

Master of Law: Advanced Studies in International Children's Rights

**In Search of UN CRC-Based Remedies for Child Civilians Affected by Armed
Conflict**



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Drawing by a Syrian girl, about 5 years old, Thermopylae, Greece.

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Executive Summary

Legally, children in armed conflict will mostly be protected by the CRC, which consists of IHRL. The CRC contains two specific provisions for children in situations of war: articles 38 and 39. Pursuant to article 38(4) CRC relevant rules of IHL (the law of war) are regarded as being incorporated into the CRC, as a safety net. Despite this dual legal protection, the harsh reality shows that children are still being killed, injured, starved, traumatised, separated from their families and left without schooling due to armed conflict. Although war-affected children can never be fully 'repaired', the survivors possess the strength and resilience to move on, if appropriately assisted and supported. However, a lack of political will, funding and awareness of the possibilities law might offer, rather than any deficiency in the existing legal framework, prevents children from obtaining full reparation of their wartime harms.

Under international law, States are obliged to provide victims of rights violations, including children, with an effective domestic remedy to redress their wartime harms. However, this may turn out to be a mission impossible for States in or recovering from armed conflict. Where domestic remedies fail, there should be a civil judicial remedy at the international level. Currently, such remedy lacks or is under-used. This thesis revolves around the role the CRC, including its OPAC and OPCP, may play in providing 'child civilians', children who are not associated with armed forces or groups, with such an international remedy. Both rights of children and remedies for violations thereof are UN based. Therefore, the UN system is followed as much as possible. This will enhance the coherence and comprehensiveness of the whole system and facilitate the use of the proposed remedies.

Chapter 2 starts with an analysis of children's rights in armed conflict. Pursuant to Article 38(1) CRC, States should respect and ensure respect for rules of IHL 'relevant to the child.' No separate instrument of IHL exist, although GCIV and API (both applicable in IACs); APII (applicable in NIACs); common Article 3 to the GeCos and rules of CIHL (applicable in all armed conflicts), offer some protection. IHL regulates the conduct of hostilities through the overarching principles of military necessity and humanity and the closely-related principles of distinction, proportionality and precautionary measures. These principles do not require the express consideration of children, whilst means or methods of warfare have a greater impact on children as compared to adults. IHL also governs the treatment of persons. Protection offered varies depending on age, with a special focus on children under 15. GCIV does not expressly state that children are entitled to special care and protection. API (article 77(1)), APII (article 4(3)) and CIHL (rule 135) do contain such provisions.

Article 38(4) CRC holds that States have to take all feasible measures to ensure protection and care of children affected by armed conflict. These measures must be in accordance with provisions of IHL protecting the civilian population in armed conflict. Article 38(4) CRC inserts IHL, a separate body of law, into the CRC, which is a human rights treaty. Hence, during armed conflicts not only the CRC, including its general principles, applies but also relevant norms of IHL. There is still ongoing debate as to the exact scope of the relationship between IHL and IHRL, although since the decision of the ICJ in the Wall the interplay has generally been understood as 'complementary, not mutually exclusive.'

Following the Machel Report which revealed the detrimental impact of war upon children, the SC identified six grave violations against children: 1) recruitment for and use of children in hostilities; 2) killing or maiming of children; 3) sexual violence against children; 4) attacks against schools or hospitals; 5) abduction of children and 6) denial of humanitarian access. The identified categories do not represent a complete list of violations, but they are most common, have severe consequences on children's lives and constitute egregious violations of IHL and/or IHRL (and of international criminal law, which is beyond this thesis' scope). The six grave violations are linked to several human rights of children, contained in the CRC. Children have the right to life and survival (article 6); to be protected

against violence and sexual abuse (articles 19, 34 and 37(a)) and to be protected against abduction (article 35). Children also remain entitled to at least the minimum essential levels of ESCR. Inability of a State to provide children with these 'core obligations' due to a lack of resources caused by the armed conflict, will generally not be accepted. This means that the State involved has to protect, to the best of its abilities, children's right to education (articles 28 and 29); to adequate health care (article 24); to access to food, clean water and shelter (article 27) and to play (article 31). Since this thesis solely deals with child civilians, neither the first grave violation nor article 38(2) and (3) are addressed.

Measures addressing the six grave violations are provided for by the UN. It established a mandate for a SRSG-CAAC to be appointed, as well as Monitoring and Reporting Mechanisms in war-affected countries. The SG lists in his annual reports parties to conflict responsible for committing grave violations. At the domestic level, described in chapter 3, States are under a dual obligation as regards the provision of remedies. Firstly, according to article 39 CRC they have to take swift measures to promote the physical and psychological recovery and social reintegration (food, health care, education, shelter and a safe, stable and loving environment) of children whose rights under IHL and/or IHRL have been violated, irrespective of the State's legal liability for the occurred breach. Children should be involved in their design and implementation.

States in, or emerging from, an armed conflict may be unwilling or unable, due to a lack of resources, to (fully) provide children with these rehabilitative measures. In such cases, a possible solution may be provided by OPAC. Article 6(3) OPAC entails, inter alia, the obligation of a State to take measures to promote the physical and psychological recovery and reintegration of children recruited or used in hostilities. In order to allow a State to take such rehabilitative measures, article 7(2) OPAC stipulates that assistance may be provided by other States and/or private actors through the establishment of a voluntary fund. Such a Fund has, for unknown reasons, not been operational (yet), although there are successful comparable Funds, as the Voluntary Fund for Victims of Torture. This thesis holds that the OPAC Fund should be established and used for *all* child victims of armed conflict. It would not only benefit individual children, but also their families and communities of which they form a part.

Secondly, to fulfil their obligation to provide children with domestic remedies to redress rights violations, States must ensure that children (and their representatives) have access to independent complaints procedures and to the courts. Where rights are found to have been breached, there should be appropriate reparation. Reparation encompasses, according to the BPG: restitution; compensation; rehabilitation; guarantees of non-repetition and satisfaction. After the exhaustion of domestic remedies, victims can appeal to the CRC Committee under its OPCP. That also applies when domestic remedies do not exist or are not accessible. The communication may concern a violation of IHL or IHRL contained in the CRC, committed by or attributable to the State. It may also concern a State's unwillingness to take the recovery and reintegration measures of article 39. However, the State concerned must have acceded to OPCP for the Committee to have competence. Since it has been ratified by just 44 States, encouraging further ratification should feature high on the political agenda.

The CRC Committee has never dealt with IHL in a GC or in the context of the OPCP. Therefore, it is of interest to note that the HRC recently issued a GC in which it considered breaches of IHL, linked to grave violations, concerning the right to life captured in article 6(1) ICCPR. Although the views of the Committee are not legally binding and collective communications are not allowed, the OPCP could play an important role in redressing violations of children's rights in armed conflict. Both this route and the one leading to the OPAC Fund have their own advantages and disadvantages, and both have never been used, although for different reasons. However, at the international level there is no (other) civil adjudicative remedy available to provide children with adequate reparation, enabling their recovery from wartime harms and their reintegration in a safe, stable and caring environment.

Keywords

Key words: child - Convention on the Rights of the Child – International Humanitarian Law – OPAC – remedy - reparation - recovery – reintegration - accountability – Voluntary Fund - Optional Protocol on a Communications Procedure

Overview of Main Findings

In armed conflicts, 'child civilians' are protected by the CRC and norms of IHL relevant to them and their protection. Under IHRL, for rights to have meaning, remedies must be available to redress violations thereof. Timely remedies at the domestic level are likely to fail in most States suffering or emerging from armed conflict. The SC is since the Machel Report actively committed to the protection of war-affected children and a lot of academic literature has been published relating to this protection. However, less has been written about international civil remedies and even much less about international civil remedies available to child civilians (and their representatives). Therefore, this thesis aims to identify possible solutions in finding remedies for violations of child civilian's rights under the CRC, including norms of IHL, in armed conflict. Since the suggested solutions are both UN (CRC)-based, the UN-system relating to violations and remedies in the context of armed conflict is followed.

The first thing that had to be established was which rights apply to child civilians in armed conflict. Since two spheres of international law are applicable, the relationship between the two of them needed to be examined, with a view to article 39 CRC and the OPCP. Article 39 obliges States, irrespective of their liability, to take measures to promote recovery and reintegration of child victims of armed conflict. These measures are identified as being a (substantial) remedy in light of the BPG, namely providing victims with reparation in the form of rehabilitation. However, the use of the term victim presupposes the breach of a primary right. The main question that had to be answered in this respect was if conduct in the context of hostilities, in accordance with applicable norms of IHL, could still be a violation of children's human rights. It has been argued that this is the case, although a violation of only IHRL does generally not lead to legal liability. The conclusion drawn, was that each child civilian affected by armed conflict is a victim in the context of article 39 CRC and the OPCP.

The above renders article 39 CRC very important, which is multiplied by the fact that the provisions of article 39 may be interpreted very broadly and benefit not only individual children, but also families and communities. It may inter alia lead to maintaining and repairing homes, schools and hospitals, establishing playgrounds and reunifying families. Victims seem to prefer such measures above (financial) compensation. If a State is unable or unwilling to take the rehabilitative measures article 39 CRC requires, the child is entitled to an effective judicial remedy to address the breach thereof.

The BPG entitles victims of article 39 and of article 38 CRC to several forms of reparation by the State, including financial compensation; at least if the violation can be attributed to the State, which may also depend on the State's available resources. If there is no effective domestic remedy available to obtain reparation, the only route for children to take at the international level is the communication procedure under (especially) the OPCP. However, the Committees' views are not legally binding and the OPCP has been ratified by far too few States. A child, without access to domestic remedies, living in a (recently) war-affected State that has not ratified any UN treaty bodies' communication procedures and is unwilling to take the remedial measures of article 39 CRC, has at the moment no international civil remedy. That is not a satisfactory outcome. The Voluntary OPAC Fund, could alleviate the harms suffered, if it were operational and applicable to *all* child victims of armed conflicts. This thesis holds that given the Preamble of OPAC; its Reporting Guidelines; the COs of the CRC Committee under OPAC as well as the universal prohibition of discrimination, it could be argued that article 7(2) OPAC allows for the establishment of Voluntary Fund to be used for the benefit of both 'child soldiers' and 'child civilians'. The Fund should be directed at the 'prevention of any activity contrary to the Protocol' and at 'the rehabilitation and social reintegration of persons who are victims of acts contrary to the Protocol'. This Fund could follow the examples set by the Voluntary Fund for Victims of Torture, the Special Fund established under OPCAT and the ICC's Trust Fund for Victims.

List of Abbreviations

ACRWC African Charter on the Rights and Welfare of the Child
API Additional Protocol to the Geneva Conventions I
APII Additional Protocol to the Geneva Conventions II
BPG Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
CAT Convention against Torture (and other Cruel, Inhuman or Degrading Treatment or Punishment)
CEDAW Convention on the Elimination of All Forms of Discrimination against Women
CESCR Committee on Economic Social and Cultural Rights
CIHL Customary Humanitarian Law
CO(s) Concluding Observations
CRPD Convention on the Rights of Persons with Disabilities
CRC Convention on the Rights of the Child
DGD Day(s) of General Discussion
ESCR economic, social and cultural rights
GA General Assembly
GC(s) General Comment(s)
GeCos (Geneva Conventions I, II, III and IV)
GCIV Geneva Convention IV
HRC Human Rights Committee
IAC(s) International Armed Conflict(s)
ICC International Criminal Court
ICCPR International Covenant on Civil and Political Rights
ICESCR International Covenant on Economic, Social and Cultural Rights
ICJ International Court of Justice
ICL International Criminal Law
ICRC International Committee of the Red Cross
IHL International Humanitarian Law
IHRL International Human Rights law
MRM Monitoring and Reporting Mechanism
NIAC(s) Non-International Armed Conflict(s)
OHCHR Office of the High Commissioner of Human Rights
OP(s) Optional Protocol(s)
OPAC Optional Protocol to the CRC on the Involvement of Children in Armed Conflict
OPCAT Optional Protocol to the Convention against Torture
OPCP Optional Protocol to the CRC on a Communications Procedure
OPSC Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Pornography
OSRSG-CAAC Office of the Special Representative of the Secretary General on Children and Armed Conflict
PP Paris Principles
SC UN Security Council
SDGs Sustainable Development Goals
SG UN Secretary-General
SRSG-CAAC Special Representative of the Secretary General on Children and Armed Conflict
TFV Trust Fund for Victims of the ICC
UDHR Universal Declaration of Human Rights
VFVT UN Voluntary Fund for Victims of Torture
VCLT Vienna Convention on the Law of Treaties

1. Introduction

1.1. Children in Armed Conflict

When war breaks out, it impacts children's present, their future and as a result, also the future of our world. Nowadays, an estimated 350 million children – one child in every six – live in war-torn regions. This is an enormous increase compared to the 200 million of the early 1990s.¹ Moreover, the nature of conflicts has changed due to terrorism and advanced technologies, causing war increasingly to be fought in civilian settings. War-affected children are subjected to wartime harms: Killing and maiming; conscription; sexual violence; abduction. Many children may be deprived of basic necessities as food, clean water and shelter. Schools and hospitals may have been destroyed after a military attack. The UN Security Council (SC) has identified these harms as the so-called 'six grave violations' against children during armed conflict. However, everything that has been done to protect children against these violations is clearly not enough. More has to be done: 'With more children suffering horrific abuses in war zones across the globe, we desperately need to reinvigorate our efforts to raise awareness about [...] the core of the six great violations, and to redouble our common advocacy to ensure action by parties to conflict to give children the protection they deserve'.²

Law, although not the only instrument, plays a main role in protecting children in situations of armed conflict. Legal protection of children in times of war is governed by two partly overlapping bodies of law: international humanitarian law (IHL) and international human rights law (IHRL). International criminal law also plays a part but will not be discussed in this thesis. IHL only applies in times of war, while IHRL applies at all times, in peace and in war. There is no separate instrument of IHL relating solely to the protection of children in armed conflicts, although Geneva Convention IV (GCIV) as well as Additional Protocols I and II (API and APII) to the Geneva Conventions (GeCos) offer some protection.

The UN Convention on the Rights of the Child (CRC) consists mainly of IHRL. The Convention contains two specific provisions on children in war situations (articles 38 and 39). Rules of general IHL relevant to the child are regarded as being incorporated into the CRC pursuant to article 38(4) CRC. This provision is understood as a safety net, because children in armed conflicts will mostly be protected by the rights enshrined in the CRC which are linked to the abovementioned six grave violations. Apart from the CRC, its Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) and its Optional Protocol on a Communications Procedure (OPCP) are relevant.

For rights to have meaning, effective remedies must be available to redress violations.³ This means that States must ensure that children and their representatives have access to independent complaints procedures and to the courts. It also means that where rights are found to have been breached, there should be appropriate reparation. Reparation encompasses, according to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (BPG): restitution; compensation; rehabilitation; guarantees of non-repetition and satisfaction.

After the exhaustion of domestic remedies, children can appeal to the CRC Committee under OPAC, or, when applicable, to other human rights treaty bodies. That applies even when domestic remedies do not exist or are not accessible, which might be due to the (former) situation of armed conflict. The

¹ Brown at XI.

² Website OSRSG-CAAC.

³ CRC Committee, GC No. 5, paras. 24-25.

communication under the OPCP may concern a violation of relevant norms of IHL or CRC rights, committed by or attributable to the state. However, the state involved must have acceded to OPCP in order to give the CRC Committee competence. Unfortunately, OPCP has been ratified by just 44 States. Encouraging ratification of the OPCP should therefore feature high on the political agenda in order to protect children's rights in practice.

