acceptance,

stressing that parties to armed conflicts have taken measures in many instances to ensure during their military operations that IHL is respected, such as when cancelling or suspending attacks on military objectives because the expected incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, would be excessive in relation to the concrete and direct military advantage anticipated; when enabling civilians to exchange personal news with family members, wherever they may be; or when treating detainees humanely,

deeply concerned nevertheless that there continue to be violations of IHL, which can cause dire humanitarian consequences, and stressing that better respect for IHL is an indispensable prerequisite for minimizing negative humanitarian consequences and thereby improving the situation of victims of armed conflict,
recalling that domestic implementation of international obligations plays a central role in fulfilling the obligation to respect IHL, and recognizing the primary role of States in this regard,

noting the significant role and mandates of the components of the Movement in promoting the application of IHL and in accordance with the Statutes of the Movement, in particular the unique role of National Red Cross and Red Crescent Societies (National Societies) as auxiliaries to the public authorities in the humanitarian field, based on which they disseminate and assist their governments in disseminating IHL and take initiatives in this respect, and cooperate with their governments to ensure respect for IHL and to protect the distinctive emblems recognized by the Geneva Conventions and their Additional Protocols,

recognizing the positive impact that the integration of IHL into military practice can have on battlefield behaviour, for example, through issuance of doctrine, procedures that incorporate IHL principles and concepts, legal advisers advising commanders on IHL during military operations, and training on IHL commensurate with individuals’ military duties and responsibilities,

stressing the basic value of respect for human dignity in times of armed conflict, which is enshrined in IHL but also in the rules and principles of different faiths and traditions, as well as military ethics, and recognizing the importance of dialogue among relevant actors and ongoing efforts in this respect,

emphasizing the vital importance of building on existing efforts to achieve more effective implementation and dissemination of IHL and of demonstrating the benefits of IHL for all parties to armed conflict and for the protection of all victims of armed conflict,

convinced that the measures recommended below provide a useful road map for effective implementation of IHL at the national level,

1. urges all parties to armed conflicts to fully comply with their obligations under IHL;
2. calls upon States to adopt necessary legislative, administrative and practical measures at the domestic level to implement IHL, and invites States to carry out, with the support of the National Society where possible, an analysis of the areas requiring further domestic implementation;
3. acknowledges with appreciation States’ efforts and initiatives taken to disseminate IHL knowledge and promote respect for IHL, by raising awareness among civilians and military personnel, and to put in place implementation measures, and strongly encourages the intensification of such measures and initiatives;
4. encourages all States that have not already done so to consider ratifying or acceding to IHL treaties to which they are not yet party, including the Protocols additional to the Geneva Conventions, and recalls that States may declare that they recognize the competence of the International Fact-Finding Commission as established under Article 90 of Protocol I additional
to the Geneva Conventions and that this may contribute to an attitude of respect for IHL;

5. **acknowledges** the effective role and increasing number of national committees and similar entities on IHL involved in advising and assisting national authorities in implementing, developing and spreading knowledge of IHL, and **encourages** States that have not yet done so to consider establishing such an entity;

6. **recalls** the outcomes of the fourth universal meeting of national committees and similar entities on IHL held in 2016, and **calls for** the strengthening of cooperation between such entities on the international, regional and cross-regional levels, in particular by attending and actively participating in the universal, regional and other regular meetings of such entities, as well as through the new digital community for national committees and similar entities on IHL, created on the basis of the recommendations made by the participants in the 2016 universal meeting;

7. **strongly encourages** States to make every effort to further integrate IHL into military doctrine, education and training, and into all levels of military planning and decision-making, thereby ensuring that IHL is fully integrated into military practice and reflected in military ethos, and **recalls** the importance of the availability within States’ armed forces of legal advisers to advise commanders, at the appropriate level, on the application of IHL;

8. **encourages** States and the components of the Movement, in particular National Societies, to take concrete, and where appropriate, coordinated activities, including through partnerships with academics and practitioners where suitable, to disseminate IHL effectively, paying particular attention to those called upon to implement or apply IHL, such as military personnel, civil servants, parliamentarians, prosecutors and judges, while continuing to disseminate IHL at the domestic level as widely as possible to the general public, including to youth;

9. **calls upon** States to protect the most vulnerable people affected by armed conflicts, in particular women, children and persons with disabilities, and to provide that they receive timely, effective humanitarian assistance;

10. **encourages** States and the components of the Movement, while continuing to rely on proven effective methods of dissemination of IHL, to explore new innovative and appropriate methods to promote respect for IHL, including using digital and other means, such as video games, and where possible to consider therein the voices of people affected by armed conflict and their perception of IHL;

11. **recalls** the obligations of High Contracting Parties to the Geneva Conventions and Additional Protocol I to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any grave breaches of the Geneva Conventions and Additional Protocol I, as applicable, and to take measures necessary for the suppression of all other acts contrary to those Conventions or to other applicable IHL
obligations, and further *recalls* obligations with respect to the repression of serious violations of IHL;

12. *also recalls* the obligations of the High Contracting Parties of the Geneva Conventions and Additional Protocol I to search for persons alleged to have committed, or have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before their own courts or, in accordance with provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case;

13. *invites* States to share examples of and exchange good practices of national implementation measures taken in accordance with IHL obligations as well as other measures that may go beyond States’ IHL obligations, including by making use of existing tools and of national committees and similar entities on IHL, where they exist, consistent with International Conference resolutions, including this road map.
Resolution 2 of the 33rd International Conference of the Red Cross and Red Crescent

ADDRESSING MENTAL HEALTH AND PSYCHOSOCIAL NEEDS OF PEOPLE AFFECTED BY ARMED CONFLICTS, NATURAL DISASTERS AND OTHER EMERGENCIES

The 33rd International Conference of the Red Cross and Red Crescent,

expressing deep concern about the unmet mental health and psychosocial needs of people affected by armed conflicts, natural disasters and other emergencies, including the needs of migrants, refugees and internally displaced persons, stressing that mental health and psychosocial needs increase extensively as a result of these situations and that pre-existing conditions may resurface or be exacerbated, and underscoring the urgent demand to increase efforts to respond to them by means of prevention, promotion, protection and assistance,

recognizing that mental health and psychosocial well-being are critical to the survival, recovery and daily functioning of people affected by armed conflicts, natural disasters and other emergencies, to their enjoyment of human rights and fundamental freedoms and to their access to protection and assistance,

recalling the Constitution of the World Health Organization, which recognizes that health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity; and further recognizes that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, or economic or social condition,

recognizing that early and appropriate mental health and psychosocial support is important to prevent distress from developing into more severe conditions and that children and youth face particular risks if their mental health and psychosocial needs are not addressed early, and acknowledging that most people show resilience and do not develop mental health conditions provided they have access to basic services and family- and community-level resources,

recognizing also that unmet mental health and psychosocial needs have far-reaching and long–term negative human, social and economic impacts, which affect individuals, communities and society as a whole, and that meeting these needs, in particular in armed conflicts, natural disasters and other emergencies, is critical to achieving universal health coverage and the Sustainable Development Goals,

recalling Resolution 3, “Sexual and Gender-Based Violence: Joint Action on Prevention and Response”, of the 32nd International Conference of the Red Cross and Red Crescent (International Conference), which calls upon States and National Red Cross and Red Crescent Societies (National Societies) to make every feasible effort to ensure, insofar as possible, that survivors of sexual violence and, where
appropriate, gender-based violence have unimpeded and ongoing access to psychological and psychosocial support,

recognizing that the mental health and psychosocial well-being of volunteers and staff responding to humanitarian needs is often affected as they are exposed to risks and potentially traumatic events and work under stressful conditions, and that the safety, security, health and well-being of staff and volunteers are vital to the provision of sustainable quality services, and recalling the relevant recommendations and commitments set out in Resolution 4, “Health Care in Danger: Continuing to Protect the Delivery of Health Care Together”, and Resolution 5, “The Safety and Security of Humanitarian Volunteers”, of the 32nd International Conference,

recognizing also that factors such as, but not limited to, pre-existing mental health conditions, substance use and addictive behaviours, age, gender, disability, state of health, socio-economic status, ethnicity, legal status, deprivation of liberty, displacement and exposure to violence can further increase risk and impact needs and vulnerability and that diversity factors should be considered in order to ensure effective access to, and the culturally sensitive provision of, mental health and psychosocial support services for all people affected,

reaffirming the fundamental premise and commitment to “do no harm” by taking into account the perspectives of people with lived experience, and by promoting applicable standards of care, ethical and professional guidelines and evidence-informed, participatory and culturally sensitive approaches that protect and promote mental health and psychosocial well-being,

recognizing that the stigma and often hidden nature of mental health and psychosocial needs are key challenges that need to be addressed with medium- and long-term strategies, as appropriate to the context, at individual, family, community and societal levels,

affirming that the existing international legal frameworks, including international humanitarian law and international human rights law, as applicable, provide for protections that may be relevant to mental health and psychosocial well-being, and recognizing that respect for those protections may significantly contribute to addressing the challenges in preventing and meeting mental health and psychosocial needs,

affirming also that States have the primary responsibility to address the humanitarian needs, including mental health and psychosocial needs, of people affected by armed conflicts, natural disasters and other emergencies, in accordance with the applicable legal frameworks,

recognizing that the components of the International Red Cross and Red Crescent Movement (Movement) have important complementary and supportive roles in addressing the mental health and psychosocial needs of affected people, including the role of National Societies as auxiliaries to the public authorities in the humanitarian field, as reflected in the Geneva Conventions of 1949, their Additional Protocols of 1977, the Statutes of the Movement and resolutions of the International Conference,
acknowledging the important and diverse work carried out by the components of the Movement to address mental health and psychosocial needs, including basic psychosocial support through to specialized mental health care provided in close proximity to the affected people and their communities, welcoming the Movement’s efforts to strengthen its response to these needs, and taking note of the Movement’s new policy on addressing mental health and psychosocial needs adopted by the 2019 Council of Delegates, recalling all relevant resolutions adopted by the International Conference and the United Nations (UN) and other commitments addressing mental health and psychosocial needs, including Resolution 29 of the 25th International Conference, expressing appreciation for existing relevant work and initiatives by the World Health Organization and other relevant agencies and parts of the UN system, regional organizations, States, humanitarian organizations and other relevant actors aimed at addressing mental health and psychosocial needs, underlining the complementary character of the work of the Movement and the International Conference in relation to the above work and initiatives, and emphasizing the importance of coordinating the response with other local and international actors and building on local needs and available resources,

1. calls upon States, National Societies, the International Federation of Red Cross and Red Crescent Societies (IFRC) and the International Committee of the Red Cross (ICRC) to increase efforts to ensure early and sustained access to mental health and psychosocial support services by people affected by armed conflicts, natural disasters and other emergencies;

2. also calls upon States, National Societies, the IFRC and the ICRC to invest in local and community-based action, embedded in local and national services, on a longer-term basis to prevent, prepare for and respond to mental health and psychosocial needs, including by strengthening local and community resilience and the capacities of volunteers;

3. encourages States and National Societies to enhance their cooperation to address these needs, as appropriate, building on the National Societies’ often unique humanitarian access to affected people and auxiliary role to the public authorities in the humanitarian field;

4. calls upon States, National Societies, the IFRC and the ICRC, in accordance with their respective roles, mandates and capacities, to ensure that mental health and psychosocial support responses include psychosocial, psychological and specialized mental health care;

5. also calls upon States and the components of the Movement to integrate mental health and psychosocial support into all activities addressing humanitarian needs, including prevention and protection, and ensure that mental health and psychosocial support and responses addressing other humanitarian needs, such as shelter, food, livelihoods, education and support to separated families and families of the missing, are mutually reinforcing;

6. calls upon States to ensure that mental health and psychosocial support is an integral component in domestic and international emergency response
systems, including disaster laws, preparedness plans and emergency response coordination mechanisms, and **calls upon** the components of the Movement, particularly National Societies, to support this effort in accordance with their respective mandates;

7. **calls upon** States and the components of the Movement to take action to address stigma, exclusion and discrimination related to mental health and psychosocial needs through approaches that respect the dignity and reinforce the participation of affected people, in particular persons with lived experiences, in a context-specific, culturally sensitive and faith-sensitive way;

8. **encourages** States to work to strengthen the quality and capacity of the workforce, including volunteers, responding to the mental health and psychosocial needs of people affected by armed conflicts, natural disasters and other emergencies, in close coordination and cooperation with the components of the Movement;

9. **calls upon** States and the components of the Movement to take measures to protect and promote the mental health and psychosocial well-being of staff and volunteers who are responding to humanitarian needs across all sectors, equipping them with the necessary skills, tools and supervision to cope with stressful situations and responding to their specific mental health and psychosocial needs.
Resolution 3 of the 33rd International Conference of the Red Cross and Red Crescent

TIME TO ACT: TACKLING EPIDEMICS AND PANDEMICS TOGETHER

The 33rd International Conference of the Red Cross and Red Crescent,
expressing deep concern over the threat that epidemics and pandemics pose to global health, the economy and stability, particularly in the world’s most vulnerable areas and in complex settings where epidemics may be particularly difficult to address,
acknowledging the increasing recognition and importance of effective preparedness, which can save time, money and lives,
recalling Sustainable Development Goal 3 and its aim to ensure healthy lives and promote well-being for all at all ages,
also recalling that the Statutes of the International Red Cross and Red Crescent Movement (Movement) recognize that National Societies cooperate with the public authorities in the prevention of disease, the promotion of health and the mitigation of human suffering for the benefit of the community,
further recalling that Resolution 2 of the 30th International Conference of the Red Cross and Red Crescent (International Conference) recognized that public authorities and National Societies, as auxiliaries in the humanitarian field, enjoy a specific and distinctive partnership, entailing mutual responsibilities and benefits, based on international and national laws, in which the national public authorities and the National Society agree on the areas in which the latter supplements or substitutes for public humanitarian services within its mandate and in conformity with the Fundamental Principles,
further recalling that Resolution 4 of the 31st International Conference encouraged relevant government departments and other donors to provide a predictable and regular flow of resources adapted to the operational needs of their National Societies,
recalling that Resolution 1 of the 30th International Conference stressed the need to strengthen health systems and develop national health plans with the involvement of National Societies and to include the empowerment of volunteers and affected groups,
acknowledging the importance of the complementarity and coordination of the actions of the different components of the Movement to prevent, mitigate and respond to epidemics and pandemics with the action of other relevant actors in the field,
acknowledging that epidemics and pandemics may have a different impact on girls, boys, women and men and on young and older persons as well as on people living with disabilities and people with chronic health conditions and others whose
circumstances may make them more vulnerable at the time of an epidemic or pandemic,

*recognizing with gratitude* the humanitarian work undertaken by the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and National Societies, working closely with key partners such as the World Health Organization, in response to recent epidemics and pandemics, including outbreaks of measles, polio, dengue and cholera, Ebola virus disease outbreaks and the Zika virus disease epidemic,

*acknowledging* the wide range of activities that Movement components regularly undertake to prepare for and respond to the needs of vulnerable communities before, during and after epidemics and pandemics,

*acknowledging* the commitment of States Parties to the International Health Regulations (2005) (IHR) to ensure the effective core capacities to prevent, detect, assess, report and respond to epidemics and pandemics,

*emphasizing* the importance of National Societies working in close coordination with national authorities and other local and international organizations responding to epidemics and pandemics in order to assist States Parties in meeting their obligations to comply with the IHR,

*emphasizing* the role that National Societies, the ICRC and the IFRC could play, in collaboration with other partners such as the World Health Organization, in further strengthening countries’ epidemic and pandemic core capacities, including, but not limited to, planning, preparedness, coordination with other local and international organizations, prevention and control, immunization, community engagement and accountability, communication with the public, and emergency response,

*recalling* the WHO Health Emergency and Disaster Risk Management Framework,

*acknowledging* that neutral, impartial and independent humanitarian action extending beyond the provision of clinical care is a critical tool in epidemic and pandemic response, particularly in areas of insecurity,

*recalling* the obligations to respect and protect the wounded and sick and health-care personnel and facilities, as well as medical transports, and to take all reasonable measures to ensure safe and prompt access to health care for the wounded and sick, in times of armed conflict or other emergencies, in accordance with the applicable legal frameworks,

*taking into account* the particular challenges in meeting health needs when epidemics occur in areas where health care is under-resourced and where access to care is difficult,

1. *invites* States to enable and facilitate Movement components, in accordance with their mandates and capacities and with international law, to contribute to a predictable and coordinated approach to epidemics and pandemics, including effective international cooperation and coordination, and engagement with and support to affected communities;
2. encourages States to include National Societies, according to their mandate and capacities and as humanitarian auxiliaries to their public authorities, in national disease prevention and control and multi-sectoral preparedness and response frameworks and, where possible, to provide funding in support of their role in this regard;

3. further encourages National Societies to offer support to their public authorities, as appropriate, in their State’s efforts to strengthen core capacities as part of obligations to comply with the IHR, ensuring that special provisions are effectively in place for the efficient and expedited delivery of a public health response for affected populations during crisis situations, coordinating with other local and international organizations and focusing, in particular, on building early warning and rapid response capacity in hard-to-reach, vulnerable, underserved and high-risk communities, with due attention to the varied needs of girls, boys, men and women;

4. emphasizes the need for promotion of active community engagement in outbreak prevention, preparedness and response, based on a multi-sectoral, multi-hazard and whole-of-society approach, and encourages States and National Societies to build on evidence-based approaches to community-centric outbreak prevention, detection and response;

5. also encourages States and National Societies to further develop innovative tools, guidance and strategies to support implementation of the above measures and to strengthen their capabilities to respond and to utilize data and technology to improve the quality of response to epidemics and pandemics;

6. reiterates the importance of prioritizing and investing in prevention and preparedness as well as providing catalytic funding to support early action, including by National Societies;

7. reiterates also the importance of mobilizing resources and building capacities to enable developing countries and their National Societies to respond to epidemic and pandemic threats;

8. calls upon Movement components, public authorities and all other actors to take appropriate steps, in accordance with their national and regional contexts, to ensure, as far as possible, that the health and safety of their volunteers and staff responding to epidemics/pandemics, including mental health and psychosocial well-being, are adequately maintained;

9. requests the IFRC to prepare a progress report on the implementation of this resolution to the 34th International Conference in 2023.
Resolution 4 of the 33rd International Conference of the Red Cross and Red Crescent

RESTORING FAMILY LINKS WHILE RESPECTING PRIVACY, INCLUDING AS IT RELATES TO PERSONAL DATA PROTECTION

The 33rd International Conference of the Red Cross and Red Crescent, concerned by the numbers of families separated and people going missing as a result of, inter alia, armed conflicts, disasters and other emergencies, forced displacement, as well as in the context of migration, smuggling of migrants and trafficking of persons, by the lack of sufficient measures to prevent people from going missing and to clarify the fate and whereabouts of those who do, by the fact that many human remains are never identified and by the suffering of families who do not know the fate and whereabouts of their loved ones,

recalling the long-standing cooperation between States and the International Red Cross and Red Crescent Movement (Movement) to restore family links (RFL),

recalling also the importance of clarifying the fate and whereabouts of missing persons, and of restoring and maintaining contact between separated family members, and relevant international obligations, in particular those related to the right of families to know the fate of their relatives, as applicable,

recalling further the mandate of the International Committee of the Red Cross (ICRC) based on the Geneva Conventions of 1949, their Additional Protocols of 1977, the Statutes of the Movement and resolutions of the International Conference of the Red Cross and Red Crescent (International Conference), and recalling, in this regard, the Central Tracing Agency of the ICRC, including its role as coordinator and technical adviser to National Red Cross and Red Crescent Societies (National Societies) and governments, as defined in the report adopted by the 24th International Conference,

recalling further the mandate of National Societies as auxiliaries to the public authorities in the humanitarian field, as reflected in the Geneva Conventions of 1949, their Additional Protocols of 1977, the Statutes of the Movement and resolutions of the International Conference, including Resolution 2 of the 30th International Conference and Resolution 4 of the 31st International Conference,

recalling further the adoption by the Movement of its Restoring Family Links Strategy (2008–2018) in Resolution 4 of the 2007 Council of Delegates,

recalling further that personal data protection is closely related to privacy, and taking into account that processing of personal data is an integral part of RFL services and necessary for the performance of the mandate of the components of the Movement,
recognizing that it is important for beneficiaries to be able to trust all components of the Movement with their personal data, and that their data is protected,

recalling that the ICRC and the International Federation of Red Cross and Red Crescent Societies and their employees and representatives enjoy privileges and immunities, to the extent applicable, in order to enable them to perform their respective mandates and to do so in full conformity with the Movement’s Fundamental Principles of neutrality, impartiality and independence,

concerned that humanitarian organizations may come under pressure to provide personal data collected for humanitarian purposes to authorities wishing to use such data for other purposes,

1. calls upon States to take effective measures to prevent persons from going missing, to clarify the fate and whereabouts of persons who have gone missing, to restore family links and facilitate reunification of families, and to avoid, as far as possible, family separation, consistent with applicable legal frameworks, and encourages States to consider measures to protect men, women, boys and girls, in particular those in vulnerable situations, including persons with disabilities;

2. requests States to take all possible measures, consistent with applicable international obligations, to ensure the dignified treatment of people who have died as a result of armed conflicts, disasters and other emergencies, as well as in the context of migration, and to centralize and analyze data in accordance with applicable legal frameworks in order to try to identify deceased persons and provide answers to their families, and welcomes the support provided in this process by the ICRC in the form of forensic expertise;

3. calls upon the components of the Movement to work closely with States, in line with their mandates and the Movement’s Fundamental Principles, and also calls upon States to make use of the services of their National Society, in its role as an auxiliary to the public authorities in the humanitarian field, to clarify the fate and whereabouts of missing persons and to enable individuals and their families to establish, restore or maintain contact, including along migratory routes;

4. notes the adoption by the Movement of its Restoring Family Links Strategy 2020–2025 in Resolution 6 of the 2019 Council of Delegates, and encourages States to continue their support for the services of the components of the Movement in the field of RFL, as appropriate, in particular by:
   a. reaffirming and recognizing the specific role of the National Society of their country in providing RFL services, if applicable;
   b. strengthening the National Society’s capacities, including through the provision of resources;
   c. ensuring that the National Society has a clearly defined role in the context of the country’s overall disaster risk management laws, policies and plans;
d. exploring and establishing partnerships with the components of the Movement to provide connectivity to help separated families restore and maintain family links;

e. granting the components of the Movement access to places where there are people in need of RFL services;

f. cooperating with the components of the Movement, in accordance with their mandates and national, regional and international legal frameworks, by facilitating, if necessary, access to relevant personal data and responding to inquiries they may make in order to help establish the fate and whereabouts of missing persons;

5. recalls that the Movement processes personal data under the framework set out in the Restoring Family Links Code of Conduct on Data Protection;

6. recognizes the difficulty, and often impossibility, of acquiring consent in cases of missing or separated families, and the necessity that components of the Movement continue to rely upon alternative valid bases for processing of personal data, including as reflected in section 2.2 of the Restoring Family Links Code of Conduct on Data Protection, such as important grounds of public interest, vital interest, and compliance with a legal obligation;

7. welcomes the Movement’s efforts to proactively address and provide adequate safeguards against the risks associated with personal data processing, and encourages the Movement to continue to enhance the effectiveness of data processing practices;

8. recognizes that the misuse of data may result in violations of privacy obligations that are set out in national, regional and international legal frameworks, including as such obligations relate to personal data protection, and may have a serious impact on the beneficiaries of RFL services and be detrimental to their safety and to humanitarian action more generally;

9. also recognizes that it is of utmost importance to ensure that the processing and transfer of personal data between the components of the Movement for the particular purpose of providing RFL services remain as unrestricted as possible, consistent with the Restoring Family Links Code of Conduct on Data Protection, relevant international humanitarian law (IHL) instruments and the Statutes of the Movement;

10. further recognizes that, whenever any component of the Movement collects, retains or otherwise processes personal data in the performance of RFL services, it should do so for purposes that are compatible with the exclusively humanitarian nature of its mandate, and calls upon States to respect the humanitarian purpose of the Movement’s processing of personal data, in line with Articles 2 and 3 of the Statutes of the Movement;

11. urges States and the Movement to cooperate to ensure that personal data is not requested or used for purposes incompatible with the humanitarian nature of the work of the Movement, and in conformity with Article 2, including paragraph 5 thereof, of the Statutes of the Movement, or in a manner that would undermine the trust of the people it serves or the independence, impartiality and neutrality of RFL services;
12. welcomes the Movement’s *Restoring Family Links Code of Conduct on Data Protection* as an appropriate foundation for personal data protection;
13. requests the Movement to periodically review and update the *Restoring Family Links Code of Conduct on Data Protection*, and requests States to support the components of the Movement in their efforts to implement it.
Resolution 5 of the 33rd International Conference of the Red Cross and Red Crescent

WOMEN AND LEADERSHIP IN THE HUMANITARIAN ACTION OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

The 33rd International Conference of the Red Cross and Red Crescent, recalling the mission of the International Red Cross and Red Crescent Movement (Movement) to prevent and alleviate human suffering wherever it may be found, to protect life and health and to ensure respect for the human being, affirming the importance of women being represented at the decision-making level, in the spirit of the Fundamental Principles of the Movement, recognizing and recalling previous relevant resolutions of the statutory meetings of the Movement, including Resolution 12 of the 2017 Council of Delegates, “Reinforcing Gender Equality and Equal Opportunities in the Leadership and Work of the International Red Cross and Red Crescent Movement”, calling upon the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC), National Red Cross and Red Crescent Societies (National Societies) and the Standing Commission of the Red Cross and Red Crescent to take concrete measures to address the question of gender equality and equal opportunities at all levels of their own leadership, and recognizing and recalling as well relevant global non-Movement commitments,

recognizing women as agents in risk reduction and first responders in humanitarian crises, including armed conflicts, natural disasters and other emergencies, and the importance of their perspectives always being heard and included from the outset in humanitarian responses, particularly in those countries most affected by humanitarian crises,

recognizing that the empowerment and inclusion of women and girls should extend not only to their essential contributions to crisis prevention, mitigation and response, but also to development assistance, peacebuilding, mediation, reconciliation and reconstruction, and conflict prevention, and that the inclusion of and leadership from women from different backgrounds are crucial to the success of these efforts and should be promoted, facilitated and enabled,

recognizing the importance of women’s groups and women from different backgrounds being involved in decision-making, so as to ensure that the humanitarian needs and priorities in the community are met and the diversity of everyone in the society that they belong to is represented,

remaining deeply concerned about the under-representation of women in governing bodies and senior management positions across all Movement components and in humanitarian organizations in general,
expressing deep concern about the under-representation of women in processes and bodies related to humanitarian work, including in senior positions in national, regional and international institutions, and about the lack of support for women assuming leadership roles in these settings,

expressing appreciation for the work being done and initiatives being carried out by the United Nations, regional organizations, States, humanitarian organizations and others aiming to enhance the role and responsibilities of women in the humanitarian sector, and underlining the complementary character of that work and those initiatives with the work of the Movement and of the International Conference of the Red Cross and Red Crescent (International Conference),

expressing appreciation also for the work carried out and efforts made so far by the components of the Movement to address gender inequalities and achieve gender parity, in accordance with their respective mandates and institutional focuses,

1. urges National Societies, the IFRC and the ICRC to increase the representation of women from different backgrounds at all decision-making levels, including in governing bodies and management positions;

2. requests that National Societies, the IFRC and the ICRC actively seek out and identify women leaders, particularly women in those countries most affected by humanitarian crises, and invest in them, and support and strengthen the pipeline of future women leaders through various means, such as career-path development and leadership programmes targeting women;

3. urges National Societies, the IFRC and the ICRC to reach gender parity by 2030 at all levels, including in governing bodies and management, and calls on them to develop a more uniform, reliable and rigorous approach to gathering accurate, reliable, timely and sex-disaggregated information to be able to monitor and ensure progress;

4. encourages States, National Societies, the IFRC and the ICRC to invest in research, involving women to identify good practices and how to remove the barriers to women’s participation, in particular in leadership and decision-making in humanitarian responses;

5. urges States, National Societies, the IFRC and the ICRC to support women’s full, equal and meaningful participation, leadership and decision-making in international humanitarian forums at the global, regional and national levels;

6. requests that National Societies, the IFRC and the ICRC report back on the progress on the implementation of this resolution to the 34th International Conference.
Resolution co-sponsors

Swedish Red Cross

Antigua and Barbuda Red Cross Society
Argentine Red Cross
Australian Red Cross
Austrian Red Cross
Bahamas Red Cross Society
Baphalali Swaziland Red Cross Society
Barbados Red Cross Society
Belgium Red Cross
Belize Red Cross Society
Bolivian Red Cross
Botswana Red Cross
Burundi Red Cross
Canadian Red Cross
Red Cross Society of China
Colombian Red Cross
Costa Rica Red Cross
Red Cross Society of Côte d’Ivoire
Cyprus Red Cross Society
Dominica Red Cross Society
Egyptian Red Crescent Society
Ethiopian Red Cross Society
Finnish Red Cross
Georgia Red Cross Society
Grenada Red Cross Society
Haitian National Red Cross Society
Honduran Red Cross
Icelandic Red Cross
Irish Red Cross
Italian Red Cross
Jamaica Red Cross
Kazakh Red Crescent Society
Kuwait Red Crescent Society
Red Crescent Society of Kyrgyzstan
Lebanese Red Cross Society
Lesotho Red Cross Society
Lithuanian Red Cross Society
Luxembourg Red Cross
Malawi Red Cross Society
Maldivian Red Crescent
Malta Red Cross Society
Republic of the Marshall Islands Red Cross
Mexican Red Cross
Red Cross of Monaco
Myanmar Red Cross Society
Namibia Red Cross
Netherlands Red Cross
Palau Red Cross Society
Palestine Red Crescent Society
Red Cross Society of Panama
Peruvian Red Cross
Portuguese Red Cross
Saint Kitts and Nevis Red Cross Society
Samoa Red Cross Society
Senegalese Red Cross Society
Red Cross of Serbia
Slovenian Red Cross
South Sudan Red Cross Society
Spanish Red Cross
Suriname Red Cross Society
Togolese Red Cross
Trinidad and Tobago Red Cross Society
Uganda Red Cross Society
Uruguayan Red Cross
Vanuatu Red Cross Society

