



**British Institute of
International and
Comparative Law**



PEIC

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

Protecting Education in Insecurity and Armed Conflict

The International Legal Framework

SLIDES 2-3

INTRODUCTION

This is a training module on the international legal framework protecting education in situations of insecurity and armed conflict. It is based on the publication *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook*, which was published in 2012. Please do read the Handbook and three Updates (2013, 2014, 2015) when preparing for the class.¹ The module comprises both the PowerPoint slides and these Notes to assist you with the slides. You can use as many or as few of them as you wish in order to fit best with your own teaching and expertise.

The module begins with some examples of how education can be affected by insecurity and armed conflict, which can be discussed in class. Please use any examples of which you are aware and update it with any current issues. The pictures represent a bombed school in Gaza, a refugee boat in the Mediterranean, a demonstration against child labour, and a child soldier. Some examples you might use include a United Nations Security Council Resolution condemning attack against schools (as well as the recruitment and use of child soldiers), a reference to the *Lubanga* case before the International Criminal Court (ICC), where a military commander from the Democratic Republic of the Congo was convicted for forcibly conscripting child soldiers (among other war crimes), and other examples of attacks against schools in Africa. All illustrate attacks against education, which amount to education-relation violations as they curtail the enjoyment of the right to education.

SLIDE 4

DEFINITIONS

What is Education?

The term education is here understood in a broad sense. While it is established under international law that education at the *primary level* has to be offered to everyone for free and made compulsory, international law does not limit its protection to primary education. So education can be understood to include all types and levels of education: pre-school, primary, secondary and tertiary education, adult education, and vocational training. It also includes both private and public education.

Who are students and education staff?

¹ The Handbook and its Updates can be downloaded on the BIICL and PEIC websites, at:
<http://www.biicl.org/protectingeducation>;
<http://educationandconflict.org/publications/protecting-education-insecurity-and-armed-conflict-international-law-handbook>

Student is also a term that is here understood in a broad sense. The term covers primary school pupils as well as everyone who is being educated. This includes university students and also those following a practical training / vocational course, as well as adult learners. So students include those persons who benefit from education regardless of age or institution.

The same broad understanding is also applied to education staff: teachers and professors are included in this category. Everyone who makes education possible is also included within the education staff category. Thus this includes non-teaching staff, such as those working in an administrative role at a school, for example.

What are educational facilities?

Educational facilities is a term understood in a broad manner and includes not only schools, classrooms and other structural facilities directly related to the provision of education and also associated facilities at educational facilities, such as facilities for sanitation, drinking water, libraries, computers and other information technology.

SLIDE 5

How is education affected during insecurity and armed conflict?

Education can be affected in many ways during insecurity and armed conflict.

- **First**, education itself can be affected when it is used as a tool for war propaganda or a vehicle for discrimination or incitement to hatred. It may, and frequently is, discontinued entirely at such times.
 - **Second**, students and education staff can be, and are, threatened or physically harmed and populations forcibly displaced both within and outside the boundaries of their respective States. Children are often recruited into the armed forces of States or non-State armed groups.
 - **Third**, educational facilities are frequently destroyed or used as training grounds by both the state and non-state groups. The destruction and disruption of schools and other educational facilities is a notable, significant and increasing trend affecting education in insecurity and armed conflict.
- The protection of education must be ensured in situations of insecurity and armed conflict, as it is particularly at risk in such contexts. It is important that education continues to be provided as it plays a role in supporting sustained recovery after insecurity and armed conflict. Furthermore, education enables individuals to know about their rights and seek redress in case of violations, which are generally more frequent in situations of insecurity and armed conflict.

Some examples of how education is affected during insecurity an armed conflict are given. Please add your own.

Before going into the core of this presentation, a few additional key concepts must be defined.

SLIDE 6

Material Scope

What are Education-related Violations?

The Handbook introduces the term 'education-related violation' – what is it? What types of violations are we talking about?

A term which is often used in the literature is 'attacks against education'. However, that term does not capture any legal meaning as there is no legal definition of that term. Therefore, the term **education-related violation** can be used to refer to the *legal aspects* of attacks against education during situations of insecurity and armed conflict.

The Handbook could have referred to 'the right to education and other associated rights', however IHL and ICL are not rights-based regimes.

An attack on education refers to an act against education, students and education staff, and educational facilities.

- The Handbook considers education-related violations occurring in situations of insecurity and armed conflict. The reason is that, times of insecurity or armed conflict, education is particularly at risk of attacks. So we need to define when we are in those types of situations.

SLIDES 7-8

Temporal Scope

When are we in situations of Insecurity?

Insecurity is not a legal term. It is used to describe:

- situations of disturbance and tension within a State that disrupt the normal functioning of political, social, and legal institutions, including those that are used to facilitate education.
 - Internal disturbances,
 - Tensions, and
 - Situations of fragility.

'Insecurity' does not include situations of intense violence that reach the threshold of armed conflict.

- It is thus defined negatively!

When is there an Armed Conflict?

Armed Conflict is a term referring to the legal concepts of 'international armed conflict' and 'non-international armed conflict', which are different from situations of insecurity.

1. The term **International Armed Conflict (IAC)** describes situations of violence which involve:

- use of armed force between States (including where States use force against each other by 'proxy' through a non-State armed group).
[Note that some armed conflicts involving non-State actors (peoples fighting against colonial dominations, alien occupation or racist regimes) have been deemed to be examples of international armed conflict under IHL treaty law – 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), 8 June 1977]
or
- a situation of belligerent occupation, where the armed forces of one State have effective control over the territory of another.

2. **Non-International Armed Conflict (NIAC)** is a situation of violence:

- between a State and a non-State armed group on its territory, or
- between non-State armed groups on the territory of a State.