On the other hand, the CRC contains article 39, which holds that States shall take measures to promote physical and psychological recovery and social reintegration of child victims of armed conflict, whether the State is liable for the occurred breach or not.⁴ States in, or emerging from an armed conflict may be unwilling or unable to provide children with these rehabilitative measures. A possible solution for a lack of resources might be provided by OPAC. It obliges States, inter alia, to take measures to promote the physical and psychological recovery and reintegration of children recruited or used in hostilities.⁵ In order to allow a State to take such rehabilitative measures, assistance may be provided by other States or private actors in the form of a voluntary fund. Such a Fund has, for unknown reasons, not been established (yet). This thesis holds that the OPAC Fund should be established and used, not only for children associated with States' armed forces or non-State armed groups, but also for those victims of war who were not: the child civilians.

In the meantime, for children living in war-affected countries that have not ratified the OPCP, the CRC is capable of providing some relief in two ways. The first is that the Committee can exert its influence through its Concluding Observations (COs), which, despite the fact that they are not legally binding, are of a highly authoritative character. However, the recommendations they contain are mostly of a general character.⁶ The other way is through its General Comments (GC). They clarify many of States' obligations corresponding to many rights contained in the CRC and have considerable legal weight, although they are also not legally binding.⁷ Both COs and GCs will be addressed in this thesis.

1.2. Impact of War on Children

The famous Machel Report⁸, published in 1996, documented the devastating impact of war on children. It caused the UN to focus on this specific issue and led to the development and approval of OPAC, the appointment of a Special Representative of the Secretary-General on Children and Armed Conflict (SRSG-CAAC) and to the identification by the SC of the above mentioned six grave violations. Machel started her journey at the time in Rwanda, at the request of the Secretary-General (SG) and, afterwards, called her report 'a cri de coeur'. She witnessed pain, fear and desperation, but on the other hand, she saw courage and resilience.

Machel revealed the detrimental effect upon a child's psychological and physical well-being. Children are more vulnerable than adults to violations of their rights due to their age and lower level of physical and mental development.⁹ Furthermore, they are often affected in a dissimilar way, both in the short and the long term. Therefore, Machel called for the need to integrate the physical and psychological recovery and social reintegration of children affected by armed conflict as early as possible. Whilst it is still topical, the Report will be used throughout this thesis.

⁴ Tobin at 1562.

⁵ Article 6(3) OPAC.

⁶ COs are issued by the Committee in response to States' reports. They are moral and political authoritative (Ang, para. 13), but as an accountability mechanism weak, (Fatima, at 7.140.1). Following GA Resolution 68/268, para. 6, COs issued by the Committee are increasingly more focused and concrete.

⁷ ICJ (2010) at 66.

⁸ Machel Report.

⁹ Nolan at 4-5.

1.3. Scope and Framework of Analysis

One of the six grave violations is the use for and recruitment of children in States' armed forces or armed non-State groups. In this thesis, these children will be addressed to as 'child soldiers', however inaccurate. Children associated with these groups, who are for example used as cooks or couriers, will also fall under the scope of the term 'child soldiers', following the Paris Principles (PP)¹⁰. These children are victims of armed conflict and could or even should have been included in this thesis. However, they encounter very difficult and diverse problems relating to their recovery and reintegration. Due to time and space restrictions they, as well as the grave violation concerning them, are beyond the scope of this research. Hence, this thesis will solely focus on remedies for children, whom will, equally inaccurate, be called child civilians.¹¹ Another reason for this focus is that the legal protection of child civilians affected by armed conflict, has been underexposed and underreported.

The central issue of this thesis is to probe whether the CRC can provide child civilians with a remedy for violations of their rights, linked to the grave violations, in armed conflict. To analyse the content of children's rights in wartime and the remedies that might be available to them to address violations thereof, articles 38 and 39 CRC as well as OPAC and OCPD will be leading. For their respective interpretation, use will be made of GCIV; API; APII; Customary International Humanitarian Law (CIHL) as identified by the Study of the International Committee of the Red Cross (ICRC); the BPG; GCs and COs of the CRC Committee, supplemented where needed by those of other human rights treaty bodies; SC Resolutions and last but not least, relevant academic literature.

1.4. Methodology and Research Question

Research for this thesis has been conducted on the basis of legal desk research combined with some findings from interviews with experts. Dr. Helen Beckmann provided some preliminary information on the interplay between humanitarian, human rights and criminal law. Professor Jaap Doek, former chair of the CRC Committee, gave me information on the CRC and OPAC, and drew my attention to the possibility of a Voluntary Fund under OPAC. I started reading on children in armed conflict to familiarise myself with the topic, with a focus on trying to find out which possibilities child civilians have to find redress for wartime harms. My initial question led to the following research question:¹²

Does the Convention on the Rights of the Child, including its Optional Protocols, provide child civilians with a remedy for violations of their rights linked to the six grave violations, as identified by the UN Security Council, in armed conflict?

If so, which remedy/remedies and what does it/do they entail?

If not, what should/could be done to make it possible to provide child civilians with a remedy based upon the Convention on the Rights of the Child, including its Optional Protocols?

In answering the research question, the UN system is followed as much as possible. Since both rights of children and remedies for violations thereof are UN based, this will enhance comprehensiveness and coherency.

¹⁰ PP, para. 2(1).

¹¹ The distinction, however, is totally artificial.

¹² The focus on child civilians in this thesis means that the first of the six grave violations, i.e. the recruitment for and use of children in hostilities, will not be dealt with.

After this introductory chapter, an overview of the legal framework is provided in chapter 2. It reviews, pursuant to article 38 CRC and in light of the (remaining) five grave violations, the provisions of IHL relevant to children and of the CRC. Chapter 3 then turns to remedies for child civilians affected by armed conflict, focussing on article 39 CRC. The chapter examines the possibility of establishing and using a Voluntary Fund under OPAC to cover the costs of measures aimed at children's recovery and reintegration. Hereafter, the role of the OPCP is discussed. The final chapter, chapter 4, contains a conclusion and some recommendations.

2. Legal Framework

2.1. Article 38 CRC

2.1.1. Introduction

The CRC contains one article specifically aimed at children in armed conflict, which is article 38. This article is closely related to article 39 CRC, which entails the right of child victims to recovery and reintegration. Before turning to remedies in chapter 3, it has to be established first which rights apply to children in armed conflict. After all, a remedy presupposes a violation, i.e. an unlawful act or omission, of a primary right. Article 38 CRC gives guidance as to the applicable rights during armed conflict. It is directed at two categories of children. The first group are 'child soldiers', children associated with armed forces or armed groups, in short, however inaccurately and just for the sake of using a short term, referred to as 'child soldiers'.¹³ The other category addresses 'child civilians', i.e. children who are not associated with armed forces or armed groups, but who are otherwise affected by war.¹⁴ Child soldiers encounter very diverse and difficult problems compared to child civilians. For practical reasons, only child civilians will therefore be addressed in this thesis.

Article 38(1) CRC stipulates that States 'undertake to respect and to ensure respect for rules of IHL 'relevant to the child.' This provision sees to both child soldiers and child civilians. IHL, in broad terms, regulates both conduct of hostilities (military operations) and treatment of persons, in order to minimise human suffering. Therefore, IHL is about finding a balance between military necessity and humanitarian protection. The main instruments of IHL of importance for children are GCIV; API; APII; common Article 3 to the GeCos and CIHL as identified by the Study of the ICRC.¹⁵

Article 38(2) and (3) CRC deal solely with child soldiers and will, given the limited scope of this thesis, not be addressed. Article 38(4) is directed at child civilians only and obliges States to ensure their protection and care 'in accordance with [States'] obligations under IHL'. Thereby, it does not call on States to just 'respect and ensure respect' for IHL as in the first paragraph, but it inserts IHL, a separate body of law, into the Convention, which is a human rights treaty. Thus, during wartimes not only the CRC applies, but also norms of IHL. This raises all kinds of questions regarding the relationship between IHL and IHRL. ESCR are also applicable during armed conflicts, but they are of a different character than other human rights and are therefore elaborated in paragraph 2.1.3. Before turning to the legal framework in relation to the five grave violations (paragraph 2.4.), the scope of article 38(1) and (4) CRC is set out in paragraphs 2.2 and 2.3.

2.1.2. Relationship between IHL and IHRL

In 2004, a landmark decision commonly referred to as 'the Wall', was delivered by the International Court of Justice (ICJ).¹⁶ The ICJ considered that: '[T]he protection offered by human rights conventions, does not cease in case of armed conflict'.¹⁷ It continued: '[S]ave through the effect of provisions for derogation of the kind to be found for in article 4 International Covenant on Civil and Political Rights' (ICCPR). The CRC does not contain a derogation clause. Therefore, it is generally

¹³ PP, para. 1(2). See below at 2.2.4.

¹⁴ In CRC Committee, CO on Lebanon (1996), para. 42, the Committee calls them 'passive' victims of war.

¹⁵ IHL consists of rules codified in treaties, as the GeCo's, and of CIHL. Treaty law only applies to States that have ratified these treaties and does not cover all of today's armed conflicts in sufficient detail. Therefore, the ICRC studied and codified rules of CIHL. Codification is based upon both State practice and 'a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law' (website ICRC, *Introduction Customary IHL*).

¹⁶ ICJ, the Wall, para. 106. The ICJ explicitly refers to the CRC in its Opinion at para. 113.

¹⁷ *Ibid.*

assumed that the Convention remains to be applicable in armed conflicts.¹⁸ The CRC Committee itself has also explicitly expressed the applicability of all CRC provisions during armed conflicts.¹⁹ This means that article 38 CRC does not displace other CRC provisions. The CRC's general principles: the right to life, maximum survival and development (article 6); the right to non-discrimination (article 2); the right to have her/his best interests taken as a primary consideration, also when it concerns a child's safety (article 3)²⁰ and the right to be heard (article 12), remain applicable.²¹ Children living in war situations also remain entitled to, inter alia, education (articles 28 and 29), health care (article 24) and an adequate standard of living (article 27).

The combined and sometimes overlapping IHRL and IHL framework is in theory capable of protecting children affected by armed conflict. A thorny issue is whether, for example, the death or injury of a child in the conduct of hostilities constitutes a violation of her/his right to life under the CRC, when this harm is caused by an act in accordance with IHL. One might argue that this would still be a violation, since the CRC does not contain a derogation clause. However, that is where IHL rules come into play. Both the Human Rights Committee (HRC) and the ICJ have acknowledged, in relation to the right to life under the ICCPR (from which right no derogation is permitted), that use of lethal force consistent with IHL would in general not be an arbitrary deprivation of life.²² See for an elaboration hereof, paragraph 2.4.2.2.

However, primacy of IHL would be problematic for children since IHL falls short in fully protecting them. The IHL principles governing conduct of hostilities threatening children's lives do not take into account their special vulnerability as compared to adults and protection depends sometimes on age, see 2.4.2.1. On the other hand, standards set in IHL with regard to conduct in hostilities are sometimes more detailed than those in IHRL, for example regarding evacuation. Furthermore, armed groups are generally not bound by IHRL, since IHRL is directed at States.

Since 'the Wall', the interplay between IHL and IHRL has generally been understood as 'complementary, not mutually exclusive'.²³ The ICJ considered that IHL and IHRL both apply but notes that particular rights may be matters of one, the other or both. Debate is still ongoing as to the exact scope of the relationship between both spheres of law. The Machel report acknowledged the complementarity of IHL and IHRL, thereby referring to the CRC as one of the most important bridges linking the two bodies of law.²⁴ The ICRC, the most authoritative source for the interpretation of IHL, calls IHL and IHRL 'distinct yet related'.²⁵ According to Todeschini, human rights treaty bodies rely on the principle of systemic integrations, as set out in article 31(3) Vienna Convention on the Law of Treaties (VCLT).

Riedel argues that 'the [...] correct view holds that IHRL always applies but is complemented by IHL rules.'²⁶ He continues by stating that 'the task simply is to assess humanitarian and human rights rules

¹⁸ General Assembly (GA), Resolution 2675 (XXV) para. 1.

¹⁹ CRC Committee, GC No. 16, para. 49. The HRC states in its GC No. 36, para. 2, that the right to life is a 'supreme right from which no derogation is permitted even in situations of armed conflict'.

²⁰ CRC Committee, GC No. 14, para. 73.

²¹ The right of the child to be heard is also important in emergency situations, see CRC Committee, GC No. 12, paras. 125-126. This right also plays a role in children's right to a remedy (para. 3.1.8.).

²² ICJ (1996) at para 25 and HRC, GC No. 36, para. 64. The African Commission on Human and Peoples' Rights states in its GC No. 3 on the right to life at para 32: 'Any violation of IHL resulting in death, including war crimes, will be an arbitrary deprivation of life'.

²³ HRC, GC No.31, para. 11.

²⁴ Machel Report, para. 210.

²⁵ ICRC website: *IHL and IHRL: Similarities and Differences*.

²⁶ Riedel. He argues that the strongest support for his view can be found in article 72 API, where reference is made to 'other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.'

in the concrete situation and determine which provides greatest protection to the individuals concerned.' That is, with regard to children, in line with article 41 CRC, which obliges States to always apply the 'provisions which are more conducive to the realisation of the rights of the child'.²⁷ Tobin says that a particular limitation of children's rights during wartime can be justified only if this limitation is reasonable. He argues that during armed conflicts the principle of proportionality would specifically help to align IHRL with IHL.²⁸ Either way, the question whether an act or omission violates IHL and/ or IHRL is important in the context of the child's right to a remedy.

2.1.3. Economic, Social and Cultural Rights (ESCR) in Armed Conflict

ESCR have 'largely and undeservedly been reduced to a side role' in armed conflict, while violations of exactly these rights have a detrimental impact on the survival and well-being of many, many people all over the world.²⁹ Already in 1974, the GA stated that women and children belonging to the civil population 'shall not be deprived of shelter, food, medical aid or other inalienable rights'.³⁰ Children are even more vulnerable to violations of their ESCR than adults and are often affected in a dissimilar way.³¹ Relevant articles of the CRC on ESCR in the context of the grave violations are article 6(2) on the survival and development of the child; article 24 on health; article 27 on an adequate standard of living; articles 28 and 29 on education, article 31 on the right to play; the obligation to undertake remedial measures set out in article 39 CRC and articles 6(3) and 7 OPAC.³² Some of these provisions are complemented by detailed rules set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR).³³

In the Wall, the ICJ did not make an exception for the applicability of ESCR, but in contrast specifically mentioned them and the ICESCR.³⁴ Consequently, children's ESCR, must be respected, protected and fulfilled,³⁵ even in times of war. Both IHL and IHRL provide complementary and not mutually exclusive protection of ESCR in situations of conflict. As the Committee on ESCR (CESCR), responsible for monitoring state compliance with the ICESCR, noted; '[E]ven in a situation of armed conflict fundamental human rights must be respected [...] basic ESCR [...] are guaranteed under CIHL and are also prescribed by IHL'.³⁶ The CRC Committee affirmed in its GCs³⁷ and COs³⁸ that States are obliged to maintain, respect, protect and progressively fulfil each of the essential features of ESCR. This means ESCR have to be available, accessible, acceptable and of sufficient quality, even in situations of war.

However, ESCR are of a special character. They have to be implemented, according to article 4 CRC, 'to the maximum extent of a State's available resources'.³⁹ Yet, in armed conflicts, a varying degree of

²⁷ CRC Committee, DGD (1992), para. 68.

²⁸ Tobin at 1514.

²⁹ Riedel at 2.

³⁰ Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974).

³¹ Nolan at 4-5.

³² However, see paragraph 3.1.7. below.

³³ The CRC is considerably more child specific than the ICESCR. The ICESCR contains no derogation clause, although articles 2(1) and 4 permit two explicit limitations: general welfare and a lack of resources.

³⁴ The Wall, para. 112.

³⁵ CRC Committee, GC No. 15 in conjunction with CESCR, GC No. 14, which holds in para. 37 that the obligation to fulfil entails the obligation to facilitate, provide and promote.

³⁶ CESCR, CO on Israel (2003), para. 31.

³⁷ CRC Committee, GC No. 15: 'States should demonstrate their commitment to progressive fulfilment of all obligations under article 24 [CRC], prioritizing this even in the context of political or economic crisis or emergency situations.'

