

# APPLICABLE INTERNATIONAL LEGAL FRAMEWORK

The legal framework applicable to the targeting of schools and universities, and the use of schools and universities in support of the military effort, during armed conflicts is found primarily in the law of armed conflict (also known as international humanitarian law), which is the body of law that regulates conduct in international and non-international armed conflicts. While the law of armed conflict contains all the rules governing targeting, it is less focused on the use of schools in support of the military effort, which is also affected by international human rights law. It is, therefore, important to acknowledge at the outset that the law of armed conflict is complemented by international human rights law, and both are discussed below.

## Law of Armed Conflict (International Humanitarian Law)

The law of armed conflict restricts the targeting of schools and universities, and the use of schools and universities in support of the military effort, but it does not prohibit such use in all circumstances and allows for the targeting of schools and universities when they become military objectives.

Schools and universities are normally civilian objects and, as such, shall not be the object of attack unless they become legitimate military objectives.<sup>1</sup> Indeed, to intentionally direct attacks against them when they are not legitimate military objectives would constitute a war crime. Military objectives are defined as objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>2</sup> In case of doubt whether a school or university is being used to make an effective contribution to military action, it shall be presumed not to be so used and thus to be a civilian object.<sup>3</sup>

The law of armed conflict requires the parties to a conflict to take precautions against the effects of attack. To the extent that schools and universities are civilian objects, parties to an armed conflict shall, to the maximum extent feasible, a) avoid locating military objectives within or near densely populated areas where schools and universities are likely to be located; b) endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; and c) take the other necessary precautions to protect those schools and universities under their control against the dangers resulting from military operations.<sup>4</sup> These rules have important implications for schools and universities.

Turning a school or university into a military objective (for example, by using it as a military barracks) subjects it to possible attacks from the enemy that might be lawful under the law of armed conflict. Locating military objectives (a weapons store, for example) near a school or university also increases the risk that it will suffer incidental damage from an attack against those nearby military objectives that might be lawful under the law of armed conflict.

Those schools and universities that can be characterised as being of great importance to the cultural heritage of every people are afforded additional protection by the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* and its 1999 *Second Protocol*, and also by corresponding rules of customary law. In particular, the use of such education institutions for purposes which are likely to expose them to destruction or damage is prohibited, unless imperatively required by military necessity.<sup>5</sup>

In rare cases, those educational institutions that can be characterised as being of great importance to the cultural or spiritual heritage of peoples, enjoy additional special protection in the Additional Protocols to the Geneva Conventions.<sup>6</sup> This would be the case, for example, if schools and universities are located within buildings of particular cultural or heritage importance, in which case, and in particular, the use of such institutions in support of the military effort is prohibited. So also are acts of hostility against them, including their targeting as measures of reprisal.

According to the ICRC Customary Law Study, schools and universities invariably benefit from special protection as cultural property under customary law. Rule 38 of the ICRC Study reflects the assessment that each party to the conflict must respect and protect buildings dedicated to education which are included in the scope of cultural property.<sup>7</sup> This implies a duty of special care to avoid damage to buildings dedicated to education (unless they are military objectives) as well as the prohibition of all seizure of, or destruction or wilful damage done to, institutions dedicated to education.<sup>8</sup>

The abovementioned rules must not be read in a void. Account must be taken of other relevant rules and principles of the law of armed conflict.<sup>9</sup> Among these rules are those affording a special protection to children in armed conflict situations.<sup>10</sup> If education institutions are fully or partially used for military purposes, the life and physical integrity of children might be at risk<sup>11</sup> and access to education is restricted or even impeded either because children may not go to school for fear of being killed or injured in an attack by the opposing forces, or because they have been deprived of their usual educational building.

Under the Fourth Geneva Convention, applicable during international armed conflicts, an occupying power—that is, the force that has established control and authority over hostile territory—shall, with the cooperation of the national and local authorities, “facilitate the proper working of all institutions devoted to the care and education of children.”<sup>12</sup>

Under Additional Protocol II, applicable during non-international armed conflicts, it is a “fundamental guarantee” that children shall receive an education, in keeping with the wishes of their parents.<sup>13</sup>

The presence of civilians—children, students, teachers, academics and school staff—around schools and universities shall not be used to shield military objectives from attacks or to shield military operations.<sup>14</sup>

As a consequence, before using a school or university in support of the military effort, consideration should be given to all relevant rules and principles of the law of armed conflict, in particular the obligation to take precautions against the effects of attack, the special protection afforded to educational institutions that also constitute cultural property, the importance of ensuring access to education in armed conflicts, the prohibition of human shields, and the special protection afforded to children in armed conflicts.