In both types of NIAC, the violence used must be protracted: it must last for a long period and reach a certain level of intensity (threshold).

Otherwise it is a situation of internal disturbance or tension that might amount to *insecurity*.

- Why is this relevant? Because international humanitarian law does not apply to situations of insecurity.

SLIDE 9

THE INTERNATIONAL LEGAL FRAMEWORK

Why is it relevant?

The international legal framework is relevant for many reasons. Here are 3 that are particularly important:

- **It regulates the conduct of States**
 - Treaties bind State parties. They give obligations to States, either among them (inter-State obligations) or with regard to the individuals under their jurisdiction (intra-State obligations). For example, human rights treaties (IHRL) provide intra-State obligations. A number of them protect the right to education, and related rights that protect students, teachers and facilities. So if a State has ratified a convention providing for free and compulsory education at the primary level, a State has a binding obligation to do so (we will see later that this obligation is not necessarily the same for all types of rights).
 - Customary international law (CIL) binds all States.² There is no need for a treaty to be ratified for a customary international law obligation to be applicable to States. There is no need either for States to have adopted that rule at the domestic level. So basically, there is no consent required for CIL to apply to all States (silence is acceptance). For example, international humanitarian law (IHL) protects, as a matter of CIL, students and teachers because of their civilian status (and as long as they do not participate in hostilities), as well as education facilities also because of their civilian status.
- **It regulates the conduct of non-State actors**
 - Individual responsibility for genocide, war crimes, crimes against humanity. For example, conscripting and enlisting children under the age of fifteen into the armed forces is a war crime under international criminal law (ICL).³

² A rare exception applies to States that have consistently and openly objected to the development of that norm (as 'persistent objectors'). However, if a norm reaches the status of 'jus cogens', States cannot object to being bound by it.

³ Art 8 (e)(vii) for situations of non-international armed conflict.

- Non-State armed groups have some obligations under IHL, in particular under Common Article 3 of the Geneva Conventions 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), 8 June 1977.
- States can have responsibility for actions of non-State actors that violate international law. For example, a State may be responsible for the acts of a non-State actor when the latter exercises a governmental activity or when it acts under the directions of the State.⁴ States may also be held responsible if they fail to protect individuals under their jurisdiction from human rights violations committed by non-State actors (a due diligence obligation).⁵
- **It requires reparation for breaches of international obligations**
 - States have an obligation to repair the harm caused as a result of the breach.
 - IHRL includes a right to an effective remedy.
 - Monitoring of compliance by international courts, tribunals, and other bodies.

SLIDE 10

THE THREE RELEVANT LEGAL REGIMES

- What is (or are) the international legal regimes applicable to education-related violations which are committed during times of insecurity or armed conflict?

The three legal regimes considered by the Handbook are distinct. However, they each contain rules that protect education directly, or protect the conditions necessary for education to exist, such as the protection of the lives of students and education staff, and the protection of educational facilities.

There has been very little examination of the different regimes of international law and their intersection on issues concerning education-related violations during insecurity and armed conflict. Such examination is essential to understand how international law protects education itself and the benefits that derive from it, as well as how this protection can be increased. The Handbook explores the international legal protection afforded to both the right to education, as a human right, and education more generally under:

⁴ The rules of attribution are explained in detail on pp. 27-28 of the Handbook.

⁵ This obligation was expressed by the Inter-American Court of Human Rights in *Velásquez Rodríguez v Honduras*, see p 28 of the Handbook.

- **International human rights law (IHRL)**

IHRL protects the rights to which all individuals are entitled, regardless of their race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In general, IHRL applies to all situations and at all times – including during insecurity and armed conflict. This broad application means that IHRL has the broadest scope of the three regimes. States are bound to IHRL either through their agreement to and ratification of a human rights treaty, or, in some instances, through customary nature of certain international human rights obligations (which applies to all States regardless of whether they have ratified a relevant treaty).

The adoption of the following treaties and their subsequent ratification by a large number of States established binding obligations on States in respect of most human rights:

- International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and its Optional Protocol; and
- International Covenant on Civil and Political Rights 1966 (ICCPR) and its Optional Protocols.

In addition, there are human rights treaties which provide for added protection against a particular form of human right violation or for particular groups of individuals. These include the Convention Against Discrimination in Education 1960 and the Convention on the Elimination of all Forms of Discrimination against Women 1979, as well as the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 and its Optional Protocol. The human rights treaties protecting particular groups include the Convention on the Rights of the Child 1989, the Convention on the Elimination of all Forms of Discrimination against Women 1979, and the Convention on the Rights of People with Disabilities 2006.

There are human rights treaties in force in all regions of the world, except within the Asia/Pacific region. In Europe the main treaties are the European Convention on Human Rights and Fundamental Freedoms 1950 and the European Social Charter 1961 (revised 1996). The main human rights treaty in the Americas is the American Convention on Human Rights 1969. In Africa, the main treaty is the African Charter on Human and People's Rights 1981. In addition, a number of African States are also members of the Arab League which has adopted the Arab Charter on Human Rights 1994, which protects the human rights in Arab States throughout the world.

Treaty bodies have been established in order to monitor and supervise the compliance of States with their treaty obligations. For example, the ICESCR has a committee of independent experts, called the Committee on Economic, Social and Cultural Rights (CESCR).

Every State is party to at least one of the major global human rights treaties. Each of these treaties includes legal obligations on States to give effect to the treaty in national law (although many States frequently fail to comply with these obligations).

In addition, as mentioned, States may be bound to certain IHRL rules through their customary nature. The Universal Declaration of Human Rights 1948 (UDHR) is not a treaty (and, therefore, not legally binding on States) but many of its Articles are considered to have become customary international law, which is developed through both State practice and *opinio juris* (the belief that there is a legal obligation to act a certain way). For example, States are now subject to a regular Universal Periodic Review by the UN Human Rights Council (UNHRC), in which the basis for review includes compliance with the UDHR.