³⁸ For example, CRC Committee, CO on Azerbaijan (1997). COs of the Committee may be viewed as guidance to the normative content of the Covenant: see Mottershaw at 452. COs are also cited by the ICJ in the Wall, para. 112.

³⁹ This is not incompatible with the 'feasible measures' required by 38(4) CRC, as a higher standard prevails.

flexibility exists, depending on the specific conflict conditions.⁴⁰ This flexibility is nevertheless not unlimited. A State is at least obliged to provide a minimum extent of ESCR. These so called 'minimum core obligations' ensure the satisfaction of the minimum essential levels of each of the ESCR.⁴¹ The CESCR, on whose work the CRC Committee heavily relies,⁴² outlined these minimum essential levels in its GCs on food, water, housing (including sanitation), health and education. In short, the minimum core obligation concerning health encompasses essential primary health care, including food, shelter, housing, sanitation and safe and potable water.⁴³ The minimum core relating to education entails compulsory primary education, free for all and generally available secondary education.⁴⁴

Core obligations are non-derogable and may not be compromised. This would go against the nature of (most) ESCR, linked as they are with the non-derogable right to life. Therefore, a State-Party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations by referring to a lack of resources due to the conflict.⁴⁵ States are also not allowed to take any retrogressive steps that could hamper the enjoyment of children's ESCR.⁴⁶ The CESCR stressed that unwillingness to fulfil ESCR violates the ICESCR per se. On the other hand, the inability to fulfil them due to resource constraints puts a burden of proof on States.⁴⁷ In such cases, recognising the (additional) difficulties States face as a result of armed conflicts, the CESCR requires them to show that every effort has been made to use all resources that are at its disposition.

Important in the context of resources is that the ICESCR obliges States to seek international assistance and co-operation to progressively achieve the full realisation of ESCR, with a focus on the fulfilment of the core obligations.⁴⁸ Resources available to a State therefore include resources available from the international community, as is also the stance of the CRC Committee.⁴⁹ It criticised countries for prioritising military expenditures at the expense of budgetary allocations to implement the rights of children⁵⁰ where budget decisions should be made with the best interests of children as a primary consideration.⁵¹

Before moving on to the scope of article 38(1) and (4) CRC, it must be noted that, although topic of an ongoing academic debate, non-State armed groups are, in general, not bound by IHRL. The addressee of human rights treaties is always the State-Party that has ratified a certain treaty, such as the CRC, its OPs or the ICESCR. Therefore, States are obliged to monitor and regulate the conduct of non-State actors by requiring child's rights due diligence. This is in accordance with States' responsibility to protect the rights provided for in treaties they have acceded to.⁵² Through this

⁴⁰ ICESCR, article 2(1) and CESCR, GC No. 3, paras. 9-10.

⁴¹ CESCR, GC No. 3, para. 10.

⁴² CRC Committee, GC No. 5, paras. 5-8. For the external coherence, see also ICJ (1971), para. 53.

⁴³ ICESCR, article 12 and GC No.14, paras. 43-44.

⁴⁴ ICESCR, article 13 and GC No.13, paras. 57.

⁴⁵ CRC Committee, GC No. 15, para. 72 and CESCR, GC No. 14, para. 47. See also Maastricht Guidelines at 9. According to Müller, a tendency can be observed in States' and the CESCR's approach to allow for derogations from the ICESCR's labour rights, but to exclude derogations from other ESC rights, in particular from minimum core obligations under these rights.

⁴⁶ CRC Committee, GC. No. 19, para. 31.

⁴⁷ Müller at 583 and CESCR, GC No. 3, para. 10. The CESCR also took these difficulties into account when formulating recommendations in its COs.

⁴⁸ CESCR, GC No. 14, para. 45. States receiving such a request, are legally not obliged to comply.

⁴⁹ CESCR, GC No. 3, para. 3; CESCR, GC No. 14, para. 38; CRC Committee, GC No. 5, para. 7 and CRC Committee, GC No. 15, para. 23.

⁵⁰ CRC Committee, CO Sudan (2010), para. 17 and CRC Committee CO on the Democratic Republic of the Congo (2012) under OPAC, para. 18.

⁵¹ CRC Committee, GC No. 5, para. 5.

⁵² The obligation to protect means that States are required to prevent third parties from interfering with the enjoyment of rights: CESCR, GC No. 13, para. 47. See also CRC Committee, GC No. 16, in which the principle of due diligence is elaborated and CRC Committee, CO on Sudan, para. 6.

construction, States can also be held accountable for violations of children's rights during armed conflict committed by armed groups. Armed groups are, however, regarded to be bound by IHL, as set out below.⁵³

2.2. Article 38(1) CRC

2.2.1. Rules of Applicable IHL

Pursuant to article 38(1) CRC, States are bound to undertake to respect and to ensure respect for instruments of IHL applicable to them. IHL is neither defined in the CRC, nor by the Committee itself. A generally accepted definition stems from the ICRC:

'IHL is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. IHL is also known as the law of war or the law of armed conflict.'⁵⁴

This set of rules governing warfare consists of two elements: legally binding instruments to which a State is a party and CIHL (Customary IHL). Rules of CIHL are described and evidenced in the Study of the ICRC. The core provisions of IHL are contained in the four GeCos and their three APs.⁵⁵ In the context of article 38(1) CRC, IHL must be relevant to the child. Of relevance for the child are mainly GCIV relative to the Protection of Civilian Persons in Time of War,⁵⁶ common Article 3 to the four GeCos, API and APII. GCIV and API aim at the protection of victims of international armed conflict (IAC). APII is directed at the protection of victims of non-international armed conflicts (NIAC). Common Article 3 contains the minimum standards applicable to any case of 'armed conflict not of an international character.' GCIV is almost universally ratified, in contrast to the APs, which is unfortunately because they contain more detailed provisions aimed at children than GCIV and CIHL.

2.2.2. Armed Conflict

Articles 38(1) (4) and 39 CRC all contain the term 'armed conflict', without any definition. The CRC does not make a distinction between sorts of armed conflict: it applies to all types of armed conflict. In order to reach the required level that qualifies an armed conflict, Hampson points out that at least two elements must be present: 'a minimum level of intensity (i.e. the fighting should not be isolated or sporadic) and 'such a degree of organisation in the non-State forces as to enable a command structure to function.'⁵⁷

Distinguishing between IACs and NIACs is important because the characterisation of a conflict as an IAC or NIAC determines the applicable set of IHL rules. This applicable set determines whether or not rules of IHL have been violated. Tobin mentions that the qualification of a conflict is largely left to

⁵³ Geneva Call launched in 2010 its Deed of Commitment on the Protection of Children from the Effects of Armed Conflict, signed by 29 armed groups. By signing, these groups formally agree to abide by norms protecting children.

⁵⁴ Website ICRC Advisory Service on IHL: '*What is IHL?*'

⁵⁵ Obviously, although they are beyond the scope of these thesis, there are many more rules governing IHL. Treaties relating to specific weapons, tactics or protected persons and objects are, for example, the 1954 Convention on the Protection of Cultural Property during armed conflict, the 1972 Biological Weapons Convention, the 1980 Convention on Conventional Weapons, the 1993 Convention on Chemical Weapons and the 1997 Ottawa Convention on anti-personnel mines. Insofar as not codified, Hague Law (Hague Conventions of 1899 and 1907), regulating how armies should conduct themselves during hostilities, is also not discussed.

⁵⁶ GCIV contains four parts and provides protection to the civilian population in general. Some articles afford children specific protections.

⁵⁷ Hampson at 2.1.1.

States' discretion in the absence of a 'determining body, standard or internationally accepted method for characterising conflicts'.⁵⁸ Due to the complex and difficult nature, the CRC Committee seems, as Tobin puts it, 'unlikely to do so' itself in the context of its COs'.⁵⁹ States that do not wish rules of IHL to apply, will deny that their 'strife' falls within Hampson's characterisation of armed conflict.

An IAC involves 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'.⁶⁰ In addition, there is also an IAC in 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.' Article 1(4) API broadens this definition by providing that armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes are also to be considered international conflicts. In case of an IAC, GCIV and API apply (as do the other three GeCos, but they are not very relevant to children).

As regards a NIAC, this category is governed by common Article 3. This 'yardstick' applies to all armed conflicts occurring in the territory of one of the parties. It entails the principle of humanity but offers no specific protection or assistance to children. APII was issued to fill this gap. It *inter alia* provides children, in article 4(3), with 'the care and aid they require.' Pursuant to article 1(1), APII is applicable when the conflict, exceeding a minimum level of intensity, takes 'place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'

As mentioned, APII includes some important provisions especially dedicated to children, however, as noticed by Ang, it does not contain the same level of protection or detailed regulations as GCIV and API with regard to IACs.⁶¹ APII lacks for example specific rules and definitions with respect to principles that (should) govern warfare, such as the principles of distinction and proportionality (see 2.4.2.1.). However, these principles, to which the CRC Committee refers in several of its COs⁶², are deemed CIHL according to the ICRC Study. They are equally applicable in IACs and NIACs and also bind armed groups.⁶³ However, in general, as the ICRC puts it: 'NIACs suffer from a lack of rules, definitions, details and requirements in treaty law'.⁶⁴

In addition, recent armed conflicts may be difficult to categorise. The protracted conflict in Syria can be identified as a NIAC. The external support for the involved domestic actors, provided by among others the Russian Federation, Iran, Turkey and the US, turned the conflict into what Fatima calls an 'internationalised' NIAC.⁶⁵ At present, no such legal category exists and the need to its recognition is disputed by the ICRC.⁶⁶ However, it is obvious that the character of current armed conflicts has shifted with the majority of today's conflicts being non-international. Moreover, modern wars increasingly take place in populated areas, leading to more children being harmed.

⁵⁸ Tobin at 1518.

⁵⁹ Tobin at 1519. See also CRC Committee, CO on Saudi Arabia under OPAC (2018).

⁶⁰ Common Article 2 to the GeCos.

⁶¹ Ang at 28 and ICRC, website ICRC, *Introduction Customary IHL*.

⁶² See below, para. 2.3.

⁶³ The use of chemical weapons, such as the alleged chlorine attack in northwest Syria last May is prohibited under CIHL, Rule 74 on chemical weapons.

⁶⁴ Henckaerts & Doswald-Beck, ICRC at XXXV.

⁶⁵ Fatima at 2.77.3.

⁶⁶ *Ibid*, at footnote 100.

2.2.3. To Respect and Ensure Respect

A component of article 38(1) CRC that needs attention here, is the obligation of State-Parties to the CRC to 'undertake to respect and to ensure respect for rules of IHL'. This wording is consistent with the phrasing used in common Article 1 of the GeCos and article 1 API. The obligation to respect and ensure respect expresses that States have to comply 'in good faith' with IHL norms.⁶⁷ In the context of article 38(1) CRC, it means that States⁶⁸ have to 'refrain from unreasonable interference' with rules of IHL relevant to the child and that they shall ensure that non-State actors do the same.⁶⁹ It also means that States have to adopt measures to secure the full enjoyment of the rights of children within their jurisdiction.

Armed groups in NIACs are bound by APII, if APII is ratified by the State in which they operate and if the conflict falls under the scope of APII. If APII does not apply, armed groups are only bound by common Article 3, which uses a broader definition of NIAC, and by Rules of CIHL identified by the ICRC as applicable to them.⁷⁰

2.2.4. Relevant to the Child

Article 38(1) CRC is directed to 'the child'. A child means, according to article 1 CRC 'every human being below the age of eighteen years.' Article 38(1) sees to child soldiers and child civilians. Although all children are victims of armed conflict, only the rights of child civilians will be examined in this thesis, as mentioned before. However, attempts to give a clear definition of a child civilian, end in muddy waters. IHL distinguishes between combatants and civilians, which is important because only combatants are permissible targets in warfare. GCIV (article 3(1)), API (article 50(1)), APII (article 13) and CIHL Rule 5 give varying and unclear descriptions of civilians. As regards child soldiers, neither article 38(2) or (3) CRC nor OPAC, provide a definition. The PP, highly authoritative but not legally binding, does offer guidance in paragraph 2(1):

'A child associated with an armed force or armed group' refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.'

Hence, in the context of this thesis, child civilians are children who are not associated with armed forces or groups.

IHL regulates both conduct of hostilities and the treatment of persons. To start with the first, there are five IHL principles governing conduct of hostilities: the overarching principles of military necessity and humanity and the closely-related principles of distinction, proportionality and precautionary measures. They are elaborated below but it should be mentioned here that these principles do not require the

⁶⁷ As codified in article 26 VCLT.

⁶⁸ States shall ensure that civilian and military authorities, members of the armed forces, the population and even the international community as a whole, each respect the rules of IHL: Pictet, Commentary on API, para. 45.

⁶⁹ Tobin at 1515. States' obligation to ensure respect also extends to non-State actors, for instance by criminalising grave breaches of IHL. States may according to case law of the ICJ generally be responsible for breaches of IHL committed by such actors, irrespective of the latter's own responsibility for breaches of IHL, at least if the State exercises effective control. The CRC Committee means by non-State actors also paramilitary groups and private companies, even when they assume de facto control: See Tobin at 1516, footnotes 75-76.

⁷⁰ Fatima at 2.58.

express consideration of children, whilst the impact of particular means of methods of warfare may have a greater impact on children as compared to adults.⁷¹

With regard to the treatment of persons, child civilians are entitled to the same general protections as all civilians, and in addition, to child-specific protections. Protection offered by IHL often varies depending on a child's age. Ang distinguishes between six ages of childhood in IHL provisions, although 15 is the most common.⁷² This constitutes a protection gap in IHL, which has to be filled by IHRL. Some twenty-five provisions of IHL of relevance to child civilians can be identified.⁷³ The main rules contained in GCIV, common Article 3, and API and II are discussed below when addressing the grave violations.

2.3. Article 38(4) CRC

Pursuant to article 38(4) CRC, States are under the obligation to take all feasible measures to ensure protection and care of child civilians. These measures must be in accordance with provisions of IHL protecting the civilian population in armed conflict. Again, this means that article 38(4) CRC is directed at child civilians. It offers them general protection in their capacity as civilians and special protection in their capacity as children. During the drafting of the CRC, there was debate among the delegations about the use of the word 'feasible'. It was proposed to replace it by the term 'necessary', since that would more accurately reflect the absolute nature of protection accorded by IHL to civilians in times of armed conflict. However, an objection was made because the word 'necessary' would represent 'a standard which would be impossible for any state to implement'. By way of consensus, the word feasible was eventually adopted.⁷⁴ This has led to criticism because it seems to lower the standard provided for by IHL⁷⁵ as well as by the CRC itself⁷⁶.

Article 38 CRC calls upon States to abide by IHL applicable to them, whilst at the same time acknowledging the applicability of the CRC to protect and assist child civilians affected by armed conflict. IHL and IHRL are complementary, meaning that a violation of article 38 CRC concerns violations of IHL and/or IHR, as set out above. Hence, the framework is deemed capable of fully protecting children. In that regard, Ang regrets that the CRC Committee does not automatically invoke IHL: '[T]he CRC Committee could test State-Parties' report by IHL norms which in some situations are the most conducive for the realisation of the rights of the child.' It seems as if the Committee took notice of this remark since recently, more references (to principles of IHL) can be found in several COs of the Committee.⁷⁷

The question which rules of IHL are relevant to the protection and care of children affected by armed conflict, will be reviewed in light of five of the six grave violations. Key rules relating to children in GCIV, API, APII, common Article 3 and the CRC are identified, only the most important ones will be discussed. Two preliminary remarks are in place. As noted, relevant rules afford either general (all civilians) or specific (children are especially mentioned) protection to children. Three articles require

⁷¹ Hampson at 4.1.2.

⁷² Ang, with a reference to Van Bueren, para. 39.

⁷³ Krill at 41. Via Tobin, footnote 105 at 1520.

⁷⁴ Detrick at 654-656.

⁷⁵ IHL contains absolute obligations, such as the prohibition of direct attacks against civilians and the special treatment afforded to children in IACs and NIACs.