State co-sponsors:

Bulgaria
Estonia
Iceland
Luxembourg
Portugal
Spain
Sweden
Resolution 6 of the 33rd International Conference of the Red Cross and Red Crescent

ACT TODAY, SHAPE TOMORROW

The 33rd International Conference of the Red Cross and Red Crescent, recalling and celebrating the establishment 100 years ago of the League of Red Cross Societies, now the International Federation of Red Cross and Red Crescent Societies (IFRC), by its founding National Societies, the American Red Cross, the British Red Cross, the French Red Cross, the Italian Red Cross and the Japanese Red Cross Society, amidst a devastating influenza pandemic, with the stated goals “to strengthen and unite, for health activities, already-existing Red Cross Societies and to promote the creation of new Societies”,

commending the IFRC network for its 100 years of service before, during and after crises, for bringing hope to vulnerable persons and aid to those in need, and for raising its voice on behalf of peace, dignity and the safety and well-being of communities to the highest level of government and international diplomacy,

celebrating the 70th anniversary of the four Geneva Conventions of 1949, and recognizing and reaffirming their acute relevance to the protection of victims of armed conflict and to reducing war’s cost to humanity,

expressing its appreciation for the measures undertaken by States and by the components of the International Red Cross and Red Crescent Movement (Movement) in the implementation of the commitments adopted at the 32nd International Conference of the Red Cross and Red Crescent (International Conference),

taking note of the Factual Report on the Proceedings of the Intergovernmental Process on Strengthening Respect for IHL (Resolution 2 of the 32nd International Conference), prepared by the International Committee of the Red Cross (ICRC) and Switzerland, and of the progress report Strengthening International Humanitarian Law: Protecting Persons Deprived of Their Liberty (Resolution 1 of the 32nd International Conference), prepared by the ICRC,

taking note also of the 2019 report International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions,

taking note further of the outcomes of the 2019 Council of Delegates of the Movement, as referenced in the report delivered to the 33rd International Conference by the chair of the Council, in particular:

- Resolution 1, “Movement-Wide Commitments for Community Engagement and Accountability”
- Resolution 2, “Statement on Integrity of the International Red Cross and Red Crescent Movement”
Resolution 8, “Adopting a Movement Statement on Migrants and Our Common Humanity”,

expressing appreciation for the individual and collective pledges made by members and observers of the 33rd International Conference,

taking note of the International Conference chair’s paper, the report by the chair of the Drafting Committee and the report on the work of the 33rd International Conference as delivered by the Conference rapporteur,

1. recognizes that trust in principled humanitarian action is indispensable to the Movement’s ability to serve vulnerable persons, and encourages all members of the 33rd International Conference to act to preserve and develop this trust;

2. calls upon all members of the 33rd International Conference to act upon and to make their best effort to fully implement the resolutions of the International Conference and the individual and joint pledges to which they have subscribed;

3. takes note of Resolution 4 of the 2019 Council of Delegates which urges all the members of the International Conference to take into account, in all future elections of the Standing Commission of the Red Cross and Red Crescent (Standing Commission), the candidates’ personal qualities, the principle of fair geographical distribution and the equitable balance between men and women;

4. requests the ICRC and the IFRC to report to the 34th International Conference on the follow-up by International Conference members on the resolutions and pledges of the 33rd International Conference;

5. decides to hold an International Conference in 2023, the date and place of which shall be determined by the Standing Commission.
The 33rd International Conference of the Red Cross and Red Crescent, recalling its prior resolutions focused on disaster laws, in particular Final Goal 3.2 of the 28th International Conference of the Red Cross and Red Crescent (International Conference), Resolution 4 of the 30th International Conference, Resolution 7 of the 31st International Conference and Resolution 6 of the 32nd International Conference on strengthening legal frameworks for disaster risk management, Resolution 3 of the 32nd International Conference on sexual and gender-based violence, and Resolution 1 and the “Declaration: Together for Humanity” of the 30th International Conference in regard to the humanitarian consequences of environmental degradation and climate change,

recalling United Nations General Assembly Resolution 46/182 of 19 December 1991, and other subsequent resolutions on these matters, as well as all UNGA resolutions on international cooperation on humanitarian assistance in the field of natural disasters,

recalling further United Nations General Assembly Resolution 73/139 of 2018, which encouraged States to strengthen their regulatory frameworks for international disaster assistance, taking the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (known as the IDRL Guidelines) into account,

welcoming the progress that many States have made in strengthening their disaster laws since the 32nd International Conference, drawing, inter alia, on advice and support from their National Societies, and commending the States and National Societies that have made productive use of the Checklist on Law and Disaster Risk Reduction as a reference tool, as recognized in Resolution 6 of the 32nd International Conference,

noting the research completed by the International Federation of Red Cross and Red Crescent Societies (IFRC) in the area of disaster law since the 32nd International Conference, including the findings of its 2017 report Effective Law and Policy on Gender Equality and Protection from Sexual and Gender-Based Violence in Disasters and the Law and Disaster Preparedness and Response Multi-Country Synthesis Report of 2019,

noting the Intergovernmental Panel on Climate Change (IPCC) special report on the impacts of global warming of 1.5°C,

noting that, in the 2030 Agenda for Sustainable Development, the Heads of State and Government and High Representatives pledged “that no one will be left behind”, stated that they would “endeavour to reach the furthest behind first”,
and included targets in the Sustainable Development Goals related to resilience to disasters and climate change,

*noting* that the Sendai Framework for Disaster Risk Reduction highlighted the importance of promoting “the coherence and further development, as appropriate, of national and local frameworks of laws, regulations and public policies” and of assigning “as appropriate, clear roles and tasks to community representatives with disaster risk management institutions and processes and decision-making through relevant legal frameworks”

*acknowledging* that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change,

*noting* that the objectives of the Paris Agreement include, *inter alia*, “increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production”, and that the agreement states that its parties “shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions”

*noting* the potential interplay between disasters, climate change, environmental degradation and fragility, the catalytic role of disaster risk reduction in scaling up action on climate adaptation, and the critical role of disaster risk reduction in the achievement of the Sustainable Development Goals,

*noting* the focus on resilience and adaptation at the 2019 UN Climate Summit, the Global Commission on Adaptation’s “Preventing Disasters” Action Track and the establishment of the Risk-Informed Early Action Partnership,

*noting* the initiative of the IFRC, together with academic partners, to undertake research on best practice in the effective integration of disaster risk management and adaptation to climate change,

*also noting* the existing work of the IFRC and National Societies to support their States with their disaster laws, disaster response and recovery and adaptation to climate change,

*noting* important contributions in this area by many other actors, including governments, the World Meteorological Organization, the World Bank, the United Nations Office for Disaster Risk Reduction, the Climate Risk and Early Warning Systems (CREWS) initiative and the Platform on Disaster Displacement, among others,

*stressing* the importance of resources and capacity-building for developing countries and National Societies for the development and implementation of laws and policies, as appropriate,

**Effective disaster laws, policies, strategies and plans that address climate change**

1. *encourages* States to assess whether their existing domestic disaster laws, policies, strategies and plans provide guidance to prepare for and address the
evolving risks of weather-related disasters, ensure an integrated approach to
disaster risk management and adaptation to climate change and promote
gender-responsive approaches and community engagement in risk analysis,
planning and decision-making;

2. further encourages States that have not already done so, to consider, as
appropriate, the integration of innovative approaches to disaster risk
management in their laws, policies, strategies and plans, such as the use of:
a. anticipatory finance, including forecast-based triggers for the early and
timely release of response funding to rapidly mitigate the impact of
disasters;
b. various risk transfer mechanisms;
c. social protection programmes and mechanisms to strengthen resilience to
disasters, channel assistance and restore livelihoods, as needed, after
disaster events;
d. cash and vouchers programmes to assist affected people;
e. preventive measures to reduce existing risks and avoid the creation of new
risks;
f. risk-informed pre-disaster financing to improve the resilience of
community infrastructure;

3. recognizes the new Checklist on Law and Disaster Preparedness and Response
(the new Checklist) as a non-binding but important assessment tool to help
States, when applicable, to review domestic legal frameworks for
preparedness and response at the national, provincial and local level;

4. invites States to use the new Checklist to evaluate and improve, as needed, the
content and implementation of their laws, regulations and policies related to
preparedness and response, with support from National Societies, the IFRC,
relevant UN agencies, local civil society, the private sector, academia,
scientific and research institutions and other partners;

5. reiterates the importance of strong laws and policies on the facilitation and
regulation of international disaster relief and on domestic risk reduction, and
the usefulness of the IDRL Guidelines and the Checklist on Law and Disaster
Risk Reduction as non-binding assessment tools to help States, when
applicable, to review domestic legal frameworks for, respectively, the
management of international assistance and disaster risk reduction at the
national, provincial and local level;

Leaving no one behind in disaster laws, policies, strategies and
plans and in climate change adaptation plans, policies and
contributions

6. recognizes the humanitarian consequences of climate change and
environmental degradation, which contribute to poverty, displacement and
health risks and may exacerbate violence and conflict, as well as their
disproportionate impact on the most vulnerable and the unique challenges faced by small island developing States, among others;

7. recognizes the role of existing laws, policies, strategies and plans on disaster risk management in ensuring the adequate protection and inclusion of all people, and calls on States to ensure that they include a focus on the most vulnerable and promote their meaningful participation;

8. encourages States to consider, as appropriate, whether the disaster laws, policies, strategies and plans and climate change adaptation plans, policies and contributions:
   a. guard against all forms of discrimination;
   b. address the rights and specific needs of people who might be overlooked, and the most vulnerable;
   c. ensure the collection and protection of sex-, age- and disability-disaggregated data;
   d. ensure the prior and informed consent, where possible, with regards to the collection of data;
   e. promote gender equality and encourage women and girls in leadership and decision-making roles;
   f. ensure contingency planning for sexual and gender-based violence, protection from sexual exploitation and abuse, child protection and the care of unaccompanied and separated children;
   g. promote access to essential health services and medical support, including mental health and psychosocial support, as an element of disaster response and recovery;
   h. promote access to services to restore family links for persons separated by disasters;

9. recognizes the important contribution of young people in community-based volunteering and awareness-raising of climate-sensitive disaster preparedness and response initiatives, including early warning systems, and encourages all members of the International Conference to continue to engage with them;

**Extending support and research**

10. encourages National Societies, as auxiliaries to their public authorities in the humanitarian field, to continue to provide advice and support to their governments in the development and implementation of effective legal and policy frameworks relevant to disaster risk management and to climate change adaptation;

11. requests the IFRC to continue to support National Societies and States in the field of disaster laws, including with respect to the areas of concern mentioned in this resolution, through technical assistance, capacity-building, the development of tools, models and guidelines, advocacy, ongoing research and promotion of the sharing of experiences, techniques and best practices among countries;
12. *welcomes* the efforts of National Societies to cooperate with States and other actors, particularly young people and youth volunteers, in meeting the humanitarian needs of persons affected by disasters and in promoting disaster risk reduction and climate change adaptation action at the community level, including nature-based solutions, *encourages* them to scale up their efforts in light of the evolving risks related to climate change, and *encourages* States to contribute resources to enable them to do so;

13. *encourages* cooperation between States, regional organizations, National Societies and the IFRC in strengthening links between humanitarian, development and climate change adaptation efforts to reduce disaster and climate risk and enhance resilience;

**Ensuring dissemination and review**

14. *reaffirms* the important and continuing contributions of the International Conference as one of the key international fora for continued dialogue on the strengthening of disaster laws, rules and policies and, additionally, *welcomes* its contribution to dialogue on domestic legal and policy frameworks for adaptation to climate change;

15. *invites* States, National Societies and the IFRC, working in coordination with National Societies, to disseminate this resolution to appropriate stakeholders, including by bringing it to the attention of relevant international and regional organizations;

16. *requests* the IFRC, in consultation with National Societies, to submit a progress report on the implementation of this resolution to the 34th International Conference.
Resolution 8 of the 33rd International Conference of the Red Cross and Red Crescent

IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING AND AGREEMENT ON OPERATIONAL ARRANGEMENTS DATED 28 NOVEMBER 2005 BETWEEN MAGEN DAVID ADOM IN ISRAEL AND THE PALESTINE RED CRESCENT SOCIETY

The 33rd International Conference of the Red Cross and Red Crescent

1. notes the adoption of Resolution 10 of the Council of Delegates on 8 December 2019 on the implementation of the Memorandum of Understanding and Agreement on Operational Agreements dated 28 November 2005 between Magen David Adom in Israel and the Palestine Red Crescent Society (see annex for the text of the resolution);
2. endorses this resolution.

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Annex: Resolution 10 of the 2019 Council of Delegates

IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING AND AGREEMENT ON OPERATIONAL ARRANGEMENTS DATED 28 NOVEMBER 2005 BETWEEN MAGEN DAVID ADOM IN ISRAEL AND THE PALESTINE RED CRESCENT SOCIETY

In the spirit of the humanitarian mission and the Fundamental Principles of the International Red Cross and Red Crescent Movement (Movement), and the themes of the 33rd International Conference of the Red Cross and Red Crescent (International Conference),

the Council of Delegates,

recalling the Memorandum of Understanding (MoU) signed by Magen David Adom in Israel (MDA) and the Palestine Red Crescent Society (PRCS) on 28 November 2005, in advance of the Diplomatic Conference convened to negotiate and adopt the Third Additional Protocol to the Geneva Conventions of 1949 and pave the way for the future recognition of MDA and the PRCS as components of the Movement, and in particular the following provisions of the MoU:

1. MDA and PRCS will operate in conformity with the legal framework applicable to the Palestinian territory occupied by Israel in 1967, including the Fourth Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War.

2. MDA and PRCS recognize that PRCS is the authorized National Society in the Palestinian territory and that this territory is within the geographical scope of the operational activities and of the competences of PRCS. MDA and PRCS will respect each other’s jurisdiction and will operate in accordance with the Statutes and Rules of the Movement.

3. After the Third Additional Protocol is adopted and by the time MDA is admitted by the General Assembly of the International Federation of Red Cross and Red Crescent Societies:
   a. MDA will ensure that it has no chapters outside the internationally recognized borders of the State of Israel.
   b. Operational activities of one society within the jurisdiction of the other society will be conducted in accordance with the consent provision of Resolution 11 of the 1921 International Conference.

4. MDA and PRCS will work together and separately within their jurisdictions to end any misuse of the emblem and will work with their respective authorities to ensure respect for their humanitarian mandate and for international humanitarian law.
6. MDA and PRCS will cooperate in the implementation of this Memorandum of Understanding ….

*taking note, with appreciation*, of the report of October 2019 on the implementation of the MoU prepared by the Hon. Robert Tickner AO, the Independent Monitor appointed by the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC), with the full endorsement of the Standing Commission of the Red Cross and Red Crescent (Standing Commission), to monitor and facilitate progress achieved in the implementation of the MoU, including recurring issues linked to operational elements relevant to the MoU,

*recalling* Resolution 5 adopted by the Council of Delegates in November 2017 concerning the implementation of the MoU and the AOA between MDA and the PRCS, as well as Resolution 8 of the 32nd International Conference,

*reaffirming* the importance for all components of the Movement to operate at all times in accordance with international humanitarian law and with the Fundamental Principles, Statutes and regulatory frameworks of the Movement,

*noting* that all National Societies have an obligation to operate in compliance with the Constitution of the IFRC and the “Policy on the Protection of Integrity of National Societies and Bodies of the International Federation”,

*recalling* both the dispute resolution mechanism set out in Resolution 11 of the 1921 International Conference as well as the Compliance and Mediation Committee of the IFRC, and *recognizing* the rights of National Societies thereunder,

*expressing* deep regret that the assurances given by the Ministry of Foreign Affairs of the State of Israel have not yet been fully honoured, as contained in the letters of 15 November 2015 and of 11 September 2017 from the Ministry of Foreign Affairs of the State of Israel to the Independent Monitor, in which the Ministry expressed readiness to support MDA to ensure full implementation of its commitments under the MoU, and achieve compliance with the geographic scope provisions, including completing these measures “well in advance of the 33rd International Conference in 2019”,

*recognizing* that full implementation of the MoU will represent an important achievement for the Movement and that this will contribute to the strength and unity of the Movement,

*reaffirming* the necessity for effective and positive coordination between all components of the Movement in support of the full implementation of the MoU,

1. *notes* with continued regret that full implementation has still not been achieved;
2. requires, in order to maintain trust in the humanitarian action of components of the Movement, that all National Societies discharge their humanitarian mandate in accordance with international humanitarian law and with the Fundamental Principles, Statutes and regulatory frameworks of the Movement;

3. requires MDA to further engage with its authorities to end the misuse of the MDA logo in the territory considered within the geographic scope of the PRCS, and strongly urges MDA to continue to work with its authorities and with other key stakeholders to ensure that any markings used in this territory are clearly distinguishable from the MDA logo;

4. strongly urges the State of Israel to honour, without delay, its commitment to ensure that emergency medical services operating within the geographical scope of the PRCS “will, on a permanent basis, bear a logo different than the MDA logo, which will be clearly distinguishable from the MDA official logo”, as set out in the 11 September 2017 letter of the Ministry of Foreign Affairs;

5. also calls on the State of Israel to create the necessary conditions to enable MDA to comply, well in advance of the 2021 Council of Delegates, with its obligations with respect to the geographic scope provisions of the MoU, in particular:
   a. MDA will ensure that it has no chapters outside the internationally recognized borders of the State of Israel.
   b. Operational activities of one society within the jurisdiction of the other society will be conducted in accordance with the consent provision of resolution 11 of the 1921 international conference.

6. affirms, in particular, that MDA’s ability to fully comply with its obligations under the MoU will be adversely impacted if the government commitments in support of MDA as set forth in the second, fifth and sixth paragraphs of the 11 September 2017 letter of the Ministry of Foreign Affairs of the State of Israel are not implemented, and that, in consequence, a call to activate the dispute resolution mechanism set out in Resolution 11 of the 1921 International Conference as well as the possibility of recourse to the Compliance and Mediation Committee of the IFRC may result;

7. welcomes the strengthening of the Liaison Committee referred to under the AOA, ensuring a minimum of four Liaison Committee meetings per annum, and encourages continued work between the two National Societies in fulfilling their shared humanitarian mandates and commitments and their practical liaison and coordination in daily operations;

8. reaffirms the decisions of the Council of Delegates and the 32nd International Conference in 2015 that the monitoring process should continue and requests the ICRC and the IFRC to renew the mandate of an Independent Monitor until the 2021 Council of Delegates;

9. agrees that the roles of the Independent Monitor under the terms of reference as aligned with this resolution include, but are not limited to, the following main functions:
a. undertake monitoring visits no less than twice a year, and provide at least one interim report to the Movement prior to the 2021 Council of Delegates;
b. provide written reports after each visit as well as additional updates to be shared with the PRCS, MDA, ICRC and IFRC, as well as the Standing Commission, in relation to his/her activities and findings;
c. engage as necessary with all relevant stakeholders, including the authorities;
d. provide an evidence-based analysis and validation of the information provided by the two National Societies regarding the implementation of the MoU, with specific reference to the licensing of the PRCS ambulances and to ensure the ability of PRCS to carry out its operations in East Jerusalem;
e. document progress on the commitments made under the AOA;
f. call upon assistance from a support group of National Societies, chosen in consultation with the ICRC, IFRC and the two National Societies, and eminent individuals from within or outside the Movement;
g. explore constructive options within the Movement to address issues identified in the reports;
h. communicate any recommendations or concerns on the implementation of the MoU to the ICRC and the IFRC, as well as the Standing Commission, in advance of the 2021 Council of Delegates;

10. encourages National Societies, when requested, to engage with their governments to help facilitate the implementation of the MoU, international humanitarian law, the Fundamental Principles, and the Statutes and regulatory frameworks of the Movement;

11. requests the ICRC and the IFRC to provide logistical and technical support to the monitoring process and to ensure the provision of a report on implementation of the MoU to the 2021 Council of Delegates and through it to the 34th International Conference;

12. reaffirms its collective determination to support full implementation of the MoU and expresses its strong desire to see full implementation achieved and validated well in advance of the 2021 Council of Delegates as an important symbol of hope and success.
International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions

Document prepared by the International Committee of the Red Cross for the 33rd International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 9–12 December 2019

Executive summary

This is the fifth report on international humanitarian law (IHL) and the challenges of contemporary armed conflicts prepared by the International Committee of the Red Cross (ICRC) for the International Conference of the Red Cross and Red Crescent (International Conference). Similar reports were submitted to the International Conferences held in 2003, 2007, 2011 and 2015. The aim of all these reports is to provide an overview of some of the challenges posed by contemporary armed conflicts for IHL; generate broader reflection on those challenges; and outline current or prospective ICRC action, positions, and areas of interest.

Like its predecessors, this report addresses only some of the contemporary challenges to IHL. It outlines a number of issues that are the focus of increased
interest among States and other actors, as well as the ICRC: the urbanization of armed conflicts; new technologies of warfare; the needs of civilians in conflicts that are, increasingly, protracted; non-State armed groups; terrorism and counterterrorism; climate change, the environment, and armed conflict; and enhancing respect for IHL. These issues include matters not addressed in previous reports, such as sieges, the use of artificial intelligence in warfare, and the protection of persons with disabilities. The report also provides an update on some of the issues that were addressed in previous reports and that remain high on the international agenda, such as the use of explosive weapons in populated areas, certain new technologies of warfare, and foreign fighters and their families.

The introduction to the report provides a brief overview of current armed conflicts and their humanitarian consequences, and of the operational realities in which challenges to IHL arise.

Chapter II addresses contemporary and future challenges in the conduct of hostilities, focusing on selected issues related to urban warfare (section 1) and new technologies of warfare (section 2).

Increasingly, fighting takes place in cities, and this creates a number of specific challenges for parties to the conflict. The report addresses three of them. The first and fundamental one is ensuring that elementary IHL principles on the conduct of hostilities – distinction, proportionality, precautions – are applied in a way that protects civilians in urban battlefields, which are characterized by the intermingling of civilians and combatants, the proximity of civilian objects and military objectives, and a complex web of interconnected urban infrastructure. In particular, the use of explosive weapons with wide-area impact in densely populated areas continues to raise legal questions and significant humanitarian concern. Chapter II also discusses the need to ensure that sieges and encirclement tactics do not violate the rules on the protection of the civilian population – an issue that has drawn significant attention in recent conflicts.

The second section of Chapter II is devoted to new technologies of warfare – some of which have been employed in recent conflicts. It may also be expected that their use will only increase in future – with possible positive and negative consequences for the protection of civilians. Among other things, this chapter draws attention to the potential human cost of cyber warfare; outlines legal and ethical issues concerning the loss of human control over the use of force as a result of autonomy in the “critical functions” of weapon systems; and emphasizes key issues that States have to consider when implementing their responsibility to ensure that new means and methods of warfare are capable of being used in compliance with IHL.

The protracted nature of many of today’s armed conflicts has an impact on the needs and vulnerabilities of civilian populations. Chapter III presents a selection of issues under IHL that relate to the wider humanitarian debate on the protection of civilian populations. In particular, the chapter discusses how respect for IHL can
contribute to finding durable solutions for the plight of the unprecedentedly high numbers of internally displaced persons. It also recalls how IHL can address the specific capacities, experiences and perspectives of persons with disabilities during armed conflict, thereby complementing the pertinent provisions of international human rights law. The chapter also describes how IHL protects the education of children when it is a contested stake in a conflict, when the civilian value of schools is underestimated in the conduct of hostilities, and when militaries use schools.

While humanitarian concerns and IHL challenges arise in relation to operations by all parties to armed conflicts, certain issues present themselves differently when looking especially at non-State armed groups. Chapter IV is therefore devoted to IHL and non-State armed groups. It first addresses questions regarding the applicability of IHL to situations of violence involving multiple armed groups. Subsequently, the chapter discusses the legal regime protecting civilians living in territory under the de facto control of armed groups, and presents initial views on detention by armed groups.

Terrorism and counterterrorism have been the subjects of many policy, humanitarian, and legal debates in recent years. Chapter V highlights three issues in this area that are of particular humanitarian concern. First, it recalls the applicability of IHL to States fighting “terrorism” and non-State armed groups designated as “terrorists”, countering the narrative that IHL is not relevant to the fight against terrorism, or that some of its norms do not apply, or apply differently, to such “exceptional” circumstances. Second, the chapter expresses concerns about certain counterterrorism measures, which impede impartial humanitarian organizations’ efforts to assist and protect persons affected by armed conflict, and which are incompatible with the letter and spirit of IHL. The chapter also highlights recent developments that can contribute to resolving the tension between States’ interest in enacting effective counterterrorism measures and their obligation to facilitate principled humanitarian activities. Third, the chapter addresses the status and protection of foreign fighters and their families under IHL, focusing in particular on the needs of women and children, as well as parties’ obligations towards them.

Chapter VI focuses on the direct and indirect effects of armed conflict on climate and the environment, recalling that people affected by armed conflict are especially vulnerable to climate change and environmental degradation. The chapter also draws attention to the ICRC’s “Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict”, which are currently being revised.

The final chapter of the report, Chapter VII, discusses ways to enhance respect for IHL, which the ICRC has long considered to be the single most important challenge to IHL. The chapter presents work that the ICRC and partners have recently conducted or launched to enhance their dialogue with all parties to armed conflict. This includes the ICRC’s Support Relationships in Armed Conflict initiative, which aims to leverage the complex webs of support and partnering relationships in contemporary armed conflicts to strengthen international humanitarian law and the challenges of contemporary armed conflicts
respect for IHL; an ICRC study, *Roots of Restraint in War*, that identifies sources that influence norms of behaviour in armed forces and armed groups; and the development of *Guidelines on Investigating Violations of IHL: Law, Policy, and Good Practice*. 


The 2019 International Conference of the Red Cross and Red Crescent (International Conference) coincides with the 70th anniversary of the four Geneva Conventions of 1949, the foundational treaties of the modern law of armed conflict (or international humanitarian law (IHL)).\(^1\) Seven decades after their adoption, the Conventions enjoy universal ratification, frequent reaffirmation, and widespread integration into domestic law and military doctrine. Every day, armed forces implement IHL to reduce war’s cost to humanity. For many, respect for the rules is a matter of professional identity and core values.

Despite these significant achievements, noncompliance with IHL remains an intractable problem. Each transgression has grave consequences for those affected, and when disregard for the rules becomes endemic in a conflict, it is devastating not only to the lives of individuals and families, but also communities, cities and, increasingly, entire regions. As much as IHL has come to be valued in international forums and in military doctrine, parties to some conflicts continue to flout its rules on a scale that is cause for serious global concern.

The last four years have seen several regionalized conflicts continue their downward spiral of violence, often fuelled by serious IHL violations. Yemen, which has become the world’s largest humanitarian crisis, is facing epidemics, drug shortages, starvation and a decimated infrastructure. The pain of the conflicts in Syria continues to be felt, as displaced survivors of harrowing violence suffer appalling living conditions, separation from their families, and uncertainty about their future. Across the Sahel and Lake Chad regions, armed conflicts have continued to both spur and feed off intercommunal tensions.

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1 This is the fifth report on IHL and the challenges of contemporary armed conflicts prepared by the International Committee of the Red Cross (ICRC) for the International Conference. The first four reports were submitted to the International Conferences held in 2003, 2007, 2011, and 2015. The purpose of this report is to provide an overview of the main challenges that today’s armed conflicts pose for IHL, to prompt discussion of these challenges, and to outline ongoing or prospective ICRC action, positions and areas of interest.
The most protracted conflicts continue to weigh down life and hinder recovery, and some of them show signs of further deterioration. Civilian casualties have spiked in Afghanistan despite intensified peace talks. In the Democratic Republic of the Congo and the Central African Republic, armed groups continue to fragment and proliferate as peace and demobilization efforts are slow to advance. Malnutrition has become chronic in South Sudan since the outbreak of conflict there. In Colombia, a recently concluded peace agreement has resulted in disarmament and political inclusion; but it has also activated new splinter groups that disagree with the accord, as well as veteran groups that see an opportunity to consolidate power. The intensity of violence in Ukraine has abated, but the six-year-old conflict shows few signs of resolution and a high potential for re-escalation. The effects of these drawn-out conflicts – on health, education, infrastructure, the economy and society – accumulate with the passage of time and the absence of space to mend. Many of these contexts have been “forgotten”: they are underreported in the media and neglected by decision-makers, leaving millions to suffer without hope.