All human rights are interrelated and interdependent, which means that the enjoyment of one particular human right often relies in part or substantially on the enjoyment of other right(s). This means that the right to education is often necessary for the fulfillment and realization of other human rights, such as the right to work, rights to freedom of expression and of association, and to access health services. Similarly, in order for the right to education to be realized, other human rights must also be realized. This includes the protection of children from economic and social exploitation, and the right to an adequate standard of living (including housing, food and water). Like other human rights, the right to education is applicable to all - without discrimination - and it is also applicable at all times, including in insecurity and armed conflict.

States may derogate i.e. limit the application of human rights treaties, in the very specific circumstance of a state of emergency. This is not allowed for several rights, such as torture, fair trial, slavery, etc.⁶ The State must also publicly declare a state of emergency and it must be limited in terms of proportionality and time, and to the situation that is occurring.

IHRL, which applies in insecurity and armed conflict, sets out the right to life and the right to be free from torture and inhuman or degrading treatment, for example. These rights protect the lives and well-being of students and education staff in all circumstances. Protecting the physical well-being of students and education staff is an essential precondition to ensuring education in insecurity and armed conflict.

- **International humanitarian law (IHL)**

IHL is a body of law that regulates the conduct of parties to an armed conflict. It is sometimes referred to as 'the law of war' or 'the international law of armed conflict'. IHL aims to make war more humane, and its rules and restrictions embody the international ideal that military victory should not to be achieved at any cost. IHL contains rules that apply to States involved in international and non-international

⁶ See, for example, Art 4(2) ICCPR.

armed conflicts, as well as rules that apply to non-State armed groups when they are involved in a non-international armed conflict.⁷

IHL is now largely codified in the following international treaties:

- The four Geneva Conventions of 1949 (the Geneva Conventions); Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention (III) relative to the Treatment of Prisoners of War, Convention (IV) relative to the Protection of Civilian Persons in Time of War;
- The three protocols additional to the Geneva Conventions (Additional Protocols): Additional Protocol I of 1977 applicable in international armed conflict; Additional Protocol II of 1977 applicable in non-international armed conflict; and Additional Protocol 3 relating to the adoption of a new distinctive emblem (the 'Red Crystal');

In addition to the above, IHL is comprised of customary international law. In 2005 the International Committee of the Red Cross published its study on customary international humanitarian law which examined relevant State practice and identified rules of IHL which have attained customary status, including those applicable in non-international armed conflict. Those rules are also applicable to non-State armed groups when they are involved in a non-international armed conflict.

Each of these treaties and the relevant customary international law embody the central protection afforded by IHL. This is the principle of *distinction*: that parties to a conflict must at all times distinguish between civilians and those persons taking a direct part in hostilities; and between civilian objects and military objectives. Civilian objects are all those objects that have not become military objects. Typical civilian objects include school buildings; school grounds; university buildings; public or personal transportation; and private property. Parties are prohibited from deliberately attacking civilians and civilian objects.

- **International criminal law (ICL)**

ICL is a regime which identifies the circumstances that attract *individual* criminal responsibility. ICL refers to the set of rules proscribing conduct that is considered criminal by the international community and shocks the conscience of humanity. It also establishes the procedures by which these criminal violations can be prosecuted at the international level. International crimes include the crimes of aggression, genocide, crimes against humanity, transnational terrorism, war crimes, torture and enforced disappearance.

⁷ Note that for Additional Protocol II to apply to non-State armed groups, they must be in control of a territory and be under responsible command (the threshold of application is lower for Common Article 3 of the Geneva Conventions).

ICL is a relatively new discipline in terms of enforcement. In the last decade of the twentieth century and first decade of the twenty-first, a number of *ad hoc* regional courts and tribunals were created, to investigate and prosecute individuals for international crimes within a particular geographical area over a particular time-frame. The most important recent development in the field of ICL has been the creation of the International Criminal Court (ICC), being a permanent court with jurisdiction over international crimes committed by individuals.

ICL is therefore particularly relevant as it establishes the law to hold responsible those individuals who have violated international criminal provisions which amount to education-related violations. Conduct deemed criminal under ICL can, of course, have a direct or indirect impact on the full and effective realisation of the right to education.

➤ **Interaction between International Legal Regimes**

Although IHRL, IHL, and ICL are different legal regimes, they often apply at the same time to the same situations. The way that they interact can affect the overall protection of education in insecurity and armed conflict. The three regimes have substantive similarities: IHL and ICL share common sources of substantive law (including the Geneva Conventions and Additional Protocols) and are mutually reinforcing regimes. Many of the crimes set out in ICL are based on, or identical to, the prohibitions of IHL. Some ICL courts have also identified the substantive overlap between ICL and IHRL and have sought to rely on IHRL jurisprudence in interpreting particular crimes or to supplement gaps in their own jurisprudence. In addition, IHRL provides high procedural standards of international criminal justice (due process, defendant's rights, etc.).

Despite this substantive overlap, the three regimes remain distinct from each other, particularly in their object and purpose. A finding of responsibility for a violation under one regime does not necessarily give rise to responsibility under another. IHRL addresses the conduct of States and State responsibility whereas ICL is concerned with the criminal liability of individuals. Similarly, notwithstanding the obvious relationship between ICL and IHL, they have overlapping but distinct objects and purposes. IHL regulates the conduct of parties to an armed conflict and aims to alleviate the conditions of victims. IHL achieves this through a diverse number of ways. The enforcement of its provisions, through the processes of ICL, is only one of the ways in which IHL has the potential to improve the humanity in conflict.

The relationship between the three regimes is complex and examined in detail in the Handbook. Understanding the interactions between these international legal regimes is vital to identifying and addressing international law's response to education-related violations in situations of insecurity and armed conflict.