⁷⁶ Articles 4 (ESCR) and 6(2) (survival and development) CRC require a state to take measures to the maximum extent possible. However, article 41 CRC requires the highest standard to be used though, see 2.1.2.

⁷⁷ In this respect, the CRC Committee urges war-torn States in its COs to ensure observance of the core IHL principles of proportionality, distinction and precaution. See, for example, CRC Committee COs on Syria, Saudi Arabia and Israel.

States to provide children during armed conflicts with specific protection: Articles 77(1) API, article 4(3) APII and CIHL Rule 135. Although different formulations are used varying from 'special respect...care and aid', to 'care and aid' and 'special respect and protection', respectively, it is held that these standards have the same, general meaning: to ensure special respect and protection to children.⁷⁸ These three articles apply to all grave violations but will not be reiterated each time. GCIV entails several provisions that concern children, however it does neither expressly state that children are entitled to special care and protection, nor offers specific protections just for children.

The second remark concerns the phrase 'affected by armed conflict', used in article 38(4) CRC and CIHL, Rule 135. It has not been defined. Nevertheless, it includes any impact felt by a child. Obviously, child soldiers are also impacted by armed conflict. They are, however, as mentioned, regarded to be excluded from the protection of article 38(4) CRC.

2.4. The Grave Violations

2.4.1. Introduction

The shocking Machel Report about the impact of war on children caused the UN to focus on enhancing their protections. Already in 1997, the GA established a mandate for a SRSG-CAAC to be appointed.⁷⁹ In 1999, SC Resolution 1261 strongly condemned 'the targeting of children in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement, recruitment and use of children in armed conflict in violation of international law, and attacks on objects protected under international law, including places that usually have a significant presence of children such as schools and hospitals.'⁸⁰ It also called upon 'all parties to armed conflicts to ensure the full, safe and unhindered access of humanitarian personnel and the delivery of humanitarian assistance to all children affected by armed conflict.'⁸¹

This landmark Resolution identified the six grave violations against children during armed conflict, suitable for monitoring and verification: 1) recruitment for and use of children in hostilities; 2) killing or maiming of children; 3) sexual violence against children; 4) attacks against schools or hospitals; 5) abduction of children and 6) denial of humanitarian access. It also asked the SG to report on the issue. Six years later, the SC requested the SG to establish a monitoring and reporting mechanism (MRM) in war-affected countries to gather information on occurring grave violations (see below at 2.5.1.).

The identified violations do not represent a complete list of violations against children, but they are most common and have severe consequences on children's lives. Moreover, they constitute especially egregious violations of IHL and/or IHRL and of international criminal law.⁸² In 2016 there were 15,500 cases of grave violations against children verified by the UN. In 2017 the number increased to 21,000, and in 2018 the continuance of grave violations showed no signs of decreasing.⁸³

⁷⁸ Also common Article 1 to the GeCos and article 1(1) API. According to Riedel, the protection of children in article 77 API comes in addition to IHRL concerning them.

⁷⁹ GA Resolution 51/77, para. 13. The mandate of the SRSG-CAAC entails the task to strengthen the protection of children in situations of armed conflict; to raise awareness; promote the collection of information about the plight of war affected children and to foster international cooperation, among others with the CRC Committee, to improve their protection (paras. 35-37). The SRSG-CAAC reports to the GA and the Human Rights Council, and raises issues concerning war-affected children in briefings to the SC, the SC's Working Group on Children and Armed Conflict and its Sanction Committees. She also issues country-specific reports and brings the plight of children to the attention of parties involved in armed conflicts.

⁸⁰ SC, Resolution 1261, para. 2.

⁸¹ *Ibid*, para. 11.

⁸² International criminal law falls out of the scope of this thesis.

⁸³ Annual Report SG (2018).

2.4.2. Killing and Maiming

2.4.2.1. IHL

Killing means any action in the context of an armed conflict, which encompasses military operations, house demolitions or suicide attacks, that results in the death of one or more children. Maiming is any such action that causes a serious, permanent, disabling injury, scarring or mutilation to a child. Killing and injuring of children may occur as a result of direct targeting or indirect actions, including crossfire, landmines, cluster munitions, improvised explosive devices or other indiscriminate explosive devices.⁸⁴

In armed conflicts, the overarching principles of humanity and military necessity both apply. Civilians must be treated humanely, which prohibits murder, torture, corporal punishment and so on.⁸⁵ Military necessity is aimed at achieving the legitimate purpose of the conflict, namely the submission of the enemy. There are three other principles. Parties to the conflict must at all times distinguish between civilians and combatants, which is called the principle of distinction.⁸⁶ This principle implies that civilians and civilian objects indispensable to the survival of the civilian population shall not be the object of direct attack⁸⁷ and that indiscriminate attacks are prohibited.⁸⁸ Indiscriminate attacks are 'those that are not directed at a specific military objective; employ a method or means of combat which cannot be directed at a specific military objective; or that employ a method or means of combat the effects of which cannot be limited'.⁸⁹ Such attacks might involve aerial bombardments, excessive use of force, landmines, explosive remnants of war and improvised explosive devices and use of children as human shields.⁹⁰

Another principle under IHL is that of proportionality, meaning that launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.⁹¹ Lastly, States are obliged to take all feasible precautions to avoid and in any event minimise harm to civilians and civilian objects.⁹² As said before, children are not especially considered in the context of these principles, however a high number of children is being killed or maimed, as a direct or indirect result of hostilities or indiscriminate attacks.

2.4.2.2. CRC: Articles 6, 19, 24 and 37(a) and Preamble OPAC

Article 6 CRC recognises the inherent right to life of every child. States are required to protect to 'the maximum extent possible'⁹³ the child's survival and development. The right to life is one of the four general principles of the CRC, meaning that a State must ensure that all implementation measures aim at achieving an optimal development for all children. Development encompasses children's mental, emotional, cognitive, social and cultural development. The right to life is also enshrined in other human rights treaties, like in article 6 ICCPR. This article recognises and protects the 'arbitrary deprivation' of everyone's right to life'. The HRC, the monitoring body of the ICCPR, issued a GC on

⁸⁴ MRM Field Manual

⁸⁵ GCIV: articles 5, 27, 32 147; API: article 75(1); common Article 3; APII article 4(1); CIHL: rules 87, 89-92.

⁸⁶ API: article 48 and CIHL: Rule 1.

⁸⁷ API: article 51(2); APII: article 13(1) and 13(2); CIHL: Rules 1-6.

⁸⁸ API: 51(4); CIHL: Rules 11-13.

⁸⁹ API: 51(4).

⁹⁰ SC, Resolution 2427, para. 12. See also HRC, CO on USA, (2014), para. 9.

⁹¹ API: articles 51(5)(b) and 57; CIHL: Rule 14.

⁹² API: articles 57 and 58; CIHL: 22-24.

⁹³ The question of how the concept of 'to the maximum extent possible' relates to feasible measures has briefly been addressed in 2.3.1.

the right to life in 2018, in which it addressed, as the first of the treaty bodies, the right to life during armed conflict.⁹⁴

In the GC, the HRC states that the right to life is the supreme right from which no derogation is permitted even in situations of armed conflict, however it is not an absolute right.⁹⁵ States may, says the HRC, be in violation of article 6 even if reasonably foreseeable threats and life-threatening situations do not result in loss of life or injuries. It holds that:

[T]he use of lethal force consistent with IHL is, in general, not arbitrary. By contrast, practices inconsistent with IHL, entailing a risk to the lives of civilians and other persons protected by IHL, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would [...] violate article 6 of the Covenant.⁹⁶

The question is whether practices consistent with IHL, entailing a risk to the lives of children, violate their right to life or not, since the formulation of this right in article 6 CRC does not contain the term 'arbitrary'. Therefore, it could be argued that the killing and maiming of children in armed conflict⁹⁷ always constitutes a violation of article 6 CRC, whether or not the obligations under IHL are fulfilled. However, article 6 CRC adds that States must ensure the child's survival to the 'maximum extent possible.' Thus, if it can be established that a State has done everything it could to protect the child, who might be disabled and in need of support, the State would not be liable for the harm suffered.⁹⁸ Moreover, since practices consistent with IHL are, in general, not arbitrary, no one (else) would be legally responsible for reparation of the child's harm. Leaving such a child without redress would be a very unsatisfactory outcome, for which the drafters of the CRC found a solution in the form of the remedial measures of article 39 CRC (see below at 3.1.4.)

2.4.3. Sexual Violence Against Children

2.4.3.1. IHL

Sexual violence is a very sensitive topic and many children will be unwilling to speak about their experiences. Research indicates that there is a high incidence of sexual violence against children, mostly girls, however boys can be victims too, in armed conflict. It is prohibited under ICL, however both IHL and IHRL offer additional protection. IHL stipulates that civilians must be treated humanely. As a consequence, they must be protected, in all circumstances, against such acts as torture or cruel, inhuman, humiliating or degrading treatment.⁹⁹ More specifically, IHL explicitly prohibits rape and other forms of sexual violence, such as sexual slavery and/or trafficking, enforced prostitution/sterilization, forced marriage, forced pregnancy/abortion, sexual harassment, sexual exploitation and/or abuse, against civilians in both IACs and NIACs.¹⁰⁰

⁹⁴ HRC, GC No. 36, para. 64. By correlating the right to life to IHL obligations, the communications procedure of the HRC becomes available to victims of such violations of IHL. The same applies mutatis mutandis for other human rights treaty bodies. Article 38(4) CRC opens the door to its communications procedure for all violations of IHL norms affecting children.

⁹⁵ HRC, GC No. 36, para. 2.

⁹⁶ Although the HRC sets high standards in assuming compliance with IHL principles through emphasising the need for investigations under the Minnesota Protocol and by demanding transparency in the disclosure of criteria used relating to attacks.

⁹⁷ IHL only applies when a clear nexus between the use of force and armed conflict exists.

⁹⁸ CRC Committee, GC No. 9, para. 55.

⁹⁹ GCIV: articles 5, 27, 32 and 147; API: article 75(1); Common Article 3; APII article 4(1); CIHL: Rules 87, 89-92.

¹⁰⁰ APII article 75(2)(b); APII article 4(2)(e); CIHL: Rule 93.

2.4.3.2. *Sexual Abuse: CRC Articles 19, 34, 37(a) and OPSC*

Articles 19 CRC on all forms of violence and 34 CRC on sexual abuse and exploitation provide solid protections for children against sexual abuse in armed conflicts. This protection is supplemented by the more specific protections of the Optional Protocol to the CRC on the sale of children, child prostitution and pornography (OPSC), on how to end sexual exploitation and abuse.

Article 37(a) CRC prohibits torture, or other cruel, inhuman or degrading treatment. Rape and sexual violence will usually fall within the scope of this provision. It includes forcing children to engage in activities against their will by non-State armed actors, which even may take place as a strategy of war.¹⁰¹ The CRC Committee warns that children are extremely vulnerable in armed conflict, when as a consequence thereof, 'social systems collapse, children become separated from their caregivers and caregiving and safe environments are damaged or even destroyed'.¹⁰²

2.4.4. Attacks Against Schools or Hospitals

2.4.4.1. *IHL*

There is no specific definition for either schools or hospitals in IHL.¹⁰³ Attacks targeting schools or medical facilities, the military use of schools and hospitals in contravention of IHL, as well as attacks against, and/or abduction of teachers, students and medical personnel have all been recognised as a grave violation by the SC since 2011.¹⁰⁴ The SC also expressed its concern at the closure of schools and hospitals during armed conflicts as a result of attacks and threats of attacks.¹⁰⁵ IHL in this context, focusses mainly on protecting buildings, so there is no particular focus on protecting children, although 'special protection' article 4(3)(a) APII states that children -in NIACs- 'shall receive an education.'

Pursuant to the principle of distinction, IHL prohibits indiscriminate attacks, like area bombardments, in order to protect civilian objects,¹⁰⁶ like schools and hospitals. Parties to an armed conflict are also required to distinguish between civilian objects and military objectives.¹⁰⁷ Attacks may only be directed against the latter. Civilian objects are protected, unless and for such time as they are military objectives.¹⁰⁸ The principle of proportionality prohibits the launching of an attack that may be expected to cause incidental damage, often referred to as collateral damage, to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated (i.e. the principle of necessity). Moreover, precautionary measures have to be taken in this context.

Hospitals may not be targeted, unless they are used to commit acts harmful to the enemy.¹⁰⁹ There are two ways of identifying hospitals as protected areas: the use of a distinctive emblem¹¹⁰ or the use

¹⁰¹ CRC Committee, GC No. 13, para. 26.

¹⁰² CRC Committee, GC No. 13, para. 72(g).

¹⁰³ Although the SRSG-CAAC adopted working definitions in the 'Protect Schools and Hospitals Guidance Note on SC Resolution 1998, Annex II.

¹⁰⁴ SC, Resolution 1998.

¹⁰⁵ SC, Resolution 2427, para. 15.

¹⁰⁶ Civilian objects are all objects not falling under the definition of military objectives, i.e., those failing to contribute to military action because of their nature, location, purpose or use, or whose partial or total destruction, capture or neutralization would provide no definite military advantage.

¹⁰⁷ API: article 52(2); CIHL: Rules 8-9.

¹⁰⁸ API: articles 48 and 52; CIHL: Rules 7 and 10.

¹⁰⁹ GCIV: articles 18-20; API: article 12; common Article 3 (implicit); APII: article 11; CIHL: Rule 28.

¹¹⁰ A new and promising technique in this regard is the use of the Whiteflag Protocol. It enables entities protected under humanitarian law to make themselves known in real-time, by using pre-defined signs and signals using blockchain technology, to prevent collateral damage and casualties in conflict zones.

of protected zones, such as hospital and safety zones, and neutralised zones.¹¹¹ Both types of zone are intended to protect the wounded, sick and civilians from the effects of war. Directing an attack against such a zone is prohibited.¹¹² Only very limited use has been made of these specially protected zones, however 'days of tranquillity' and 'corridors of peace' have been negotiated to meet the needs of children, for example for vaccination.¹¹³

Both attacks and occupation of schools by armed forces or groups have been condemned by the SC.¹¹⁴ However, no specific protection for the military use of schools exists in IHL, apart from their protection as a civilian object, for as long as schools are not occupied. There is neither a provision on protective zones for schools, nor on identifying schools as such. The Global Coalition to Protect Education from Attack launched in 2015 a Safe Schools Declaration referring to, non-legally binding, Guidelines for protecting schools and universities from military use during armed conflict.¹¹⁵ So far, it has been endorsed by 89 countries and both the CRC Committee as the CESCR encourage States in their respective COs to endorse the Declaration.

2.4.4.2. CRC Articles 3(3), 6, 24, 28 and 29 and Preamble OPAC

The most significant provisions relating to children's health are articles 6 and 24 CRC. Articles 28 and 29 CRC are the most important provisions concerning the right to education. These rights are frequently infringed in armed conflicts. Schools and hospitals are critical for the realisation of the rights at issue. Attacks or fear of attacks against schools or hospitals are a main cause in preventing children from having access to health care and education. Both the CRC Committee as the CESCR have regularly addressed bombings of schools and hospitals in war-affected countries.¹¹⁶ Repairing or maintaining destroyed schools and hospitals is implicit in IHRL. However, this is far from easy in and even after armed conflict, since it relies on consistent funding and administrative support that is 'difficult to sustain during political turmoil'.¹¹⁷

States have the obligation to respect, protect and fulfil the right to health and education of children, whether or not an emergency situation prevails.¹¹⁸ States should at least comply with core obligations that represent the minimum essential levels of the right to health. This includes the availability, accessibility and acceptability of health care of sufficient quality. The same applies mutatis mutandis to the right to education, where States must make available 'functioning educational institutions and programmes'.¹¹⁹ Nevertheless, 1 in 3 children and young people is out of school in countries affected by war.¹²⁰

The use of hospitals and schools for military purposes is not per se prohibited under IHL. However, such use results in the loss of protection as a civilian object, rendering hospitals and schools more vulnerable for attack. Under IHRL, use by States' armed forces is contrary to their obligation to respect children's rights to health and education, since use is a direct interference by the State with children's

¹¹¹ GCIV: articles 14-15; API: articles 59- 60; CIHL: Rule 35. Although there is no formal provision, such zones have also been designated in NIACs.