In many instances, the fighting has caused massive displacement, leaving family members with no knowledge of one another’s whereabouts or well-being. Many of those who have been displaced are undergoing a seemingly interminable ordeal. The tidy conflict narrative of flight and return is in reality for many a life of persistent stagnation, punctuated by the trauma of repeated displacement, the health-effects of unsuitable accommodations, the distress of being unable to move freely, and the knowledge that those responsible for protecting them and ensuring their safe return are in fact reordering their place in society.

Meanwhile, other factors are doing much to exacerbate and prolong the harm caused by contemporary armed conflicts. Climate change increases the vulnerability of conflict-shaken populations to drought and other natural disasters. Social media provides a widely accessible platform for demonizing and inciting violence against communities. And failure to account for differences in how men, women, girls, and boys experience violence leaves their specific needs unrecognized and unmet.

The factors that trigger and sustain many of today’s wars may be complex, but the violations that needlessly intensify their human cost are basic: indiscriminate and deliberate attacks against civilians; torture and other forms of ill-treatment; rape and other sexual violence; attacks on hospitals, medical personnel, and the wounded themselves; hostage-taking; extrajudicial killing and summary executions. To make things worse, a spirit of vengeance has taken hold in some contexts where violations are systematically directed at adversaries who are hors de combat and at anyone affiliated with them.

Ensuring that warring parties recognize the applicability of IHL to all persons affected by armed conflict, regardless of their actions, is vital for ensuring respect for the law; but it is also a recurring challenge. If the period since the 2015 International Conference has seen some actors solidify their reputation for brutality, it has also seen signs of an alarming response from others: the notion that some individuals or groups are so bad that they – and sometimes even their
families or communities – are beyond the humanitarian protection of IHL. There is an urgent need to unequivocally reject such misconceptions and to reassert that, even though terrorism flagrantly contravenes the basic principle of humanity, it must be fought in a manner that is exemplary in its respect for the law. IHL reaches everyone affected by armed conflict, without exception.

For components of the International Red Cross and Red Crescent Movement (Movement) and other humanitarian organizations seeking to help in today’s armed conflicts, defending the space to operate has never been more urgent. As sweeping counterterrorism legislation proliferates, outlawing broadly-defined “support” for groups and individuals designated as “terrorists”, the ability of organizations to provide impartial humanitarian assistance and protection in conflict-affected areas is becoming increasingly jeopardized. Examples of good practice by States and recent positive developments at the United Nations (UN) Security Council, and at the regional level, must be taken advantage of to preserve the humanitarian space that States universally agreed upon in the Geneva Conventions.

Meanwhile, engaging parties to conflict in dialogue about their responsibilities under IHL is becoming more and more complicated. As armed groups fragment and reconstitute themselves with new, often ill-defined, hierarchies, and as governments retreat from direct involvement in extraterritorial conflicts – preferring to support other actors instead – it is becoming increasingly difficult to attribute responsibility for violations and corrective measures. In many places, the involvement of multiple actors with overlapping hierarchies and motives – political, criminal, religious, ethnic – makes it complicated and dangerous for humanitarian organizations to reach the people affected and to engage belligerents in discussions on compliance with IHL.

Addressing the less obvious challenges in interpreting and applying IHL is also vital for promoting compliance with the law. As States deploy force against a variety of threats, the foundational determination of whether the law of armed conflict applies is susceptible to manipulation. Law is subordinated to convenience when States invoke IHL and use large-scale force in situations that do not meet the legal criteria for armed conflict; or when, conversely, IHL is given no chance to fulfil its role because States, wary of negative perceptions and external constraints, deny the existence of an armed conflict even though the requirements have been unmistakably met. Moreover, as States interpret fundamental provisions of IHL with increasing elasticity – usually to defend the legality of an expedient course of action – they risk establishing regrettable legal precedents and enabling future actors to inflict harm beyond what is militarily necessary or tolerable to humanity.

Contemporary challenges for IHL go well beyond non-compliance with the rules. Transformations in the methods, means and geography of warfare continue to test the adaptability of treaty and customary law. As the world continues to urbanize, so do its conflicts, making war in cities and its consequences for civilian life, infrastructure and services a pressing concern. Many parties to conflicts have not adapted their choice of weapons and tactics to the unique vulnerabilities of
people in urban environments. In addition, technological advances in the realm of warfare present both promises and threats for the future of the law of armed conflict. The relationship between cyberspace and the battlespace, the role of artificial intelligence in targeting decisions, and the potential for non-peaceful use of outer space are all important issues that will figure prominently in discussions about the applicability of IHL to new technologies of warfare. Regardless of where these developments and debates may lead, sober analyses and perspectives are imperative: technology can provide unprecedented precision in targeting, and alternatives to physical destruction; however, innovation in weaponry must not displace rigorous legal analysis and the human decision-making demanded by IHL.

Despite these many challenges, the potential of IHL to mitigate the devastation of armed conflict for individuals, families and communities is unique; and positive examples abound. Recent years have seen armed forces make more of an investment in tracking civilian casualties and understanding their causes. Military legal advisers in some States have become more involved in upholding IHL on the battlefield. Clearance of anti-personnel landmines, risk education for communities affected, and assistance to mine victims continue apace as States parties to the Anti-Personnel Mine Ban Convention implement their obligations. Tens of thousands of conflict-related detainees have remained connected with their families; prisoners of war have been released and repatriated; and mortal remains have been returned to relatives. Non-State armed groups have made commitments against the recruitment and use of children in hostilities and against sexual violence. And daily, medical services belonging to governments and armed forces treat wounded adversaries solely based on medical need.

The endurance of the Geneva Conventions owes as much to the principles and pragmatism they embody as to the work of States, Movement components, and other international actors who have defended their relevance at crucial moments in history. Seventy years after their signing, compliance with the Conventions is far from perfect. When IHL is violated, the seriousness of the consequences, and the urgency of taking corrective measures, cannot be overstated. International judicial and fact-finding mechanisms provide a partial response; however, there is a great deal of unused leverage in the world today to stop violations as they occur. On the 70th anniversary of the Geneva Conventions, the undertaking of States to respect and ensure respect for the Conventions – stated in Article 1 common to the four Geneva Conventions – remains the best starting point to reduce the suffering and the needs of communities affected by armed conflict.
II. Contemporary and future challenges in the conduct of hostilities

1. Urbanization of armed conflicts

As the world urbanizes, so too does conflict. Increasingly, fighting takes place in urban areas, and civilians bear the brunt of it. The ICRC knows from direct observation that the use in populated areas of explosive weapons that have wide area effects continues to be a major cause of injury and death among civilians and of damage to civilian objects. Even when services that are indispensable for sustaining life in urban areas are not directly targeted, they are disrupted as an indirect result of attacks, or become more and more degraded until they are at the point of breakdown.\(^2\) In some cases, services are deliberately denied to specific areas, in order to exert pressure on civilians living there. Inhabitants are left without sufficient food or water, sanitation and electricity, and deprived of health care; such privation is aggravated when cities are besieged. In addition, fighting in urban centres results in widespread displacement. Once fighting stops, unexploded ordnance and/or other forms of weapon contamination, and the lack of essential services, prevent many of the displaced from returning. Many of these consequences are not unique to cities, but they occur on a significantly larger scale in urban warfare and may require a different humanitarian response.

IHL imposes limits on the choice of means and methods of warfare, protecting civilians and civilian infrastructure against unacceptable harm and destruction. Even so, the devastating humanitarian consequences of urban warfare raise serious questions regarding how parties to such conflicts interpret

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and apply relevant IHL rules. In this section, the ICRC presents its views and shares the findings of new multidisciplinary research on (a) the protection of civilians against the effects of hostilities during urban warfare; (b) the use of explosive weapons in populated areas; and (c) the protection of the civilian population during sieges.

a. The protection of civilians against the effects of hostilities during urban warfare

Military and civilian people and objects are often intermingled in cities. For parties involved in urban hostilities, this intermingling presents important challenges, both militarily and in terms of avoiding civilian harm. Because urban warfare endangers civilians in ways particular to it, the protection afforded by the principles and provisions of IHL is critical. Policies can also be an effective tool to protect civilians and limit the effects of urban warfare, but they must not be used to offer protection to civilians that would be weaker or less than that afforded by IHL.

IHL prohibits attacks directed at civilians and civilian objects, as well as indiscriminate attacks—that is, attacks that strike military objectives and civilians or civilian objects without distinction. IHL also prohibits attacks that may be expected to cause incidental civilian harm that would be excessive in relation to the concrete and direct military advantage anticipated. While the existence of the principle of proportionality is uncontested and is applied daily by military commanders, the key concepts on which it relies (“incidental civilian harm”, “military advantage”, and “excessiveness”) would benefit from further clarification, which the ICRC has sought to support.3

In addition, IHL requires parties to conflict to take a range of precautions in attack and against the effects of attacks to protect civilians and civilian objects. With regard to precautions in attack, all feasible precautions must be taken to avoid or at least minimize incidental civilian harm. Feasible precautions are those that are possible in practice, taking into account all of the circumstances ruling at the time, including humanitarian and military considerations. The understanding of what precautions are feasible may evolve over time, depending on a number of factors, including technological developments, or with the identification of new techniques, tactics or procedures that make it possible to minimize incidental

civilian harm. In this regard, lessons-learned processes/exercises may bring new feasible precautions to light.

Unless circumstances do not permit, effective advance warning must be given of attacks that may affect the civilian population. Most attacks in urban areas may well do so. The effectiveness of a warning should be assessed from the perspective of the civilian population that may be affected. It should reach and be understood by as many civilians as possible among those who may be affected by the attack, and it should give them time to leave, find shelter, or take other measures to protect themselves. Advance warnings do not relieve the party carrying out the attack from the obligation to take other precautionary measures, and civilians who remain in the area that will be affected by the attack – whether voluntarily or not – remain protected.

The principles of distinction, proportionality and precautions are complementary, and all three must be respected for an attack to be lawful.

Debate has arisen with respect to the relevance of expected incidental harm to civilians in the form of disease and mental trauma when implementing the principles of proportionality and precautions. In the ICRC’s view, it is important to consider incidental harm that is foreseeable, such as contamination when targeting a military objective in a city that contains toxic industrial chemicals, or the spread of disease due to incidental damage to municipal sewage systems. This is particularly relevant when an attacker expects to cause incidental damage to water or sewage systems in a city where cholera or other similarly contagious diseases are already present, as has been the case in some recent conflicts.

As for mental health, while IHL prohibits acts whose primary purpose is to terrorize the civilian population, psychological trauma has long been seen as an inevitable consequence of conflicts. The psychological effects of hostilities might also be less easily anticipated than physical injuries or death. Yet, it is broadly accepted today that human health encompasses physical and mental health. In this regard, there is some indication of awareness in some recent military manuals that the psychological effects of hostilities should be taken into account. This may be an area in which the practice of belligerents in the future might be influenced by evolving research and understanding. In their operations, the ICRC and its Movement partners see significant mental health and psychosocial needs, which require broader acknowledgement and better ways to address the harm caused.

Several of the rules mentioned above apply specifically to attacks within the meaning of IHL: that is, to military operations most likely to cause harm to civilians. Nonetheless, parties to conflict must take constant care to spare the civilian population in all military operations. These include troop movements and

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4 For hospitals and medical facilities, including those located in urban areas, that have lost their protection because they are used for acts harmful to the enemy, there is a specific rule on warnings prior to attack.

manoeuvres preparatory to combat, such as during ground operations in urban areas. The specific protection afforded to particular objects may also go beyond attacks. For instance, objects indispensable to the survival of the civilian population must neither be attacked nor otherwise destroyed, removed or rendered useless. This includes a city’s drinking-water supply network and installations.

Compliance with IHL during the conduct of hostilities in urban areas, as anywhere else, depends on what the commander knew, or should have known, at the time of the attack, based on information reasonably available from all sources in the circumstances. Given the intermingling of civilians and military objectives in urban areas, it is critical that information collected when planning an operation in urban areas does not focus solely on verifying that targets are military objectives – a key requirement, of course – but also on assessing the incidental civilian harm, including the indirect or “reverberating” effects, that may be expected. Practices such as assuming the presence of civilians in all civilian buildings and assessing patterns of civilian life, among others, may help overcome difficulties – created by the physical environment of a city – in accurately assessing civilian presence.

**Challenges raised by attacks in urban areas**

Services essential to the civilian population in urban areas rely on a complex web of interconnected infrastructure systems. The most critical infrastructure nodes within a system enable the provision of services to a large part of the population and damage to them would be most concerning when it causes the whole system to fail. Such nodes are also described as a “single point of failure”. Services depend on the operation of people, hardware and consumables, each of which can be disrupted directly or indirectly. For instance, a damaged electrical transformer can immediately shut down the supply of water to an entire neighbourhood or hospital, drastically increasing the risks posed to public health and well-being. In addition, over time, direct and indirect effects can have a cumulative impact on a particular service – leaving large parts of the system in disarray – which becomes much more difficult to address. This cumulative effect will influence the incidental-harm assessment and analysis during protracted hostilities: in the proportionality assessment, the civilian harm expected from damaging the last electric power distribution line of a city will be significantly greater than that expected from damaging one of many functioning distribution lines, as that loss can be made up by redundancy in the power distribution grid.

Given this complexity and interconnectedness of essential service systems, it is particularly important to consider not only incidental civilian harm directly

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caused by an attack but also reverberating effects, provided they are foreseeable.\(^7\) As for any type of incidental harm, what is reasonably foreseeable – or should have been foreseen – will vary, depending on the circumstances of the attack and the target; however, patterns of incidental civilian harm can be foreseen based on past experience of the effects of urban warfare. What is foreseeable will be informed and evolve, in particular, through: analysis of the effects of past attacks; studies on the effects of conflicts; better modelling of weapons’ effects; better understanding of the infrastructural set-up and interdependency between services; and new technologies to better assess the condition or status of infrastructure and service delivery during the conflict. In this respect, it is important that armed forces rigorously apply short feedback loops and other lessons learned as part of the targeting cycle or other decision-making processes, to prevent the repetition of mistakes and inform future assessments of effects that had not been adequately anticipated or mitigated in the past. In particular, recent conflicts have shown the devastating effects that urban warfare has on critical civilian infrastructure and the delivery of essential services to the population, especially when explosive weapons with a wide impact area are used.

Displacement within cities, or to other areas, is one of the many harmful effects on civilians of urban warfare.\(^8\) In addition to the threat to civilian lives, and the disruption of essential urban services, one of the key drivers of long-term displacement is the damage or destruction of civilian homes typically caused by the use of heavy explosive weapons. While displacement is not expressly mentioned in the principles of proportionality and precautions as a relevant type of civilian harm, depending on the circumstances it may increase the risk of death, injury or disease. More generally, the displacement of civilians expected when incidentally damaging their homes will affect the weight to be given to that damage under these principles.

Another challenge of urban warfare is that many objects are used simultaneously for military and civilian purposes. For example, a firing position might be situated on the rooftop of a civilian house or an apartment in a multistorey building used as a command post. Similarly, a power station may provide electricity to both a military barrack and the rest of the city. If its use for military purposes renders a civilian object – or the separable part thereof – a military objective, it will become a lawful target. However, the prevailing view,\(^9\)


shared by the ICRC, is that the principles of proportionality and precautions remain relevant, not only with regard to incidental damage to other civilian objects, but also in terms of the consequences for civilians of impairing the civilian use of that object. Under this view, for instance, the attack must be directed at the rooftop of the civilian house or at the specific apartment in the multi-storey building, provided it is feasible in the circumstances, to avert the possibility of civilians losing their homes and livelihoods.

Finally, during ground operations in urban areas, troops are likely to become involved in firefights and call for fire support. The danger and urgency of such situations significantly increases the likelihood and extent of incidental civilian casualties and damage – as the ICRC has observed repeatedly. As further discussed below, fire by troops in contact with the enemy, as well as fire support, must respect all the rules governing the conduct of hostilities.

**Protecting the urban population against the effects of attacks**

Civilians can be protected most effectively when they are not in the midst of combat. Because urban warfare occurs among civilians, it is critical that parties implement their obligation to take all feasible precautions to protect civilians and civilian objects under their control from the effects of attacks. For example, avoiding to locate military objectives within or near densely populated areas, or more generally, employing strategies and tactics that take combat outside populated areas, are means to try to reduce urban fighting altogether.

When urban fighting cannot be avoided, all parties have an obligation to take precautions to spare civilians from the effects of attacks. The obligation of the party carrying out an attack to give effective advance warning is mirrored by that of the party in control of the area to remove civilians and civilian objects from the vicinity of military objectives to the maximum extent feasible.

Unfortunately, far too often in contemporary conflicts, parties do the exact opposite and deliberately endanger the civilian population and civilians under their control by using them as human shields, which is absolutely prohibited. Civilians used as human shields remain protected, and – while it does raise practical challenges – the other party must take all feasible precautions to avoid harming these civilians and must take them into account in proportionality assessments.

b. The use of explosive weapons in populated areas

One of the defining features of urban warfare is the use of explosive weapons with a wide impact area (also referred to as “heavy” explosive weapons), i.e. of weapons that typically deliver significant explosive force from afar and over a wide area.\(^\text{10}\)

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\(^\text{10}\) These are: i) weapons that have a wide impact area because of the large destructive radius of the individual munition used, i.e. its large blast and fragmentation range or effect (such as large bombs or missiles); ii) weapons that have a wide impact area because of the lack of accuracy of the delivery system (such as unguided indirect-fire weapons, including artillery and mortars); and iii) weapons that have a wide...
While generally not a cause for concern when used in open battlefields, these weapons have devastating effects for the civilian population when employed against military objectives located in populated areas, such as towns and cities. Their footprints are all over recent and ongoing armed conflicts such as those in Afghanistan, Gaza, Iraq, Libya, Somalia, Syria, Ukraine, and Yemen: death, severe injuries (often leading to lifelong disabilities), mental and psychological trauma, and large-scale destruction of houses, hospitals, schools, and infrastructure indispensable for the functioning of essential services—everything that makes a city work, and on which its inhabitants depend for their survival.

Beyond the direct impact on the lives, health and property of civilians, there is a wide array of indirect or reverberating effects that spread across the networks of interconnected urban services and affect a much larger part of the civilian population than those present in the immediate impact area of the attack. These increasingly known and foreseeable consequences are exacerbated in protracted armed conflicts, where the long-term and at times irreversible degradation of essential services increases the suffering of civilians. The gendered impact of heavy explosive weapons’ use in populated areas is also often overlooked: the different social roles of men and women will influence the chances of who will be injured or killed—men, women, boys, or girls—and impact the nature of the stigma faced by survivors. Moreover, heavy bombing and shelling is a major cause of displacement; displaced populations are exposed to further risks, including sexual violence, particularly against women.

**IHL questions raised by the use of explosive weapons in populated areas**

In its 2015 report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, the ICRC outlined key IHL questions raised by the use of explosive weapons with a wide impact area in populated areas. Those questions are summarized here, followed by additional issues.

The use of explosive weapons with a wide impact area against military objectives located in populated areas is not prohibited per se under IHL, but it is regulated by the rules on the conduct of hostilities—namely the prohibition against indiscriminate attacks, the prohibition against disproportionate attacks, and the obligation to take all feasible precautions in attack. Because of the close proximity of military objectives to civilians and civilian objects, the particular vulnerability of civilians in urban environments as a result of their dependency on interlinked essential services, and the wide-area effects of the explosive weapons of concern, the use of such weapons in populated areas typically results

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11 The terms “populated areas” and “densely populated areas” are used interchangeably here, to refer to a concentration of civilians or of civilians and civilian objects, be it in a city, town or village, or in a non-built-up area, and be it permanent or temporary. See, notably, Art. 1(2) of Protocol III to the 1980 Convention on Certain Conventional Weapons.

in significant civilian harm, raising serious questions about the interpretation and application of the relevant IHL rules.

In its 2015 report, the ICRC noted that the inherent inaccuracy of certain types of explosive weapon systems—such as many of the artillery, mortar and multiple-rocket launcher systems in use today, in particular when using unguided munitions, as well as unguided air-delivered bombs and rockets—raises serious concerns under the prohibition against indiscriminate attacks. Their low accuracy makes it very difficult to direct these weapons against a specific military objective as required by this rule: there is a high risk therefore that they will strike military objectives and civilians and civilian objects without distinction. While increasing the accuracy of delivery systems would help reduce the weapons’ wide-area effects in populated areas, their accuracy could be obviated by the use of large-calibre munitions—i.e. munitions that have a large destructive radius relative to the size of the military objective—which might still be contrary to IHL.

In the 2015 report, the ICRC also noted that, in addition to the direct effects of an attack using heavy explosive weapons, indirect or reverberating effects must also be taken into account when assessing the expected incidental civilian harm as required by the rules on proportionality and on precautions in attack, insofar as they are reasonably foreseeable in the circumstances. For example, as noted above, incidental damage caused by heavy explosive weapons to critical civilian infrastructure—such as vital water and electricity facilities and supply networks—can severely disrupt services essential to civilian survival, notably health care, the provision of electricity, and water and sanitation services. As these services are for the most part interdependent, damage to any one component of a service will often have a domino effect on other essential services, triggering humanitarian consequences far beyond a weapon’s impact zone. Based on direct observation of the extensive civilian harm caused by the use of heavy explosive weapons in populated areas, there is significant doubt that armed forces sufficiently factor in such reverberating effects, as required by the rules of proportionality and precautions in attack.

Where explosive weapons with a wide impact area are used to provide covering fire for own or friendly forces under attack, some States invoke the notion of “self-defence” to suggest that IHL restrictions on the use of force, including on the choice of weapons, could be less stringent compared to such restrictions in pre-planned attacks, and to justify the use of weapons that carry a high risk of indiscriminate effects in the circumstances. However, even the use of force in “self-defence” is circumscribed by the absolute prohibitions against indiscriminate and disproportionate attacks, and by all other IHL rules governing the conduct of hostilities, which apply in defensive as well as offensive situations. In the ICRC’s view, the protection of own or friendly forces is a relevant military consideration impacting on the feasibility of precautions. It is also a relevant military advantage when assessing the proportionality of an attack, but only

13 On the question of when reverberating effects are reasonably foreseeable, see Chapter 2(1)(a) on the protection of civilians against the effects of hostilities during urban warfare.
insofar as it is “concrete and direct”, which is primarily the case when troops are under attack (i.e. in “self-defence” scenarios). In all such circumstances, force protection must be balanced against humanitarian considerations, such as the extent of incidental civilian harm expected to result from the use of heavy explosive weapons. In this respect, the greater the risk of incidental civilian harm anticipated from the attack, the greater the risk to its own forces the attacking party may have to be prepared to accept. At any rate, force protection can never justify the use of indiscriminate fire as a measure to avoid the exposure of own or friendly forces.

At times, explosive weapons with a wide impact area (most commonly artillery or other indirect-fire weapon systems) are used to harass the enemy, to deny them freedom of movement, or to obstruct their activities (“harassing”, “interdiction” or “suppressive” fire). This takes the form of a continuous flow of fire – often of low or moderate intensity – intended to deliver effects over an area or on specific objects or persons, depending on the circumstances. However, to be lawful, harassing, interdiction or suppressive fire must be directed at a specific military objective, and must use means capable of being so directed. Yet in practice it is not always clear that this is the case.

When using indirect-fire weapon systems such as artillery, many armed forces apply fire adjustment techniques such as “walking fire” against a target or “bracketing” a target, in order to be able to strike the target after several rounds of fire. Such techniques consist in firing rounds progressively closer to the target, recording their impact and making adjustments (corrections) before firing “for effect” at the target (fire in salvos). Such methods of adjusting fire within a populated area in themselves pose a significant risk of civilian harm, in that the “adjustment” rounds are likely to land off-target and strike civilians and/or civilian objects. The use of such techniques in populated areas therefore raises questions under the prohibition against indiscriminate attacks.

Avoiding the use of wide-impact explosive weapons in populated areas

In its 2015 report, the ICRC reiterated a position it had first expressed like this in 2011: “due to the significant likelihood of indiscriminate effects and despite the absence of an express legal prohibition for specific types of weapons, the ICRC considers that explosive weapons with a wide impact area should be avoided in densely populated areas”.

The ICRC has called on all States and parties to armed conflicts to adopt a policy of avoidance of use of heavy explosive weapons in populated areas, regardless of whether or not such use would violate IHL, based on three observations:

- the grave pattern of civilian harm caused by the use of these weapons and the humanitarian and moral imperative to prevent, or at least reduce, such levels of destruction and suffering
- the objective difficulty of employing – in conformity with the prohibitions against indiscriminate and disproportionate attacks – explosive weapons with a wide impact area against military objectives situated in populated areas
- the persistent lack of clarity on how States, and parties to armed conflicts in particular, interpret and apply said IHL rules with regard to the use of heavy explosive weapons in populated areas. As the ICRC has previously stated, “there are divergent views on whether these rules sufficiently regulate the use of such weapons, or whether there is a need to clarify their interpretation or to develop new standards or rules. Based on the effects of explosive weapons in populated areas being witnessed today, there are serious questions regarding how the parties using such weapons are interpreting and applying IHL.”

An avoidance policy suggests a presumption of non-use of such weapons owing to the high risk of incidental civilian harm, which could be reversed if sufficient mitigation measures can be taken to reduce such risk to an acceptable level. These include measures and procedures related to targeting and to the choice of weapons that significantly reduce the size of the explosive weapon’s area of impact, and other measures to minimize the likelihood and/or extent of incidental civilian harm. Such policies and practices should be developed well in advance of military operations and faithfully implemented during the conduct of hostilities, shared with partner forces or supported parties in the context of such operations, and taken into consideration when deciding on the transfer of heavy explosive weapons as well as when providing support to a party to an armed conflict.

Changing behaviour through “good practice”

Given the complex challenges of conducting hostilities in urban environments, and the unique vulnerabilities of civilians living there, it is critical that military policies and practices pay sufficient attention to the protection of civilians, including in the choice of means and methods of warfare. While instances of express limitations on heavy explosive weapons and associated methods of warfare in populated areas can be found, these are scattered or mission-specific and rarely part of a consistent approach towards military operations conducted in such environments. Information available to the ICRC to date indicates that only a limited number of States appear to have specific guidance and training on urban warfare or the

conduct of hostilities in populated areas – although some positive movement can be seen.

To support policy development in this regard by States and parties to armed conflicts, the ICRC recommended, in a recently published report, a number of good practices for implementing an avoidance policy and for facilitating compliance with IHL rules on the conduct of hostilities in populated areas.

In light of the large-scale destruction and civilian suffering witnessed in today’s armed conflicts, the ICRC continues to call on all parties to armed conflict to take urgent action by reviewing their military policies and practice and by ensuring that their doctrine, education, training and weapons are adapted to the specificities of urban and other populated environments and to the vulnerability of civilians therein.

c. The protection of the civilian population during sieges

The history of warfare is full of instances of sieges being used as a method of warfare. Some of them are notorious for their exceedingly high death tolls. Contemporary conflicts in the Middle East have again drawn the attention of the international community to sieges and other encirclement tactics.

Sieges often have grave consequences for large numbers of civilians. Recent sieges were accompanied by bombardment and sometimes intense fighting between besieging and besieged forces, creating constant danger for the civilians trapped in the besieged area. Little or no electricity and degraded public services are also characteristic features of sieges. Families are forced to make impossible choices with the little food and water available. Factors such as age, gender-specific roles, or disabilities, may exacerbate difficulties in accessing scarce resources. The consequences are hunger, malnutrition, dehydration, illness, injury and death.

The notion of “siege”

There is no definition of “siege” or “encirclement” under IHL. A siege can be described as a tactic to encircle an enemy’s armed forces, in order to prevent their movement or cut them off from support and supply channels. The ultimate aim of a siege is usually to force the enemy to surrender, historically through starvation and thirst, though in contemporary conflicts besieging forces usually attempt to capture the besieged area through hostilities. Sieges or other forms of encirclement may also be part of a larger operational plan: for instance, they can be used to isolate pockets of enemy forces left behind during an invasion.

A siege that does not involve attempts to capture an area through assault may be aimed at obtaining a military advantage in relative safety for the armed forces of the besieging party. It avoids the hazards of urban fighting for the besieging party and may also be a means to limit the heavy civilian casualties often associated with urban fighting.

Conversely, sieges that do involve attempts to capture an area through assault may increase the intensity of the fighting and the associated risks of
incidental harm for civilians. This is particularly the case if the besieged forces are left with no option other than to fight or surrender.

Under IHL, it is not prohibited to besiege an area where there are only enemy forces or to block their reinforcement or resupply, including to achieve their surrender through starvation. It is also not prohibited to attack military objectives within a besieged area, provided such attacks can be carried out in conformity with the principles of distinction, proportionality and precautions.

Unfortunately, civilians are often trapped within when entire towns or other populated areas are besieged, causing unspeakable suffering. IHL offers vital protection to these civilians by imposing limits to what the parties can do during such sieges.

The scope of the parties’ obligation to allow civilians to leave a besieged area

Throughout history, besieging and besieged forces have prevented civilians from leaving besieged areas. For the besieging forces, the main purpose was often to hasten the surrender of the besieged forces, because civilians have to rely on the same supplies as the enemy forces. At the Nuremberg trials, the practice of using artillery to prevent civilians from leaving a besieged area was deemed an extreme, but not unlawful, measure.

The law has evolved considerably since then. It has developed even beyond the essential, but limited, provisions of the Geneva Conventions on the evacuation of specific categories of vulnerable people.