International Law on the Use of Force/Collective Security

An issue that can arise in an armed conflict is about the lawfulness of the conflict, especially in relation to where States are involved. This is about the international law on

the use of force and the UN role in collective security. This deals with matters such as self-defence, collective actions, peace-keeping, self-determination, humanitarian intervention, etc.

This area of international law deals with whether the commencement of the conflict was lawful and not whether the conduct of the conflict is lawful. It is not relevant here as the application of IHR, IHL and ICL occur irrespective of the international legality of the conflict.

SLIDES 11-12

How does International Human Rights Law protect education?

The key provision for the right to education is Article 13 of the International Covenant on Economic, Social and Cultural Rights, which was adopted in 1966 and entered into force in 1976, made this right binding for the States that ratified that Covenant:

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

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

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

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

Under the right to education, States have

- positive obligations: providing free and compulsory primary education, making secondary and higher education available (and progressively free), and
- negative obligations: prohibition of impeding access to education in any way, prohibition of interfering with an individual's choice of school (whether public or private)
- immediate obligations: not to discriminate
- Progressive obligations: States need to take immediate steps towards their full realisation
- States also have *immediate* obligations, including non-discrimination in the provision of education, and obligations for which they must take steps to realise the right progressively, such as access to higher education. Thus States have a continuous obligation with regard to the right to education as soon as they are party to a treaty protecting it, which entails taking all necessary measures to achieve the full realisation of this right as expeditiously as possible.
- Even in situations of insecurity and armed conflict, every effort to satisfy the minimum core obligations associated with the realisation of the right to education must be made by States. When necessary, a State must make use of international assistance and cooperation to achieve the realisation of the right to education.
- [side note on the concept of 'progressive realisation': economic, social and cultural rights (like the right to education) must be *progressively* realised. This is not quite the same as for civil and political rights which must (for the most part) be immediately realised. Note that this distinction is not as clear as it seems, some obligations stemming from ESCR are also immediate!]

Note that the right to education was first inscribed in the Universal Declaration of Human Rights (Art 26 UDHR)

Article 26 UDHR says that:

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial

- or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- (3) Parents have a prior right to choose the kind of education that shall be given to their children.

The UDHR is not a treaty, so does not directly legally bind States, though it was influential in crafting of the treaties. It is now in many international human rights treaties:

In addition to Article 13 ICESCR, there are a number of other international law provisions that contain the right to education:

Global:

- Article 29 (1) and 38 Convention on the Rights of the Child (CRC)
- Article 10 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Article 24 Convention on the Rights of Persons with Disabilities (CRPD)
- Article 28 (1) ILO Convention 169 on Indigenous and Tribal Peoples
- UNESCO Convention against Discrimination in Education

Regional:

- Article 17 African Charter on Human and Peoples' Rights
- Article 11 African Charter on the Rights and Welfare of the Child
- Article 12 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women
- Articles 13, 15 and 23 African Youth Charter
- Art 9 (2)(b) Convention for the Protection and Assistance of Internally Displaced Persons in Africa
- Article 41 Arab Charter on Human Rights
- Articles 12 and 17 Covenant on the Rights of the Child in Islam
- Article 2 Protocol 1 European Convention on Human Rights
- Article 13 and 16 Additional Protocol to the Inter-American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol)

European Human Rights System

- Article 2 Protocol 1 European Convention on Human Rights

Inter-American Human Rights System

- Article 13 Additional Protocol to the Inter-American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol): right to free, compulsory education. There is also Article 16 with regard to the rights of children (which reaffirms their right to education).

African Human Rights System

- Article 17 African Charter on Human and Peoples' Rights:
"Every individual shall have the right to education" > it leaves open to interpretation the content of the right (it does not expressly guarantee the protection of compulsory and free education).
- Article 11 African Charter on the Rights and Welfare of the Child:
Provide for free and compulsory basic education > it is more extensive than in the African Charter on Human and Peoples' Rights. It also states that there is a need to take specific measures for "female, gifted and disadvantaged children to ensure equal access to education". It also provides for the protection of parental liberty in choosing their children's education.
- Article 12 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol): it highlights the principle of non-discrimination against women, which must also apply to the content of education material which shall not perpetuate stereotypes. It also reiterates the prohibition of all forms of abuse, including "sexual harassment in schools and other education institutions"
- Article 13 African Youth Charter (recognises the importance of quality education and the value of all forms of education, including distance learning and lifelong learning. See also Article 15 which limits the kind of work a young person can perform to work that is not has arduous to his or her education. And see Article 23 on girls and young women (which builds on the Maputo Protocol and calls for the need to eliminate discrimination in education).
- Art 9 (2)(b) Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention): States parties shall "provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, *education*, and any other necessary social services, and where appropriate, extend such assistance to local and host communities."

Arab Human Rights System

- Article 41 Arab Charter on Human Rights (adopted by the Arab League): it recognises the right to education by providing that the "eradication of illiteracy is a binding obligation upon the State and everyone has the right to education". States must also guarantee their citizens free education, at least throughout the primary and basic levels. All forms and levels of education of primary education shall be compulsory and accessible to all without discrimination of any kind.
- Article 12 Covenant on the Rights of the Child in Islam, adopted by the Organisation of Islamic Cooperation provides for the right to education and culture. I have also highlighted Article 17 here because it is relevant in armed conflict as it provides that States must protect children by not involving them in armed conflict and wars (note that by using the term involvement, the Covenant does not expressly prohibit their recruitment into armed forces).

SLIDE 13

Why is the right to education important?

It is an important right in itself as it allows individuals to realise themselves. It is also an enabling right.