¹¹² CIHL: Rule 35. See also GA, Resolution 2675 (XXV).

¹¹³ Hampson, chapter 6.

¹¹⁴ SC, Resolution 2225.

¹¹⁵ Also, SC Resolution 2143, para. 18. The Safe Schools Declaration also addresses abduction.

¹¹⁶ For example: CESCR, CO on Sudan (2000), para. 25 and CRC Committee, CO on Myanmar (2012), paras. 83-84.

¹¹⁷ Machel Report, para. 186.

¹¹⁸ The CESCR made clear that States must 'adapt education to emergency situations, such as by providing security to children to attend school during armed conflict', a statement that closely relates to article 3(3) CRC.

¹¹⁹ CESCR, GC No. 1, para. 1.

¹²⁰ UNICEF, Press Release, 18 September 2018.

enjoyment of these rights. In addition, a State is also obliged to ensure that the rights to health and education are not infringed by third parties, among which armed groups, either through attacks or occupation of hospitals and schools.

Where the importance of providing children with health care is evident, the importance of providing children with education lies in developing 'the child's personality, talents and mental and physical abilities to their fullest potential' (29 CRC). Furthermore, education gives shape and structure to children's lives, which is of particular importance at times of war. As Machel described it: 'While all around may be in chaos, schooling can represent a state of normalcy.'¹²¹ Reason for the SC to highlight the importance of continued access during a conflict.¹²²

2.4.5 Abduction of Children

2.4.5.1. IHL

Abduction of children, domestic or international, is the unlawful removal, seizure, capture, apprehension, taking or enforced disappearance of a child either temporarily or permanently for the purpose of any form of exploitation of the child. This includes, but is not limited to, recruitment in armed forces or groups, participation in hostilities, sexual exploitation or abuse, slavery, forced labour or indoctrination: separate violations under IHL which might offer indirect protection against abduction.¹²³ There are no specific provisions of IHL that deal with abduction, although it is contrary to the obligation to treat civilians humanely.¹²⁴ In some cases, abduction of children may amount to hostage-taking, which is prohibited under IHL.¹²⁵ The majority of abductions is perpetrated by non-State armed groups and occurs in a variety of settings, including schools.¹²⁶ The SC acknowledged the increasing amount of abductions and its harmful consequences.

2.4.5.2. CRC Articles 35 and 37(a)

Contrary to IHL, IHRL explicitly prohibits in article 35 CRC the 'abduction of children for any purpose or any form.' Abduction is not defined, but article 35 obliges States to take appropriate measures to prevent them. Abduction, removal of a child without consent, has several common purposes, noted above, which are also prohibited under IHRL. Abduction may also lead to trafficking of children for the purpose of exploitation, as highlighted by the SC.¹²⁷

2.4.6. Denial of Humanitarian Access

2.4.6.1. IHL

Heart breaking examples abound of denial of humanitarian assistance to children trapped or displaced by conflict, deprived of access to food, water and medical assistance, including vaccines. This has always been a reality but is unfortunately increasingly being used as a tactic of war.¹²⁸ There are no treaty definitions of humanitarian access, assistance or relief, although already in 1999, the SC expressed its concern 'at the denial of safe and unimpeded access to people in need'. It also called upon parties to armed conflicts 'to ensure the full, safe and unhindered access of humanitarian

¹²¹ Machel Report, paras. 179, 183 and 185.

¹²² SC, Resolution 2427.

¹²³ MRM Field Manual.

¹²⁴ Common Article 3. CIHL might also offer some protection where it protects families: CIHL, Rules 105 and 117.

¹²⁵ GCIV: articles 34 and 147; API: article 75(2)(c); APII: article 4(2)(c); CIHL: rule 96.

¹²⁶ SC, Resolution 2225.

¹²⁷ SC, Resolution 2427.

¹²⁸ Starvation as a method of warfare is prohibited under IHL: CIHL, Rule 53.

personnel and the delivery of humanitarian assistance to all children affected by armed conflict'.¹²⁹ These grave concerns were reiterated in later Resolutions.¹³⁰ Humanitarian access must be provided in accordance with the principles of humanity, neutrality, impartiality and independence, as set out by the GA.¹³¹

In IACs, the parties should endeavour to conclude local agreements for the evacuation of children aged 15 and under from the besieged or encircled areas and for the passage of medical personnel and medical equipment to such areas.¹³² They must also permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for them.¹³³ API broadens this provision and covers all relief consignments, equipment and personnel including clothing, bedding, means of shelter and other supplies essential to the survival of the (whole) civilian population.¹³⁴ In distributing humanitarian aid priority must be given to, inter alia, children, who are already entitled to special care and aid pursuant to article 24 GCIV¹³⁵ and article 77(1) API.

In NIACs, the obligations are less developed. Article 18(2) APII recognises the entitlement of a civilian population in need to receive humanitarian relief. This provision is supplemented by CIHL on the facilitation of rapid and unimpeded passage of humanitarian relief, including the protection of humanitarian personnel.¹³⁶ There are also provisions on medical facilities and personnel.¹³⁷ Article 18(1) APII covers access of humanitarian organisations. None of these provisions are directly aimed at children, although article 4(3) APII requires that children be provided with care and aid. In addition, 4(3)(e) addresses the evacuation of children. In NIACs where, apart from CIHL Rule 135, only common Article 3 applies, humanitarian organisations may 'offer' their services to the parties involved.

Denial of humanitarian access should be considered in terms of children's access to assistance as well as humanitarian agencies' ability to safely access them.¹³⁸ Movements may be temporarily restricted only in case of imperative military necessity.¹³⁹ States bear the primary responsibility of ensuring humanitarian assistance and therefore, assistance may only be provided with the consent of the affected country.¹⁴⁰ A State failing to fulfil its obligations in this regard, is in violation of IHL and this may, at the far end, lead to SC authorised military intervention enabling humanitarian access to civilians. Where in NIACs only common Article 3 and ICRC Rule 135 apply, denial of humanitarian assistance by armed groups is generally considered to be a violation of IHL too.¹⁴¹

2.4.6.2. CRC Articles 6, 24, 27 and 37(a)

There is no direct article in the CRC that addresses the issue of (denial of) humanitarian assistance to child civilians, apart from article 22 that deals with refugee children. Pursuant to article 27 CRC every child within the jurisdiction of a certain war-torn State has the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. In case of need, the State has to

¹²⁹ SC, Resolution 1265 and SC, Resolution 1261, respectively.

¹³⁰ For example, in SC Resolution 1296.

¹³¹ GA, Resolution 46/182, at para. 2; GA, Resolution 58/114, Preamble and GCIV: article 23; API: article 70(2); APII: article 18(2); CIHL: Rules 53-56.

¹³² GCIV: article 17.

¹³³ GCIV: article 23.

¹³⁴ API: articles 69-70.

¹³⁵ Applies to orphaned or separated children.

¹³⁶ CIHL: Rules 55, 31 and 32 respectively.

¹³⁷ APII: articles 9-11 and CHIL: Rules 25-26.

¹³⁸ MRM Field Manual.

¹³⁹ API: article 71(3); Customary IHL: Rule 56.

¹⁴⁰ To this point: GA, Resolution 46/182, paras. 3-4: 'The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the UN Charter.'

¹⁴¹ Fatima at 8.55 and common Article 1 to the GeCos.

provide material assistance and support programmes, particularly with regard to adequate nutritious food, clean drinking-water, clothing and housing/shelter, including sanitation.

These obligations also fall under the scope of article of 24 CRC, which establishes the right of the child to the highest attainable standard of health, including the right (of access) to health facilities, medical supplies and services. Denying children their rights under articles 24 and 27 CRC may, in the worst-case scenario lead to their death, or hamper their survival and development, which constitutes a breach of article 6 CRC. It may also amount to torture, inhuman or degrading treatment of children prohibited by, amongst others the CRC in article 37(a).

Article 38(4) CRC entails the obligation for a State involved in an armed conflict to take all feasible measures to ensure protection and care of war affected children. Where such a State is unable or unwilling to provide children with, at the very least, minimum essential levels of food, water, health, and shelter, it violates children's rights under articles 24 and 27 CRC. In such cases, a state must request, accept and facilitate humanitarian assistance made available from third parties.¹⁴² This obligation derives from articles 4 and 24(4) CRC emphasising that the implementation of the CRC is a 'cooperative exercise for the States of the world'.¹⁴³ In relation to the right to health, the CRC Committee noted:

'States have individual and joint responsibility [...] to cooperate in providing [...] humanitarian assistance in times of emergency. In these cases, States should consider prioritising efforts to realise children's right to health, including through appropriate international medical aid; distribution and management of resources, such as safe and potable water, food and medical supplies.'¹⁴⁴

A state withholding consent for humanitarian actors to access its territory, or otherwise fails to allow such assistance, violates its obligations under IHRL. Non-State armed groups are generally not bound by IHRL obligations and therefore, only IHL¹⁴⁵ would be applicable in case of their refusal to give consent, although consent is in theory only to be given by the State.¹⁴⁶

2.5. Measures to Address Grave Violations

2.5.1. UN Measures

Landmark Resolution 1261 did not only identify and condemn the six grave violations but also led to the SG's annual (global and country-specific) reports on children and armed conflict. Subsequent SC's Resolutions, resulting from the Council's primary responsibility for the maintenance of international peace and security, provided the UN with four other main tools to effectively address the six grave violations. These tools include: the listing of parties to conflict, including armed groups and individuals, responsible for committing grave violations in annexes to the reports of the SG.¹⁴⁷ All grave violations are triggers for listing, except denial of humanitarian access.¹⁴⁸ The other three instruments are the requirement of dialogue with listed parties on the development of concrete and time-bound Action

¹⁴² CESCR, GC No.14, paras. 39-40 on the international obligations of state-parties concerning the right to health.

¹⁴³ CRC Committee, GC No.5, paras. 60 and 6-7.

¹⁴⁴ CRC Committee, GC No.15, para. 88 and CESCR, GC No. 3, paras. 13-14.

¹⁴⁵ APII or, if not applicable, common Article 3, in conjunction with CIHL Rule 135.

¹⁴⁶ Fatima at 8.53 and 8.84.

¹⁴⁷ SC, Resolution 1379. The Annexes, or Black Lists, are based upon the principle of naming and shaming. Annex I contains countries on the agenda of the SC, Annex II those that are not.

¹⁴⁸ However, denial of humanitarian access has become a growing concern. Security Council Report's eighth research report (2017) mentions as an option to 'determine if the time is right to make denial of humanitarian access a trigger that could lead to a party being listed'.

Plans to halt and prevent violations;¹⁴⁹ the creation of the SC's Working Group on Children and Armed Conflict¹⁵⁰ and, importantly, the country-specific Monitoring and Reporting Mechanism (MRM), implemented by SC Resolution 1612. The Working Group, composed of all SC members, reviews the MRM reports and monitors the Action Plans. The MRM itself is a process managed by country-based taskforces co-chaired by UNICEF and the highest UN representative. The SRSG-CAAC promotes and supports their work.¹⁵¹

The purpose of the MRM is to provide for systematic gathering of information on any of the six grave violations in war-affected countries.¹⁵² This information is used in UN reporting, such as in reports of the SG, which in turn might trigger action (sanctions, interventions, resolutions expressing concern or condemning violations) by the SC and other actors. Sanctions can be diplomatic, economic, may target individuals and as a last resort, could even be of a military nature. According to the SRSG-CAAC, 'the information collected through MRM is used to inform the response, to provide services to boys and girls as well as to engage with parties to conflict to foster accountability and compliance with international child protection standards.'¹⁵³ The SC architecture of monitoring, reporting and responding tries to hold States, armed groups and individuals to account for the six violations. However, these instruments cannot provide children with a remedy to address the harm they suffered in armed conflicts.

2.5.2. Domestic Measures

At the domestic level, a State, involved in an armed conflict, is under article 38(4) CRC obliged to take all feasible measures to ensure protection and care of children under its jurisdiction. If, despite these measures, child civilians have become a victim of armed conflict, the State is obliged to provide them with appropriate measures supporting their recovery and reintegration pursuant to article 39 CRC. In case a State fails to take these remedial measures,¹⁵⁴ the war-affected child has the right to hold the State to account. The provision of article 39 CRC is without prejudice to the child's right to (try to) obtain reparation from the party liable for the primary violation of article 38(1) in conjunction with 38(4) CRC. However, both ways of finding domestic redress may be a mission impossible, or at least a long-lasting operation, in States suffering or recovering from armed conflict. The question is, whether there is an international remedy capable of providing child civilians with redress. Following the discussion of article 39 CRC, chapter 3 examines two possible solutions the UN system might provide in order to effectively address the six grave violations at victim level.¹⁵⁵

¹⁴⁹ SC, Resolution 1539.

¹⁵⁰ SC, Resolution 1612 (2005).

¹⁵¹ See above, footnote 86.

¹⁵² SC, Resolution 1539, para. 2. This Resolution called on the SG to develop an action plan for MRM.

¹⁵³ Website OSRSG-CAAC, *Monitoring and Reporting on Grave Violations*. The implementation of the mandate of the SRSG-CAAC is supported by a Trust Fund for Children and Armed Conflict.

¹⁵⁴ Child soldiers have the same right via article 6(3) OPAC, which repaired the remedial gap of article 38(4) CRC.

¹⁵⁵ The framework of the entire international legal system must be taken into account: ICJ (1971), para. 53.

3. Remedies for Breaches of Articles 38 and 39 CRC

3.1. Article 39 CRC

3.1.1. General Introduction

The focus when dealing with children affected by armed conflict generally lies on children associated with armed forces or groups. Child civilians whose protections are violated by warring parties tend to be overlooked. However, these children are also victims of war. As Machel described in her Report, war leaves physical and/or emotional scars on all affected children which may last a lifetime. And it does not stop there, as research recognises possible intergenerational transmission of (war-related) trauma. Despite the efforts of the UN and other actors to stop the war on children, the harsh reality shows that they are still being killed, injured, starved, traumatised, separated from their families and left without schooling.

In 1948, article 8 UDHR already acknowledged everyone's right to an effective remedy for acts violating one's fundamental rights. Article 2 ICCPR puts the obligation to ensure that any person has an effective remedy on States. Since every child is a rights holder, every child has an equal right to effective remedies. However, children's special and dependent status, 'creates real difficulties for them in pursuing remedies for breaches of their rights'.¹⁵⁶ Nevertheless, the CRC does not explicitly require the availability of a domestic remedy. The CRC Committee solved this issue by stating that this right is 'implicit in the CRC and consistently referred to in the other six major international human rights treaties'.¹⁵⁷ The Committee notes: 'For rights to have meaning, effective remedies must be available to redress violations'. Such remedies should include 'access to independent complaints procedures and to the courts.' The Committee proceeds: 'Where rights are found to have been breached, there should be appropriate reparation'.¹⁵⁸

3.1.2. Remedy and Reparation: The UN Basic Principles and Guidelines

Before moving on to article 39 CRC, it has to be clarified what is meant by 'remedy' and 'reparation'. The CRC does not give any guidance, and terms are used interchangeably throughout the whole UN human rights system. To provide guidance in a systematic and thorough way,¹⁵⁹ the GA adopted in 2005 the BPG.¹⁶⁰ The BPG, however not legally binding, affirms the importance of addressing remedies and reparations for victims of gross violations of IHRL and serious violations of IHL at both the national and international level. It is currently the central international instrument which has been highly influential in shaping developments in this area.¹⁶¹

The BPG stipulates that remedies include equal and effective access to justice (procedural remedy); adequate, effective and prompt reparation for harm suffered (substantive remedy); and access to relevant information concerning violations and reparation mechanisms.¹⁶² Starting with the procedural component: Under international law, victims, including children, should have access to an effective judicial remedy at the domestic level both during, if possible, and after conflict.¹⁶³ Other remedies

¹⁵⁶ CRC Committee, GC No. 5, para. 24.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ The Revised Guidelines Regarding Initial Reports to be Submitted by State-Parties under article 8(1) OPAC (2007) requires States to report to the CRC Committee on their efforts to implement the BPG (para. IV).