Today, sieges are lawful only when directed exclusively against an enemy’s armed forces.

First, shooting at or otherwise attacking civilians fleeing a besieged area would amount to a direct attack on civilians and is absolutely prohibited.

Second, IHL rules apply to the conduct of hostilities during sieges. As shown in the following paragraphs, the implementation of several rules stemming from the principle of precautions requires both parties to allow civilians to leave the besieged area whenever feasible. In particular, constant care must be taken to spare the civilian population in all military operations, and all feasible precautions must be taken, notably in the choice of means and methods of warfare, to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. In a besieged area where hostilities are taking place, and in view of the risk that poses to them, one obvious precautionary measure is to evacuate civilians, or at least allow them to leave. Parties must also give effective advance warnings of attacks that may affect the civilian population, the purpose of which is precisely to enable civilians to take measures to protect themselves.

The besieged party has obligations, too. It must take all feasible precautions to protect the civilian population under its control from the effects of attacks. This can entail allowing civilians to leave or otherwise removing them from the vicinity of military objectives, for example by evacuating them from a besieged area where hostilities are ongoing or expected to take place.
The besieged party might be tempted to prevent the civilian population from leaving because having a besieged area cleared of civilians would make it easier for the besieging forces to starve out the besieged forces, or give the former more leeway when attacking military objectives in the besieged area. However, IHL categorically prohibits using the presence of civilians to render certain areas immune from military operations, for instance in attempts to impede the military operations of the besieging forces. This would amount to using the civilian population as human shields.

Finally, treaty and customary IHL prohibit the starvation of the civilian population as a method of warfare. The implication is that the plight of civilians deprived of supplies essential to their survival in a besieged area can no longer be used by a besieging party as a legitimate means to subdue its enemy. It is therefore the ICRC’s view that a belligerent aiming to use starvation as a method of warfare against enemy forces, besieged in an area in which civilians are also trapped, must allow the civilians to leave the besieged area, because experience shows that in practice these civilians will share the privation caused by a siege and may be expected to be left with their basic needs unmet.

The protection of civilians leaving, or being evacuated from, a besieged area

Civilians may flee a besieged or otherwise encircled area or be voluntarily evacuated; they may also be evacuated against their will by a party to the conflict.

The issue of forcible evacuation of a besieged area has raised questions with respect to forced displacement. Under IHL, forced displacement is prohibited, unless the security of the civilians involved or imperative military reasons so demand. Prohibited acts of forced displacement can include those resulting from unlawful acts under IHL by the parties in order to coerce civilians to leave, including in the conduct of hostilities. As hostilities during sieges entail a high risk of incidental civilian casualties, the security of the civilians involved may require their evacuation from the besieged area, but the evacuation must not be carried out in a way that would amount to forced displacement as a result of unlawful acts.

To ensure that displacement is not forced or unlawful, it must last no longer than required by the circumstances. Displaced persons have a right to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. Although temporary evacuations may be necessary, and even legally required, sieges must not be used to compel civilians to permanently leave a particular area.

From a practical perspective, safe evacuations are best organized when the parties to the conflict agree on the necessary procedures. In the absence of such an

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17 See Chapter III(1) on internally displaced persons.
agreement, both parties remain obliged to take all feasible precautions to avoid causing incidental harm to civilians fleeing during hostilities.

In case of displacement, regardless of whether civilians flee or are evacuated from a besieged area, all possible measures must be taken to ensure that the civilians in question are received under satisfactory conditions of shelter, hygiene, health, safety (including from sexual and gender-based violence) and nutrition and that members of the same family are not separated.

The besieging party may decide to screen displaced persons for security reasons, such as finding out whether members of the besieged forces intermingled with the civilians leaving the besieged area. Screening and other security measures undertaken by the besieging party must be conducted with full respect for IHL and human rights law, particularly with regard to humane treatment, living conditions and relevant procedural safeguards in cases of detention, and the prohibition against collective punishment.

The protection of civilians and the wounded and sick who remain in a besieged or encircled area

Civilians who remain in a besieged area continue to be protected as civilians, unless and for such time as they take a direct part in hostilities. The mere fact of remaining in a besieged area – whether voluntarily, forcibly, or as human shields – does not amount to taking a direct part in hostilities. In addition, the presence of besieged fighters among the civilian population does not mean that the civilians lose their protection from direct attack. The besieged and besieging forces therefore remain bound by all the rules protecting civilians against the effects of hostilities.18

Furthermore, the IHL rules on starvation and on relief operations are designed to ensure – in combination – that civilians are not deprived of supplies essential to their survival.

First, in addition to the prohibition against using starvation of the civilian population as a method of warfare, IHL prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population. Even when such objects are also used by the enemy armed forces, operations against them are prohibited if they can be expected to leave the civilian population with such insufficient quantities of food or water as to cause its starvation.

Second, during a siege, the parties continue to be bound by IHL obligations relating to relief operations and humanitarian access. IHL provides that impartial humanitarian organizations have a right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by the armed conflict are not being met. Once impartial humanitarian relief operations have been agreed to, the parties to the armed conflict – which retain the right to control the humanitarian nature of relief consignments – must allow and facilitate rapid and unimpeded passage of these relief operations.

18 See Chapter II(1)(a) on the protection of civilians against the effects of hostilities during urban warfare.
The commander of a besieged force who is not in a position to provide the supplies essential to the survival of the civilian population under its control must consent to humanitarian relief operations for civilians. Similarly, the commander of a besieging force must allow humanitarian access to and relief operations for civilians remaining in the besieged area. This is subject to the parties’ right of control and ability to impose temporary and geographically limited restrictions required by military necessity at the time and place of on-going hostilities.

Finally, IHL contains extensive rules relating to respect and protection for the wounded and sick, as well as the persons and objects assigned to care for them. The Geneva Conventions contain a few explicit provisions on the evacuation of the wounded and sick from besieged areas and the passage of medical personnel and medical equipment into such areas. More generally, parties must take all possible measures to search for, collect and evacuate the sick and wounded, and must provide – to the fullest extent practicable and with the least possible delay – the medical care and attention required by their condition. All these rules apply not only to civilians; they also benefit wounded and sick members of an enemy’s armed forces. The applicability of these rules to sieges is uncontested.

2. New technologies of warfare

New technologies are changing human interaction profoundly – including in times of armed conflict. Many States are investing heavily in the development of means and methods of warfare that rely on digital technology. Cyber tools, increasingly autonomous weapon systems, and artificial intelligence are being used in contemporary armed conflicts. The ICRC closely follows the development of new means and methods of warfare and their use by militaries; it also engages all relevant stakeholders on the applicability of IHL to the use of these new means and methods of warfare.

Technological advances can have positive consequences for the protection of civilians in armed conflict: weapons can be used with more precision, military decisions can be better informed, and military aims can be achieved without the use of kinetic force or physical destruction. At the same time, new means of warfare and the way they are employed can pose new risks to combatants and civilians, and can challenge the interpretation and implementation of IHL. The ICRC’s assessment of the foreseeable humanitarian impact of new technologies of warfare, and the challenges they may pose to existing IHL rules, focuses on interrelated legal, military, technical, ethical, and humanitarian considerations.

IHL is applicable to the development and use of new weaponry and new technological developments in warfare – whether they involve (a) cyber technology; (b) autonomous weapon systems; (c) artificial intelligence and machine learning; or (d) outer space. States that develop or acquire such weapons or means of warfare are responsible for ensuring that they can be used in compliance with IHL (e).
a. Cyber operations, their potential human cost, and the protection afforded by IHL

The use of cyber operations during armed conflicts is a reality. While only a few States have publicly acknowledged using such operations, an increasing number of States are developing military cyber capabilities, and the use of such capabilities is likely to increase.

The ICRC understands “cyber warfare” to mean operations against a computer, a computer system or network, or another connected device, through a data stream, when used as means or methods of warfare in the context of an armed conflict. Cyber warfare raises questions about precisely how certain provisions of IHL apply to these operations, and whether IHL is adequate or whether, building on existing law, it might require further development.

The use of cyber operations may offer alternatives that other means or methods of warfare do not, but it also carries risks. On the one hand, cyber operations may enable militaries to achieve their objectives without harming civilians or causing permanent physical damage to civilian infrastructure. On the other hand, recent cyber operations – which have been primarily conducted outside the context of armed conflict – show that sophisticated actors have developed the capability to disrupt the provision of essential services to the civilian population.

**Understanding cyber operations and their potential human cost**

To develop a realistic assessment of cyber capabilities and their potential human cost in light of their technical characteristics, in November 2018 the ICRC invited experts from all parts of the world to share their knowledge about the technical possibilities, expected use, and potential effects of cyber operations.19

Cyber operations can pose a particular threat for certain elements of civilian infrastructure. One area of concern for the ICRC, given its mandate, is the health-care sector. In this regard, research shows that the health-care sector appears to be particularly vulnerable to direct cyber attacks and incidental harm from such attacks directed elsewhere. Its vulnerability is a consequence of increased digitization and interconnectivity in health care. For example, medical devices in hospitals are connected to the hospital network, and biomedical devices such as pacemakers and insulin pumps are sometimes remotely connected through the internet. This growth of connectivity increases the sector’s digital dependence and “attack surface” and leaves it exposed, especially when these developments are not matched by a corresponding improvement in cyber security.

Critical civilian infrastructure – including electrical, water, and sanitation facilities – is another area in which cyber attacks can cause significant harm to the civilian population. This infrastructure is often operated by industrial control systems. A cyber attack against an industrial control system requires specific

expertise and sophistication, as well as specifically designed cyber tools. While attacks against industrial control systems have been less frequent than other types of cyber operations, their frequency is reportedly increasing, and the severity of the threat has evolved more rapidly than anticipated only a few years ago.

Beyond the vulnerability of specific sectors, there are at least three technical characteristics of cyber operations that are cause for concern.

First, cyber operations carry a risk of overreaction and escalation, simply due to the fact that it may be extremely difficult—if not impossible—for the target of a cyber attack to detect whether the attacker’s aim is to spy or to cause physical damage. As the aim of a cyber operation might be identified only after the target system has been harmed, there is a risk that the target will imagine the worst-case scenario and react much more strongly than it would have done if it had known that the attacker’s true intent was limited to espionage, for example.

Second, cyber tools and methods can proliferate in a unique manner, one that is difficult to control. Today, sophisticated cyber attacks are carried out only by the most advanced and best-resourced actors. But once a cyber tool has been used, stolen or leaked, or becomes available in some other way, actors other than those who developed it may be able to find it, reverse-engineer it, and repurpose it for their own—possibly malicious—ends.

Third, while it is not impossible to determine who created or launched a particular cyber attack, attributing an attack tends to be difficult. Identifying actors who violate IHL in cyberspace and holding them responsible is likely to remain challenging. The perception that it will be easier to deny responsibility for such attacks may also weaken the taboo against their use—and may make actors less scrupulous about violating international law by using them.

While cyber operations have exposed the vulnerability of essential services, they have not, fortunately, caused major human harm so far. However, much is unknown in terms of technological evolution, the capabilities and the tools developed by the most sophisticated actors, and the extent to which the increased use of cyber operations during armed conflicts might be different from the trends observed so far.

*The limits that IHL sets for cyber warfare*

The ICRC welcomes the fact that an increasing number of States and international organizations are acknowledging that IHL applies to cyber operations during armed conflicts. It urges all States to recognize the protection that IHL offers against the potential human cost of cyber operations. For example, belligerents must respect and protect medical facilities and personnel at all times, which means that cyber attacks against the health-care sector during armed conflict would—in most cases—violate IHL. Likewise, IHL specifically prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population.

More generally, IHL prohibits directing cyber attacks against civilian infrastructure, as well as indiscriminate and disproportionate cyber attacks. For
instance, even if the infrastructure or parts of it become military objectives (such as a discrete part of a power grid), IHL requires that only those parts be attacked, and that there be no excessive damage to the remaining civilian parts of the grid or to other civilian infrastructure relying on the electricity provided by the grid. IHL also requires parties to conflict to take all feasible precautions to avoid or at least minimize incidental harm to civilians and civilian objects when carrying out a cyber attack.

Notwithstanding the interconnectivity that characterizes cyberspace, the principles of distinction, proportionality and precautions can and must be respected. A careful examination of the way cyber tools operate shows that they are not necessarily indiscriminate. While some of the cyber tools that we know of were designed to self-propagate and indiscriminately affect widely used computer systems, they did not do these things by chance: the ability to self-propagate usually needs to be specifically included in the design of such tools. Furthermore, attacking specific targets may require custom-made cyber tools, which might make it difficult to carry out such attacks on a large scale or indiscriminately.

In fact, many of the cyber attacks that have been observed appear to have been rather discriminate from a technical perspective. This does not mean they were lawful or would have been lawful if carried out in a conflict; on the contrary, in the ICRC’s view, a number of the cyber attacks that have been reported in public sources would be prohibited during armed conflict. However, their technical characteristics show that cyber operations can be very precisely designed to have an effect only on specific targets, which makes them capable of being used in compliance with IHL principles and rules.

IHL rules protecting civilian objects can, however, provide the full scope of legal protection only if States recognize that cyber operations that impair the functionality of civilian infrastructure are subject to the rules governing attacks under IHL. Moreover, data has become an essential component of the digital domain and a cornerstone of life in many societies. However, different views exist on whether civilian data should be considered as civilian objects and therefore be protected under IHL principles and rules governing the conduct of hostilities. In the ICRC’s view, the conclusion that deleting or tampering with essential civilian data would not be prohibited by IHL in today’s ever more data-reliant world seems difficult to reconcile with the object and purpose of this body of law. Put simply, the replacement of paper files and documents with digital files in the form of data should not decrease the protection that IHL affords to them.

Finally, parties to armed conflicts must take all feasible precautions to protect civilians and civilian objects under their control against the effects of attacks. This is one of the few IHL obligations that States are required to implement in peacetime.

Affirming that IHL applies to cyber warfare should not be misunderstood as encouragement to militarize cyberspace or as legitimizing cyber warfare. Any use

21 See ICRC, IHL Challenges Report 2015, p. 43.
of force by States, whether cyber or kinetic in nature, will always be governed by the UN Charter and relevant rules of customary international law. IHL affords the civilian population an additional layer of protection against the effects of hostilities.

In the coming years, the ICRC will continue to follow the evolution of cyber operations and their potential human cost, in particular during armed conflicts. It will explore avenues to reduce that cost and work towards building consensus on the interpretation of existing IHL rules and, if necessary, on the development of complementary rules that afford effective protection to civilians.

The use of digital technology during armed conflicts for purposes other than as means and methods of warfare

In recent conflicts, certain uses of digital technology other than as means and methods of warfare have led to an increase in activities that adversely affect civilian populations. For example, misinformation and disinformation campaigns, and online propaganda, have fused on social media, leading in some contexts to increased tensions and violence against and between communities. Unprecedented levels of surveillance of the civilian population have caused anxiety and increasing numbers of arrests, in some instances possibly based on disinformation. Disinformation and surveillance are not unique or new to armed conflicts; however, the greater scope and force-multiplying effect provided by digital technology can exacerbate—and add to—the existing vulnerabilities of persons affected by armed conflicts.22 Developments in artificial intelligence and machine learning are also relevant in this regard.23 IHL does not necessarily prohibit such activities, but it does prohibit acts or threats of violence the primary purpose of which is to spread terror among the civilian population. Moreover, parties to armed conflict must not encourage violations of IHL. Other bodies of law, including international human rights law, might also be relevant when assessing surveillance and disinformation.

The global digital transformation is changing not only warfare but also the nature of humanitarian action. Digital technologies can be leveraged to support humanitarian programmes, for instance by capturing and using data to inform and adjust responses or by facilitating two-way communication between humanitarian staff and populations affected by conflicts.24 For example, the ICRC analyses “big data” to anticipate, understand, and respond to humanitarian crises, and uses internet-based tools to interact with beneficiaries as well as with parties to armed conflicts. The ICRC also uses digital tools to restore family links and, if possible, to facilitate communication between detainees and their loved ones; the ICRC does all this also to help parties to implement their IHL obligations. These new possibilities entail new responsibilities: humanitarian organizations need to

23 See Chapter II(2)(c) on artificial intelligence and machine learning.
strengthen their digital literacy and data-protection measures, in accordance with the “do no harm” principle.\textsuperscript{25} The ICRC encourages further research, discussion, and concrete steps by all relevant actors to enable humanitarian actors to safely adapt their operations to digital changes.

b. Autonomous weapon systems

The ICRC understands autonomous weapon systems as: \textit{Any weapon system with autonomy in its critical functions. That is, a weapon system that can select and attack targets without human intervention.} Autonomy in critical functions – already found in some existing weapons to a limited extent, such as air defence systems, active protection systems, and some loitering weapons – is a feature that could be incorporated in any weapon system.

The most important aspect of autonomy in weapon systems – from a humanitarian, legal and ethical perspective – is that the weapon system self-initiates, or triggers, an attack in response to its environment, based on a generalized target profile. To varying degrees, the user of the weapon will know neither the specific target nor the exact timing and location of the attack that will result. Autonomous weapon systems are, therefore, clearly distinguishable from other weapon systems, where the specific timing, location and target are chosen by the user at the point of launch or activation.

The ICRC’s primary concern is loss of human control over the use of force as a result of autonomy in the critical functions of weapon systems. Depending on the constraints under which a system operates, the user’s uncertainty about the exact timing, location and circumstances of the attack(s) may put civilians at risk from the unpredictable consequences of the attack(s). It also raises legal questions, since combatants must make context specific judgements to comply with IHL. And it raises ethical concerns as well, because human agency in decisions to use force is necessary in order to uphold moral responsibility and human dignity.

Fuller understanding of the legal,\textsuperscript{26} military,\textsuperscript{27} ethical,\textsuperscript{28} and technical\textsuperscript{29} aspects of autonomous weapon systems has enabled the ICRC to refine its

views. It continues to espouse a human-centred approach, based on its reading of the law and ethical considerations for humans in armed conflict.

**Human control under IHL**

The ICRC holds that legal obligations under IHL rules on the conduct of hostilities must be fulfilled by those persons who plan, decide on, and carry out military operations. It is humans, not machines, that comply with and implement these rules, and it is humans who can be held accountable for violations. Whatever the machine, computer program, or weapon system used, individuals and parties to conflicts remain responsible for their effects.

Certain limits on autonomy in weapon systems can be deduced from existing rules on the conduct of hostilities – notably the rules of distinction, proportionality and precautions in attack – which require complex assessments based on the circumstances prevailing at the time of the decision to attack, but also during an attack. Combatants must make these assessments reasonably proximate in time to the attack. Where these assessments form part of planning assumptions, they must have continuing validity until the execution of the attack. Hence, commanders or operators must retain a level of human control over weapon systems sufficient to allow them to make context-specific judgments to apply the law in carrying out attacks.

Human control can take various forms during the development and testing of a weapon system (“development stage”); the taking of the decision to activate the weapon system (“activation stage”); and the operation of the weapon system as it selects and attacks targets (“operation stage”). Human control at the activation and operation stages is the most important factor for ensuring compliance with the rules on the conduct of hostilities. Human control during the development stage provides a means to set and test control measures that will ensure human control in use. However, control measures at the development stage alone – meaning control in design – will not be sufficient.

Importantly, however, existing IHL rules do not provide all the answers. Although States agree on the importance of human control – or “human responsibility” – for legal compliance, opinion varies on what this means in practice. Further, purely legal interpretations do not accommodate the ethical concerns raised by the loss of human control over the use of force in armed conflict.

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Towards limits on autonomy in weapon systems

In the ICRC’s view, the unique characteristics of autonomous weapon systems, and the associated risks of loss of control over the use of force in armed conflict, mean that internationally agreed limits are needed to ensure compliance with IHL and to protect humanity.

Insofar as the sufficiency of existing law – particularly IHL – is concerned, it is clear, as shown above, that existing IHL rules – in particular distinction, proportionality, and precautions in attack – already provide limits to autonomy in weapon systems. A weapon with autonomy in its critical functions that is unsupervised, unpredictable and unconstrained in time and space would be unlawful, because humans must make the context-specific judgments that take into account complex and not easily quantifiable rules and principles.

However, it is also clear that existing IHL rules do not provide all the answers. What level of human supervision, intervention and ability to deactivate is needed? What is the minimum level of predictability and reliability of the weapon system in its environment of use? What constraints are needed for tasks, targets, operational environments, time of operation, and geographical scope of operation?

Moreover, the limits dictated by ethical concerns may go beyond those found in existing law. Anxieties about the loss of human agency in decisions to use force, diffusion of moral responsibility, and loss of human dignity are most acute with autonomous weapon systems that present risks for human life, and especially with the notion of anti-personnel systems designed to target humans directly. The principles of humanity may demand limits on or prohibitions against particular types of autonomous weapons and/or their use in certain environments.

At a minimum, there remains an urgent need for agreement on the type and degree of human control necessary in practice to ensure both compliance with IHL and ethical acceptability.

c. Artificial intelligence and machine learning

Artificial intelligence (AI) systems are computer programs that carry out tasks – often associated with human intelligence – that require cognition, planning, reasoning or learning. Machine learning systems are AI systems that are “trained” on and “learn” from data, which ultimately define the way they function. Both are complex software tools, or algorithms, that can be applied to many different tasks. However, AI and machine learning systems are distinct from the “simple” algorithms used for tasks that do not require these capacities. The potential implications for armed conflict – and for the ICRC’s humanitarian work – are broad.33 There are at least three overlapping areas that are relevant from a humanitarian perspective.

The first area is the use of AI and machine learning tools to control military hardware, in particular the growing diversity of unmanned robotic systems – in the air, on land, and at sea. AI may enable greater autonomy in robotic platforms, whether armed or unarmed. For the ICRC, autonomous weapon systems are the immediate concern (see above). AI and machine learning software – particularly for “automatic target recognition” – could become a basis for future autonomous weapon systems, amplifying core concerns about loss of human control and unpredictability. However, not all autonomous weapons incorporate AI.34

The second area is the application of AI and machine learning to cyber warfare: AI-enabled cyber capabilities could automatically search for vulnerabilities to exploit, or simultaneously defend against cyber attacks while launching counter-attacks, and could therefore increase the speed, number and types of attacks and their consequences. These developments will be relevant to discussions about the potential human cost of cyber warfare. AI and machine learning are also relevant to information operations, in particular the creation and spread of false information (whether intended to deceive or not). AI-enabled systems can generate “fake” information – whether text, audio, photos or video – that is increasingly difficult to distinguish from “real” information and might be used by parties to a conflict to manipulate opinion and influence decisions. These digital risks can pose real dangers for civilians (see above).35

The third area, and the one with perhaps the most far-reaching implications, is the use of AI and machine learning systems for decision-making. AI may enable widespread collection and analysis of multiple data sources to identify people or objects, assess “patterns of life” or behaviour, make recommendations for courses of action, or make predictions about future actions or situations. The possible uses of these “decision-support” or “automated decision-making” systems are extremely broad: they range from decisions about whom – or what – to attack and when, and whom to detain and for how long, to decisions about overall military strategy – even on use of nuclear weapons - as well as specific operations, including attempts to predict, or pre-empt, adversaries.

AI and machine learning-based systems can facilitate faster and broader collection and analysis of available information. This may enable better decisions by humans in conducting military operations in compliance with IHL and minimizing risks for civilians. However, the same algorithmically-generated analyses, or predictions, might also facilitate wrong decisions, violations of IHL and exacerbated risks for civilians. The challenge consists in using all the capacities of AI to improve respect for IHL in situations of armed conflict, while at the same time remaining aware of the significant limitations of the technology, particularly with respect to unpredictability, lack of transparency, and bias. The use of AI in weapon systems must be approached with great caution.

35 See ICRC, Digital Risks in Situations of Armed Conflict.
A human-centred approach

AI and machine learning systems could have profound implications for the role of humans in armed conflict. The ICRC is convinced of the necessity of taking a human-centred, and humanity-centred, approach to the use of these technologies in armed conflict.

It will be essential to preserve human control and judgement in using AI and machine learning for tasks, and in decisions, that may have serious consequences for people’s lives, and in circumstances where the tasks – or decisions – are governed by specific IHL rules. AI and machine learning systems remain tools that must be used to serve human actors, and augment and improve human decision-making, not to replace them.

Ensuring human control and judgement in AI-enabled tasks and decisions that present risks to human life, liberty, and dignity will be needed for compliance with IHL and to preserve a measure of humanity in armed conflict. In order for humans to meaningfully play their role, these systems may need to be designed and used to inform decision-making at “human speed” rather than accelerate decisions to “machine speed”.

The nature of human-AI interaction required will likely depend on the specific application, the associated consequences, and the particular IHL rules and other pertinent law that apply in the circumstances – as well as on ethical considerations.

However, ensuring human control and judgement in the use of AI systems will not be sufficient in itself. In order to build trust in the functioning of a given AI system, it will be important to ensure, including through weapon reviews: predictability and reliability – or safety – in the operation of the system and the consequences of its use; transparency – or explainability – in how the system functions and why it reaches its output; and lack of bias in the design and use of the system.

d. Humanitarian consequences and constraints under IHL related to the potential use of weapons in outer space

Military use of space objects has been an integral part of warfare for several decades. It includes the use of satellite imagery to support the identification of enemy targets and the use of satellite communication systems for command-and-control, and more recently, for remotely controlled means of warfare. The weaponization of outer space would further increase the likelihood of hostilities in outer space, with potentially significant humanitarian consequences for civilians on earth.

The exact scope of the potential humanitarian consequences of the use of weapons in outer space is uncertain. It is clear, however, that the use of weapons in outer space – be it through kinetic or non-kinetic means (such as electronic, cyber or directed energy attacks), using space – and/or ground-based weapon systems – could directly or incidentally disrupt, damage, destroy or disable
civilian or dual-use space objects on which safety-critical civilian activities and essential civilian services depend. This includes the navigation satellite systems (such as BeiDou, Galileo, GLONASS, and GPS) that are increasingly employed in civilian vehicles, shipping, and air traffic controls. Satellites are also critical for the weather services used for disaster prevention and mitigation, and for the satellite phone services on which the delivery of humanitarian assistance and emergency relief is reliant.

The use of weapons in outer space would not occur in a legal vacuum. It is constrained by existing law, notably the Outer Space Treaty,\textsuperscript{36} the UN Charter, and IHL rules governing means and methods of warfare.

The applicability of IHL in outer space is confirmed by Article III of the Outer Space Treaty, which states that international law applies to the use of outer space; and IHL forms part of international law. Furthermore, the International Court of Justice has recalled that the established principles and rules of IHL applicable in armed conflict apply “to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future”.\textsuperscript{37} In terms of treaty law, the four 1949 Geneva Conventions and Protocol I of 8 June 1977 additional to the Geneva Conventions (Additional Protocol I) apply “to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties”.\textsuperscript{38} Article 49(3) of Additional Protocol I shows that the Protocol’s rules on the conduct of hostilities are meant to apply to all types of warfare that may affect civilians on land. This would include hostilities in outer space.

IHL applies to any military operations conducted as part of an armed conflict, including those occurring in outer space, regardless of whether or not the use of force is lawful under the UN Charter (\textit{jus ad bellum}). IHL does not legitimize the use of force in outer space; nor does it encourage the militarization or weaponization of outer space. The sole aim of IHL is to preserve a measure of humanity in the midst of armed conflict, notably to protect civilians.

The Outer Space Treaty prohibits the placement in orbit around the earth of objects carrying nuclear weapons or other weapons of mass destruction, the instalment of such weapons on celestial bodies, and the stationing of such weapons in outer space in any manner. It also forbids the establishment of military bases, installations and fortifications, the testing of any type of weapon, and the conduct of military manoeuvres on celestial bodies; it also requires that celestial bodies be used exclusively for peaceful purposes. For its part, IHL notably prohibits weapons that are indiscriminate by nature, as well as a number of other specific types of weapon. These prohibitions are not limited to the terrestrial domains.

\textsuperscript{36} 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies.

\textsuperscript{37} International Court of Justice, \textit{Legality of the Threat or Use of Nuclear Weapons}, Advisory Opinion, 8 July 1996, para. 86.

\textsuperscript{38} Art. 1(3), Additional Protocol I; Art. 2 common to the four 1949 Geneva Conventions.
Even when resorting to weapons that are not prohibited, a belligerent has to respect the IHL rules governing the conduct of hostilities. These include the principle of distinction, the prohibition against indiscriminate and disproportionate attacks, and the obligation to take precautions in attack and against the effects of attack. Furthermore, attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited. While specific protections, such as the latter, apply to a broad range of military operations, the rules affording general protection to civilian objects apply mostly in relation to attacks. Under IHL, a kinetic operation against a space object would constitute an attack. However, a space object could also be disabled (rendered dysfunctional) without being physically damaged, for example by directed energy/laser weapons or a cyber attack. In the ICRC’s view, such non-kinetic operations would constitute attacks under IHL.

IHL forbids targeting civilian objects in outer space. However, civilian satellites or some of their hosted payloads may also be used by the armed forces, meaning they are of a dual-use nature. They may become military objectives, provided that their use for military purposes is such that they fulfil the definition under Article 52(2) of Additional Protocol I. If such a dual-use satellite or its payload is attacked, the expected incidental harm to civilians and civilian objects, directly or through knock-on effects, must be taken into consideration while assessing the legality of the attack under the principles of proportionality and precautions. Furthermore, the consequences for civilians of putting an end to or impairing the civilian use of the targeted satellite or payload must also be considered. As noted above, disabling the civilian functions of satellites could disrupt large segments of modern-day societies, especially if they support safety-critical civilian activities and essential civilian services on earth.