Dame Rosalyn Higgins, the former President of the International Court of Justice, said:

It is an enabling right. Without education, it is virtually impossible to know of other entitlements in times of insecurity and armed conflict, let alone how to go about realizing them. Education is also, of course, the key to everything.

- It is an enabling right which empowers access to other human rights, to meaningful participation in society, and to the promotion of universal respect for the dignity of all. Without education, the right to work is at risk, as well as the right to vote, etc.

The content of the right to education has been further developed with **the 4 As Framework**. According to this framework, the right to education must be:

- Available

'Availability' refers to the general obligation of States to establish schools or allow the establishment of schools. For example, States must ensure that free and compulsory education is available to all at the primary level. It is important that this right is read in conjunction with the prohibition of discrimination, which is provided for in Article 2 paragraph 2 of the Covenant.

As a minimum, the Committee on Economic, Social and Cultural Rights identifies that the right to education requires States to provide basic amenities at educational institutions, including protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, as well as teaching materials. Such requirements are not obviated in times of insecurity and armed conflict.

- Accessible

'Accessibility' requires States to make education affordable and physically accessible. Accessibility also includes the obligation to provide education within safe reach of students or virtually, via modern technology. Physical accessibility may be particularly challenged during periods of insecurity and armed conflict. Not only can violence and attacks destroy schools but they may also render the travel of students and education staff to and from educational facilities more hazardous. Another aspect of accessibility means that education shall support the principle of equality and not discriminate against any group, including persons with disabilities or foreign nationals. For example, accessibility for displaced and refugee children in particular may be affected by provisions that restrict access only to those who fulfil certain legal status requirements.

- Acceptable
 'Acceptability' refers to the relevance, cultural appropriateness and quality of the curricula and teaching methods. The acceptability requirements need to be set and enforced by States. States must ensure that the standards set, and their protection, relate not only to education curricula but also to teaching methods. In situations of insecurity and armed conflict, there is a high risk of neglecting the vigilant oversight of acceptability standards. Although oversight may not be able to reach usual or normalised standards, it does not mean that no oversight is required. This oversight (but not the State's international legal obligations) might be assumed by actors other than those traditionally carrying such tasks.

- Adaptable
 'Adaptability' refers to the need for schools to adapt to each child. It refers to the flexibility of education to respond to the changing needs of societies, including the need to adapt to current knowledge and the latest scientific standards, and to the needs of students in relation to their diverse social and cultural backgrounds. In accordance with the Convention on the Rights of the Child, the best interests of each child are paramount. In a situation of insecurity, adaptability would require, for example, a rapid resumption of educational activities and reintegration of children after an attack on the school or other security-related school closure. Adaptive programs in such contexts may also include education about conflict resolution, disaster risk reduction and civic education. These would give students tools with which to handle the different challenges that arise in insecurity and conflict situations.

SLIDE 14

Other relevant human rights that can protect education

So what does it mean that the right to education is binding for State parties to both international and regional treaties? States must take the necessary, concrete steps to achieve the full realisation of the right to education, immediately or, where the treaty permits it, within a reasonable time period.

- o The right to freedom from discrimination: this is a cross-cutting right which applies to all human rights.
 - Civil and Political Rights
- o The right to life: Article 6 ICCPR (Article 4 ACHPR, Art 5 Arab Charter)
- o The right to liberty and security: Articles 9 and 10 ICCPR (Article 6 ACHPR, Article 14 (1) Arab Charter)

- The prohibition from torture and other inhuman and degrading treatment: Article 7 ICCPR and Article 37 (a) CRC (Art 5 ACHPR)
- The right to freedom of thought, conscience and religion: Article 18 ICCPR
- The right to freedom of expression: Article 19 ICCPR, etc
- Immediately enforceable!
- Other Economic, Social and Cultural Rights
 - The right to work and to join trade unions
 - The right to health and the right to an adequate standard of living
 - The right to cultural life, etc

Must be progressively realised: States need to take immediate steps towards their full realisation. But they may not be able to protect the right fully if there is a demonstrable lack of resources.

A Note on the Protection of Educational Facilities under International Human Rights Law

As the function of IHRL is to protect and promote the rights of individuals, its provisions do not directly protect buildings such as educational facilities. However, as the realisation of a number of human rights requires the existence and maintenance of buildings, the protection of physical structures is sometimes implied within IHRL provisions, such as the right to education and the prohibition of discrimination.

Other rights can also provide protection for educational facilities. For example:

- The prohibition of discrimination entails the right of everyone to be treated in an equal manner. As a result, educational facilities must be physically accessible to all students and education staff. In particular, reasonable accommodation measures must be taken by States in order to ensure access to educational facilities to persons with disabilities.
- Situations of insecurity and armed conflict may result in the destruction or confiscation of private property or educational facilities. The right to property, although not in all IHLR treaties, can be an important source of protection for

educational facilities and materials, as it protects against the confiscation (and destruction) of private property without adequate compensation.

- Situations of insecurity and armed conflict may impair infrastructure, such as water pipes, which, if not repaired by the State, may result in a violation of the right to health. This could constitute an education-related violation where the infrastructure is necessary for the functioning of educational facilities. The right to both physical and mental health, which is protected under IHRL, requires that students and education staff have access, among other things, to safe and potable water and adequate sanitation at educational facilities.

SLIDE 15

Group Exercise

During a non-international (internal) armed conflict, the State arrests children from the minority groups and puts them in detention centres which do not have any educational facilities. Many teachers are arrested and tortured, and water to all universities is shut off.

Discuss:

- What human rights, if any, have been violated by the State?
- What justifications may the State have for its actions? Are these legitimate justifications?
- Does the situation of an armed conflict affect whether human rights should be protected?
- Where can a claim be brought?

1. What human rights might have been violated?

Right to education: everyone has the right to education, including those in detention centres.