¹⁶⁰ The Preamble explicitly refers to article 39 CRC.

¹⁶¹ Website Nuhanovic Foundation: *Database Legal Instruments, BPG*.

¹⁶² BPG, articles 11 and 24. Due to space constraints, access to information is not elaborated here, but briefly in the Recommendations (para. 4.2.).

¹⁶³ OSRSG-CAAC, Working Paper No. 3, at 11.

include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law,¹⁶⁴ whether judicial, non-judicial or traditional. An adequate, effective and prompt remedy should include international processes, without prejudice to any other domestic remedies.¹⁶⁵ States are also obliged to 'endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation'¹⁶⁶ an obligation that should also be available at the international level.

The BPG dictates with regard to reparation, the substantive component of a remedy, that reparation must be adequate, effective and prompt. It explains adequateness as 'appropriate and proportional to the gravity of the violation and the circumstances of each case.'¹⁶⁷ Five forms of reparations are distinguished: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁶⁸

To begin with the first, restitution aims at restoring the situation as it existed prior to the wrongful act, if in the best interests of the child victim. The second form is compensation and covers both pecuniary and non-pecuniary compensation, as long as the damage is economically assessable. Compensation might encompass physical or mental harm, material damages and loss of earnings including earning potential, moral damage and lost opportunities, such as education, which is often the case for children in situations of war. The BPG does not pay many words to rehabilitation, the third form. It just holds that rehabilitation should include medical and psychological care as well as legal and social services. The Committee against Torture (CAT Committee) says that 'rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society'.¹⁶⁹ Satisfaction, the fourth form of reparation, is a subsidiary form. It only comes into play insofar as the harm cannot be made good by restitution or compensation.¹⁷⁰ The last form, guarantees of non-repetition, revolves around preventive measures.

3.1.3. Accountability

Article 39 CRC obliges States to 'take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of [...] armed conflicts.'¹⁷¹ The rehabilitation and reintegration of war-affected children is, as Doek puts it, a human rights imperative and is governed by the CRC and its OPAC.¹⁷² The obligation arises 'irrespective of whether the state is actually responsible for, involved with, or contributed' to the victimisation of the child.¹⁷³ This means that, importantly, in the context of article 39 CRC, accountability does not have to be established. In other words, the only thing that has to be established is whether a child is a victim of armed conflict. The term 'victim' will be discussed in the following paragraph.

Something else has to be made clear first. The question that arises is whether article 39 CRC obliges States to provide victims with all aforementioned forms of reparation. If the answer to that question

¹⁶⁴ BPG, articles 12.

¹⁶⁵ BPG, article 12.

¹⁶⁶ BPG, article 13.

¹⁶⁷ BPG, articles 18-20.

¹⁶⁸ The Maastricht Guidelines stipulates in para. 23 that all victims of violations of ESCR are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

¹⁶⁹ CAT Committee, GC No. 3, paras. 11-12.

¹⁷⁰ Capone at 117-118.

¹⁷¹ Children who are victims of torture (article 37(a) CRC) also fall under the scope of article 39 CRC, as do victims of any form of neglect, exploitation or abuse.

¹⁷² Doek (2012) at xii and xiii.

¹⁷³ Tobin at 1562.

would be affirmative, it would mean that all victims mentioned in article 39 CRC are entitled to, for example, compensation by the State, without determining whether a State is liable for the violation or not. Such an answer would be very unlikely. The Committee holds that reparation for violations should include 'compensation, and where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 CRC.'¹⁷⁴ Careful reading reveals that although both compensation and measures constitute reparation, what is required by article 39 are the remedial measures only.¹⁷⁵

Therefore, article 39 CRC enables victims to claim all 'appropriate' measures from the State promoting their physical and psychological recovery and social reintegration. On top of that, a victim must have 'access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.'¹⁷⁶ A victim might claim (inter alia) compensation from the State,¹⁷⁷ if facts or omissions can be attributed to the State and constitute gross violations of IHL or serious violations of IHRL.¹⁷⁸ The latter will be the case if such an act or omission falls under the scope of the grave violations as identified by the UN. In addition, establishing accountability in this context calls for a procedural remedy at the domestic and international level. This, as well as the liability of the State, will be discussed in paragraph 3.3.

3.1.4. Definition of Child Victim

A remedy presupposes a violation, i.e. an unlawful act or omission, of a primary right. Article 39 CRC is a remedy, a form of reparation according to the CRC Committee, and requires a victim to be identified. The BPG defines victims as:

'[P]ersons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of IHRL, or serious violations of IHL.'¹⁷⁹

Based upon this definition, a child who is a victim of a *lawful* attack under IHL may not be entitled to the remedial measures of article 39 CRC, since there has been no violation of an IHL norm. This would mean there is no -victim in the legal sense- unless the attack is a violation of a provision of IHRL.¹⁸⁰ The HRC and the ICJ concluded in relation to article 6 ICCPR that the use of lethal force consistent with IHL would in general not be an arbitrary deprivation of life. As argued before in paragraphs 2.1.2. and 2.4.2.2., an act or omission in accordance with IHL may constitute a violation of the CRC. The right to life in the CRC is unconditional, although the State is required to take all feasible measures (article 38(4) CRC), or measures to the maximum extent possible (article 6(2) CRC), for children's protection and care. These measures see to the liability of the State for the occurred breach, and not to the violation of the right in itself. If a child loses a limb because of a lawful attack, her/his right to life is violated, whether or not the State is liable for this violation.

Hence, liability of the State is irrelevant in the context of article 39 CRC. Therefore, the (un)lawfulness of an act or omission under IHL only has consequences for the State's liability and not for the

¹⁷⁴ GC No. 5, para. 24.

¹⁷⁵ See also OPSC article 8(3) and especially (4). Remedial measures, however, may include financial assistance.

¹⁷⁶ OPSC, article 9(3) and (4) are very instructive in this regard, see also footnote 240.

¹⁷⁷ Or from a non-State actor, or an individual.

¹⁷⁸ BPG, article 15.

¹⁷⁹ BPG, article 8.

¹⁸⁰ For the relationship between IHL and IHRL see above at 2.1.2.

applicability of article 39 CRC. The example used, was about the right to life, but may also concern other rights, like the right to education. This leads to the conclusion that each child (civilian) affected by armed conflict is a victim in the context of article 39 CRC. All are entitled to assistance and support from the State for their recovery and, which is a unique provision, for their reintegration.¹⁸¹

Article 39 CRC is directed at child victims. However, as is known from victims of armed conflicts in the past, the physical, mental and social effects of war tend to have a life-long impact and might even negatively affect next generations. The necessity of treatment may therefore very well extend beyond childhood. Furthermore, it may take years before children are able to disclose traumatic experiences, which leads to the question whether they are entitled to recovery and reintegration measures under article 39 CRC even when they are already adults. Tobin is of the opinion that States should take these possibilities into consideration when designing remedial measures.¹⁸²

3.1.5. Child Victim under OPAC

Article 6(3) OPAC says that States shall accord all appropriate assistance for the recovery and reintegration of 'persons recruited or used in hostilities.' Article 7(1) OPAC uses different terminology.¹⁸³ It calls for international cooperation in the rehabilitation and reintegration of 'victims of acts contrary to the Protocol'. Subsequently, article 7(2) OPAC facilitates the establishment of a voluntary fund to financially assist States in providing these 'victims of acts contrary to OPAC' with remedial measures. The fund will be discussed in paragraph 3.3. For now, it is enough to note that, obviously, children recruited or used in hostilities are victims of acts contrary to OPAC.

The question arises whether article 7 OPAC also includes child civilians. Given the Preamble of OPAC, the Reporting Guidelines and the COs of the CRC Committee under OPAC, as well as the prohibition of discrimination, it is argued here that article 7 encompasses *all* war-affected children.

Firstly, a treaty's Preamble must be taken into account when answering questions on the interpretation of its provisions. Hulme, who studied the relevance of a Preamble using the VCLT, concludes: '[I]nterpretation of any treaty term *always requires* an examination of the Preamble as part of the holistic text-and-context approach.' Moreover, 'interpretation of a term always requires an inquiry into the object and purpose of the treaty, which itself *may require* an examination of the Preamble.'¹⁸⁴ The Preamble of OPAC emphasises the harmful and widespread impact of armed conflict 'on children' and states:

'Convinced of the need to strengthen international cooperation in the implementation of the present Protocol, as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict.'

Secondly, the Preamble condemns the targeting of children and direct attacks on objects protected under international law such as schools and hospitals. Consequently, the Revised Reporting Guidelines for State-Parties to OPAC requires States to include information on measures taken to prevent such targeting and direct attacks. In this context, the Committee addressed in its CO under OPAC on Israel, the 'passive' child victims of unlawful attacks, denial of humanitarian access and their

¹⁸¹ Irrespective of children's additional right to seek full reparation if liability of the State, (legal) person or other entity' can be established. Liability will generally not be established if there is no breach of IHL.

¹⁸² Tobin at 1569. Communications under the OPCP may be submitted by adults for harms suffered as a child.

¹⁸³ Apart from the use of the word 'rehabilitation' instead of 'recovery'.

¹⁸⁴ Hulme at 1304.

ensuing right to rehabilitative measures.¹⁸⁵ In its CO under OPAC on Iraq, the Committee addressed not only attacks, but also two other grave violations, namely sexual violence and abductions.¹⁸⁶

Lastly, the Preamble reads: '[C]onditions of peace and security [...] are indispensable for the full protection of children, in particular during armed conflicts.' When addressing war-torn States in its COs under OPAC, the Committee refers to (its COs under) the CRC and IHL. In its 2018 OPAC CO on Saudi-Arabia, the Committee reminded the state that 'in accordance with [OPAC], conditions of peace and security are indispensable for the full protection of children'.¹⁸⁷ Regarding Iraq, the Committee called upon the State to provide assistance for physical and psychological recovery and social reintegration to children affected by conflict, in particular 'child combatants, girls, unaccompanied internally displaced children and refugees, returnees and landmine survivors, as well as victims of sexual abuse.'

In conclusion, both the Preamble as the Committee emphasise the conditions of peace and security in which the development of all children, without distinction, should take place. Although OPAC specifically elaborates and strengthens the CRC protections for children recruited and/or used in hostilities, it also aims at the full protection of children who are not, in accordance with relevant norms of IHL and applicable IHRL. Consequently, this thesis holds that the international cooperation as required by article 7 OPAC, applies to *all* child victims of armed conflicts.

3.1.6. Recovery and Reintegration

What stands out when reading article 39 CRC is the use of the words 'recovery and reintegration' instead of the term 'rehabilitation' as used in the BPG. The original proposal read 'physical, psychological and social rehabilitation'.¹⁸⁸ It was only for linguistic reasons that the term 'rehabilitation' was divided into recovery and reintegration.¹⁸⁹ Several delegations said that 'rehabilitation' in their respective languages was linked to 'a very precise and restrictive idea and that it would not be understood if it were to be applied to the concepts involved in the proposal.' Furthermore, Doek notes that the Committee does not like the word 'rehabilitation' because of the 'possible connotation with disabilities'.¹⁹⁰ In the following it is held that States must provide measures promoting -not guaranteeing- the rehabilitation of child victims of armed conflicts in three respects: physical and psychological rehabilitation or recovery, and social rehabilitation or reintegration.¹⁹¹

Physical recovery includes providing children with food, water, medical supplies, medical treatment, clothing and appropriate housing, including sanitation (articles 6, 24 and 27 CRC). Psychological recovery may include psychosocial support (article 24 CRC), which is¹⁹²

'often not considered a priority but is as important to children's well-being as physical needs and must be integrated at the earliest possible point in the humanitarian response. With the

¹⁸⁵ CRC Committee, CO Israel under OPAC (2010) paras. 10-11 and 37-38.

¹⁸⁶ CRC Committee, CO Iraq (2015) paras. 17-18, 19-20 and 37-38, respectively.

¹⁸⁷ CRC Committee, CO Saudi Arabia (2018) paras. 16-17 and 38-39.

¹⁸⁸ Report of the Working Group on a Draft CRC, paras. 66-70.

¹⁸⁹ Detrick at 671 and Tobin at 1564.

¹⁹⁰ The term is used in article 7(1) OPAC: Doek (2012) at xiii. However, the text of OPAC was not composed by the CRC Committee, but was negotiated by States.

¹⁹¹ Detrick at 671. The word 'promote' expresses an 'ongoing' obligation.

¹⁹² OSRSG-CAAC, Working Paper No. 2, at 49. Although this applies to internally displaced children, it applies *mutatis mutandis* to all war-affected children.

right kind of support, children can escape long-term trauma or post-traumatic stress disorder and the community can begin to rebuild itself, thereby enhancing the protection of children.’

Psychological recovery also entails services that restore normalcy, such as family reunification (articles 9 and 18 CRC), educational programmes or vocational training (articles 28 and 29 CRC), opportunities for play, recreation and cultural activity (article 31 CRC) and legal counselling and information (articles 13 and 17 CRC).

Social reintegration means allowing the child to be reintegrated in a community that is familiar to her/him. Reintegration should, in the words of article 39 CRC, take place in an environment fostering the child’s health, self-respect and dignity, see below paragraph 3.1.9. It cannot be achieved unless action for recovery is taken at the same time.¹⁹³ The recovery and social reintegration of vulnerable groups, such as young children; girls; adolescents; children who suffer disabilities as a result of armed conflict; unaccompanied and separated children; refugee and displaced children,¹⁹⁴ requires special attention of States.

3.1.7. Appropriate Measures

The obligation of a State to take rehabilitative measures, arises from article 2 CRC which demands States to respect and ensure children’s rights. It means, in the context of article 39, that States must respect, protect and try to fulfil the right of the child to return to her/his former state of health and social integration as much as possible. The obligation to fulfil refers to article 4 CRC, meaning that apart from being a remedial provision, article 39 CRC also contains elements of an ESCR. It is therefore subject to progressive realisation: States must allocate sufficient human and financial resources for children’s recovery and reintegration, where needed with international assistance. A lack of resources due to the armed conflict cannot be used as a valid excuse to take no action to implement this obligation. In case a state is unwilling, or unable to fulfil article 39 CRC, the child in need is entitled to a remedy for the violation of article 39 CRC, which is addressed in paragraph 3.3.

Where the BPG requires measures to be adequate, effective and prompt, the CRC obliges States to take ‘appropriate’ measures. The Convention does not provide an answer to the question what exactly is meant by this term. During the drafting of the CRC, the words ‘legal, administrative and other measures’ were considered superfluous and replaced by ‘all measures.’ A later amendment added the word ‘appropriate’ so as not to put an unduly strong obligation on the state.¹⁹⁵ So, how should States model legal, administrative and other measures in the context of article 39 CRC?

Measures in the context of article 39 CRC must address the harm war-affected children suffer(ed), regardless of the circumstances of their victimisation. Although States are afforded a level of discretion, the measures need to be child-sensitive, family and community-based and remedial in both the immediate and long-term. Research indicates sustainable physical and psychosocial recovery and reintegration programmes must be available both during and after armed conflict.¹⁹⁶ In order to be appropriate, measures must also be in accordance with the general principles of the CRC, all other Convention rights, IHRL standards generally and, if applicable, IHL.

¹⁹³ Nylund (2012) at 37.

¹⁹⁴ Guiding Principles on Internal Displacement pays attention to the special needs of displaced children. Although not legally binding, the Principles have been recognized by all heads of State, as “an important international framework for the protection of internally displaced persons”, as well as a “tool” and “standard” to guide governments, international organisations and all other relevant actors in situations of internal displacement. The ACRWC also addresses the needs of displaced children in articles 22-23.