Another issue of concern is the risk posed by space debris. Debris can be created by a number of space activities. A kinetic attack on a satellite, for example, risks causing far more debris than other space activities. Debris may continue to travel in the orbits in which it was produced for decades or more. Given the speed at which it travels, debris risks damaging other satellites supporting civilian activities and services. This would have to be considered in – and may limit – the choice of means and methods of warfare in outer space.

The ICRC is concerned by the potentially high human cost of the use of weapons in outer space. It recommends that future multilateral processes acknowledge:

- the potentially significant humanitarian consequences, for civilians on earth, of the use of weapons in outer space
- the protection afforded by the IHL rules that restrict belligerents’ choice of means and methods of warfare, including in outer space.39

As with the development of any new means or methods of warfare, the weaponization of outer space is not inevitable but a choice. States may decide to set limits in this regard for a range of reasons, including humanitarian ones. The fact that IHL applies does not prevent States from agreeing on additional rules to prohibit or limit specific military activities or weapons in outer space, as they did in the Outer Space Treaty. States may decide that further prohibitions or limitations may be warranted to reduce the risks of the significant civilian harm that could ensue from the use of weapons in outer space.

e. Challenges posed by certain new technologies of warfare to legal reviews of new weapons

As noted above, the development and use of new technologies of warfare, such as autonomous weapon systems or military cyber capabilities, do not occur in a legal vacuum. As with all weapon systems, they must be capable of use in compliance with IHL, particularly its rules on the conduct of hostilities. The responsibility for ensuring this rests with every State that is developing, acquiring and using these new technologies of warfare. In this respect, legal reviews are as critical now as they were when Article 36 of Additional Protocol I was conceived during the Cold War arms race. To assist States in implementing this obligation, in 2006, the ICRC published A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977. What follows is drawn from that Guide and addresses new questions regarding the challenges to legal reviews posed by new technologies of warfare.

Every State party to Additional Protocol I is obliged to determine whether the employment of a new weapon, means or method of warfare that it studies, develops, acquires or adopts would, in some or all circumstances, be prohibited by international law. In the ICRC’s view, the requirement to carry out legal review of new weapons also flows from the obligation to ensure respect for IHL under Article 1 common to the Geneva Conventions. Besides these legal requirements, all States also have an interest in assessing the lawfulness of new weapons. Legal reviews are a critical measure to help ensure that a State’s armed forces can conduct hostilities in accordance with that State’s international obligations. They also help prevent the costly consequences of approving and procuring a weapon the use of which is likely to be restricted or prohibited.

40 Sweden and the United States, for example, first established mechanisms for legal review in 1974, three years before the adoption of Additional Protocol I.
Weapon systems of all types should be subjected to legal review, including physical systems (hardware) and digital systems (software). This extends to military cyber capabilities intended for use or expected to be used in the conduct of hostilities. It also includes software components that form part of the weapon system (the “means” of warfare) or the way in which the system will be used (the “method” of warfare), such as software that controls a physical system or supports decision-making processes for use of that weapon system. Since a weapon cannot be assessed in isolation from the way in which it will be used, the normal or expected use of the weapon must be considered in the legal review.

Weapons that include a software component that permits the critical functions of selection and attack of targets (the defining characteristics of autonomous weapon systems) to be triggered by the weapon system’s environment, rather than by a commander, make it challenging to assess whether the weapon can be used in compliance with IHL rules. A reviewer will need to be satisfied that the proposed weapon’s design and method of use will not prevent a commander from exercising the judgement required by IHL. If the reviewer is not satisfied of this, they must not allow the weapon to be used; alternatively, they may need to impose limitations on the weapon’s use to ensure the commander’s ability to comply with IHL.

Foreseeing the effects of weapon systems through testing may become increasingly difficult, as weapon systems become more complex or are given more freedom of action in their tasks, and therefore become less predictable, such as weapon systems that incorporate machine learning. Unpredictability in the functioning of the system, and the interaction of the system with a dynamic environment, cannot be simulated in advance of use. This challenge will be compounded, in some cases, by the inability of the commander to understand how a weapon system using artificial intelligence – particularly machine learning – reaches its output from a given input, which makes it difficult (if not impossible) to foresee the consequences of its use.

For legal reviews to be effective, States that develop or acquire new weapon technologies need to navigate these complexities. Therefore, legal reviews of weapons, means and methods of warfare, relying on these new technologies may need to be conducted at an earlier stage of weapon development, and at shorter intervals, than for more traditional technologies, and may need to be repeated during development. The unique characteristics of new technologies and the related processes of legal review require new standards of testing and validation. States should also share information about their legal-review mechanisms and, to the extent feasible, about the substantive results of their legal reviews, especially where a weapon’s compatibility with IHL may be in question – so that other States will not encounter the same problems and can benefit from reviewing States’ conclusions on whether the use of the weapon in question is prohibited or restricted by IHL. When States exchange information about conducting legal reviews of new technologies, it can help build expertise and identify good practices, and also assist States that wish to establish or strengthen their own mechanisms.
III. Needs of the civilian population in increasingly long conflicts: Selected issues

The needs of civilian populations affected by armed conflict are multifaceted and complex. They range from protection from direct harm, and against the effects of hostilities, to basic needs such as food, water and medical care, education for children, psychosocial support, knowing the fate and whereabouts of missing family members, and hearing from a loved one in detention. Civilians may also need protection against crime, including sexual violence.

To ensure that people are effectively protected, and their suffering diminished, action is needed on at least three interconnected levels. First, it is the responsibility of parties to armed conflicts to implement their international legal obligations, many of which are concerned with safeguarding the fundamental rights and meeting the needs of the civilian population. Second, individuals and communities are agents of their own protection who will know their needs. With sufficient information and support, they may find ways to overcome the difficulties created by armed conflict. Their efforts to protect themselves must not be hindered. And third, humanitarian action needs to be designed with people, their needs, and their specific vulnerabilities at the centre. This means that their perspectives and knowledge of the context must be incorporated in the design and implementation of a humanitarian response, and their questions and concerns regarding humanitarian action taken seriously.

The protracted nature of many of today’s armed conflicts has an impact on the needs and vulnerabilities of civilian populations. Many humanitarian needs arise early in a conflict, but they may change, accumulate, and become exacerbated over time. For instance, protracted conflicts destroy elements of...
essential infrastructure, such as schools and hospitals, or seriously degrade them to the point that they become unusable. When conflicts are not resolved, displaced persons, far too often, are effectively deprived of the possibility of returning voluntarily, in safety and with dignity, to their homes. And where support services and systems collapse, new barriers arise for persons with disabilities. Such obstacles, especially if prolonged, feed rather than dissipate tensions.

Fundamental IHL norms on the protection of the civilian population in armed conflict apply from the start of an armed conflict at least until its end. IHL applies regardless of the length of a conflict; its rules prohibit certain conduct at all times and aim to alleviate the humanitarian consequences of warfare whenever they arise. This chapter presents the ICRC’s views on the ways in which IHL—complemented by other bodies of international law—protects (1) internally displaced persons; (2) persons with disabilities; and (3) children’s access to education.

1. Internally displaced persons

At the end of 2018, 41.3 million people were displaced within their own country by armed conflict and violence—the highest figure ever recorded. Many have been displaced for long periods or forced to move multiple times, including due to protracted conflicts. In armed conflicts, internally displaced persons (IDPs) are often among the most vulnerable civilians. They can become separated from their families or go missing and live precariously. As the world’s population becomes ever more urbanized, people are increasingly displaced to, between, or within cities. Cities are theatres of war but can also become places of refuge. A recent ICRC study—on strengthening the humanitarian response to urban displacement in cities at war—found that people who wish to flee to avoid danger may be prevented from doing so and those who have fled may remain at risk during displacement. Critical civilian infrastructure may be damaged or destroyed by conflict, leading to service disruption, further affecting people’s living conditions and potentially causing new displacement. When IDPs seek safety in cities spared from the hostilities, they often face problems because they lack official documentation and adequate access to essential services, accommodation and employment.

In armed conflicts, IHL protects IDPs as civilians. Better respect for IHL can contribute to reducing the scale of displacement, in addition to protecting those displaced. Human rights law complements the protection afforded by

46 ICRC, *Displacement In Times Of Armed Conflict: How International Humanitarian Law Protects In War, And Why It Matters*, 2019, available at: www.icrc.org/en/document/ihl-displacement. This study is an exploratory research, which does not necessarily reflect the institutional views of the ICRC, that deals with the role and contribution of respect of IHL in relation to displacement.
IHL, but the precise relationship between the two bodies of law is subject to further clarification and evolution. As displacement remains a reality for far too many people, a stronger focus on prevention and protection is needed. This is an integral part of the ICRC’s commitment to putting people and their needs at the centre of its action. In this connection, it is essential to continue working to influence and change the behaviour of parties to conflict, in order to ensure greater respect for IHL and other rules protecting IDPs. Strengthening protection for IDPs is a subject that requires further reflection.47

The civilian character of IDP camps

Camps may be necessary as an exceptional measure but should not be the default solution to displacement. In the short term, camps can facilitate the provision of emergency assistance. In the long-term, however, they can prevent people from resuming a normal life and can undermine traditional coping mechanisms. Moreover, in some armed conflicts, non-State armed groups infiltrate or settle in camps, affecting the protection of civilians. Their presence has – at times – resulted in direct attacks against a camp by their adversary, or in child recruitment and sexual violence by their members, particularly against women and girls. It is critical to protect civilians and the civilian – and humanitarian – character of camps.

Measures to ensure the civilian character of camps must, however, comply with applicable law. For instance, to prevent armed groups from entering camps, authorities may establish screening processes to identify and, where relevant, separate these individuals. However, such screening can lead to family separation and to persons going missing. Those identified as security threats – usually men and boys – are often taken into custody, and experience has shown that this is not always done in conformity with the law. Movement in and out of camps may be restricted, which often also narrows IDPs’ access to livelihoods and essential services. Restrictions on movement, for instance imposed in screening processes or on persons living in camps, can also, in some cases, amount to deprivation of liberty. Whether restriction of movement rises to the level of deprivation of liberty depends on the actual situation; ultimately, the difference between the two lies in the degree or intensity of the specific restriction.

Preserving the civilian and humanitarian character of camps is fundamental to protecting IDPs. IHL can contribute to realizing this objective. Under this body of law, camps qualify as civilian objects and are entitled to protection against direct attacks, unless and for such time as they, or parts of them, become military objectives. Since combatants, fighters and civilians who

directly participate in hostilities may be subject to direct attack, their presence in the vicinity of or within camps presents a danger to the camps and their inhabitants. To maintain the civilian character of camps, it is thus essential to distinguish combatants and fighters from civilians, as well as civilians who directly participate in hostilities from those who do not. However, even when camps, or parts of them, are used for military purposes in a manner that would make them military objectives, parties to conflict must respect all rules related to the conduct of hostilities, including the principles of distinction, proportionality and precautions. Importantly, the mere presence of armed forces or armed groups within a camp does not, in itself, make all or part of that camp a military objective. Additionally, parties must take all feasible precautions to protect camps under their control against the effects of attacks, notably by avoiding, to the extent feasible, locating military objectives inside camps or in their vicinity.

The ICRC and the Office of the UN High Commissioner for Refugees (UNHCR) published an aide-mémoire to address the dilemmas that arise in maintaining the civilian and humanitarian character of camps, clarify how legal frameworks can contribute to resolving these dilemmas, and provide operational guidance to humanitarian and other actors. It provides an overview of IHL rules that can contribute to safeguarding the civilian character of camps; the aide-mémoire also gives an overview of other measures – including those based on other bodies of law – that can be taken to maintain the humanitarian character of camps.

Durable solutions

Armed conflicts are, increasingly, protracted; so is displacement. Durable solutions – voluntary return, local integration or resettlement in another part of the country – are needed to end displacement. Authorities often regard return as the only solution, even though some IDPs may prefer to stay and integrate locally or resettle elsewhere in the country. Returning to their homes may be the preference of a great number of IDPs. But, it may not be an option when an armed conflict is ongoing; and displaced people might, over time, feel less compelled to return, as they gradually establish themselves in their place of displacement. If voluntary, safe and dignified choices of durable solutions are not promoted, the plight of IDPs can worsen. For instance, IDPs forced to return to dangerous areas may be particularly vulnerable and may face threats to their fundamental rights. Those who have returned prematurely, or whose efforts to integrate locally are not supported, may find themselves without access to adequate housing, education, and employment, or ostracized by receiving communities.

In situations of armed conflict, greater respect for IHL can contribute to finding durable solutions to the plight of IDPs. Importantly, under IHL, if

displacement results from evacuations carried out by parties to the armed conflict – for the security of the civilians involved or imperative military reasons – it must last only for as long as the conditions warranting it exist.49 Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.50 As part of this, the competent authorities have a duty to take measures to facilitate the voluntary and safe return and reintegration of displaced persons, as provided in some IDP-related legal instruments. Measures that parties to armed conflict can take include mine clearance; provision of assistance to cover basic needs; rehabilitation of schools; or facilitating visits by displaced persons to assess conditions in their potential place of return.

Unlike in certain legal instruments, IHL does not explicitly provide for durable solutions other than the right to return. However, greater respect for certain of its rules can contribute to facilitating all durable solutions. For instance, ensuring respect for the rules and principles on the conduct of hostilities protecting civilian objects can help limit the degradation or destruction of critical civilian infrastructure that provides essential services. As explosive remnants of war are among the main obstacles to safe return and resettlement in another part of the country, respect for weapons treaties can help preserve or create the conditions necessary to achieve a durable solution. In fact, explosive remnants of war continue to pose a serious risk to people’s lives, impede access to homes and essential services, and exacerbate difficulties for those trying to rebuild their lives long after the end of active hostilities or even of the conflict. Finally, ensuring respect for the duty of parties to armed conflict to provide families of persons reported missing due to conflict with any information it has on their fate can facilitate the reintegration of IDPs upon return, or local integration.

Building on and going beyond IHL, the UN Guiding Principles on Internal Displacement and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa explicitly recognize the right of IDPs to return to their former homes, integrate at the location to which they were displaced, or resettle in another part of the country. Under human rights law, these durable solutions are derived from the right to freedom of movement and residence.51 Freedom of movement is also essential for IDPs to have access to livelihoods, education and health care, and to achieve a durable solution to their displacement. Restrictions on movement not only take away these possibilities but can also lead to family separation and create obstacles to family reunification. Although IHL does not contain a right to freedom of movement and residence, ensuring better respect for certain of its rules can contribute to allowing or facilitating freedom of movement. For instance, the obligation to take all feasible


51 This right may be subjected to limitation and can be derogated from in times of public emergency.
precautions to protect civilians and avoid causing incidental harm to them might require parties to the conflict to allow civilians to leave an area, or evacuate them from it, if they are endangered by hostilities.\textsuperscript{52}

For the reasons outlined in this section, ensuring better respect for IHL can help not only to prevent displacement but also increase the chances that durable solutions will be available for IDPs. It is therefore important to constantly come back to the basics—that is compliance with IHL and other relevant rules—to prevent the root causes of much of the suffering created by displacement.

2. The protection of persons with disabilities

For persons with disabilities, armed conflict often further raises existing barriers or puts up new ones regarding access to services and support—such as food, water, shelter, sanitation, health care, education, rehabilitation and transportation. Conflict-specific barriers may be physical (e.g., destruction of physical infrastructure vital for access to services), communicational (e.g., lack of accessible information on available humanitarian relief), or attitudinal (e.g., denial of participation by persons with disabilities in humanitarian activities because of the prejudiced view that persons with disabilities cannot communicate their own wishes and needs or contribute to the design of humanitarian responses). Persons with disabilities may face multiple or intersecting forms of discrimination not only on grounds of their disability but also because of age or gender norms. For instance, women and girls with disabilities may have more limited financial means, which further raises barriers to services and support for them.

Persons with disabilities may not be able to flee ongoing military operations occurring near them and might be left behind by family members or other support persons. They are at greater risk of attacks and violence, including sexual violence. They may also acquire new impairments during armed conflicts, for instance because of conflict-related injuries or traumatic experiences.

Protracted armed conflicts exacerbate the impact of the above-described consequences of armed conflict on persons with disabilities, because of the large-scale breakdown of support services and systems that they cause. Such conflicts demand greater attention to individual experiences from humanitarian organizations and a prioritization not only of the short-term, but also the long-term needs of persons with disabilities, such as needs related to education. However, a major barrier to greater inclusion of persons with disabilities in humanitarian responses is the lack of their meaningful participation in those responses and the scarcity of good-quality disability data. As a result, they often remain invisible.

The ICRC, in line with the ambitions of the Movement, has committed to strengthening disability inclusion in its protection and assistance activities and among its own staff. It is working towards incorporating the perspectives of

\textsuperscript{52} See Chapter II(1)(a) on the protection of the civilian population in situation of sieges.
persons with disabilities in the design, implementation and review of its humanitarian response. The ICRC also strives to promote more systematically the protection of persons with disabilities under relevant international legal frameworks, especially IHL and the Convention on the Rights of Persons with Disabilities (CRPD).

The interplay between IHL and human rights law, in particular the CRPD

The relationship between IHL and human rights law protecting persons with disabilities, in particular the CRPD, has received significant attention in recent years. Article 11 of the CRPD addresses armed conflicts and imposes an obligation on States Parties to ensure the safety and protection of persons with disabilities in accordance with both IHL and human rights law.

It is important to unpack this obligation, especially since IHL has been repeatedly criticized as taking an outdated, medicalized approach to persons with disabilities, focusing merely on a person’s individual condition (i.e. the impairment) that requires medical treatment. For this reason, IHL has sometimes been considered inadequate for addressing barriers that persons with disabilities face in other protection and assistance matters. Critics believe that IHL conflicts with the contemporary social model of disability underlying the CRPD, which characterizes disability by the interaction between persons’ impairments (for instance, physical, psychosocial, intellectual or sensory) and a variety of barriers that hinder their full and effective participation in society on an equal basis with others.53

However, IHL addresses the specific capacities, experiences and perspectives of persons with disabilities in armed conflict beyond the purely medical realm. Even where persons with disabilities are not expressly mentioned in relevant IHL rules, they enjoy general protection as civilians or persons hors de combat during armed conflict. IHL rules protecting civilians or persons hors de combat are especially strong in those instances when individuals find themselves in the power of a party to a conflict, in particular an adverse party to a conflict. This includes not only situations like detention but also such circumstances as living in a territory controlled by a party to a conflict.

Under IHL, parties to conflict must treat all civilians and persons who are hors de combat without “adverse distinction”. This may, and in some cases does, require the taking of all feasible measures to remove and prevent the raising of any barriers that persons with disabilities might face in gaining access to services or protection provided under IHL on par with other civilians and persons hors de combat.54 When interpreted to include these positive obligations, IHL converges

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53 See Preamble, para. (e), and Art. 1(2) of the CRPD.
54 Art. 3 common to the four 1949 Geneva Conventions (Common Art. 3); Art. 27, Fourth Geneva Convention; Art. 75, Additional Protocol I; Art. 4, Additional Protocol II.
with obligations to advance the *de facto* equality of persons with disabilities under human rights law, in particular the CRPD.

IHL is sensitive to the context in which it is applied. For instance, the obligation to treat civilians and persons *hors de combat* humanely means respecting an individual’s physical and mental integrity as well as his or her inherent dignity. Today, the ICRC understands this obligation to mean that parties to armed conflict are required to consider not only the individual condition of a person, including his or her impairment, but also environmental factors, i.e. how his and her capacities and needs differ due to the socio-cultural, economic and political structures in place.

Admittedly, the terminology used in the 1949 Geneva Conventions and Additional Protocols I and II with regard to persons with disabilities was a product of those times, of that social and cultural context (e.g. references to “the infirm” and “mental disease”, using the term “disability” to describe an impairment in the context of the definition of “wounded and sick” persons). It is outdated in light of contemporary understanding of disability. This, however, does not detract from the fact that – already then – persons with disabilities were identified as requiring specific protection in armed conflict. Moreover, a contemporary reading of IHL shows more complementarity than contradiction between IHL and human rights law, particularly the CRPD, in two important ways. First, it stresses the commonalities between IHL and the CRPD. Second, it shows that the different scopes of application of IHL and the CRPD lead to additional protection for persons with disabilities during armed conflict. In this respect, it is worth noting that IHL imposes uncontested obligations on non-State armed groups, whereas the CRPD binds only States Parties to it.\(^{55}\) Moreover, IHL may minimize or prevent harm to persons with disabilities from conflict-specific risks, including from the conduct of hostilities.

In a recent paper entitled “How law protects persons with disabilities in armed conflict”, the ICRC presented its views on how the commonalities between IHL and the CRPD, as well as additional IHL-based protection, can inform humanitarian activities that are more inclusive of persons with disabilities.\(^{56}\) The following paragraphs present some examples.

**Complementary roles of IHL and human rights law regarding persons with disabilities**

IHL and human rights law, including the CRPD, require humane treatment of detainees, without discrimination.\(^{57}\) Specific measures are thus required to ensure

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\(^{55}\) This issue is discussed further in Chapter IV(2) on the legal regime protecting persons living in territory under the control of non-State armed groups.


\(^{57}\) See, for instance, Common Art. 3; Arts 13 and 16, Third Geneva Convention; Art. 27, Fourth Geneva Convention; Art. 75, Additional Protocol I; Art. 4, Additional Protocol II; ICRC Customary IHL Study, Rules 87–88; Art. 10, International Covenant on Civil and Political Rights; Art. 14(2) CRPD.
that persons with disabilities can obtain basic services and facilities on an equal basis with other detainees. During its visits to places of detention, the ICRC has observed that detainees with disabilities were provided information about available services or facilities in accessible formats by detaining authorities, who had also adapted infrastructure to enable better access for detainees with physical impairments.

The Geneva Conventions also explicitly require detaining powers to provide specialized services and support for the medical and rehabilitative needs of prisoners of war with disabilities (e.g. physiotherapy or psychosocial counselling services), and assistive devices (e.g. crutches, prostheses, ocular devices) to both prisoners of war and civilian internees.

In another vein, IHL rules on the conduct of hostilities – in particular the obligation to take all feasible precautions – may minimize or prevent conflict-specific harm to persons with pre-existing impairments if they are civilians or persons hors de combat. Feasible precautions can include taking measures to help them leave the vicinity of military objectives or evacuating them for their own safety. The Fourth Geneva Convention explicitly provides for the possibility of local agreements to evacuate persons with disabilities for their own safety from besieged or encircled areas.

**Participation of persons with disabilities in decisions concerning humanitarian action**

The CRPD, by requiring States Parties more generally to collect disability disaggregated data to implement obligations under the CRPD, and by identifying specific barriers confronting persons with disabilities, reinforces the expectation on humanitarian organizations to collect data on persons with disabilities in humanitarian needs assessments. Furthermore, to ensure respect for their dignity and the necessary specificity in humanitarian responses, the principle of humanity implies meaningful participation of persons with disabilities in those responses. This converges with the explicit State obligations under the CRPD to ensure participation of persons with disabilities in all decisions concerning them. Data collection and meaningful participation of persons affected are also among the explicit obligations in certain weapons treaties to assist persons who have acquired impairments as a result of the use of weapons in armed conflict.

Finally, the rules of IHL that justify or even require taking measures to ensure non-adverse distinction also provide the basis for prioritized or specific humanitarian relief for persons with disabilities as parts of populations affected in territory under the control of a party to a conflict. In this respect, IHL converges with related obligations under the CRPD. Relevant measures include ensuring the accessibility of water, sanitation or shelter; providing support for transportation to obtain food and health care; or presenting accessible information on available relief (e.g. by using sign language, Braille or large print).

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58 See, for instance, Art. 5(1) and (2)(f), Convention on Cluster Munitions.
59 See, for instance, Common Art. 3; Art. 70, Additional Protocol I; Art. 18(2), Additional Protocol II.
IHL also implicitly recognizes the need to proactively identify persons with disabilities in the distribution of humanitarian relief when impartial humanitarian organizations assist parties to an armed conflict in meeting their obligations.

3. Access to education

Too often, education is rapidly and profoundly disrupted during armed conflict. Disruption occurs when students, educational personnel, and education infrastructure are directly targeted or incidentally harmed and damaged in attacks; when military use of educational facilities impedes learning and exposes schools to attack by opposing forces; and when armed forces and armed groups recruit children or commit acts of sexual violence against them in or near schools. In addition, schools are frequently closed by authorities owing to surrounding hostilities and conflict-exacerbated resource constraints. The protection of education continuity is particularly challenging where its importance as an essential public service is undervalued by warring parties – “education can wait” – or where the delivery of education itself is a contested issue in the conflict, and thus becomes a target of attack for belligerents.

The disruption of education has long-term effects that can persist for generations. For instance, the killing of one teacher, or the destruction of one school building, can deprive an age cohort of children of education for years. In situations of protracted conflict, the degradation of basic services, including education, has a cumulative impact on children and the community. The consequences of disrupting education can also be gender-distinct: girls may be more likely to be kept home for fear of sexual violence; girls who drop out may be less likely to return; boys may be more likely to be recruited as combatants. The gravity of these consequences is confirmed by the communities with whom the ICRC works, who consistently cite education as a priority concern in situations of armed conflict; the protection of education continuity is correspondingly an important facet of the ICRC’s people-centred approach.

In recognition of these persistent challenges, the ICRC developed its Framework for Access to Education and an accompanying strategy for 2018–2020. In tandem, the Movement adopted a resolution at the Council of Delegates in 2017, titled “Education: Related humanitarian needs”. Together, these outline operational and policy measures to strengthen responses to the impact of armed conflict and other violence on educational services. They also affirm that efforts to foster compliance with IHL rules that protect access to education are needed to address the persistent challenge of ensuring education continuity during armed conflict.61


61 Though not the focus of this discussion, the provisions of human rights law governing the right to education continue to apply in situations of armed conflict in complement to the IHL rules addressed here.
The protection of education under the IHL rules on the conduct of hostilities

Under the IHL rules governing the conduct of hostilities, students and educational personnel are usually civilians and as such are protected from attack, unless and for such time as they directly participate in hostilities. Similarly, schools and other educational facilities are usually civilian objects and thus protected against attack, unless they are turned into military objectives. Even if they become military objectives, all feasible precautions must be taken prior to attack to avoid or at least minimize incidental harm to civilian students, personnel and facilities. Attacks expected to cause excessive harm to civilians or damage to civilian objects are prohibited.

These IHL obligations bear particular significance for three challenges that regularly disrupt the delivery of education.

The first of these challenges arises when education is a contested stake in a conflict. This includes those situations in which education is directly targeted because the language, history, or value-system taught in schools is, or is perceived to be, a vehicle for recruitment or generator of community support for one party to the conflict.62 The first prong of the definition of a military objective under IHL requires that the educational facility in question must—by its nature, location, purpose or use—make an effective contribution to military action. Accordingly, if an educational facility merely generates support for a party to the conflict, it will not fulfil the definition of a military objective. This differentiation is crucial. For example, where the content of education provided at a school is of an ideology that increases the level of community support for one party to the conflict, this does not make a direct effective contribution to military action, even if it strengthens political commitment, or encourages recruitment or support for the war effort of an enemy party to the conflict. As a result, the school does not qualify as a military objective under IHL and must not be attacked.

A second challenge is whether belligerents assign sufficient value to the expected civilian harm from attacks affecting educational facilities or personnel. This value is part of the assessment required by the prohibition against attacks causing excessive civilian harm. Conceptually, the assessment process involves assigning values to the concrete and direct military advantage anticipated and to the expected incidental civilian harm; the protection of educational facilities is therefore influenced by the amount of value that military personnel assign to them in this process. The value of civilian objects is linked to their usefulness to civilians; accordingly, schools should be ascribed high civilian value. This is particularly the case given the long-term consequences of attacking a school, which may include the total loss of access to education for children in that

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62 This is one among many reasons for which a school might be targeted, including where a school is more generally seen as being symbolic of one side of the conflict, or as an important point of infrastructure in resource-poor environments.
community and the corresponding impact on the daily life of the local civilian population.

A third challenge is military use of schools. While there is no specific treaty or customary IHL rule prohibiting the use of schools or other educational facilities for military purposes, such use does not occur in a legal vacuum. The military use of a particular school must be assessed in light of the obligations of parties to the conflict, as applicable, to take all feasible precautions to protect civilians and civilian objects under their control against the effects of attacks by an opposing party; to afford children special respect and protection; to comply with IHL rules on cultural property as applicable to buildings dedicated to education; and to facilitate access to education. The lawfulness of the military use of a school will be determined by the application of these rules to the specifics of a given case.63

Belligerents seeking to take steps to reduce the disruption to education caused by military use of schools may choose to implement the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict.64 While in and of themselves not legally binding, the Guidelines provide useful practical recommendations as to how belligerents may reduce the impact of their military operations on the delivery of education.65

**Obligations to facilitate access to education during protracted conflicts**

IHL also contains rules that specifically require parties to conflict to facilitate access to education. Two of these may be particularly relevant in protracted conflict if either the law of occupation or Additional Protocol II applies. The strength of the obligation to facilitate access to education articulated by these instruments demonstrates the intention of the drafters of the four Geneva Conventions in 1949 and the Additional Protocols in 1977 to recognize children’s education as an essential service to be protected from disruption.