Prohibition of discrimination: see the case of *Juvenile Reeducation Institute v Paraguay* (IACtHR, 2004): the State breached its obligation to provide interned children with access to education. The State must establish educational programmes, job-training programs and psychological and medical assistance for the victims.

Prohibition against Arbitrary Arrest: teachers cannot be arrested on the sole ground of their profession.

Prohibition on torture: this norm is considered *jus cogens*, which means that no derogation from it is possible.

Right to adequate standard of living: this right includes the right to food, which itself includes the right to water. Turning off the water supplies of universities may not amount to a violation of this right (provided water is available elsewhere). However, if it renders universities inaccessible, then it may amount to a violation of the right to education.

- **A violation of any right which impacts negatively on the provision of education is an education-related violation.**

2. What justifications may a State have?

The state can argue that it only has obligation of progressive realisation and not immediate action with regard to the right to education. However, non-discrimination, the prohibition against arbitrary arrest, and the prohibition on torture, are all immediate obligations.

While a State may argue that it lacked sufficient resources (and that these were not simply resources put into other priorities, such as the military) to meet the right to education or the right to adequate standard of living, it cannot use this arguments with regard to the other rights as they are immediately applicable. The State could have derogated from its obligation not to conduct arbitrary arrest, this is not mentioned here. Note also that the right to torture cannot be derogated from.

3. Does the existence of an armed conflict make any difference?

No. IHRL applies in conflict as well as in peace. While IHL also applies in situations of armed conflict, IHRL continues to apply.⁸

4. Where can a claim be brought?

It will depend on the State, its human rights protections and the treaties it has ratified.

In the first instance, a person will have to bring the claim within the State's own legal system. This is called the 'exhaustion of domestic remedies'

If this does not lead to any effective remedy (or takes an unreasonable length of time) then a complaint can be made to a regional or international human rights treaty body. However, this can only occur if that State has agreed to this body considering individual complaints.

Otherwise, there are general UN bodies, such as the Human Rights Council, which will not hear individual cases but can consider where there are widespread human rights violations, and appoint a Special Rapporteur to report on it.⁹

SLIDE 16-17

The Protection of Education under International Humanitarian Law

In armed conflict the right to education under IHRL applies alongside the rules of IHL. IHL strengthens the IHRL legal framework for the protection of education in

⁸ For more on the interaction between see pp. 47-54 of the Handbook.

⁹There is no effective permanent remedy mechanism for violations of IHL, unless through the international criminal system, for those violations that amount to a war crime.

international and non-international armed conflict and seeks to ensure that, where education was provided before an armed conflict, it continues uninterrupted.

Principle of distinction

The principle sets out two main rules for parties to an international or non-international armed conflict: the prohibition of deliberate attacks on civilians and the civilian population; and the prohibition of indiscriminate attacks, i.e. those that are not directed at military objectives (as defined below).

- Civilian status accorded to those not taking part (or no longer taking part) in hostilities (e.g. students, education staff)
Civilian status accorded to objects which are not military objectives (e.g. educational facilities which are not military used). Note that in certain cases, an educational facility may benefit from additional protection, i.e. if it is also a cultural object or a medical facility, e.g. a historic building housing a school or a teaching hospital.¹⁰

Military Object:

- According to the principle of distinction, an educational facility can only be attacked when it has become a military object, e.g. it is used (or occupied) for a military purpose, and its destruction offers a definite military advantage. Storing weapons or stationing troops in a school are examples of military use of an educational facility. In addition, attacks must always abide by the principles of proportionality and military necessity.

The principle of distinction is part of customary international law.

IHL is applicable in times of armed conflict:

- International armed conflict: Geneva Conventions 1949 + Additional Protocol I 1977
- Non-international armed conflict: common Article 3 to the four Geneva Conventions 1949 + Additional Protocol II 1977

Note that IHRL provides specific protection for children in armed conflict:

- For example, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which protects all children under 18 from directly participating in hostilities.

IHL provides protection to all property, including educational facilities, from direct and deliberate attack where such property is civilian and is not a military objective. Further, IHL prohibits destruction or seizure of an enemy's property where this is not justified by military necessity.

¹⁰ See pp. 208-212 of the Handbook.

However, where an educational facility has become a military object, it is no longer protected from attacks, in accordance with the principle of distinction. This occurs when an educational facility is used (or occupied) for a military purpose and its destruction offers a definite military advantage. Under IHL the definition of military object is broad and fluid. Thus an educational facility may become a military object at any time depending on its utility to military operations and the advantage offered by attacking it. As such, where it is militarily necessary to do so, educational facilities may be used by armed forces in a way that exposes such facilities to lawful attack by the enemy. Some objects, such as cultural objects and medical facilities, are entitled to special protection under IHL which means it is illegal for armed forces to occupy these objects. However, educational facilities do not benefit from this protection unless they also happen to qualify as a cultural object or medical facility – for example a teaching hospital.¹¹

IHL also contains provisions for establishing special zones of neutrality in which military operations are prohibited. These zones can provide additional protection from attack for educational facilities located within them. These provisions have not been used so far to protect educational facilities in armed conflict but they have the potential to provide additional protection to education where all parties to a conflict agree to comply with their terms.

The Geneva Conventions address education specifically in relation to four situations common in armed conflict:

- Parties to an international armed conflict must take ‘the necessary measures’ to ensure the education of children under 15, who have been orphaned or separated from their families as a result of armed conflict.
- In situations of civilian internment in international armed conflict, the detaining power must encourage educational pursuits among internees and provide facilities to ensure education, especially for children and young people.
- Occupying powers must cooperate with the national and local authorities to ensure facilitation of educational institutions for children.
- Parties to a non-international armed conflict must ensure that children receive the care and aid they require, including education.