## International Human Rights Law

International human rights law is applicable at all times, subject to lawful derogations.<sup>15</sup> However, not all states agree on the precise relationship between the law of armed conflict and human rights law during armed conflicts. Disagreements of this sort, while acknowledged here, are not problematic in relation to the Guidelines. As such, it protects students, teachers, academics, and all education staff during peace, armed conflict, and situations of internal disturbances and tensions, although a state can derogate from its ICCPR obligations under Article 9 during an emergency. A number of international human rights law provisions are relevant to the issue of the military use of schools and universities.

International human rights law guarantees students, teachers, academics, and all education staff the right to life,<sup>16</sup> personal liberty, and security.<sup>17</sup> States shall also ensure to the maximum extent possible the survival and the development of children.<sup>18</sup>

As children, students under the age of 18 receive special protections under international human rights law. According to the *Convention on the Rights of the Child*, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>19</sup>

Everyone has the right to education.<sup>20</sup> With a view to achieving the full realisation of this right, states shall make primary education compulsory and available free to all; secondary education generally available and accessible to all; and higher education equally accessible to all on the basis of capacity.<sup>21</sup> The material conditions of teaching staff shall be continuously improved.<sup>22</sup> States shall also take measures to encourage regular attendance by children at schools and the reduction of child drop-out rates.<sup>23</sup> With respect to children, states shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.<sup>24</sup>

The *Convention on the Rights of the Child*, one of the main international treaties guaranteeing the right to education for children, contains no provision for derogation or suspension.<sup>25</sup>

## Relevant International Treaty Provisions

“States Parties ... recognize the right of everyone to education... [W]ith a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms ... shall be made generally available and accessible to all by every appropriate means ... [and] (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means...” – International Covenant on Economic, Social, and Cultural Rights, art. 13.

“States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, ... [and] make them available and accessible to every child... (c) Make higher education accessible to all on the basis of capacity by every appropriate means; ... (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.” – Convention on the Rights of the Child, art. 28(1).

“Parties to [an armed] conflict shall, to the maximum extent feasible: (a) ... endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.” – 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 58.

“Children shall be provided with the care and aid they require, and in particular ... they shall receive an education ... in keeping with the wishes of their parents, or ... of those responsible for their care...” – 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4.

“The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.” – 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 50.

“The property of ... institutions dedicated to ... education, ... even when State property, shall be treated as private property. All seizure of, ... or wilful damage done to institutions of this character ... is forbidden, and should be made the subject of legal proceedings.” – 1907 The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Regulations), art. 56.

“[E]ducational ... institutions shall be considered as neutral and as such respected and protected by belligerents ... The same respect and protection shall be accorded to ... educational ... institutions in time of peace as well as in war.” – Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), 1935, art. 1.

## Relevant International Guidance

“The Security Council ... [e]xpresses deep concern at the military use of schools in contravention of applicable international law, recognizing that such use may render schools legitimate targets of attack, thus endangering children’s and teachers’ safety as well as children’s education and in this regard: (a) Urges all parties to armed conflict to respect the civilian character of schools in accordance with international humanitarian law; (b) Encourages Member States to consider concrete measures to deter the use of schools by armed forces and armed non-State groups in contravention of applicable international law; (c) Urges Member States to ensure that attacks on schools in contravention of international humanitarian law are investigated and those responsible duly prosecuted.” – United Nations Security Council Resolution 2143, S/Res/2143 (2014), March 7, 2014, para. 18.

“The Security Council ... urges parties to armed conflict to refrain from actions that impede children’s access to education, in particular ... the use of schools for military operations.” – Statement by the President of the United Nations Security Council, S/PRST/2009/9, April 29, 2009.

“[The Security Council] Urges parties to armed conflict to refrain from actions that impede children’s access to education.” – United Nations Security Council Resolution 1998, S/Res/1998 (2011), July 12, 2011, para. 4.