In situations of occupation, Article 50(1) of the Fourth Geneva Convention provides that the Occupying Power “shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children”. The use of the term “shall” indicates that the Occupying Power is legally bound to take measures necessary to assure continuity of children’s education in occupied territories. The verb “facilitate” encompasses two elements. The first is that the Occupying Power must avoid interfering with the proper working of educational institutions for children, in line with the general obligation to maintain the *status quo ante*. This includes refraining from

63 Certain States and non-State armed groups have also opted to adopt domestic laws, military orders, policies or practices that expressly regulate the military use of schools. See Human Rights Watch, *Protecting Schools from Military Use: Law, Policy, and Military Doctrine*, 2019, pp. 47–123.


requisitioning staff, premises, or equipment that are being used to deliver education. Abstention from interference is not, however, enough to fulfil the obligation established in Article 50(1). The second element of “facilitation” is that the Occupying Power must take positive action. For example, when the resources of educational institutions are inadequate, the Occupying Power must ensure that they receive the necessary materials to enable education to continue. This may include support for rebuilding institutions damaged by the conduct of hostilities.

In non-international armed conflicts to which Additional Protocol II applies, Article 4(3)(a) thereof requires that children “shall be provided with the care and aid they require, and in particular: they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care”. With the use of the term “shall”, this provision establishes the legal duty of State and non-State parties to ensure education continuity in the territory under their control, and to take concrete steps to this end. Article 4(3)(a) is of particular relevance to education when its substance is contested by a party to the conflict, because this rule specifies that children’s education must be in keeping with the wishes of their parent or caregivers. It thereby de-anchors the content of education from the preferences of the parties to the armed conflict. The provision also recognizes the importance of education for maintaining cultural links: at the time of drafting, Article 4(3)(a) was introduced by a cross-regional and multi-faith group of States to ensure the continuity of children’s cultural and moral links to their homes.66

Article 4(3)(a) of Additional Protocol II may be complied with in different ways. Depending on the barriers to education in a given context, ensuring that children receive an education may need the allocation of funding for teachers’ salaries, running costs of schools, or educational materials for students; the construction of educational facilities for displaced children; and coordination with humanitarian organizations to ensure access to education.

66 The Holy See introduced the provision on behalf of several co-sponsors: Austria, Belgium, Egypt, Greece, the Holy See, Nicaragua, Saudi Arabia, and Uruguay.
IV. IHL and non-State armed groups

A central feature of the changing geopolitical landscape of the last decade has been the proliferation of non-State armed groups. In some of the most complex recent conflicts, analysts observed hundreds, if not thousands, of groups engaging in armed violence. Their size, structure and capabilities vary widely. While large groups with centralized and well-defined command-and-control structures continue to arise or to exist, other groups are decentralized in their structure and operate in fluid alliances. In this myriad of armed actors, the motivation for violence seems increasingly blurred between political, religious, and criminal interests.

Pursuing its mission to protect the lives and dignity of persons affected by armed conflict and other situations of violence, in 2019 the ICRC is interacting with over 400 armed groups throughout the world. Significant humanitarian and protection needs arise, for instance, when non-State armed groups take detainees or gain control over territory and populations and need to ensure the rights, safety, and dignity of the people affected. In its engagement with non-State armed groups, the ICRC seeks primarily to negotiate safe humanitarian access to assist populations affected, and to alleviate suffering by ensuring that all parties implement and uphold IHL and humanitarian principles. To influence their behaviour, the ICRC pursues different approaches: with certain groups, it works to integrate IHL and humanitarian principles into their operations and doctrine (including codes of conduct); with others, it seeks to understand and invoke traditional or religious rules that the group follows and that reflect IHL.

The multiplication of armed groups, their diverse nature, and the different ways in which they operate make it increasingly difficult for humanitarian organizations to operate safely and engage effectively with non-State armed


groups on IHL compliance. Moreover, numerous legal challenges arise in relation to the evolving operations of non-State armed groups. These include questions regarding the applicability of IHL to situations of violence involving multiple armed groups, and questions on the protection that IHL, and possibly other fields of international law, provide for persons affected by armed conflict. In this chapter, the ICRC presents its views on (1) the applicability of IHL to conflicts involving multiple non-State armed groups; (2) the legal regime protecting persons living in territory under the de facto control of non-State armed groups; and (3) legal and practical dilemmas regarding detention by armed groups.

1. The applicability of IHL to conflicts involving multiple non-State armed groups

The presence of fluid, multiplying, and fragmenting non-State armed groups makes it increasingly challenging – factually and legally – to identify which armed group can be considered party to a particular armed conflict. This classification is of great legal and practical importance: it determines whether IHL applies to the relationship between a group and its adversary. This can have significant consequences, for instance, regarding the legal regime applicable to the use of force or deprivation of liberty by States in their operations against armed groups.

In many conflicts today, it is becoming increasingly difficult to identify groups and distinguish them from one another as they engage in fighting in the same place and against the same adversary. The ICRC and others have often described non-State armed groups as, increasingly, being organized horizontally rather than vertically, and that sociologically speaking, some of them may not even constitute one single group at all. This also gives rise to IHL questions about exactly which group or sub-group can be considered to be a party to a conflict. Similarly, as larger organized armed groups splinter, which of the resulting sub-groups remains a party to the conflict and which one does not?

The applicability of IHL to “alliances” or “coalitions” of non-State armed groups

To classify a situation of violence as a non-international armed conflict, two criteria are widely acknowledged to be the most relevant: confrontations must take place between at least two organized parties and the level of violence must have reached a certain level of intensity. When many different armed groups are involved in violence, evaluating these criteria becomes increasingly complex.

One particular scenario is that of “alliances” or “coalitions” of distinct non-State armed groups that appear to be fighting together against a State or a non-State actor.

In such cases, if the level of intensity is determined by looking at each of the organized armed groups in their separate belligerent relationship with a State or another non-State armed group, the conclusion might be that the threshold of intensity required for non-international armed conflict is not reached in each and every relationship. The consequence would be that IHL does not apply to that relationship, and that the State would need to use law enforcement means (regulated by human rights law) to respond to the threat posed by that group. Yet, the reality of the situation is that it would be unrealistic to expect States to operate under different paradigms – either the law-enforcement or the conduct-of-hostilities paradigm – to respond to the different groups that operate together. In fact, these groups pool and marshal their military means in order to defeat the State. When several organized armed groups display a form of coordination and cooperation, it might be more realistic to examine the intensity criterion collectively by considering the sum of the military actions carried out by all of them fighting together.

More often, probably, there will be situations in which additional groups join forces with groups already engaged in a conflict. In a pre-existing non-international armed conflict in which several organized armed groups are coordinating and collaborating in an alliance or coalition, the nature of the military support provided by the additional group will be key to determining whether that group qualifies as a party to the armed conflict.

The applicability of IHL to splinter groups

It is also quite common for organized armed groups to splinter, leading to the emergence of new, often smaller, groups. Factions split off, forming their own new command structures.

In each of these cases, once the faction that has split off no longer falls under the hierarchical structure and chain of command of the original non-State party to the conflict, the question arises whether the newly formed group qualifies as a party to a conflict.

To answer this question, each group must be evaluated separately; and the first question to analyze is whether the group displays the organization required for non-State armed groups to qualify as parties to armed conflicts.

A second question is whether the confrontations between the group and its adversary have crossed a certain threshold of violence, such that the relationship

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70 Identifying the exact moment this cut occurs is difficult and depends on the circumstances. Indicators suggesting an effective breakaway include statements by the original non-State party recognizing the separation; declarations by the splinter group recognizing the separation; eruption of hostilities between the splinter group and the original non-State armed group; adherence by the original non-State armed group to a peace process while the splinter group continues to fight.
between them is now one of armed conflict. This has to be assessed on a case-by-case basis, taking into account the realities of fluid armed conflicts.

In some cases, the fighting in which the new group is engaged is entirely separate from previous hostilities, and its involvement in violence so diminished that the armed conflict threshold will not be reached. A State engaged in fighting it will have to resort to law enforcement means.

In other cases, the new organized armed group might in fact continue to fight alongside the group to which its members formerly belonged, essentially continuing the same military operations. The splintering of the two groups will make little difference for their adversary, which continues to face the same fighters, but in two separate groups. In such a situation, the contribution by the splinter group, when considered by itself, might be relatively small; but the reality for the opposing side is that the splinter group adds to the military capacity of an existing adversary.

A more difficult question will arise if the original group disengages from the conflict but the new group continues to engage in the hostilities. This has sometimes been the case, for instance, when peace agreements are concluded but splinter factions reject them and continue to fight. In such situations, the splinter group – while remaining organized – might be weakened or reduced in size, and its confrontations with the State might not reach the threshold of intensity that is required under IHL. Should the State then be required to revert to law enforcement measures even if the group continues to engage in acts of a military nature? Should the criterion for the end of a non-international armed conflict be applied, namely that hostilities have ceased and there is no real risk of their resumption? Would the classification of the situation depend on whether the State can reasonably foresee that the threshold of violence will again rise to the level of armed conflict? Or should the intensity be assessed on the basis of the intensity that existed before the group split off?

As conflicts become ever more complex, and the seemingly endless variety of non-State armed groups continues to pose factual and legal puzzles, the ICRC encourages continued reflection on how the fluidity of armed groups and the interaction between them affect the application of the legal criteria relevant for determining their involvement in non-international armed conflict.

2. The legal regime protecting persons living in territory under the control of non-State armed groups

Concomitant to the many contemporary non-international armed conflicts and the multiplication of non-State armed groups, a significant number of armed groups exercise de facto control over territory and persons living therein. Such control may take various forms. In some contexts, armed groups exercise military control over territory while State organs continue to be present and provide certain services – such as health care, education, or public welfare. In other contexts, non-State armed groups exercise de facto control over territory and State forces
or organs are no longer present. In these situations, and in particular if territorial control is prolonged, some non-State armed groups may develop State-like capacities and provide services for the population.

For civilian populations, living under the de facto control of a non-State armed group can exacerbate pre-existing needs and vulnerabilities, create new ones, or – in other instances – provide a degree of stability in conflict-ravaged environments. Regardless of whether civilians live under the control of a State or non-State party to a conflict, their essential concerns remain the same: they need security, work and livelihoods, respect for their basic rights, and education for their children.

Unlike in international armed conflict, there is no law of occupation for non-international armed conflict, meaning there are no IHL rules explicitly designed to regulate the relationship between non-State armed groups and persons living under their control. This could give the impression that international law leaves non-State armed groups unrestrained in these situations; however, IHL does, in fact, provide essential humanitarian rules protecting civilians in armed conflicts. Beyond these rules, there is debate about the applicability of human rights law to non-State armed groups.

The applicability of IHL in territory under the de facto control of armed groups

When non-State parties to armed conflicts control territory over an extended period of time, IHL continues to apply and provide protection to civilians.

IHL applies for the entire duration of a conflict. In protracted conflicts, hostilities may stall or freeze for certain periods without a peaceful settlement being reached by the parties. As was discussed in the ICRC’s 2015 report on IHL and the challenges of contemporary armed conflicts, various views exist on the applicability of IHL in these situations. In the ICRC’s view, non-international armed conflicts end when hostilities cease and there is no real risk of their resumption, which is rarely the case when control over territory remains contested among belligerents.71

For as long as IHL applies, its rules, which contain fundamental humanitarian protections, apply to the treatment by non-State armed groups of persons living under their control. Within territory controlled by a State or non-State party to a conflict, parties to the conflict are bound by IHL in connection with all acts having a “nexus” or link to the armed conflict. The nexus requirement has been understood to mean that an act must be “shaped by or dependent upon the environment – the armed conflict – in which it is

committed” – in other words, that the armed conflict played an essential role in a person’s ability, decision, and objective to engage in certain conduct.\(^\text{72}\) The nexus requirement ensures that the relationship between the State and the population, or between members of the population, continues to be regulated only by its obligations under human rights law, unless an act has a nexus to the conflict. It has been argued that in territory under the \textit{de facto} control of a non-State party to a non-international armed conflict, only acts with a narrow link to the conflict would have such a nexus: thus, acts of the non-State armed groups that aim primarily to maintain law and order among the civilian population, or the provision of essential services, would fall outside the scope of IHL, and would be governed by other bodies of law, including human rights law. The other view, submitted here, is that the way in which non-State armed groups exercise control over, and interact with, persons living in territory under their \textit{de facto} control is inherently linked to the conflict in question. The armed conflict plays a substantial part in the group’s ability to control the lives of those living under its control and the manner in which such control is exercised. As a result, IHL applies and therefore protects persons living in territory under the \textit{de facto} control of non-State armed groups.

\textit{Protective rules provided by international law and their limitations}

IHL provides fundamental and non-derogable protection for those affected by conflict. It protects the lives and dignity of civilians and addresses their acute humanitarian needs.

IHL obliges non-State armed groups to treat civilians living under their control humanely and without any adverse distinction. It prohibits all acts of violence against life and person; it prohibits pillage; and it requires parties to conflict to respect the convictions and religious practices of civilians under their control and to take special care not to damage or destroy cultural property. IHL defines a legal protection framework for persons deprived of their liberty and prohibits the passing of sentences without a fair trial; it provides rules protecting displaced persons; it establishes a framework regulating humanitarian assistance for the civilian population; it requires parties to conflict to collect, protect and care for the wounded and sick; and, as indicated above, Additional Protocol II protects the continuous education of children.

IHL applicable in non-international armed conflict does not, however, contain rules addressing issues such as the provision of public order and safety, the possible collection of taxes, or the adoption of laws regulating life in such territory.\(^\text{73}\) IHL applicable in non-international armed conflict tends to be less


\(^{73}\) In contrast, rules addressing such issues exist for situations of occupation in international armed conflict. See Arts. 43, 48, and 49, The Hague Regulations of 1907. See also Art. 64, Fourth Geneva Convention.
elaborate, or silent, on the protection of certain other rights, in particular the political, economic, social, and cultural rights of the population.\textsuperscript{74} Issues pertaining to the relationship between citizens and authorities are primarily the purview of human rights law. Ensuring continued protection of the human rights of persons living in territory under the \textit{de facto} control of armed groups is, however, challenging as a matter of law and practice.

First, unlike IHL, human rights treaties bind only States. In the view of committees of human rights experts and of courts, States have an obligation to take steps to protect— to the extent possible— the rights of persons living in their territory but under the \textit{de facto} control of a non-State armed group. And second, it is a matter of controversy whether human rights law also binds non-State actors. In a number of instances, States—notably though resolutions adopted in UN organs such as the Security Council, the General Assembly, or the Human Rights Council—have called on non-State armed groups that exercise \textit{de facto} control over territory to comply with human rights law in addition to respecting their IHL obligations. In the absence of relevant treaty law and owing to limited State practice, however, the applicability of human rights law to non-State armed groups is an issue that remains unsettled. Essential questions remain unanswered, such as the source, scope, and limitation of non-State armed groups’ potential human rights obligations, and the relationship between these potential obligations and those of the territorial State. Moreover, while non-State armed groups are, clearly, able to refrain from violating basic human rights, many will not have sufficient capacity to comply with the more sophisticated obligations deriving from human rights law, in particular obligations to take positive measures to protect and fulfil human rights.

To overcome these legal challenges and engage in protection-related dialogue with all parties to armed conflict, the ICRC takes a pragmatic approach and operates on the premise that “human rights responsibilities may be recognized \textit{de facto}” if a non-State armed group exercises stable control over territory and is able to act like a State authority.\textsuperscript{75} It is difficult to conclude that all non-State armed groups have human rights obligations as a matter of law; however, this approach recognizes that the needs of the civilian population living under the \textit{de facto} control of a non-State armed group may warrant the engagement of humanitarian and human rights organizations with such groups on a broader scope of issues than those tackled by IHL applicable in non-international armed conflict. This is particularly important in protracted conflicts.

\textsuperscript{74} Dedicated human rights treaties—such as the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Rights of the Child, or the CRPD—also provide rights addressing certain categories of people and complementing IHL rules.

3. Detention by non-State armed groups

More than 80 armed groups hold detainees in the countries in which the ICRC operates. Where possible, the ICRC engages with non-State armed groups, as it does with all parties to armed conflict, to ensure that the dignity and physical integrity of detainees are respected, and that they are treated in accordance with IHL and humanitarian principles; and, whenever necessary, to help detaining authorities to fulfil their obligations.

Deprivation of liberty puts people in a vulnerable situation. This vulnerability can be aggravated by various factors, such as by whom they are held and the context and reasons for their detention. Detention by non-State armed groups often presents several practical and legal challenges. These derive primarily from the significant diversity of non-State armed groups: this diversity is related to their differing operational realities, organizational structures, material capabilities, knowledge and acceptance of international law, and motivation or ideology.

The treatment of detainees, and the judicial or other procedures – if any – applied to their deprivation of liberty, also vary, depending on the reasons for their detention. Persons deprived of their liberty by armed groups include members of an adversary’s security forces and individuals suspected of supporting the adversary; persons arrested for common crimes in territories under their de facto control; an armed group’s own members; or hostages, the latter necessarily held in violation of IHL. The reasons for which armed groups deprive individuals of their liberty are often multiple and overlapping: ensuring their security and weakening an adversary by rendering its forces hors de combat; maintaining “law and order”; or ensuring discipline within their own ranks. They also detain with the aim of exchanging detainees with the adversary; to demonstrate their power by holding detainees; or to extract money.

IHL contains a set of basic rules protecting all detainees held in relation to non-international armed conflict, including those held by non-State armed groups. It has rules that clearly prohibit violence to life and person. While common Article 3 is silent on conditions of detention, Additional Protocol II – when applicable – and customary IHL rules require parties to armed conflict to provide humane conditions of detention for all conflict-related detainees. Moreover, IHL prohibits the passing of sentences and the carrying out of executions without a fair trial.

The complex realities outlined above pose legal challenges at different levels, many of which are yet to be resolved. For certain rules, such as those on the treatment of detainees and their conditions of detention, the challenge may be one of ensuring that non-State armed groups know and accept the law and integrate its provisions into their internal rules and organizational culture; have practical guidance to implement IHL in different operational contexts; and dispose of the requisite material resources to ensure humane conditions of

detention. More complex legal issues arise regarding the prohibition against arbitrary detention; IHL rules on fair trials; procedural safeguards required for internment; and the prohibition against detainee transfers in violation of the principle of *non-refoulement*. For instance, fair-trial obligations require that sentences be based on “law” and be pronounced by a “regularly constituted court”, such as those commonly operating in State legal systems. Moreover, in the ICRC’s view, ensuring that internment does not amount to arbitrary detention requires that grounds for internment be defined in a document binding for the detaining forces, and internment decisions be reviewed by an “independent and impartial review body”.\(^77\) It remains to be clarified what these and other legal notions mean in the context of detention by armed groups, and how armed groups can implement such rules.

The combination of practical challenges and a lack of clarity on, and respect for, legal norms protecting detainees in the hands of non-State armed groups often creates significant humanitarian needs. It is important to identify ways in which different armed groups can implement applicable IHL rules. The ICRC also continues to adapt its strategies for using IHL and humanitarian principles to improve protection for detainees in the hands of non-State armed groups.

V. Terrorism, counterterrorism measures, and IHL

In recent years, States have had to confront a threat emanating from individuals and non-State armed groups that resort to acts of terrorism. In response, States and international organizations have developed increasingly robust counterterrorism measures. There is no doubt that it is legitimate and necessary for States to act at the national, regional and international level to ensure their security and the security of their population. Acts of terrorism negate the basic principle of humanity and go against the principles underlying IHL. The ICRC condemns acts of terrorism regardless of their perpetrators, whether or not they are committed in the context of armed conflict.

At the same time, the ICRC is concerned about the humanitarian consequences of counterterrorism operations. In many contexts, especially in Africa, the Middle East and Asia, counterterrorism operations have been conducted in the context of armed conflict by State armed forces – alone, in coalitions, or under the auspices of an international organization. The ICRC is worried by the frequently held misperception that IHL does not apply or applies in a modified manner to groups or persons designated as terrorists, and to their families.

This chapter (1) seeks to clarify some aspects of the applicability of IHL to counterterrorism operations; (2) draws attention to the fact that counterterrorism measures can have real and adverse effects on the humanitarian work of impartial humanitarian organizations, including the ICRC; and (3) discusses the status and protection of foreign fighters and their families under IHL, focusing in particular on the needs of women and children.

1. The applicability of IHL to States fighting “terrorism” and non-State armed groups designated as “terrorists”

The ICRC has, for many years now, been observing three key challenges to the applicability of IHL to counterterrorism operations.
First, some States deny that IHL applies to their counterterrorism operations – even in the face of plainly obvious situations of armed conflict – out of a concern that recognizing the existence of an armed conflict could somehow legitimize “terrorists”. This concern is as prevalent today as ever – despite the fact that IHL norms (notably common Article 3) expressly recognize that the applicability of IHL does not confer any legal status on a non-State party to an armed conflict. Denying that non-State armed groups designated as “terrorists” can be party to a non-international armed conflict is problematic, as it greatly impedes application of the fundamental rules that IHL sets out for both State and non-State parties to conflict (for instance, the rules on the conduct of hostilities or the rules governing humanitarian access), and may jeopardize the effective application of the protection contained therein.

Second, there is a tendency among some States to consider any act of violence by a non-State armed group in an armed conflict as an act of terrorism, and therefore necessarily unlawful, even when the act in question is not in fact prohibited under IHL. This approach is likely to diminish any incentive to comply with IHL.

Third, some States have developed a discourse according to which the exceptional threat posed by non-State armed groups designated as “terrorist” requires an exceptional response. Some States are dehumanizing adversaries and employing rhetoric to indicate that actors designated as “terrorist” are undeserving of the protection of international law, including IHL: this is an alarming trend, and the ICRC has been following it closely.

Fortunately, these positions are not shared by all stakeholders involved in the fight against terrorism. Many States recognize that IHL applies to their counterterrorism operations when the conditions for its application are met. The determination as to whether an armed confrontation involving such groups amounts to an armed conflict, or is part of one, needs to be made objectively and exclusively on the basis of the facts on the ground and the recognized criteria for conflict classification under IHL.

Thus, if a non-State armed group that has been designated as “terrorist” is sufficiently organized for the purposes of IHL, and is involved in sufficiently intense armed confrontations with the State or other armed groups, the situation will amount to a non-international armed conflict, and will be governed by IHL. In contrast, situations of violence involving individuals or groups designated as “terrorist” but remaining below the threshold of armed conflict are not governed by IHL. In such situations, human rights law will govern counterterrorism operations.78

78 In addition to IHL and human rights law, international and regional instruments addressing terrorism may apply, such as the International Convention for the Suppression of Terrorist Bombings (1997), the International Convention for the Suppression of the Financing of Terrorism (1999), the Council of Europe Convention on the Prevention of Terrorism (2005), or the Shanghai Convention on Combating Terrorism (2001). In the ICRC’s view, instruments aimed at combating terrorism should never define those acts as “terrorist” that are governed by IHL and not prohibited by it when committed during armed conflict, such as attacks against military objectives or military personnel.
Claims of “exceptionalism” have also resulted in overly permissive interpretations of IHL rules. Examples include broad interpretations of who may be lawfully targeted, under which persons involved in financing organized armed groups designated as “terrorist”, for instance, are targeted; a laxing in interpreting the principle of proportionality, permitting excessive incidental loss of civilian life, injury to civilians, and/or damage to civilian objects; and a selective approach to the rules governing deprivation of liberty of persons designated as “terrorists”, justifying, for instance, prolonged solitary confinement, deprivation of family contact, or the impossibility of challenging the lawfulness of the detention.

Such permissive interpretations risk becoming new standards far below those that have been accepted for decades. They may lead to the dismantlement of the basic protection afforded by IHL to victims of armed conflict, including persons hors de combat, who remain protected even if they have been designated as “terrorists”. States should reaffirm the fact that IHL is a balanced body of law and its rationale still valid. IHL permits neutralizing and overcoming the enemy while preserving standards of humanity in armed conflict. IHL includes rules allowing, for instance, lethal force to be directed against lawful targets based on the principle of military necessity, or the internment of enemies for imperative reasons of security. IHL does not hinder States from fighting terrorism effectively, while setting out a baseline of humanity that all States have agreed to respect, even in the most exceptional situations.

2. Counterterrorism measures and principled humanitarian action

Efforts, undertaken within the framework of counterterrorism measures, to curb direct and indirect support to so-called “terrorist organizations” have led to increased monitoring of and restraints on all activities seen as providing support or assistance to non-State armed groups or individuals designated as “terrorists”.

It is clear from various armed conflicts in the past decade that counterterrorism measures also adversely affect the ability of impartial humanitarian organizations— including the ICRC— to carry out their humanitarian activities and conduct principled humanitarian action in conflict settings. This is particularly true in areas where armed groups designated as “terrorists” are active and where principled humanitarian action is most needed. In some contexts, counterterrorism measures have prevented humanitarian relief and protection from reaching those most in need.

Among the various counterterrorism measures developed by States and international organizations, some are of particular concern: penal laws criminalizing any form of support to individuals or groups designated as “terrorists”; sanctions regimes aimed at ensuring that no resources benefit such individuals and groups; and ever stricter and more cumbersome counterterrorism clauses in funding agreements between donors and humanitarian organizations. A growing body of research shows that these measures, inadvertently or
deliberately, have impeded – or even prevented – impartial humanitarian action, to the detriment of those in need.79 They can affect a variety of humanitarian activities, many of which are elements of the ICRC’s mandate: visiting and providing humanitarian assistance to detainees (including family visits); delivery of aid to meet the basic needs of the civilian population in hard-to-reach areas; medical assistance to wounded and sick fighters; first-aid training; war surgery seminars; or IHL dissemination to weapon bearers.

In 2011, the ICRC raised this issue publicly and expressed its concern about the impact of counterterrorism measures on humanitarian action.80 The ICRC has reiterated its position on various occasions, notably through statements before the UN General Assembly Sixth Committee and the UN Security Council.

Counterterrorism measures adopted by States and international organizations should not contradict the humanitarian principles that States have supported politically or endorsed through IHL treaties, and should not hinder impartial humanitarian organizations from carrying out their activities in a principled manner.

In legal terms, counterterrorism measures impeding principled humanitarian action are incompatible with the letter and spirit of IHL. For example, a number of counterterrorism measures criminalize one or more of the following acts: engagement with non-State armed groups designated as “terrorist”; presence in areas where these groups are active; or delivery of medical services to wounded or sick members of such groups. Such prohibitions are incompatible with three areas of IHL: the rules governing humanitarian activities, including the entitlement of impartial humanitarian organizations to offer their services and the obligation to allow and facilitate the relief activities undertaken by such organizations; the rules protecting the wounded and the sick as well as those providing medical assistance, notably the prohibition against punishing a person for performing medical duties in line with medical ethics; and the rules protecting humanitarian personnel.

Recent experience has shown that corrective or mitigating measures can carve out a humanitarian space in the counterterrorism realm. In particular, a number of “humanitarian exemptions” have been adopted in recent instruments. The objective of such exemptions is to exclude from the scope of application of counterterrorism measures exclusively humanitarian activities undertaken by impartial humanitarian organizations such as the ICRC. They have proven to be an effective way to preserve humanitarian activities, in line with the letter and

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spirit of IHL. They also demonstrate that fighting terrorism and preserving IHL and humanitarian activities are perfectly compatible.

Despite some useful and interesting avenues such as humanitarian exemption clauses, effective policy and legal mitigation measures preserving principled humanitarian action are still all too rare. Counterterrorism concerns are prominent in the current political environment, and humanitarian space is shrinking steadily.

Many stakeholders have released statements or adopted resolutions underscoring the need for counterterrorism measures to comply with IHL (see, for instance, UN Security Council Resolution 2462 of March 2019 on combating the financing of terrorism) and not impede principled humanitarian action (see, for instance, UN General Assembly Resolution A/RES/72/284 of June 2018 on the UN Global Counter-Terrorism Strategy). It is now necessary to close the gap between these commitments and the practical measures needed to implement them. Having adopted these resolutions, States and international organizations must now find ways to effectively resolve the tension between counterterrorism measures and principled humanitarian action. The ability of impartial humanitarian organizations to carry out their exclusively humanitarian activities, and to provide relief to those who need it most, is at stake.

3. Status and protection of foreign fighters and their families

The phenomenon of “foreign fighters and their families” – nationals of one State who travel abroad to fight alongside a non-State armed group in the territory of another State, and the families of these persons – has grown in recent years.81 A great deal of media attention within the context of the conflicts in Iraq and Syria has been directed towards the activities and fate of foreign fighters and their families. But it is imperative to recall that the wider population – beyond the media’s spotlight – also continues to suffer the devastating effects of armed conflict: people have been separated from their families; they have been displaced internally and across borders; they have been injured and killed; and their livelihoods have been destroyed. The scale of humanitarian needs arising from these conflicts is enormous, and the ICRC is working to address this suffering in a number of ways.82 During this work, and alongside the pressing needs of the local population, the ICRC has identified specific concerns with regard to the treatment of foreign fighters and their families.