In each of these four instances, basic and physical education, as well as moral and religious education is protected. Each rule of IHL applies in accordance with the principle of ‘no adverse distinction’. This means that the rules must apply equally to all persons regardless of their race, colour, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or sex. Any education provided under these provisions must apply equally to male and female students. Further, under IHL education should, wherever possible, be provided in a culturally

¹¹ Note that there are efforts at the international level to provide added protection to educational facilities, including the Safe Schools Declaration (2015), through which States can endorse the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict (2014). For more on these recent developments, see the Handbook Updates.

sensitive way. However, with few exceptions, there is no clear requirement under IHL to ensure appropriate education for people with disabilities. Nevertheless, IHRL continues to apply during armed conflict, including the Convention on the Rights of Persons with Disabilities which contains provisions seeking to ensure the protection and safety of people with disabilities that are specifically applicable during armed conflict.

Protection of Students and Education Staff under IHL

In armed conflict, IHL protects civilian students and education staff through the principle of distinction explained above.

However, some practices common in armed conflict, including the arming of education staff to prevent illegal attacks on educational facilities, have serious risks. The use of self-defensive force by armed education staff could be mistakenly interpreted by any party to a conflict as a direct participation in hostilities. This exposes education staff, and the students around them, to potential attack. Increased awareness of these consequences is necessary to improve the overall physical protection of students and education staff in armed conflict.

SLIDE 18 -19

How does International Criminal Law protect education?

The Protection of Education by International Criminal Law

At present, ICL, which criminalises genocide, crimes against humanity, and war crimes, does not criminalise attacks against education itself. Education is only mentioned within the targeting and/or destruction of 'educational property', listed as a war crime under Article 8 of the Rome Statute.

However, a number of ICL provisions criminalise other acts which also impact negatively on education, albeit indirectly, and thus the harm done to education through criminal conduct needs to be considered by those with the power to hear or bring such cases. For example, the widespread and systemic discriminatory denial of education to a group of people with a particular political, racial, national, ethnic, cultural, religious, or gender identity, may amount to the crime against humanity of persecution under Article 7 of the Rome Statute. Furthermore, the application of the crime of incitement of genocide (Article 6 in connection with Article 25 of the Rome Statute) to educational content needs to be considered. The full protective power of ICL has not yet been realised in relation to education.

Protection of the Lives and Well-Being of Students and Education Staff

The rules of ICL establish individual criminal liability for war crimes which would be contrary to the principle of distinction, and thus contain several provisions which protect the lives of students and education staff, such the direct prohibition on wilful killing of civilians.

Protection of Educational Facilities

ICL contains provisions which establish individual criminal liability for violations of the principle of distinction, including the wanton destruction or seizure of enemy property (including educational facilities) in international armed conflict. It also contains similar provisions in relation to particular objects (including education facilities) during non-international armed conflicts. These complement and are based on, in part, the protection set out under IHL.

SLIDE 20

Group Exercise

During a non-international (internal) armed conflict, an armed group takes over a secondary school (for students aged 12-17) and uses it to store weapons. Its leader orders the group to capture the students and compel them to join the group. The State military use powerful bombs and chemical weapons to destroy the school. By the time the dust clears, it is evident that the armed group had already left before the explosions began. Two neighbouring schools are also destroyed in the explosions, as is a small children's hospital.

Discuss:

- What international humanitarian laws, if any, have been violated by the armed group and by the State?
- What justifications may each of them have for its actions? Are these legitimate justifications?
- Are there any human rights violated? If so, by whom?
- Where can a claim be brought by a victim of an education-related violation?

1. IHL violations

Use of school to store weapons – transforming a civilian object into a military property is only allowed if it is military necessary.

Students who do not take part in hostilities are civilians - *DRC v Burundi, Rwanda and Uganda* (AfCommHR, 2003): Armed activity, including looting, killing and mass transfers of population, breach the right to, and protection of, education.

Children forced to join military – contrary to IHL – *Lubanga*

Destruction of school – possible only if it has become a military object and the attack respects principles of proportionality and military necessity.

Chemical weapons – prohibited to use under the Chemical Weapons Convention (1993).

Collateral damage to other schools and hospital – collateral damage must respect the principle of proportionality (the destruction must not be excessive in relation to the military advantage anticipated).

2. Justifications

School is military objective – must be proportional and necessary. Here it was abandoned before the explosions.

No justification for chemical weapons, which are under a universal ban under the Chemical Weapons Convention (1993).

3. HR violations

State failed to protect the students' right to life – violation of the right to life
Conscription of children under eighteen into armed forces – prohibited under the Optional Protocol to the CRC on the involvement of children in armed conflict.

Only the State can be directly responsible for IHRL violations (actions of non-State actors can be attributed to a State under certain circumstances; a State may also fail in its duty of due diligence).

4. Prosecution of individual perpetrators

It will depend on where the conflict is and if the State is party to the ICC or other mechanism.

ICC referrals require action by Prosecutor, Security Council or State referral

SLIDE 21-23

Reparations

- In case of an education-related violation, what are the avenues for justice that are available to the victims?

International law makes clear that there is an obligation on a State to provide for effective remedies, including making reparation in respect of harm where the responsibility for the action can be attributed to the State. Violation of the right to education, and of other related rights and protections affecting education, attributable to the State, is a breach of its international obligation. Given the frequent absence of meaningful social assistance programmes in many situations of insecurity and armed conflict (and post-conflict), some form of appropriately designed reparations programme provides one of the few avenues by which the harm inflicted by education-related violations can be addressed.

According to the Basic Principles on the Right to Reparation victims of gross violations of IHRL and serious violations of IHL have a right to adequate, effective, and prompt reparation for the harm they have suffered. This means all States should ensure victims

have “available adequate, effective, prompt and appropriate remedies, including reparation.” Reparation may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Remedies are available at an international and regional level in addition to those required at the national level. For example, in order to bring a claim under IHRL before an international supervisory body:

- The specific requirements of the relevant treaty must be complied with; and
- The complainant must have exhausted all effective domestic remedies. This means that a claim must have been first considered appropriately within the national legal system, including available appeal procedures.