¹⁹⁵ Report of the Working Group on a Draft CRC, para. 67.

¹⁹⁶ Report of the SRSG-CAAC to the GA, Annex 1 (2009).

Appropriate assistance and support to children affected by armed conflict requires measures to be effective. According to Tobin, there are at least five principles offering States guidance in their efforts to design, implement, monitor and evaluate effective measures. The first is the principle of individualisation, meaning that a child's gender, ethnicity, disability, cultural context and age have to be taken into account. Parents, teachers and others who play an important role in a child's life should be involved.

The second principle is the requirement for measures to be consistent with the concept of the 4As, as developed by the CESC. In the context of article 39 CRC, it means that appropriate measures must be available (first A); financially and physically accessible to all, including the accessibility of available information (second A); acceptable to all involved (third A) and of a quality ensuring their effectiveness, including well trained personnel and adequate facilities (fourth A).¹⁹⁷

Thirdly, States must consider the recommendations provided by the CRC Committee in its COs, although mostly of a general character, such as the call to reconstruct homes, schools and hospitals. The fourth and fifth principle revolve around consultation of the child and her/his family members, discussed in the next paragraph, and the requirement of evidence-based measures and monitoring.

3.1.8. Child Participation

Article 12 CRC establishes the right of every child, capable of forming her or his own views, to freely express those views, in all matters affecting the child. Children's needs, concerns and experiences should be heard and be given due weight, according to their age and maturity, taking account of their evolving capacities.¹⁹⁸ In order to enable children to participate, their rights to information and freedom of association and peaceful assembly must be fulfilled. That is because these rights have implications for children's freedom of expression and are therefore critical to their participation.¹⁹⁹

The right to be heard as embodied in article 12 CRC, does not cease in situations of war or in their aftermath, which is often overlooked.²⁰⁰ Moreover, research indicates that children are capable of contributing to their own psychosocial healing in the context of armed conflict, if they are respected and, during the conflict, given safe spaces.²⁰¹ Pursuant to this rights-based approach, children might be involved as individuals, or as a group, for example a group of students from a certain bombed school.

However, further harm or re-victimisation is a real risk when involving children. Machel, who took a very inclusive approach towards children, recommended not to focus on a child's emotional wounds, but rather on programmes aiming to support healing processes and to re-establish a sense of normalcy.²⁰² Therefore, recovery and reconstruction programmes should take into account that restoration of children's rights, especially their socio-economic rights, is important to children. Research reveals that children primarily expect support in finding their families, in helping them return to education and in assisting them to learn a trade so that they can find employment and (eventually) live independently.²⁰³

¹⁹⁷ CRC Committee, GC No. 6, para. 48.

¹⁹⁸ Article 5 CRC.

¹⁹⁹ SRSG-CAAC, Working Paper 2, at 23.

²⁰⁰ CRC Committee, GC No. 12, para. 125.

²⁰¹ Back at 74.

²⁰² Machel Report, para. 182.

²⁰³ OSRSG-CAAC, Working Paper No. 3.

Being a victim of war does not mean that children are merely vulnerable creatures in need of protection, deriving their rights from dependency on adults.²⁰⁴ Children are also resilient, at least when provided with appropriate assistance and support. In this regard, it is important to acknowledge that children should not only be active participants for shaping the measures for their recovery and reintegration, but also for promoting their self-respect and dignity.²⁰⁵ Taking children's resilience or 'ability to face trauma',²⁰⁶ expertise and insight into consideration, in accordance with their evolving capacities, is of the 'utmost importance'.²⁰⁷

3.1.9. Environment Fostering Health, Self-respect and Dignity

Article 39 CRC requires that recovery and reintegration take place in an environment, whether in places of origin or places of resettlement,²⁰⁸ which foster the health, self-respect and dignity of the child.²⁰⁹ This additional sentence was needed, according to the drafting history, to regulate the quality of the rehabilitative measures. Not 'any kind of medical treatment or mechanisms for social adjustment would be acceptable'.²¹⁰ Child victims of armed conflict are entitled to individual support aimed at their physical and psychological recovery. However, the creation of the necessary facilities and provisions for a child's recovery and reintegration, such as school buildings or family reunification, will also benefit a child's family and the community the child lives in. Therefore, the importance of article 39 CRC goes beyond assisting and supporting individual children.

'Environment' means a child's, preferably own, physical environment, including a child's home, school, hospital or other medical facilities and the community the child lives in. Article 39 CRC requires States to repair and maintain homes, hospitals, schools and infrastructure, such as recreational areas, water, sanitation and electricity.²¹¹ 'Environment' also encompasses the social setting or, in other words, a child's relationship with her/his parents, siblings, relatives and teachers, as well as health and social workers. Physical environment and relationships both need to protect and promote a child's rehabilitation.

The physical environment should first and foremost be safe. Safe areas should include schools (taken up by the international community via the Safe Schools Declaration and accompanying Guidelines), hospitals, churches and homes. During conflict, IHL prohibits attacks on these civilian objects, unless they are being used for military purposes. However, during conflict, they can hardly be described as 'safe', since there is always the risk that they may be hit, killing or maiming those inside as 'collateral damage.' Academics and practitioners have highlighted the importance of IHL protected safety or neutralised zones, negotiated days of tranquillity and corridors or zones of peace. The CRC Committee recently recommended Syria to provide children with safe, accessible and inclusive spaces for play and socialisation.²¹² Where no actual fighting takes place, education, play, recreation, health (immunisation!) and psychosocial support can be provided for in, for example, NGO-led 'child-friendly spaces'.

²⁰⁴ CRC Committee, GC No. 12, para. 18.

²⁰⁵ *Ibid*, para. 125.

²⁰⁶ Barudy, therapist for victims of torture, video 8 April 2016.

²⁰⁷ CAT Committee, GC No.3, para. 13.

²⁰⁸ Whether that be permanent or temporary resettlements, like refugee camps.

²⁰⁹ According to SRSG-CAAC, Working Paper 2, at 48, the harmful effects of armed conflict upon a child's psychological and physical well-being are multiplied by the experience of (internal) displacement, including living in refugee camps.

²¹⁰ Report of the Working Group on a Draft Convention on the Rights of the Child para. 69.

²¹¹ CRC Committee, GC No.17, para. 56(e); CRC Committee: CO on Israel under OPAC (2010), para. 11 and CO on Iraq under OPAC (2015), paras. 17-18.

²¹² CRC Committee, CO on Syria (2019), para. 46.

Another key factor for a child's rehabilitation is having a stable environment, in which the child is cared for and supported by adults with whom the child has solid and continuing relationships. This means that where children are separated from their parents, States have the obligation to do everything they can to reunite them successfully, as long as reunification is in the best interests of the child, or ensure alternative care for such a child.²¹³ A State must also assist and support families if needed,²¹⁴ especially since, as Machel noted, the psychosocial well-being of children is better promoted when caregivers themselves feel relatively secure and confident about the future.²¹⁵

Two other key conditions have to be pointed out: the role of education and the child's need for expression. Child-sensitive measures contributing to a child's recovery should, as Machel emphasised, include establishing daily routines of family and community life, opportunity for expression and structured group activities such as school, play, drawing, storytelling and sports. Creating or restoring safe schools is therefore not only important as a route to employment and to fulfil children's right to education; it also helps to normalise life and re-establish social stability. This applies during conflict as well, so States should think creatively and establish alternative sites for classrooms or facilitate electronic learning.²¹⁶ The other crucial, often undervalued measure for States to take is the (re-) establishment of opportunities for play, recreation and cultural activity, as envisaged in article 31 CRC. It helps children build their resilience and promotes psychological healing.²¹⁷

3.1.10. Resources and International Cooperation

Unfortunately, there are often insufficient resources available to support children, especially in the global south, where the majority of wars are occurring.²¹⁸ As noted above, article 39 CRC refers to article 4 CRC, thereby making clear that the obligation of States to provide child victims with appropriate remedial measures depends on a State's available resources.²¹⁹ States are obliged to seek international cooperation in order to supplement a perceived or real lack of financial, human (a sufficient amount of trained personnel for example) or technical (relating to the requirement of evidence-based measures) resources.²²⁰ States must cooperate with other States and specialised UN agencies, such as UNICEF and the WHO. This cooperation encompasses the development, deliverance, monitoring and evaluation of all remedial measures deemed appropriate in the context of article 39 CRC.

As regards OPAC, article 7(1) thereof requires States to cooperate 'in the rehabilitation and social reintegration of children who are victims of acts contrary to the Protocol.'²²¹ Pursuant to the article, States shall cooperate through technical cooperation and financial assistance. Such cooperation and assistance must be undertaken in consultation with involved State-Parties and relevant international organisations. However, financial assistance to a war-affected State enabling it to dispose of sufficient funding for recovery and reintegration measures is not self-evident, despite repeated calls for funding

²¹³ CRC, articles 9 and 10. Also GCIV: articles 25-26; API: article 74; APII: article 4(3) and CIHL: Rules 105 and 131. Regarding alternative care: CRC, article 20.

²¹⁴ CRC, articles 18 and 27.

²¹⁵ On the other hand, States are required to 'respect the responsibilities, rights and duties of parents, members of the extended family or community, as provided for by local custom: CRC, article 5.

²¹⁶ Models for the delivery of educational facilities during and after conflict already exist: Fatima at 7.111.3.

²¹⁷ CRC Committee, GC No. 17, paras. 53 and 56(e).

²¹⁸ Sarkin at 88.

²¹⁹ But only to a certain extent, since a lack of resources due to the armed conflict cannot be used as a valid excuse. See also CAT Committee, GC No. 3, para. 12: 'The obligation [to provide the means for "as full rehabilitation as possible"] does not refer to the available resources of State-Parties and may not be postponed.'

²²⁰ As do UN Charter articles 55 and 56; CRC Committee, GC No. 5 and several GCs of other human rights treaty bodies.

²²¹ The OPSC contains a similar provision in article 10(2).

made by the SC.²²² The second paragraph of article 7 OPAC holds a solution, which will be the topic of the following paragraph.

3.2. The Remedial Measures of Article 39 CRC: Voluntary Fund under OPAC

Although war-affected children can never be fully 'repaired', they possess the strength and resilience to move on, if appropriately assisted and supported. Not only children, but also their families and the communities they live in would benefit from the measures required by articles 39 CRC. However, where so much money is/was spent on military and international financial assistance often lacks, funding of sustainable and timely remedial measures is often problematic for war-affected States.²²³ As a result, many children living in conflict zones do not receive the support they need.²²⁴ Of course, war-affected children may also have the (additional) possibility to claim full reparation from either the State, in case the violation is attributable to it, a (legal) person, or other entity liable for the harm.²²⁵ This other main route for children to take, will be explored in the next paragraph on the OPCR.

Here, the inability and/or unwillingness of States to provide child victims with recovery and reintegration programmes is discussed. There are two ways of dealing with it. The first is holding the State accountable for the breach of article 39 CRC. This calls for a civil judicial mechanism and will therefore be discussed in the next paragraph. The second revolves around article 7(2) OPAC, which contains a solution that has never been used so far. It holds that States in a position to do so, shall provide financial assistance 'through a voluntary fund established in accordance with the rules of the GA.' This financial assistance should be directed at the 'prevention of any activity contrary to the Protocol'²²⁶ and at 'the 'rehabilitation and social reintegration of persons who are victims of acts contrary to the Protocol'.

Based upon the Preamble, the difference in wordings between article 6(3) and 7(1) OPAC, and the COs of the Committee, it has already been argued that acts contrary to the Protocol are acts contrary to 'conditions of peace and security'. Consequently, such acts are acts contrary to relevant norms of IHL and/or applicable IHRL, meaning acts infringing article 38(1) in conjunction with 38(4) CRC. Since OPAC applies to *all* child victims of war, all of them should be able to benefit from OPAC's, currently non-existing, Voluntary Fund. Even if this legal reasoning would be considered invalid, holding on to the OPAC-Fund being only accessible for child soldiers would amount to discrimination of child civilians, who are also victims of armed conflict.²²⁷ Therefore, making such a distinction would constitute a breach of, inter alia, article 2 CRC. Furthermore, singling out the first category would stigmatise these children and could also be seen as an unwanted reward for their involvement with armed forces or groups.²²⁸

The idea of a voluntary UN fund is not new. As early as in 1981, the GA established a UN Voluntary Fund for Victims of Torture (VFVT).²²⁹ It was followed by a Special Fund, based upon the Optional

²²² SC, Resolution 2427, para. 27. See also SC, Resolution 2143, para. 15, explicitly mentioning funding gaps.

²²³ See also SRSR-CAAC, Working Paper 3, at 12.

²²⁴ Other children have fled to other countries to escape war. However, refugee law falls out of this thesis' scope. Nevertheless, article 39 CRC also applies to receiving States.

²²⁵ Apart from establishing individual criminal responsibility, which is beyond this thesis' scope.

²²⁶ OPCAT article 26 prescribes the establishment of a voluntary fund for the prevention of torture and was set up in 2011, see website.

²²⁷ As recognised by articles 39 CRC and 8 BPG.

²²⁸ Tobin at 1586. PP, Principle 7.30 and the ICC's Trust Fund for Victims both favour collective post-conflict reparation for that reason as well.

²²⁹ The Fund was established by GA, Resolution 36/151, which extended the mandate of the UN Trust Fund for Chile, set up in 1978 by GA, Resolution 33/174.

Protocol to the Convention against Torture (OPCAT).²³⁰ This innovative Special Fund supports torture prevention projects. It is governed by the OHCHR, with the advice of the OPCAT Special Fund Working Group of the Subcommittee on Prevention of Torture. The Fund to be created under OPAC would be a mixture of both funds, since it is deemed to be used for preventive as well as remedial measures, recognising 'the need to provide assistance, in a purely humanitarian spirit,' to all child victims of armed conflict.²³¹

Now, it is of value to briefly mention a few features of the VFVT. It aims at healing the physical and psychological consequences of torture on victims and their families.²³² It is managed by the OHCHR with the advice of a Board of Trustees composed of independent experts from the five world regions.²³³ Applications must be made through accredited 'channels of assistance', such as NGOs, associations of victims of torture and/or their family members, hospitals and clinics, law firms and individual lawyers, legal aid clinics and grass-root and community based organisations. Victims themselves and governmental or political entities or movements cannot apply. Voluntary contributions can be made by States as well as by private donors. The Board distributes grants through the channels of assistance. Grants may be used for medical, psychological, social, legal or financial assistance. Since its establishment, the Fund has awarded more than 620 organisations and rehabilitation centres worldwide, reaching out to over 50,000 victims every year. According to the OHCHR, the Fund is estimated to have provided assistance worth US\$140 million over the last three decades.

Inspiration related to armed conflicts could also be drawn from the ICC's Trust Fund for Victims (TFV) created in 2004 under article 79 of the Rome Statute. The first of its two mandates is to provide assistance to victims of genocide, crimes of humanity, war crimes and aggression. Assistance does not have to be linked to specific cases pending before the ICC. The TFV, in cooperation with locally-based implementing partners, supports victims at the individual, family and community level through programmes of physical and psychological rehabilitation, and material support, including reintegration.²³⁴ State-Parties (122 in total) and private donors provide the TFV with sufficient resources. Assistance programmes are currently operational in several African 'ICC situation' countries, like Uganda and the DRC.

Transplanting terms, conditions and working methods of the aforementioned Funds to a possible Fund under OPAC could mean that the Fund will be governed by the OHCHR with the advice of the SRSG-CAAC and a Board of Experts, perhaps drawn from the CRC Committee. Article 7(2) OPAC does not provide any guidance, apart from the requirement that the fund needs to be established in accordance with already existing UN Financial Rules and Regulations. The Fund would probably only apply in the 168 State-Parties to OPAC, so research has to be conducted on how to achieve universal application. The effectiveness of the existing Funds should also require more research. Moreover, children have to be involved in all stages of the Fund's design. However, the results of the comparable Funds seem promising. As regards donors, with the 'humanitarian spirit' of a victim's fund in mind as well as the 'polluter pays principle', the arms industry might be persuaded to contribute to the OPAC Fund.