“There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education... If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party’s maximum available resources.” – UN Committee on Economic, Cultural, and Social Rights, “General Comment No. 13: The right to education,” E/C.12/1999/10, December 8, 1999, para. 45.

“Prohibit the occupation of schools by security forces in conflict-affected regions in compliance with international humanitarian and human rights law standards” – UN Committee on the Elimination of Discrimination against Women, Concluding observations, CEDAW/C/IND/CO/4-5, 2014, para. 27.

“[M]ilitary presence in the vicinity of schools significantly increases the risk of exposing school children to hostilities and retaliations by illegal armed groups... The Committee urges the State party to immediately discontinue the occupation of schools by the armed forces and strictly ensure compliance with humanitarian law and the principle of distinction. The Committee urges the State party to conduct prompt and impartial investigations of reports indicating the occupation of schools by the armed forces and ensure that those responsible within the armed forces are duly suspended, prosecuted and sanctioned with appropriate penalties.” – UN Committee on the Rights of the Child, Concluding observations, CRC/C/OPAC/COL/CO/1, 2010, paras. 39-40.

“Immediately discontinue military occupation and use of the schools and strictly ensure compliance with humanitarian law and the principle of distinction ... Ensure that school infrastructures damaged as a result of military occupation are promptly and fully restored.” – UN Committee on the Rights of the Child, Concluding observations, CRC/C/OPAC/LKA/CO/1, 2010, para. 25.

“[E]nsure that ... national legislation explicitly prohibits the occupation and use of ... schools ..., in line with international humanitarian law; expedite the reconstruction of these facilities as appropriate; take concrete measures to ensure that cases of unlawful ... occupation of schools ... are promptly investigated, and that perpetrators are prosecuted and punished.” – UN Committee on the Rights of the Child, Concluding Observations, CRC/C/OPAC/YEM/CO/1, 2014, para. 30.

“[S]top using schools as detention centres, and ... strictly ensure compliance with humanitarian law and the principle of distinction.” – UN Committee on the Rights of the Child, Concluding observations, CRC/C/SYR/CO/3-4, 2012, para. 52.

“Cease ... use of schools as outposts and detention centres ...” – UN Committee on the Rights of the Child, Concluding observations, CRC/C/ISR/CO/2-4, 2013, para. 64.

“Ensure that schools are not disrupted by State military and paramilitary units and are protected from attacks by non-state armed groups.” – UN Committee on the Rights of the Child, Concluding observations, CRC/C/THA/CO/3-4, 2012, para. 85.

“[T]ake all necessary measures to prevent the occupation and use of ... places with a significant presence of children, such as schools, in line with international humanitarian law, expedite the vacation of schools as appropriate and take concrete measures to ensure that cases of unlawful ... occupation of schools are promptly investigated, and that perpetrators are prosecuted and punished.” – UN Committee on the Rights of the Child, Concluding observations, CRC/C/OPAC/IND/CO/1, 2014, para. 29.

“Special care must be taken in military operations to avoid damage to buildings dedicated to ... education ... unless they are military objectives.” – ICRC Customary International Humanitarian Law Study, Rule 38.

“All seizure of or destruction or wilful damage done to institutions dedicated to ... education ... is prohibited.” – ICRC Customary International Humanitarian Law Study, Rule 40.

“[S]ecurity in schools, meaning not only physical, psychological and emotional safety but also an uninterrupted education in conditions conducive to knowledge acquisition and character development, forms part of the right to education. This means that States have a responsibility to punish perpetrators and devise effective methods of protection.” – Report of the UN Special Rapporteur on the Right to Education, A/HRC/8/10, 20 May 2008.

## NOTES AND REFERENCES

<sup>1</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (“Additional Protocol I”), art. 52(1). This rule is also part of customary law for international and non-international armed conflicts. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Rules*, vol. 1, International Committee of the Red Cross (“ICRC Customary IHL Study”), rule 9 and 10.

<sup>2</sup> See Additional Protocol I, art. 52(2). This rule is also part of customary law for international and non-international armed conflicts. See ICRC Customary IHL Study, rule 8. See also ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, §41.

<sup>3</sup> See Additional Protocol I, art. 52(3). The principle of presumption of civilian character in case of doubt is also contained in Amended Protocol II to the Convention on Certain Conventional Weapons. The customary character of this rule is not fully established, but it is clear that in case of doubt, a careful assessment has to be made. See ICRC Customary IHL Study, commentary to Rule 10.