The international supervisory bodies can recommend a variety of remedies, including a range of reparation measures, to deal with the consequences to the victim of the human rights violation by the State, including education-related violations.

While there are some regional human rights mechanisms, there are still regions where these mechanisms are not in place or contain no complaint process. It is desirable that all people in all regions have access to appropriate and effective regional mechanisms to enable remedies for human rights violations.

The ICRC and ad hoc claims commissions can provide individuals with resolution of particular violations of IHL and, in the case of claims commissions, potentially access to a remedy. However, none of these mechanisms establishes a permanent or a judicial process by which individuals have a clear entitlement to hold violators to account. Nevertheless, victims of violations of IHL, including education-related violations, in both international and non-international armed conflict, can benefit from the IHRL and ICL mechanisms and remedies.

ICL is a regime where a number of its crimes involve serious or grave breaches of IHL and as such has the potential to serve a preventive and protection function for victims of armed conflict. Yet the primary purpose of ICL mechanisms is the punishment of individuals - not States - and these mechanisms are not focused on the rights of victims or their access to remedies. Although, in respect of the latter, increasingly, there are attempts to address this issue (e.g. Articles 75 and 79 of the Rome Statute). An individual does not have an automatic right to remedy under ICL but rather, may have access to reparation if they are the victim of a successfully prosecuted crime.

- **Restitution**

Restoring – for example: reinstatement of the student status of a victim, restoration of liberty of students or education staff, return of a school building to a community

- **Compensation**

Financial – for example: funds for students, parents and teachers, who are victims of discrimination on grounds of language, gender, ethnicity, etc.

- **Rehabilitation**

Support – for example education support to victims who have not completed their primary and secondary schooling, and to increase a victim's employability and reinsertion in the society

- **Satisfaction**

Moral – for example: verification of the facts and disclosure of the truth, public apology, commemorations of the event and of victims

- **Guarantees of non-Repetition**

Preventative – for example provision of human rights training and education, and strengthening the rule of law

➤ One or a combination of the above!

Other Forms of Reparations

➤ Education as a form of reparation

❖ Inclusion in school curriculum of an accurate account of the violations that occurred

➤ The concept of transformative reparation

Recognition of the structural context of the denial of education and the need to change this.

❖ *Gomez Paquiyauri Brothers v Peru* (IACtHR, 2004)

The State must officially name a school in the province of El Callao after Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, in a public ceremony and in the presence of the next of kin of the victims. This will contribute to enhancing public awareness of the need to avoid repetition of injurious acts such as those that occurred in the instant case and to ensure remembrance of the victims. [Moreover] as a form of satisfaction, the State must establish a scholarship up to university level education, in favor of Nora Emely Gómez Peralta, which will also include educational materials, study texts, uniforms, and school utensils

❖ *Lubanga case (ICC, 2012)*

'Reparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes'.

SLIDE 24

CONCLUSIONS

Please make your own conclusions but the following may help.

The Handbook's examination of IHRL, IHL and ICL reveals a considerable amount of similarities in their protective role and demonstrates how they can work together as a strong framework of protection. Yet there are also gaps where protection is lacking, there is confusion or inconsistency, or the mechanisms for remedies are unavailable.

Perhaps it is most revealing in demonstrating the volume of obligations to which States - and other parties - must comply, and to the required increased attention to such obligations by its intended audience to ensure their implementation.

To conclude, here are some points that may be considered further and that may need to be developed further.

- The right to education is not only an end in itself. It is an enabling right, empowering access to other human rights, to meaningful participation in society, and to the promotion of universal respect for the dignity of all. It is a right deserving of all our protection.
- States must improve their recognition of the international and universal importance of education at all times. To do this States must ratify and implement relevant IHRL treaties at the international and regional levels. They should engage fully and cooperatively with all relevant treaty monitoring bodies and procedures. In turn, relevant treaty monitoring bodies and other supervisory bodies should demonstrate their combined and co-ordinated will to offer coherent guidance to States as to measures required to implement their education-related obligations, and where breached, measures required to remedy such breach.
- States and non-State armed groups must demonstrate a shared commitment to upholding IHL and recognising more fully, and giving effect to, the protection of education inherent within its rules. There needs to be improved compliance with the rules protecting students, educational staff, and educational facilities from direct and deliberate attack; and the rules relating to incidental damage. The special protection afforded to particular categories of people and objects also

needs to be respected by parties to an armed conflict. These changes would significantly improve the overall protection of education in armed conflict.

- International criminal courts and tribunals should acknowledge and respond to education-related violations within their mandates. They should seek ways of recognising the effect of violations of ICL on education at all stages in their processes, including initial investigation, sentencing, and awards of reparation.

Given the need to improve the protection of education during times of insecurity and armed conflict the Handbook is an important publication which explains how the different international legal regimes protect education. It is also a particularly valuable resource to identify how the protection currently afforded to education can be improved. Finally, it also indicates the avenues available to seek reparation following the violation of the right to education and other related rights.

SLIDE 25

Further Discussion / Paper Topic Ideas

- Does international law adequately protect education in insecurity and armed conflict?
- Does the content of the education provided by a State play a role in insecurity and armed conflict situations?
- To what extent is the international legal framework appropriately implemented at the domestic level? Discuss in the context of two States of your choice.
- Does the rule of law have a role to play in the protection of education in insecurity and armed conflict?
- To what extent is education relevant in post-conflict situations and transitional justice initiatives?
- Do non-state actors have obligations in relation to education in insecurity and armed conflict?