The phenomenon is characterized by the diversity of individual cases and the corresponding difficulty of discussing the applicable legal framework in general rather than in case-specific terms. The nature of an individual’s
association with a non-State armed group, the individual’s nationality, and which State has jurisdiction over the individual: these are a few of the many factors that differ from case to case. Thus, generalizations about foreign fighters and their families risk omitting facts from which important legal consequences flow: for example, children may accompany family members or they may have travelled to fight alongside the non-State armed group themselves (in which case they themselves are “foreign fighters”); they may have suffered the crime of unlawful recruitment and have committed crimes themselves. Similarly, caution must be exercised to avoid oversimplification with regard to women in this context. Women may have travelled voluntarily to areas where such armed groups are active, or may be victims of trafficking; they may be both perpetrators and victims of war crimes (including though not limited to sexual violence); and may have fulfilled a wide range of roles as members or civilian affiliates of a non-State armed group.

States have taken a variety of measures to quell the perceived or potential threat posed by foreign fighters and their families, including the use of force, detention, travel bans and revocation of nationality. While most security measures taken are of a law enforcement nature and therefore governed by human rights law, IHL – where applicable – must also be considered and respected.

The applicability of IHL to foreign fighters and their families

“Foreign fighter” is not a term of art in IHL. There is no specific regime – and there are no rules – under IHL dealing explicitly with foreign fighters and their families. IHL deals with these individuals as it does with any other person involved in or affected by armed conflict. It governs the actions of foreign fighters and their families, as well as any measures taken by States in relation to them, when these actions and measures are taken in the context of an ongoing armed conflict. Therefore, the applicability of IHL to a situation of violence in which foreign fighters and their families are present depends on whether the criteria for the existence of an armed conflict, in particular those set out in Articles 2 and 3 common to the 1949 Geneva Conventions, are met.

When foreign fighters are engaged in military operations, relevant IHL rules on the conduct of hostilities govern their conduct. They are thus subject to the same IHL principles and rules that bind any other belligerent in the conduct of their military operations.

When foreign fighters and their families are in the power of a belligerent, notably when deprived of their liberty, they must benefit from the same protection provided by IHL rules as any other person in such a situation.

83 The term “foreign fighter and their families” is used here for convenience, in awareness of the fact that the term may carry a risk of stigmatization. The ICRC observes that stigmatization affects persons associated with armed groups designated as “terrorist” – and indeed can affect a wide range of individuals who have had any contact with such groups – regardless of whether they are third-country nationals.
Accordingly, in non-international armed conflicts, common Article 3 and customary IHL – as well as Additional Protocol II as applicable – will govern their treatment. Importantly, these rules require, *inter alia*, that grounds and procedures are provided by the detaining party when foreign fighters and their families are interned for imperative reasons of security, that judicial guarantees are respected where individuals face criminal charges, and that no one is transferred to an authority if there are substantial reasons to believe that the person would be in danger of being subjected to certain fundamental rights violations if transferred. In addition, differential treatment is required on bases such as a person’s state of health, age, and sex. Pursuant to customary IHL, children are entitled to special respect and protection – including if they are detained for reasons related to an armed conflict – and family life must be respected as far as possible.

The designation of foreign fighters and their families as “terrorists”, as well as any perception that they pose an exceptional security threat, have no bearing on the applicability and application of the relevant IHL rules, including those containing the protection to which these individuals are entitled. At the same time, IHL in no way prevents States from prosecuting foreign fighters for violations of law that they may have committed in relation to an armed conflict.84

The fact that IHL applies to foreign fighters and their families during armed conflict does not mean that IHL applies to all security measures taken by States against these persons. Only States that are parties to the armed conflict in which foreign fighters and their families are involved are bound by IHL. IHL rules in relation to foreign fighters and their families apply first of all in the territory in which the armed conflict is taking place. In addition, it is submitted that IHL also applies throughout the territories of all the States involved in a non-international armed conflict extraterritorially, even if hostilities related to that conflict are not taking place in their territory.85 In the ICRC’s view, foreign fighters and their families who are in the territory of these intervening States (notably through transfer or repatriation) benefit from the protection afforded by the applicable IHL rules – including those governing detention, family contact, and the special protection of children – in addition to applicable domestic and human rights law.

In any other situation, measures against foreign fighters and their families taken by States that are not party to an armed conflict are governed by other bodies of law, notably human rights law. All States must ensure that their counterterrorism activities and security measures against persons designated as foreign fighters and their next of kin – including prosecution and deprivation of liberty – comply with the relevant international laws and standards.

84 More specifically, in the absence of a combatant privilege and immunity under the law governing non-international armed conflict, States retain under domestic law the possibility of criminalizing acts by foreign fighters – regardless of whether or not they are lawful under IHL.
International law rules protecting children associated with foreign fighters

The need to affirm that international law must govern the treatment of foreign fighters and their families arises from a persistent legislative trend that treats these individuals as exceptional cases to whom existing law does not apply. Three issues related to the treatment of children in the foreign-fighter context are emblematic of this trend.

First, States are reticent to apply the law and standards governing the treatment of children associated with armed groups (commonly referred to as “child soldiers”) to children in the foreign-fighter context who have been trained and/or used in hostilities. However, children termed “foreign fighters” remain entitled to these legal protections. Notably, States party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict are obliged, when necessary, to accord to unlawfully recruited children all appropriate assistance for their physical and psychological recovery and their social reintegration; and to cooperate for the rehabilitation and social reintegration of such children, including through technical and financial assistance.86

The second issue relates to the principle of the best interests of the child. It is a core obligation under Article 3 of the Convention on the Rights of the Child that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Decisions regarding, for example, how to repatriate and reintegrate children in the foreign-fighter context are actions to which this obligation applies, regardless of the age of the child and the nature of their involvement with a non-State armed group.

The third, related issue is the right of all children not to be separated from their parents against the parents’ will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. This right is set out in Article 9(1) of the Convention on the Right of the Child and must be respected by States Parties in the various situations of detention and repatriation that arise for foreign-fighter families.

Specific humanitarian concerns with regard to female foreign fighters and female family members

The ICRC has specific humanitarian concerns regarding the current treatment and future situation of foreign fighters and their families. The stigma and level of threat ascribed to these fighters may place them at particular risk of violations of their fundamental rights. The treatment and fate of the many women in these circumstances is at times overlooked, and requires case-by-case consideration. For

86 Arts. 6(2) and 7 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000).
example, thousands of foreign women are located in camps, many of them accompanied by children. Regardless of their potential culpability under domestic or international law, these women have a distinct set of needs and face specific physical and psychological risks. Their distinct needs include basic female hygiene items, and medical care for pregnant women, nursing mothers, and those who have experienced sexual violence (though importantly, sexual violence affects women, men, boys and girls in such contexts). The specific risks they face include retributive violence or collective punishment for their perceived role as foreign fighters’ “brides”; statelessness of their children arising from nationality laws or policies that limit women’s ability to confer citizenship; and prosecutions that fail to take account of the broad range of roles and experiences of women in the foreign-fighter context.

The ICRC emphasizes that authorities who hold foreign fighters and/or their family members must treat them humanely and in accordance with international law. It recognizes that humanely and lawfully resolving the situation of foreign nationals during or after an armed conflict is inevitably complex and takes time. What happens to foreigners is often dependent on varied legal frameworks and political decisions. Measures other than local resettlement, such as repatriation or third-State resettlement, require the cooperation of multiple States. Consequently, steps to identify and secure the best solution for each foreigner should be taken as soon as possible.
Climate change and environmental degradation affect populations across the globe, threatening lives and exacerbating existing vulnerabilities, inequalities, and social fragility. People, communities, and countries affected by armed conflict tend to be especially vulnerable to the consequences of climate change because conflicts limit their capacity to adapt and protect themselves. This is in part because conflicts—and especially protracted ones—harm assets required to facilitate adaptation to climate change, such as infrastructure, markets, institutions, social capital, and livelihood. Within those countries, vulnerable populations are disproportionately affected by food insecurity, loss of livelihood opportunities, health impacts and displacement, which are compounded by environmental degradation and climate change. People will keep trying to cope with and adapt to a degraded environment, growing risks of floods, droughts, extreme heat and poverty by searching for new livelihood strategies, changing their way of life or leaving their homes.

To bolster the sustainability of its humanitarian response, the ICRC has committed itself, in its institutional strategy for 2019–2022, to helping conflict-affected communities reduce their vulnerability by reinforcing their ability to adapt to the combined consequences of conflict and climate shocks. The strategy reaffirms a long-standing commitment to mitigating the impact of environmental degradation and climate change on people and to enhancing the ICRC’s own environmental policies. As part of this commitment, the ICRC is also revising its 1994 Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict to promote greater respect for existing IHL rules protecting the natural environment from the effects of armed conflict.

The Guidelines were annexed to the Report of the Secretary-General on the United Nations Decade of International Law (UN Doc. A/49/323, 1994); UN General Assembly Resolution 49/50 (1994) invited all States to give due consideration to the possibility of incorporating the Guidelines in their military manuals and other instructions for military personnel.
Effects of armed conflict on climate and the environment

Over 80% of all major armed conflicts between 1950 and 2000 took place directly in biodiversity hotspots that sustain around half the world’s plants and many rare species of animals. Armed conflicts have always been a threat to the environment, and environmental degradation in turn affects the well-being or even the survival of people. They can lead to environmental degradation and destruction, including by contaminating land and soil, with effects frequently extending over large areas, including to coastal and marine zones, and to water sources. These consequences of conflict can remain in place for years or decades after a war.

The environment is at risk from direct attacks or from the use of certain means or methods of warfare. It is also at risk from damage and destruction to the built environment – including industrial complexes, combustible storage and processing facilities, factories and plants, agricultural facilities, and solid- and hazardous-waste sites – across urban and rural areas. Attacks against, or incidental damage to, extractive mines and chemical facilities can lead to water, soil and land contamination, or release pollutants into the air. Explosive remnants of war can also severely affect the environment by contaminating the soil and water sources, and harming wildlife. In certain circumstances, the environmental consequences of armed conflict can also contribute to climate change. For instance, the destruction of large areas of forest can have detrimental climatic consequences. Damage to infrastructure, such as oil installations and big industrial facilities, can force large volumes of greenhouse gases and other airborne pollution into the atmosphere.

In addition to the effects resulting from the acts of parties to armed conflicts, certain indirect effects of armed conflict are also important. These include the collapse of governance; the diminution or erosion of institutional capacities in environmental management and of the coping mechanisms employed by the civilian population; and the deterioration of entire infrastructure service systems owing to lack of proper operation and maintenance over prolonged periods of time. Furthermore, when local populations are forced to avoid or abandon certain areas, including because of environmental damage, it can lead to the unsustainable exploitation of other areas, putting the environment under even greater stress. Another important contributor to environmental damage is the exploitation of natural resources to sustain war economies or for personal gain.

The revised ICRC Guidelines for the Protection of the Natural Environment in Situations of Armed Conflict

The environment is frequently one of the casualties of war – but the damage is often not visible and environmental damage tends not to be the priority of warring parties.

A certain amount of environmental harm is inherent in armed conflict, but it cannot be unlimited. IHL does not address all environmental consequences of armed conflict, but it does contain rules that provide protection to the natural environment and that seek to limit the damage caused to it.

The revision of the 1994 Guidelines seeks to reflect current treaty and customary IHL. The revised Guidelines represent a selection of existing IHL rules and seek to provide clarification on the interpretation of these rules and their sources. Although the focus is on IHL, the Guidelines recall that other rules of international treaty and customary law protecting the natural environment may continue to apply in armed conflicts. The Guidelines aim to act as a reference tool that parties to conflicts can use to protect the natural environment—a tool that can help them to adopt concrete measures to promote, implement, and apply IHL rules.

Under IHL, there is no agreed legal definition of the term “natural environment”. According to the Commentary on Article 55 of Additional Protocol I, the notion of the natural environment includes everything that exists or occurs naturally and is therefore not man-made, such as the general hydrosphere, biosphere, geosphere, and atmosphere (including fauna, flora, oceans and other bodies of water, soil, and rocks). In addition, the natural environment includes natural elements that are or may be the product of human intervention, such as foodstuffs, agricultural areas, drinking water, and livestock. It is of particular significance that this understanding does not refer exclusively to organisms and inanimate objects in isolation; rather, the term “natural environment” also refers more broadly to the system of inextricable interrelationships between living organisms and their inanimate environment. Considering the above, and as also noted in the Commentary of Article 55, the term “natural environment” should be understood in the widest sense possible, in line with the meaning States have given this term in the context of IHL. This approach takes into account the fact that the notion of the “natural environment” may evolve over time, based on increased knowledge but also as the environment itself is subject to constant change.

IHL contains a family of rules that protect the natural environment during armed conflict. The first type of protection that IHL offers is contained in the rules that specifically protect the natural environment as such. These include the prohibitions against using means or methods of warfare that are intended, or may be expected, to cause long-term, widespread and severe damage to the natural environment. As mentioned in the ICRC’s report on strengthening IHL in 2011, the meaning of “widespread, long-term and severe” is subject to debate. Therefore, the revised Guidelines seek to clarify these terms, while recognizing that further refinement remains necessary. IHL also explicitly prohibits attacking the natural environment in reprisal. These rules, which were

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adopted in 1977, were among the first to explicitly protect the natural environment in times of armed conflict, following the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. The recognition among the drafters of Additional Protocol I of the need to protect the natural environment, particularly at a time when this was still quite a novel idea, was a significant step towards affirming the importance of this protection.

The second type of protection is contained in general IHL rules that protect the natural environment, without this being their primary purpose. Importantly, it is generally recognized today that, by default, the natural environment is civilian in character. On this basis, all parts or elements of the natural environment are civilian objects, unless parts of it become military objectives. Its various parts therefore benefit from the corresponding protection under IHL, in particular the general principles and rules on the conduct of hostilities, i.e. the principles of distinction, proportionality, and precautions. The applicability of these principles to the natural environment is widely recognized but challenges can arise in practice.

An attack cannot be directed against parts of the natural environment unless it is directed against a specific element of the natural environment that has become a military objective. This may be the case if, by its nature, location, purpose or use, a distinct part of the natural environment makes an effective contribution to military action, and if its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. As the intrinsic character of the natural environment is civilian, it can never by its “nature” make an effective contribution to military action, but it may make an effective contribution to military action by its location, purpose, or use. For example, a hill may contribute effectively to the military action of enemy forces if it provides them with a vantage point over their adversary’s camp. The foliage in a specific forested area may also contribute effectively to military action by providing cover for a troop manoeuvre. However, the concept of an “area” must not be interpreted so broadly that a large expanse of forest is deemed a military objective simply because combatants are located in a small portion of it. Furthermore, the contribution to military action must be “effective” and made to the actual war-fighting capabilities of the adversary and not merely towards its war-sustaining capabilities.\textsuperscript{90} For instance, an area of the natural environment where the mining of high-value natural resources takes place does not make an effective contribution to military action even though it may generate significant revenue for the war effort.

Based on its civilian character, the natural environment is also protected against “incidental damage; it is prohibited to launch an attack against a military objective which may be expected to cause damage to parts of the natural environment constituting civilian objects which would be excessive in relation to the military advantage anticipated. Bearing in mind that an assessment of

whether damage would be “excessive” must be made in each individual case, taking into account the circumstances ruling at the time, an example of disproportionate incidental damage would be to cause an entire forest to burn when attacking a single, small enemy campsite of minor importance. It is the ICRC’s position that the foreseeable indirect, or reverberating, incidental effects of an attack must also be considered in the proportionality assessment. This is of particular importance for the protection of the natural environment, which is often affected indirectly rather than directly by hostilities. Whether an effect is reasonably foreseeable will depend on the facts of each case; however, the assessment should be informed by past practices and empirical data. Finally, in the conduct of military operations, including during troop movements or the establishment of military bases, constant care must be taken to spare civilian objects, including parts of the natural environment. Lack of scientific certainty regarding the effects on the natural environment of certain military operations does not absolve a party to conflict from taking precautions.

The natural environment is also protected by other IHL rules that seek to prevent or limit damage. These include rules on specially protected objects, such as works and installations containing dangerous forces and objects indispensable to the survival of the civilian population, as well as rules on enemy property and pillage. Moreover, protection is also granted to the natural environment through the rules on the use of certain weapons, including the prohibition against using herbicides as a method of warfare; rules on incendiary weapons; the prohibitions against using poison or poisoned weapons, biological weapons and chemical weapons; rules on landmines; and rules to minimize the impact of explosive remnants of war.

It is not enough that there are important IHL rules protecting the natural environment during armed conflict; they must be better disseminated, implemented and enforced, as well as reaffirmed and clarified. Ultimately, respect for IHL can limit the impact that armed conflict can have on the natural environment and on climate change.
VII. Enhancing respect for IHL

In each report on IHL and the challenges of contemporary armed conflicts, the ICRC has emphasized that the single most important challenge to IHL is lack of respect for it. Efforts to enhance respect for IHL should be taken by all parties to armed conflict; by States, at the national, regional, and international level,91 and by all actors that can influence those involved in the fighting. The first – and a pivotal – responsibility that States have is to “bring IHL home”, which means to consider ratifying or acceding to IHL treaties; to integrate into domestic law IHL treaties to which the State is party; and to integrate IHL obligations into military training and all levels of military planning and decision-making.92 The ICRC and National Red Cross and Red Crescent Societies have long-standing and complementary mandates in these endeavours.

Integrating IHL into domestic law and military doctrine is only the starting point for enhancing respect for it. This report presents a selection of additional, non-exhaustive legal and operational measures that can affect how IHL is respected. These include (1) effective investigation by States of their own forces for alleged violations of IHL; (2) measures by actors supporting parties to armed conflicts to further respect for IHL among those they support; (3) examining and applying the findings of the research underpinning the study on the roots of restraint in war; and (4) presenting concrete examples of IHL compliance.

1. Investigations in armed conflict

Investigations into alleged violations of IHL are recognized as critical for the proper application of this body of law in both international and non-international armed

91 Starting in 2011 and under a renewed International Conference mandate in 2015, the ICRC and Switzerland co-facilitated consultations and subsequently an intergovernmental process aimed at improving compliance with IHL. Participating States discussed a range of options to that end. A procedural report of the process (2015–2019) is provided in Factual Report on the Proceedings of the Intergovernmental Process on Strengthening Respect for IHL (Resolution 2 of the 32nd International Conference of the Red Cross and Red Crescent), 33IC/19/9.1.

92 It is hoped that the 33rd International Conference will adopt a resolution containing a plan of action (or road map) in this respect.
conflict, and are a way for parties to armed conflict to enhance respect for IHL on the ground.

A number of States and their militaries have recognized the importance of robust domestic investigations into the lawfulness of their own actions in armed conflict. There are, however, significant differences in the various domestic legal frameworks and in practice across States in the way investigations are carried out. Clarity on a number of issues would appear to be useful, including the circumstances in which investigations should be triggered, the different forms investigations may take depending on the nature of an incident, and the principles and standards applicable during the investigation process. In 2017, the ICRC joined the Geneva Academy of International Humanitarian Law and Human Rights’ work to develop guidelines for investigating violations of IHL.93

This work has been underpinned by extensive research into the domestic law and practice of States and informed by a number of meetings and bilateral engagements with military and government experts, academics and non-governmental organizations, in their personal capacity. The intention is not to set out a uniform investigation process for all States. Instead, it is to identify and present – while remaining sensitive to the differences that characterize domestic legal and investigative systems – a range of practical and legal issues that can arise in investigations or should be considered beforehand. The aim is also to provide practical assistance by setting out a general framework for investigations in armed conflict and, where relevant, the corresponding international principles and standards.94

Legal sources for a duty to investigate can be found in treaty law, inter alia, in the obligation of the High Contracting Parties to the Geneva Conventions and Additional Protocol I, applicable in international armed conflict, to enact any legislation necessary to provide effective penal sanctions for persons suspected of having committed or ordering the commission of grave breaches of their provisions. States have a legal obligation to search for such persons, regardless of their nationality, and to carry out criminal proceedings – which necessarily includes investigations – so as to bring the perpetrators to justice.

Other “serious violations of the laws and customs of war” – a legal term of art synonymous with “war crimes” – that may be committed in international or non-international armed conflict must also be dealt with. Under customary IHL, States must investigate all war crimes committed by their nationals or on their territory, and other war crimes over which they have jurisdiction, and, if appropriate, prosecute the suspects. A list of “other serious violations of the laws and customs of war”, generally considered to reflect customary law, is provided for in the Statute of the International Criminal Court.95

94 The Guidelines may prove useful to other actors too, such as non-State armed groups party to non-international armed conflict.
95 See Art. 8(2)(b), (c), and (e) of the Rome Statute of the International Criminal Court (1998).
It should be noted that apart from the “repression” of grave breaches and other “serious violations of the laws and customs of war”, including by means of criminal prosecution, States also have a duty to “suppress” other violations of IHL. “Suppression” refers to administrative measures that States may take to deal with non-criminal violations of IHL, such as administrative investigations.

In practice, the existence of effective domestic procedures and mechanisms for investigations in armed conflict serves to enhance a State’s military operational effectiveness. Investigations may be a source of information on the success or failure of military operations and enable appropriate steps to be taken in the latter case. They can also assist in the identification of good practice and lessons learned. Ultimately, investigations are crucial for maintaining discipline and good order in the armed forces.

Investigations are also a form of accountability to a State’s own population, to the victims of violations of IHL and their next of kin, the population of another territory in which its military may be operating, as well as to the international community. They can demonstrate that a State is adhering to its international obligations – either by clarifying that IHL was not violated or by demonstrating that the State is addressing an alleged violation of the law and taking appropriate corrective action. A genuine effort to comply with the law and a rejection of impunity for violations may, for example, increase trust in the military’s actions. A State striving to implement its legal obligations is also helping to promote the overall credibility of the law.

The text of the Guidelines on Investigating Violations of IHL: Law, Policy, and Good Practice, published in 2019, contains 16 guidelines, each followed by a commentary. The Guidelines draw on common elements found in international law and domestic laws and policies, and are informed by State practice. The commentaries aim to provide clarification on the meaning of the guidelines and give further indication on how they could be implemented in practice.

By way of illustration, the Guidelines deal with the steps prior to the launching of an investigation in armed conflict, such as recording of military operations, internal reporting and external allegations, actions at the scene of an incident, and assessment of incidents. A separate section is devoted to administrative investigations in armed conflict, i.e. to the different types of non-criminal investigations into violations of IHL. Several guidelines focus on criminal investigations, including the standards of independence and impartiality, thoroughness, promptness, and transparency that make up effective investigation. Fair-trial guarantees and how matters of State responsibility should be approached are also considered. Other guidelines address the concept of policy-related violations of IHL, as well as the need for armed forces to have legal advisers.

2. Roots of restraint in war

As mentioned in earlier sections of this report, a central feature of the changing geopolitical landscape of the last decade has been the proliferation of non-State
armed groups, particularly in the Middle East and North Africa. The decentralized structure of these groups poses a hefty challenge to the ICRC’s efforts to ensure that IHL is known, understood and respected by parties to armed conflicts. The ICRC’s “integration approach” to generating respect for the law, which is based on the findings of its study *Roots of Behaviour in War* (2004),96 consists of assisting armed forces and armed groups to incorporate IHL in their doctrine (or codes of conduct), training regimes, and mechanisms – in order to ensure compliance. This approach requires an armed organization to have a form of vertical hierarchy through which orders and discipline flow from military commanders to the rank and file. Given that most armed groups today lack this organizational structure, the ICRC required new research to identify ways in which these decentralized groups might be influenced to fight in accordance with IHL.

The research took the form of a two-year collaboration between the ICRC and academics specialized in the behaviour of armed organizations and led to the publication of a study entitled *The Roots of Restraint in War*97 in June 2018. The study explores how norms of restraint are socialized in different types of armed forces and armed groups, according to their organizational structure. It identified sources of influence on the development of such norms, from the strict formal training in military academies for integrated State armed forces to the village prophets in South Sudan who, prior to battle, lead rituals for community-embedded cattle-keeping groups. The research was rich in insights on the widely varying internal and external stimuli that prompt certain kinds of behaviour.

The study delivered some important findings. First and foremost, it provided empirical evidence that higher levels of IHL training resulted in greater adoption of norms of restraint by combatants in the two State armed forces studied: the Philippine and Australian armies. Training was found to be most effective if taught intensively; when using mixed methods including classroom instruction, case-study analysis and practical field exercises; and when taught by a trainer with a great deal of credibility among the soldiers. Effectiveness should be tested under duress, in battlefield-like conditions when soldiers are exhausted, hungry and afraid; and training should aim to internalize respect for IHL in the identity among soldiers: “we don’t commit abuses because it is not who we are”.

Second, the study found that informal norms have a strong bearing on behaviour even within strict military hierarchies, and that these norms could potentially reinforce or undermine the formal instructions issued. Examples of nefarious informal norms and practices include hazing rituals; insignia on uniforms symbolizing extreme violence; and marching songs glorifying sexual violence. The research suggested that informal sources of socialization such as the opinion of a peer group could help to reinforce respect for IHL if understood and steered in that direction. The ICRC is now exploring the nature of informal


norms in six different armed forces in different parts of the world to see whether this is a potential avenue of interest for enhancing compliance with the law.

The third main finding is closely related to the second: an exclusive focus on the law is not as effective in influencing behaviour as a combination of the law and the values underpinning it. Linking the law to local norms and values gives it greater traction. The ICRC has been exploring parallels between IHL and Islamic law for many years, and the study recommends that investigation of local cultural and religious norms be intensified across many different contexts. The report gives the example of an ICRC staff member in South Sudan who struck up a conversation with some fighters about their favourite sport of wrestling. He was able to draw parallels between the fighters explanations—for instance, that the sick, elderly and children were not worthy opponents in a wrestling match—and the IHL rules that also excluded them from the fighting. Understanding and invoking traditional norms of restraint that reflect IHL rules can resonate better than discussions only of the law, or provide an entry point into such discussions.

Initially, the study sought to explore why violence occurs. The decision to broaden its scope and examine how norms of restraint form and are socialized in armed organizations eased its way and led to unexpected findings. Not only was it easier to question soldiers and fighters about the influences that curbed violent behaviour than to ask about violations of IHL, but exploring restraint also uncovered sources of influence that had not been considered before. One armed group’s preferred tactic over many years, for instance, was to attack oil pipelines running through rural areas. Tracking this pattern of violence and observing when it changed or stopped, allowed for an analysis of the reasons for the change and who or what might have influenced it. In this case, it was environmentalists who had successfully changed the armed group’s behaviour, a source of influence not previously considered.

Finally, and perhaps most importantly, the research demonstrates that external entities can influence the behaviour of armed forces and armed groups. Hence, making it a criminal offence for humanitarian organizations and local communities to interact with armed groups hampers efforts to promote respect for humanitarian norms.

3. “Support relationships” in armed conflict

As throughout much of the history of warfare, contemporary armed conflicts involve a multiplicity of actors, including States, non-State actors and international organizations. Some fight one another, and others support one another through military partnerships, alliances, and coalitions. This support takes various forms, such as: provision of training and equipment; arms transfers; institutional capacity support; financial aid; cyber operations; hosting of troops; provision of private contractors; and intelligence sharing. The ICRC is able to report that these complex webs of support and partner relationships have become
increasingly prevalent and are a key feature of almost every major context of conflict in which it operates.98

Under IHL, those who support parties to armed conflicts may themselves become party to that conflict, and thus bound by IHL, notably by contributing to the collective conduct of hostilities by another party against an armed group or by exerting overall control over an armed group.99

However, support provided to parties does not always reach this threshold, but it still affects the conduct of the supported party to an armed conflict, and may increase or reduce human suffering.

The ICRC is engaged in a dialogue with parties to armed conflict themselves. But this alone has appeared to be insufficient to address its concerns regarding the lack of respect for IHL in contemporary conflicts. The ICRC has therefore been developing – for some time now, through its Support Relationships in Armed Conflict initiative – its engagement with those who support such parties.

Support relationships in armed conflicts carry both risks and opportunities in connection with respect for IHL. On the one hand, complex, overt or covert, support and partner relationships carry the risk of diluting responsibility among parties to armed conflicts and those who support them. On the other hand, they are an opportunity for those who support parties to conflict to assist not only their partner’s military efforts, but also their efforts to better respect IHL.

From what the ICRC has observed, the degree to which respect for IHL is factored into such support relationships seems, all too frequently, insufficient. Far too often, humanitarian considerations are trumped by political, security or economic interests. This weakens accountability for violations, which increases the severity of the humanitarian consequences of conflict and seriously undermines global peace and security.

The ICRC believes that there is a need and an opportunity for individual and collective action that aims to leverage such support relationships to positively influence partners’ behaviour for the benefit of victims of armed conflict. In fact, many actors have put in place measures to promote, among the parties they support, protection of civilians and those hors-de-combat. These efforts should be expanded and strengthened. In the ICRC’s view, these are good examples of how States can implement their obligations to respect and ensure respect for IHL, in all circumstances.100

Ensuring respect for IHL includes an obligation not to encourage, aid or assist in violations of IHL, as well as a due-diligence obligation to take proactive steps to influence parties to conflict and bring them to an attitude of respect for IHL. The obligation to ensure respect for IHL is an obligation of means and not

100 Art. 1 common to the four Geneva Conventions; Art. 1, Additional Protocol I; ICRC Customary IHL Study, Rules 139 and 144. See also ICRC, ICRC Commentary on GC I, paras 150–184.
of result, and States have very broad discretion in choosing measures with which to exercise influence.

In addition, supporting States may have obligations under other provisions of international law. For instance, parties to the Arms Trade Treaty must refrain from authorizing weapons transfers if there is a clear or substantial risk of the arms being used to commit or facilitate serious violations of IHL.