<sup>4</sup> See Additional Protocol I, art. 58(a), (b), and (c). These rules are also part of customary law for international and non-international armed conflicts. See ICRC Customary IHL Study, rules 22-24. See also: ICTY, *Kupreskic case*, Judgment, Trial Chamber, 14 January 2000, §§524-525.

<sup>5</sup> See the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 4(1), and ICRC Customary IHL Study, rule 39.

<sup>6</sup> See Additional Protocol I, art. 53(1), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (“Additional Protocol II”), art. 16.

<sup>7</sup> ICRC Customary IHL Study, rules 38-40. There are a number of national laws and military manuals that include education institutions as objects enjoying a special protection alongside other cultural objects. In the consultation process, which led to the drafting of the present guidelines, however, not all States agreed that all schools and universities are to be considered as cultural property.

<sup>8</sup> *Ibid.* See also the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (“the Hague Regulations of 1907”), art. 56.

<sup>9</sup> This is a traditional rule of interpretation. See Vienna Convention on the Law of Treaties, art. 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

<sup>10</sup> On the special protection afforded to children in armed conflicts, see Geneva Convention relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”), art. 14, 17, 23, 24, 38, 50, 82, 89, 94, 132; Additional Protocol I, art. 70, 77, 78; Additional Protocol II, art. 4 and 6.

<sup>11</sup> It should be noted in particular that the law of armed conflict foresees the creation of safety zones and localities so organized as to protect from the effects of war children under fifteen (See Fourth Geneva Convention, art. 14.) This indicates that the law of armed conflict puts a particular emphasis on the protection of children from the effects of attacks.

<sup>12</sup> Fourth Geneva Convention, art. 50.

<sup>13</sup> Additional Protocol II, art. 4(3)(a).

<sup>14</sup> See Fourth Geneva Convention, art. 28; and Additional Protocol I, art. 51(7). The prohibition of human shields belongs to customary law as well for both international and non-international armed conflicts. See ICRC Customary Law Study, rule 97.

<sup>15</sup> See Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, para. 25; Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004, para. 106; Judgment, *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, ICJ, 19 December 2005, para. 216; Merits and Judgment, *Bámaca Velásquez vs. Guatemala*, IACtHR, 25 November 2000, para. 207; see also Louise Doswald-Beck & Sylvain Vité, “International Humanitarian Law and Human Rights Law,” 293 *IRRC* 94 (1993).

<sup>16</sup> International Covenant on Civil and Political Rights (“ICCPR”), art. 6. See also African Charter on Human and Peoples’ Rights (“ACHPR”), art. 4; European Convention on the Protection of Human Rights and Fundamental Freedoms (“ECHR”), art. 2; American Convention on Human Rights (“IACHR”), art. 4; Arab Charter on Human Rights (“Arab Charter”), art. 5; and Human Rights Committee, *General Comment 6: the Right to Life* (1982).

<sup>17</sup> ICCPR, arts. 9 & 10. See also ACHPR, art. 6; ECHR, art. 5(1); IACHR, art. 7; and Arab Charter, art. 14(1).

<sup>18</sup> Convention on the Rights of the Child (“CRC”), art. 6.

<sup>19</sup> CRC, art. 3(1).

<sup>20</sup> International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), art. 13; and CRC, art. 28. See also ACHPR, art. 17; African Charter on the Rights and Welfare of the Child, art. 11; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, arts. 13 & 16; Additional Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2; Arab Charter, art. 41.

<sup>21</sup> ICESCR, art. 13(2)(a)-(d); and CRC, art. 28(a)-(d).

<sup>22</sup> ICESCR, art. 13(e).

<sup>23</sup> CRC, art. 28(e).

<sup>24</sup> CRC, art. 4.

<sup>25</sup> CRC. Similarly, the ICESCR provides no derogation provision; however, article 4 permits states to limit rights when proscribed by law to the extent compatible with the nature of the right and for the purpose of promoting general public welfare. The Committee on Economic, Social, and Cultural Rights has noted that in regard to the right to education, “[Article 4] is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State. Consequently, a State party which closes a university or other education institution on grounds such as national security ... has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.” Committee on Economic, Social, and Cultural Rights, *General Comment No. 13 – The Right to Education*, para. 42.