In addition, apart from offering a solution for a lack of resources, an OPAC Fund is also important because it is capable of reaching out to more, and groups of victims. Such a Fund could give priority to

²³⁰ Pursuant to OPCAT, article 26.

²³¹ Words used by the GA in the Preamble of Resolution 36/151, which established the VFVT.

²³² Since treatment of children during armed conflict may amount to torture or other cruel, inhuman or degrading treatment or punishment, child victims can apply for a grant. The Fund supports an organisation in northern Iraq that provides mental health services to Syrian refugees and victims of ISIL attacks.

²³³ VFVT, see website.

²³⁴ TVF, Annual Report 2016.

victims of the six grave violations committed by States or armed groups listed in the SG's annual reports.²³⁵ The latter is important, because treaties as the CRC and OPAC are directed at States. It is only via the concept of 'due diligence' that States can be held liable for acts or omissions of armed groups,²³⁶ where a State is due to article 39 CRC always obliged to provide child victims with remedial measures. As will be explained below, child victims have limited opportunities to hold perpetrators to account and to receive full reparation from them. Victims of armed groups have even less opportunities than victims of States' armed forces.

3.3. A Remedy for Breaches of Articles 38(1) in conjunction with 38(4), and 39 CRC: OPCP

Turning to the second main route to remedy the harm war-affected children suffer in so many ways: access to justice, as required by 12 BPG. The CRC and OPAC do not contain an explicit provision to ensure the presence of effective²³⁷ remedies for children and their representatives, including access to independent complaints procedures and to the courts.²³⁸ However, as stated above, this requirement is implicit in the Convention. Accordingly, domestic courts, other bodies, (transitional justice)²³⁹ mechanisms, modalities or proceedings have to be available to children in order to allow them to seek reparation from those legally responsible.²⁴⁰ When domestic remedies fail as a result of practical or political impediments due to an armed conflict, like the collapse of judicial infrastructure,²⁴¹ children should have access to all available and appropriate international processes provided for under international law.²⁴²

At this international level, a judicial remedy for violations of CRC provisions may be provided for by the CRC Committee through its OPCP, although its views are not legally binding.²⁴³ The OPCP is considered to reinforce and complement national mechanisms and to further enhance the implementation of the CRC and its two (other) Protocols. Unfortunately, the number of ratifications of the OPCP is rather low -44- and up to now, the Committee has only received a few complaints and none about alleged violations during conflicts.²⁴⁴ It must also be kept in mind that the CRC Committee has a monitoring function which it exercises through its COs. In these COs it also addresses violations of the CRC, including violations of articles 38(4) and 39 CRC.²⁴⁵ A GC relating to the protection of children in armed conflict, has not been issued (yet).

²³⁵ GA, Resolution 36/151 (1981), para. 1(a).

²³⁶ CRC Committee, GC No. 16, paras. 50 and 62.

²³⁷ In this regard; CESCR GC No. 9, para. 9: 'Whenever a right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.'

²³⁸ CRC Committee, GC No. 5, at para. 24. Also: CRC Committee, CO on Saudi Arabia under OPAC (2018), para. 17.

²³⁹ Among which special truth and reconciliation commissions.

²⁴⁰ See OPSC, article 9(4). A complicating factor at the domestic level is that issues of implementation of the CRC may arise, dependent on the applicable legal system (common or civil law), see for example CRC Committee, CO on Saudi Arabia under OPAC, paras. 15-16. OPSC, article 9(3) sets out a State's obligation to provide for measures aimed at recovery and reintegration of victims of sexual exploitation or abuse.

²⁴¹ For example, a lack of political will, resources or infrastructure, adequately functioning of rule-of-law compliant institutions or a lack of relevant personnel (for example, judges, lawyers), Fatima at 9.32 and SRSG-CAAC, Working Paper No. 3, at 12.

²⁴² BPG, articles 12. See also Shelton at 149.

²⁴³ Other human rights treaty bodies might also offer a remedy: HRC (for breaches of the right to life); CAT Committee (concerning torture, cruel, inhuman or degrading treatment); CESCR (violations of ESCR).

²⁴⁴ The CESCR has also not considered complaints under its OP concerning breaches of ESCR during armed conflict, although the CESCR does address violations of ESCR in armed conflicts in its COs. The African Commission on Human and Peoples Rights on the other hand, found a breach of the right to secondary education where schools and universities were closed because of armed conflict (1996).

²⁴⁵ The Committee is through its reporting procedure, which involves not only States, but also UNICEF, civil society organisations and (I)NGOs, well informed on the situation of children in a specific country. Furthermore, the Committee cooperates with the SRSG-CAAC and other human rights treaty bodies. See for a condemnation of Israel, CRC Committee, CO on Israel under OPAC (2010), para. 10-11.

Article 15 BPG holds that ‘a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of IHRL or serious violations of IHL.’²⁴⁶ The article proceeds by stating that where a (legal) person or other entity is found liable for reparation, such party should provide reparation to the victim’.²⁴⁷ If liability can be established, the victim is entitled to all forms of reparation, including financial compensation, in contrast to article 39 CRC. That is something article 39 CRC cannot provide, since it obliges States to ensure appropriate measures promoting recovery and reintegration of child victims. However, financial assistance does fall under the scope of these measures. The Committee is not allowed to consider direct complaints regarding acts or omissions of armed groups, since they are neither a party to the CRC (or other human rights treaties), nor to the CRC’s OPCP.

Under its OPCP, the Committee is allowed to consider alleged breaches of article 38(1) and (4) CRC, which includes all rights enshrined in the Convention and its two OPs, and IHL, including CIHL. The latter is important, since there is no specific court designed to adjudicate IHL and it is uncertain whether individuals are enabled to directly seek reparation before domestic courts for violations of IHL.²⁴⁸ The CRC Committee has never dealt with IHL in a GC or in the context of a communication. Therefore, it is of interest to note that the HRC was the first treaty body that considered breaches of IHL relating to the right to life (article 6 ICCPR) in a GC.²⁴⁹

The failure of a State to provide a child victim with remedial measures pursuant to article 39 CRC may also be the subject of a communication, although article 10(4) OPCP might apply, since article 39 CRC contains elements of an ESCR.²⁵⁰ The comprehensiveness of the CRC leads to the direct justiciability of the ESCR envisaged in the Convention, where, for example the HRC, can only take the route of the right to life when it concerns ESCR.²⁵¹ A child victim can combine both main routes: he or she may invoke article 39 CRC against the State, whether it is liable for the harm or not, and seek (all forms of) reparation from those legally responsible for the violation (which might be the State). This may be beneficial when the State provides the child only with partial remedial measures.

However, whether it concerns an alleged breach of article 38(1) and 38(4) or of article 39 CRC, available domestic remedies must have been exhausted in order for the Committee to consider a communication admissible. This imperative does not apply whenever the application of these (procedural) remedies is ‘unreasonable prolonged or unlikely to bring effective relief’.²⁵² It does also not apply when a State fails to provide a child with access to an appropriate procedure to seek reparation from those legally responsible, something which is not unlikely during or after armed conflicts.

Ratification of the OPCP should be encouraged, not only because it allows child victims to submit complaints against States, and indirectly against armed groups, on violations of both Convention rights and IHL, but also because the Committee is able to provide victims with all forms of reparations as listed in the BPG. Given the formulation of articles 5 and 7 OPCP, which do not contain any reference

²⁴⁶ In this regard, CIHL, Rules 139 and 149-150; CRC Committee, CO on Saudi Arabia under OPAC (2018), para. 16, in which it attributed the targeting of children, unlawful attacks and denial of humanitarian access in Yemen to Saudi Arabia.

²⁴⁷ Or compensate the State, if the State already provided reparation to the victim (article 15 BPG). Article 16 BPG states that a State should ‘endeavour’ to establish national programmes for reparation, when the parties liable for the harm are unable or unwilling to meet their obligations.

²⁴⁸ CIHL, Rules 139, 149-150.

²⁴⁹ HRC, GC No. 36, para. 64.

²⁵⁰ Nolan, at 2. See also above, paras. 3.1.7. and 3.1.10.

²⁵¹ HRC, Toussaint v. Canada (2018).

²⁵² OPCP, article 7(e).

to children, also adults are entitled to submit a communication to the CRC Committee for violations of their rights suffered as a child. This is of importance, since adults can probably not make use of the remedial measures of article 39 CRC, although research and practice show that many traumatised children are only capable of disclosing their trauma after many years of silence, when they are already in their adulthood.

In addition, the OPCP also contains an inquiry procedure²⁵³, which enables the Committee to start investigations even without a complaint and without consent of the State concerned.²⁵⁴ The Committee's findings may be sent to the GA, after 'consultation' with the State-Party. Views and recommendations of the Committee concerning communications and inquiries may, however only with consent of the State-Party, be transmitted to, if established, (inter alia) the OPAC Fund, in case financial assistance is indicated.

In sum, the OPCP might play an important role for children in the context of violations of their rights in armed conflict. Nevertheless, apart from the difficulties in enforcing views of the Committee, there is another downside to the OPCP. Groups of children may submit a communication, in accordance with article 13 BPG, but they all have to be identified, to the disappointment of the CRC Committee.²⁵⁵ Identification may sometimes be difficult or problematic given the special and vulnerable status of children. Enabling collective communications would enhance confidentiality and children's protection, and complement the Committee's reporting procedure. It might also amount to the prevention of future violations and lead to changes in law, policy or practice.²⁵⁶

²⁵³ State parties have the opportunity not to recognise this competence of the Committee: OPCP, article 13.

²⁵⁴ Cooperation shall be sought at all stages of the proceedings. However, only a country visit demands consent of the State concerned: OPCP, article 13.

²⁵⁵ Grover at 26.

²⁵⁶ Newell.

4. Conclusion and Recommendations

4.1. Conclusion

Every adult in the world will affirm that childhood is indeed a unique period in life. It is a period of physical, mental, emotional and spiritual development. To foster this development, all children should be able to live in peace and dignity. However, children do not live in an ideal world. Millions of children are affected by the horrors of war as a result of conscious and deliberate decisions made by adults. Grave violations, identified by the UN as killing and maiming, attacks on schools and hospitals, sexual abuse, abductions and denial of humanitarian access, may have lifelong, irreversible and even transgenerational consequences. Many child victims of ongoing armed conflicts, such as Yemeni, Yezidi, Syrian children, may become part of a lost generation. Many of them will be unable to develop their personality, talents and abilities to their fullest potential.²⁵⁷

After the devastating two world wars of the last century, rules of IHL were issued. However, the protection of the rights of child civilians in armed conflict only by IHL falls short since it does not provide children with sufficient safeguards and care. For years, it was unclear whether and if so, to what extent children's human rights, among which ESCR, were (still) applicable in times of war. The recognition of the 'complementary and not mutually exclusive' applicability of IHL and IHRL during armed conflict certainly improved children's protection in armed conflict. Despite the existing legal framework, the work of the SRSG-CAAC, the repeatedly expressed grave concerns and condemnations of the SC, a growing number of children still suffer wartime harms. It turns out that IHL and IHRL are weakly enforceable, mainly due to a lack of political will, funding and awareness of the possibilities law might offer to support children.

This thesis has tried to establish which main routes could be followed by children to remedy their harms, based upon the CRC and its OPs. One route may lead to a UN Fund under OPAC which will enable the funding of programmes for children's recovery and reintegration. Such a Fund would not only benefit individual children, but also their families and communities of which they form a part. The other route is already open, although not to many children yet, and leads to the Communications Procedure of the CRC Committee. The Committee is allowed to review complaints submitted by or on behalf of children for violations of their rights in the Convention and, pursuant to article 38 CRC, of IHL norms relevant to children. Children may also submit complaints before other UN treaty bodies, such as the HRC, the CESCR and the CAT Committee, concerning alleged breaches of their rights under the ICCPR, ICESCR and CAT, respectively. The HRC has taken the promising lead in the sense that it will also review actions or omissions committed by States, or attributable to States, during armed conflicts relating to the right to life.

Both routes have their own advantages and disadvantages, and both have never actually been used, although for different reasons. However, at the international level there is, apart from responses in the context of criminal law, no other civil judicial instrument available. In addition, even if treaty bodies would review communications submitted by children, their views still may have only political impact, since views are not legally binding. The success of the establishment of the OPAC Fund would largely depend on the donations provided for. On the other hand, children themselves become more and more aware of their rights and are increasingly calling for the reparation of harms they suffered.²⁵⁸

²⁵⁷ Machel Report, para. 186.

²⁵⁸ CRC Committee, DGD (2018) at 4.3.3.

How can the UN family, in light of its Sustainable Development Goals (SDGs),²⁵⁹ strengthen its system in order to assist and support child victims, enabling them to live and lead a responsible life, contributing to ‘a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship’?²⁶⁰ Some suggestions have been made in this thesis, but a key answer to the question should be that children have to be involved as much as possible in seeking ways for their and others’ recovery and reintegration. Not only because children are entitled to participate, but primarily because they are key to rebuilding societies emerging from armed conflicts. As Machel in 1996 already stated, children are first and foremost in need of ‘nutritious food, adequate health care, a decent education, shelter and a secure and loving family’.²⁶¹ These needs are deeply related to the preservation of human dignity, the ground of all human rights, irrespective of age.²⁶²

4.2. Recommendations

Without prejudice to being complete, some recommendations can be made regarding the proposed Fund and the OPCP. Firstly, it has to be decided how the OPAC Fund should be established and to whom it applies. Secondly, it has to be determined how the Fund should be managed and which terms and conditions should apply to provide child victims with the best possible recovery and reintegration measures. The SRSG-CAAC could have a broadened mandate enabling her/him to assist a Board of Trustees. Furthermore, extensive resources are required to design, implement, monitor and evaluate the appropriate measures, provided for by donors. Involvement of States but also of the business sector should actively be sought, paying attention to the pressure involvement of international public opinion could mean in this regard, especially concerning the corporate social responsibility of the arms industry. A more legal question is whether the Fund could be made applicable worldwide, now that OPAC has not been ratified universally. It could mean that the SC needs to be involved in the Fund’s establishment.

As regards the OPCP, obviously, greater ratification has to be encouraged. This applies also to OPAC, OPSC, API and APII. The first to enhance accountability, the others to enhance children’s protection. Victim’s access to relevant information concerning violations and existing reparation mechanisms is of importance for the functioning of the OPCP as well as the Fund.²⁶³ More broadly, awareness raising is important, not only among States, donors, UN agencies, domestic players and (I)NGOs, but also and foremost among children. Research could be conducted as to the involvement of children. Additionally, the Committee could clarify the rights of children applicable in armed conflict through a new GC, following the lead of the HRC. Since especially norms of IHL, that fall under the scope of the CRC Committee, are scattered and not very clear, the Committee could give more guidance as to that point too.

The Committee, being entrusted with monitoring the implementation of the CRC, receiving communications and conducting inquiries, should be equipped with greater funding and additional members. Funds are already tight; reviewing communications of victims of armed conflict and conducting inquiries in war-torn states would require even more of the Committee (members). To enhance the efficacy of the OPCP, use could be made of article 21 OPCP, allowing for collective communications, at least in situations of armed conflict. Furthermore, as food for further research, there is the question of how non-State armed groups might be bound by IHRL, since all the human rights treaties are aimed at States as protector of rights. Lastly, and it has been put forward regularly,

²⁵⁹ SDGs, Principles 3, 4, 8 and 16.

²⁶⁰ CRC, article 29(1)(d).

²⁶¹ Machel Report, para. 6.

²⁶² Riedel.

²⁶³ BPG, articles 11 and 24.

the establishment of an International Human Rights Court, with a children's rights department, would definitely close the circle of an effective UN human rights family.

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