The ICRC understands there are challenges in finding concrete measures to foster better respect for IHL. States remain free to choose between different possible measures that would be adequate to ensure respect, and are not responsible if such positive measures do not succeed. The law does not provide a specific list of measures that have to be taken. Supporting actors can adopt different measures aimed at ensuring respect, as long as they conform to international law.

The ICRC has started identifying practical measures that supporting actors can use throughout their support relationships. These include assessments prior to providing support, mechanisms to identify and address partner misconduct while support is provided, and to review, limit, or suspend the support if needed. Practical measures may also include continuous, concrete and context-specific IHL training and mentoring, capacity building and assistance with a view to implementing IHL obligations where needed, as well as the preparation of an exit strategy for when the support ends. Experience shows that beyond training–oversight and accountability are critical for the protection of victims of armed conflict in active military operations and detention. In this respect, it would be helpful for States to share their experiences.

The ICRC is conscious of the legal, policy and operational challenges that the development of such measures is likely to encounter. Aiming to improve its understanding of support relationships, it engages with actors in supporting or supported roles to discuss its recommendations, to increase their usefulness over time, and to learn from experience.

4. IHL in action: Respect for the law on the battlefield

As highlighted in the introduction to this report, on their 70th anniversary, the Geneva Conventions are among the few international treaties that have achieved universal ratification. However, they are not universally respected, as demonstrated by the tragic reports of violations in many armed conflicts, with disastrous consequences for civilians and persons hors de combat. The impression that IHL is more often violated than respected is reinforced by an ever-higher level of mediatization of IHL violations, which has unfortunately led to a discourse about the effectiveness of IHL and a tendency to question its impact.

Such a discourse is dangerous, as it renders violations banal and risks creating an environment where they may become more acceptable. What is needed is nuanced discourse on the subject, because the perception that IHL is continuously violated and therefore ineffective does not reflect the reality of
contemporary armed conflicts. Instances of respect for IHL, though underreported, are a daily occurrence.

IHL has continued to develop over the past few decades and has been implemented in many ways: for instance, States have adopted new treaties, legislators have translated international agreements into domestic laws, courts have created a wealth of domestic and international jurisprudence, and many armed forces train their troops in IHL. This demonstrates that States—and other parties to armed conflicts—believe that IHL matters. In many instances, belligerents state openly that they consider it in their own interest to operate in accordance with IHL, even beyond the legal and moral obligation to do so.

ICRC operations continue to encounter manifold positive examples of IHL application around the world.

Instances of respect for IHL can be seen when parties to conflict make arrangements to facilitate the implementation of specific IHL norms, such as to cooperate in searching for and/or identifying the remains of missing people. Such agreements are often trust-building measures that may pave the way for a peace process.

Changes in practices and behaviour over time may also be a sign of improving IHL compliance. This can be the case when armed actors reform their detention policies to allow family visits, when they release child soldiers and stop recruiting them, or when they adjust their rules of engagement to reduce civilian casualties.

The ICRC has decided to collect and present cases of IHL compliance to counter the narrative that IHL is constantly violated and to recall that—when respected—IHL has a positive impact on the lives of people affected by armed conflict. By shedding light on positive examples of belligerents’ conduct on the ground, the ICRC seeks to encourage them to lead by example and share good practices with regard to IHL.101

Seventy years after their adoption, the 1949 Geneva Conventions – complemented by three Additional Protocols and customary IHL – provide a robust set of international legal rules regulating the behaviour of belligerents. IHL conveys a basic yet fundamental message: wars, even between fierce enemies, have limits. Anchored in States’ experiences during two world wars and subsequent armed conflicts, IHL was designed for the most extreme circumstances, striking a careful, pragmatic balance between military necessity and humanity.

The ICRC hopes that with this report it has brought to the fore some of the new trends and complexities of contemporary armed conflicts and the legal challenges they entail.

At the same time, the report shows that existing IHL rules – complemented by other norms of international law – are adequate for preserving a minimum of humanity in armed conflict. While exploring new and not fully answered questions, we must preserve the basics. Any interpretation or development of the law should build on existing protection that IHL provides; it should never undermine it.

Most importantly, perhaps, IHL rules can prevent atrocities only if all States take measures to implement their legal obligations, if all parties to armed conflict are committed to respecting them, and if all actors able to influence those involved in the fighting use their leverage to ensure respect for IHL. On the 70th anniversary of the four Geneva Conventions, the suffering caused by armed conflicts should be a stark reminder that it is time to recommit to protecting our common humanity in armed conflict.
Several years ago, I received an invitation to travel to Geneva to participate in a discussion on issues related to detention and treatment of captives at Guantanamo Bay Naval Base. I was excited to visit Geneva for the first time, although I knew it would be a challenging topic and audience. As the US Army’s former senior international humanitarian law (IHL) adviser turned law professor, I looked forward to the opportunity to rebut some of the assumptions about my views that I expected to be confronted with.

When I learned that I would be sharing the stage with Professor Marco Sassòli, I was, to be candid, much more excited about this opportunity. Although I had never met Professor Sassòli, I’ve always considered him one of a handful of IHL scholars whose works laid the foundation for so many of those who would seek to join his circle of experts as it expanded over the years. When I received an email from Professor Sassòli inviting me to present a lecture to his IHL class, I knew this would indeed be both a challenging and memorable visit.

* Published by Edward Elgar, Cheltenham, 2019.
It therefore came as a welcome surprise when the International Review of the Red Cross contacted me and asked if I would be interested in reviewing Professor Sassòli’s new IHL text, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare. I immediately answered this request in the affirmative, and I was eager to dive into Professor Sassòli’s latest work. Having now finished my review, not only has my expectation that this would be an outstanding contribution to the field been confirmed, but also my own expertise has been enhanced. Accordingly, I hope this review inspires others—scholars, legal and operational practitioners, and others interested in this vital but often cryptic realm of international law—to share the experience of learning from Marco Sassòli through this latest work.

Let’s start with the foundation, for all lawyers know that the value of expert interpretation and opinion is contingent on the foundation upon which it rests. To say this foundation is solid would be inadequate to capture the expertise and respect in the field of IHL that Professor Sassòli brings to this work. One need only consider the colleagues whose praise for the book populates the back cover: Michael Schmitt, Bruce Oswald, Marko Milanovic, and Andrew Clapham. Those familiar with IHL scholarship and practice know that there are few other peers for whom these experts would offer such unanimous and uniform praise. And for good reason—Professor Sassòli has developed his expertise through years of study, practice with the International Committee of the Red Cross (ICRC), service as an expert, and teaching IHL. Having had the pleasure of interacting with him at a number of conferences and working groups, I agree with the consensus of experts referenced above. It is no exaggeration to invoke the tag line from an old commercial for E.F. Hutton brokers: When Marco talks, people listen.

The scope, density and organization of his book corroborate the high expectations that I had when I first cracked open the cover. I will attempt to highlight each of these aspects in this review. Of course, this is not to say that I agree with all of Professor Sassòli’s interpretations—probably a manifestation of what he identifies as the logical tendency of the views of experts in the field to be informed by their disparate experiences (more on that later). But my disagreements were remarkably few. Indeed, if there is one aspect of his book that stood out to me as a testament to Professor Sassòli’s scholarly integrity, it was that it revealed how his own views and interpretations have evolved over time; how he recognizes that like the balance between military necessity and humanity which itself lies at the foundation of IHL, scholars must constantly strive to balance formalism with pragmatism in order to ensure that the influence they exert on the evolution of the law avoids distortions that will ultimately undermine the credibility of the law.

Anyone who has contemplated adopting a text for an IHL course or considered a text as a “go-to” resource for IHL issues understands that this is one area of the law that does not lend itself to uniform organization. Some texts are organized along a historical vector; others simply align the structure of the text with key treaties or perhaps cardinal IHL principles. In The Law of Armed
Conflict: An Operational Approach, my co-authors and I sought to align the structure of the book with the likely presentation of issues that a military legal adviser would encounter in support of the planning, execution and assessment of a combat operation. Our goal was to place the law in the context of the range of issues likely to arise during military operations.

As the title indicates, Professor Sassòli approached the challenge of structuring the book with quite a holistic vision. First, the text would provide a comprehensive explanation of the myriad of rules under the umbrella of IHL and, to a lesser extent, international human rights law (IHRL). Second, the text would highlight areas of controversy related to the interpretation and implementation of these rules. Finally, the text would offer proposed solutions to many of these controversies.

I found this approach both effective and engaging; I especially appreciated the comprehensive foundation that the text provides in the first five chapters. These chapters explain in a clear and readily understandable manner the historical foundation of the law and how this history evolved into contemporary IHL. Professor Sassòli’s years of experience teaching IHL had an obvious and useful influence on these introductory chapters; indeed, it was easy for me to imagine how the organization and style of these chapters reflect Professor Sassòli’s pedagogy as he teaches students how the law evolved, the many influences on that evolution, and how the law functions in the contemporary international domain. This is beneficial because the text intermingles explanation of legal sources, both positive and customary in nature, with Professors Sassòli’s commentary. The reader is thus able to gain an understanding of the law through the lens of an informed expert perspective.

I especially enjoyed the chapter on sources of IHL. Professor Sassòli walks the reader through recognized sources of IHL: treaties, customary international law, general principles and soft law. This is largely consistent with other texts, but Professor Sassòli adds important insights into various influences on the interpretation and evolution of the law, explaining the role of sources such as the ICRC Commentaries to the Geneva Conventions and Additional Protocols, decisions of international and domestic tribunals, military manuals and policies, and scholarly writing and commentary.

This last category is, unfortunately, given insufficient weight. Professor Sassòli justifiably notes that scholarly writing must be taken with a grain of salt, especially considering the explosion of interest in the field in the past two decades. His candour in expressing what must be his own reticence in attributing too much weight to this IHL scholarship is refreshing, and he rightly observes that the pressure on academics to satisfy institutional requirements often leads to what I have called the phenomenon of a “solution in search of a problem”. I also think his cautionary warning that scholars are often substantially influenced by their pre-academic professional backgrounds is valid, though perhaps a bit too

sweeping. In contrast, as long as a scholar’s background is candidly acknowledged, I believe it can often render scholarship more valuable. Finally, as one of a number of current or former military officers engaged in IHL scholarship I was surprised and frankly disappointed with Professor Sassòli’s use of the term “brainwashed” to characterize the influence of prior military and government service. In my view, experience – whether military, governmental or non-governmental – often makes a valuable contribution to the foundation of scholarly exploration of IHL issues and important insights into how the law actually functions. Indeed, Professor Sassòli seems to implicitly acknowledge this – at least in relation to non-governmental service – when in the same chapter he emphasizes how his own experiences have informed his views.

Professor Sassòli’s scepticism regarding the probative value of much of the contemporary IHL scholarship aligns perfectly with one of the few aspects of the book that I believe might have been approached differently: the lack of reference to such works throughout the text. I was somewhat surprised that there were not more references to other distinguished scholars in the field. This was especially apparent in the foundational chapters; reference to such scholarship seemed much more significant in the topical chapters, but overall there seemed to be a limited diversity of views referenced. For example, I was surprised there was no reference to Brigadier-General Kenneth Watkin’s award-winning book *Fighting at the Legal Boundaries* in the discussion of conflict assessment and classification or in the chapter addressing the relationship between IHL and IHRL.

Furthermore, as I reviewed the text it quickly became apparent that a significant majority of citations were to primary sources, with an especially heavy reliance on ICRC Commentaries and other ICRC interpretive sources. This seems to reflect a prioritization of ICRC views over those of many scholars and official government statements which, while often aligning with those views, also at times deviate substantially from them. This prioritization raises a legitimate question: whether it creates the perception of doing what Professor Sassòli seems to criticize military and government experts for doing, namely being overly influenced by their professional associations. Furthermore, when referenced in the text, these government positions are mostly used to illustrate points of divergence with ICRC views. Failing to cite provisions of these same sources that highlight these points of divergence and alignment is a missed opportunity to provide important insights into the current state of the law. Furthermore, reference to a broader swath of scholarly works would have aided those using this text in identifying additional sources to further their exploration of the issues. When cited by an expert of Professor Sassòli’s gravitas, references to other scholarly works would also help readers cull the scholarly wheat from the chaff.

The chapter on respect for the law, like all the chapters in the text, is comprehensive and interesting. I thought Professor Sassòli’s discussion of the ICRC and its role in ensuring implementation of and respect for IHL was

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uniquely beneficial. This is unsurprising considering his long and valued relationship with the ICRC, but considering the vital role this organization plays in the realm of IHL, it is important for anyone studying the topic to gain this type of informed and comprehensive perspective. Equally valuable was the integration of opinions on how the ICRC itself must evolve in order to continue to enhance its role in the development of the law. For example, Professor Sassòli explains why in his opinion the ICRC must play a more aggressive role in mobilizing humanitarian concerns in response to State reluctance to move the law forward through new or revised treaties:

In my view, the ICRC must convince States to accept again the difference between its operational role, on the one hand, and its general advocacy for the respect of IHL, its progressive development and new enforcement mechanisms, on the other hand. In its operational role, the ICRC has excellent reasons to pursue its confidential and cooperative approach. In its role as guardian and promoter of IHL outside specific operational contexts, the ICRC must become the advocacy organization it once was by mobilizing public opinion against their reluctant governments and cooperating with civil society.3

While others may disagree with the strategy that Professor Sassòli proposes, this passage is illustrative of how he integrates his own commentary throughout the text and his willingness to candidly highlight what he believes are deficiencies in current approaches to the development and implementation of IHL.

The text includes a chapter on when IHL applies as a bridge between the general and the specific. I was especially interested in this chapter not only because it is an area of the law that I struggled with during my time in practice and focused on when I first began my academic career, but also because I was genuinely curious as to how Professor Sassòli would explain the complexities of conflict assessment and classification. His treatment did not disappoint. For example, in his treatment of international armed conflicts (IACs), he explains why he believes that an act of violence between members of State armed forces is not necessarily dispositive, because in his view such violence is indicative of an IAC only when conducted pursuant to the highest authority of the State. Specifically, he notes:

Although I do not think parties must have animus belligerandi (“intention to fight”) for IHL of IACs to apply, the mere fact that the person using force is attributable to a State is not sufficient in my opinion. Rather, the highest authorities of the State must (previously or subsequently) additionally approve the use of force.4

While this point of view is appealing, Professor Sassòli seems to be implying a requirement that is not explicitly required by the text of Article 2 common to the Geneva Conventions; nor, to my knowledge, is it addressed in the associated

3 International Humanitarian Law, p. 146.
4 Ibid., p. 169.
ICRC Commentary. It would have been useful for him, at this point, to illustrate the logic of his opinion with some historic examples, such as the shooting incident by the Panamanian Defense Forces that was the breaking point for President George H. W. Bush and led to the US decision to launch an invasion of Panama. Professor Sassòli’s proposed approach to an IAC trigger could have been developed a bit further, especially addressing the complexity of one State deciding whether to attribute violence by another State’s armed forces as an action approved by the highest authority.

The most interesting aspect of this chapter, however, is Professor Sassòli’s treatment of the increasingly common phenomenon of State military action directed against a non-State organized armed group operating in the territory of another State. He explains the two prevailing theories of conflict classification in such situations: what Brigadier-General Kenneth Watkin has called the “formalist” theory advanced by Professor Dapo Akande—that an IAC exists once one State uses military force on the territory of another without consent; and what Professor Sassòli characterizes as a compromise view advanced by the ICRC (which I believe is essentially indistinguishable from the formalist view)—that the non-consensual use of force qualifies as an IAC between the two States but the law of non-international armed conflict (NIAC) applies between the State and the organized armed group. I must admit that I was surprised when I read, “I therefore prefer a third solution: one should apply only IHL of NIACs because no armed conflict between States exists.”5 This “third solution” is, in essence, the position that has been advanced by the United States since the inception of the several extraterritorial NIACs in which it has engaged since 11 September 2001. Whether this is indeed a “third” solution or an alternative to a formalist/ICRC interpretation, I not only agree with this view but thought this exemplified Professor Sassòli’s ability to balance formalism and pragmatism, and his willingness to reconsider long-standing assumptions related to IHL interpretations. His observation that “what makes an armed conflict international is not where it occurs but that it occurs between two states”6 indicates not only the impact of these characteristics of his scholarly approach, but also why he is so highly regarded in this field.

There were some other aspects of this chapter that especially caught my attention. First, I wish Professor Sassòli had provided a bit more treatment on the impact of disputed governing authority when assessing the existence of an IAC. Again, the example of the US invasion of Panama provides a good example of how questions about governing legitimacy may open the door to States “gaming” the IAC factual assessment. How should an “invitation” to intervene from a disputed governing authority impact conflict classification? I appreciated that the text emphasized in several parts how the context of international criminal law may have led to enunciation of conflict assessment requirements—for example, the “protracted” armed violence requirement—that are logical in the criminal

5 Ibid., p. 172.
6 Ibid., p. 172.
accountability context but less so in the operational context. Not only do I agree, but I think these contextual influences are generally under-explored.

By far the most interesting section of the book is the professor’s treatment of what was commonly known as the US “Global War on Terror”, or GWOT. Professor Sassòli first explains why this “global” war concept was so widely condemned as extreme, but also how the US “abandoned” the term (I actually don’t think the term was ever offered as a legal concept) in favour of characterizations aligned with the notion of an extraterritorial NIAC against non-State terror groups considered to be organized armed groups. Again, I was surprised by Professor Sassòli’s pragmatic approach to the complex question of how geography impacts conflict assessment and scope. First, he notes that the ICRC has yet to embrace (or perhaps more accurately has rejected) the notion of a “worldwide” NIAC. He then follows by noting:

The ICRC’s fears linked to worldwide targeting and detention of “enemy fighters” based upon an “authorization” provided by IHL of NIACs are understandable. However, I think that logic as well as the reality of modern weapons and conflicts dictate that geography as a decisive criterion for the application of IHL should be abandoned in favor of placing emphasis on the nexus of the conduct, the legitimacy of the target and protection offered by other branches of international law even where IHL applies. Under this approach, IHL would apply worldwide to every act linked to a NIAC. First, however, conduct to be regulated must have a stronger nexus with the NIAC the further away from the NIAC it occurs.7

I tend to think this proposed approach is actually manifested by State practice more than is often recognized. Furthermore, I have also proposed a sliding scale of certainty to justify lethal targeting contingent on the proximity of the proposed target to the “conventional” battle space. Thus, I found this passage both logical and valuable. This is not to say that I think such an approach resolves all complexity—for example, how would this approach apply in the absence of a “hot” or conventional battle space which might result from initial conventional success against an organized armed group that then disperses to continue operations in other areas? But again, what is more significant for the purposes of this review is how passages such as this attest to Professor Sassòli’s especially appealing approach to the topic.

Following this chapter, the book then moves into treatment of topical issues: combatants and prisoners of war; civilians in the power of an enemy; belligerent occupation; the missing and dead; protection of civilians against the effects of hostilities (where the book addresses targeting issues); means and methods of warfare; naval warfare; and air and missile warfare. This part of the text provides an unsurprisingly comprehensive explanation of the myriad of treaty and customary international law rules related to each respective aspect of IHL regulation.

7 Ibid., p. 190.
Were the text to end here, it would be quite impressive. However, Professor Sassòli then moves into what might be best characterized as the “contemporary challenges” phase of the text. This begins with a treatment of the relationship between IHL and other branches of international law: IHRL, international criminal law, migration law, law related to peacekeeping operations, and the law of neutrality. This is a valuable contribution for all readers, but I think especially for the practitioner who might have extensive expertise in IHL itself but limited opportunities to explore these intersections—junctions which can have such profound practical and operational impact. Professor Sassòli then moves to a topical treatment of a number of complex issues, ranging from the question of whether IHL provides a source of authority or only serves as a constraint, to IHL and gender issues, to cyber and drone operations, to cultural and environmental protections, to the conduct of operations in NIAC involving targeting and detention. From a structural perspective, I felt this approach was quite useful, especially for readers who hope to utilize the text as a research companion. The ability to focus directly on one of these many issues will streamline research, and the comprehensive treatment will provide an excellent foundation for further exploration of these issues. Again, while I might not agree with all of Professor Sassòli’s opinions or interpretations, there is no question that each is well reasoned and highly credible.

*International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* is an exceptional contribution to the growing crop of IHL texts, offered by a scholar and practitioner of unquestioned expertise. This book’s innovative structure makes it viable as a text for an IHL course, and equally valuable as a principal source for scholars in other fields of law and policy, and for practitioners. Whether one is interested in learning IHL from its roots up or focusing on specific topical issues and debates, this text is a comprehensive yet reader-friendly resource. Professor Michael Schmitt says it perfectly on the book’s back cover:

A succinct and accessible treatment of the key principles and rules of IHL, [the book] moves beyond doctrine to perceptively examine the dynamic of implementing IHL in law and practice. Sassòli also takes on the key issues around which contemporary IHL debates are circling … and does so with the clarity and precision that has long marked his work.

This is indeed a book that should be on the shelf of every IHL scholar and practitioner.
What can armed drones, opium, whales, manganese nodules and railway clocks tell us about the production of international law? Edited by Jessie Hohmann and Daniel Joyce,1 *International Law’s Objects* is the result of an innovative research project that takes a new look at the relationship between international law and the material world that it governs. A collaborative endeavour, the book presents forty contributions examining the relevance of a selected object to the field, resulting in an analysis of international legal dispositions and practices grounded in the physical world.

The central question of the book – what might the study of international law through objects reveal? – is a call for experimentation. The volume’s contributions thus move the focus away from the interpretation of the texts of international law to delve into stories, practices and processes. They re-contextualize the sources of international law connected to their object of study and explore how these sources have impacted perceptions, representations and

* Published by Oxford University Press, Oxford, 2018.
uses of that object over time. In that aspect, they prove to be very much in line with the current turn to history permeating international law scholarship. At the same time, the volume innovates by focusing on cultural and material history, in a field that is mostly text-based. Because they connect international law with larger, contemporary debates in the humanities and social or natural sciences, the contributions presented here open new avenues for research. They look at what happens when law and politics coalesce around symbolic objects, or when law and science collaborate to define and regulate the material world. They explore the way international law produces objects through processes of codification and standardization, and how international law is produced by objects in return, as evidenced by the chapters on the déchiqueteuse (paper shredder) and the gavel, among others. As a whole, the volume thus successfully brings to light the multitude of ways in which international law materializes in everyday life.

The “Librarian’s Pick” is a new section of the International Review of the Red Cross, replacing “New Publications in International Humanitarian Law and on the International Committee of the Red Cross”. In this section, one of the International Committee of the Red Cross’s (ICRC) librarians picks and writes about their favourite new book relating to public international law, which they recommend to the readers of the journal.

The ICRC Library welcomes researchers interested in international humanitarian law (IHL) and the institution’s work throughout the years. Its online catalogue is the gateway to the most recent scholarship on the subject, documents of Diplomatic and International Conferences, all ICRC publications, rare documents published between the founding of the ICRC and the end of the First World War, and a unique collection of military manuals. The Library Team also publishes research guides in order to help researchers access the full texts of the most relevant and reliable sources in the field of IHL and the ICRC.


2 The online catalogue is available at: library.icrc.org. For the most recent publications, see: https://library.icrc.org/library/search/date. For more information on the research guides, see: blogs.icrc.org/cross-files/category/research-guide.
The collection is highly heterogeneous. The objects presented range from unique artefacts to natural resources, manufactured goods, and functional and symbolic items. The editors have made the conscious decision not to categorize them, nor to connect contributions pertaining to the same branch of international law. The objects are presented in alphabetical order, but the reader is encouraged in the introduction to explore the volume in a non-linear fashion. The book also does without a traditional conclusion, as if it is refusing to wrap up its findings in a neat package. This absence is counterbalanced by the strong opening chapters, which provide the theoretical framework of the book and explain its creative premise and ambition for further developments in the field. The cohesion of the whole relies on the homogeneous presentation of the individual contributions, each bearing an understated, sometimes cryptic title and an evocative illustration.

The contributors have been left free to pick the object of their choosing, based on expertise and personal experience, and have not been constrained by a clear-cut definition of what an “object of international law” could or could not be. Coherently, the opening chapters do not attempt to provide a definitive answer to this question, or to clearly draw the line between the legal subject and the legal object. A couple of the contributions actually investigate what falls through the cracks of that opposition, as when Lolita Buckner Inniss exposes the dramatic reality concealed behind the term “ships’ ballast” in the historic transatlantic slave trade. She details not only how slave ships avoided legal penalties by pretending to sail on ballast only, but also how the enslaved men reduced to this dehumanizing denomination were themselves treated as ballast, sometimes even jettisoned.

Given the nature of the collection, it is unsurprising that the book touches on multiple branches of international law, from international environmental law to cultural heritage law, trade law, criminal law and refugee law. The chapters are nevertheless connected by common overarching themes; their unexpected or forgotten findings often echo one another. Reflecting on the volume’s premise, Wouter Werner explains that

by putting the objects in a collection one starts a process of transformation and the production of new meanings. The objects are read in light of the collection as a whole and are interpreted in relation to each other. … Reading these chapters in conjunction adds another layer to each and every individual contribution.4

Issues of sovereignty, territoriality and the legitimization of State authority over land and populations are explored in chapters on the passport, the Russian flag at the

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3 As with Alex Mill’s “Mosul Four and Iran Six”, named for the ten Kuwait Airways Corporation aircrafts that were seized by Iraq at the time of the Kuwait invasion, which tells the story of how a highly politicized commercial dispute affecting international relations between Iraq and Kuwait was surprisingly taken on by an English Court; and Gerry Simpson’s “NM 68226 84912; TQ 30052 80597”, named after two commemorative monuments situated respectively in a Highland village and on Trafalgar Square.

4 International Law’s Objects, p. 69.
North Pole, and the Western Sahara Boundary Marker. Disparities between legal and material realities make for thought-provoking narratives, as when François Finck looks at the border checkpoint of the Moldovan Republic of Transnistria. What happens when a physical manifestation of State sovereignty existing and functioning in the material world remains absent of the legal manifestation?

The book’s methodology also proves to be a fertile ground for uncovering the commercial and political interests that played a role in the formation of international legal rules. Volume editor Jessie Hohmann traces how powerful Western States have used international law to control the production and trade of opium, imbuing the law with both their moral norms and commercial interests. In her chapter “Sovereign Marks”, Tanja Aalberts discusses the contradictions inherent to colonial practices of treaty-making with indigenous rulers.

Focusing on an object and its meaning in international legal practices provides an opportunity to challenge prevailing accounts of the development of international law. Ziv Bohrer’s contribution uses the story of the “Jolly Roger” pirate emblem—the skull-and-crossbones symbol on a black flag—to challenge the widespread notion that domestic criminal law predated international criminal law. Alessandra Arcuri’s chapter on glyphosate problematizes science-based law, which she renames “legally embedded science-based law”, to account for the way the use of scientific results in the international legal system influences their production and presentation.

Questioning our anthropocentric framework, the chapters on international environmental law interestingly look at the law from the perspective of the objects it seeks to preserve, whether the whale, the trees, or the ocean floor (in Surabhi Ranganathan’s chapter on manganese nodules). In the chapters on international humanitarian law, objects stand in, either metaphorically or literally, for combatants. Kimberley N. Trapp’s chapter looks at “Boots (on the Ground)” as a common shorthand phrase for the deployment of ground troops abroad and its significance in international law, notably with regard to the obligations triggered by the presence of forces on the ground as an element of effective control over a territory. Ioannis Kalpouzos’s contribution, on the contrary, centres on an object that replaces forces on the ground: the armed drone. He argues that the legal debates around this particular object crystallize the fears and promises of the “new way of war”, from the development of automated weaponry to the normalization of endless wars.

Finally, the book addresses the way in which international law invests objects with specific power in the material world. In “Peace Sign: La Comunidad de Paz de San José de Apartadó”, Thomas MacManus relates how a community in northern Colombia successfully reclaimed a mechanism of international law to protect itself from the surrounding violence, using the object of the peace sign.

Likely to reach a wider audience than solely practitioners of international law, *International Law’s Objects* will interest scholars in an array of disciplines in the social and natural sciences. A non-traditional but valuable pedagogical tool for students, it offers innovative insights into a range of issues pertaining to contemporary international legal scholarship while remaining mostly accessible to
the uninitiated. For any reader interested in the history of international law, the book provides a compelling alternative to a traditional chronological account of its genesis and development. In the end, its most significant achievement might very well be its ability to challenge common perceptions of international law as fixed and remote from our daily experiences. The stories behind each of the objects presented in the volume remind us of the way international law permeates our world and is itself permeated by it. If, as Julia Dehm convincingly argues, law and object exist in a relationship of co-constitution, it is this co-defining, dynamic relationship that is at the core of the volume.

5 Ibid., Part II, Chap. 20. See argumentation on p. 318 about the world-making power of international law.
Established in 1869, the International Review of the Red Cross is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The Review offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the Review informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

Aim and scope
Established in 1869, the International Review of the Red Cross is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. An impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the International Red Cross and Red Crescent Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Movement.

International Committee of the Red Cross
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Cover Photo: A refugee girl sits in a classroom at a Lebanese public school where only Syrian students attend classes in the afternoon. 29 May 2014. Credit: Hussein Malla/AP/Keystone.
Children and war

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“This is my story”: Children’s war memoirs and challenging protectionist discourses
Helen Berents

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Testimonies of former child soldiers in the Democratic Republic of Congo

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