C38

Article 38. The Rights of Children in Armed Conflict

C38.P1 **1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.**

C38.P4 **2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.**

C38.P3 **3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.**

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

C38.P6 **I. Introduction** 1505

C38.P7 A. A Foundation for Evolving Standards 1505

C38.P8 B. Key Issues 1509

C38.P9 **II. Analysis of Specific Phrases** 1511

C38.P10 A. Paragraph 1: The Undertaking to Respect and to Ensure Respect for the Rules of International Humanitarian Law 1511

C38.P11 1. The Importation of Humanitarian Law 1511

C38.P12 2. The Perceived Tension Between Human Rights Law and Humanitarian Law 1512

C38.P13 (a) Divergent Interests? 1512

C38.P14 (b) Arbitrary Distinctions? 1513

C38.P15 (c) Blurred Distinctions 1513

C38.P16 (d) Protection of Children as an Afterthought? 1514

C38.P17 (e) Towards Complementarity 1514

C38.P18 (f) Reconciling Conflict 1515

C38.P19 3. The Undertaking 'To Respect and to Ensure Respect' 1516

C38.P20 4. The 'Rules of International Humanitarian Law Applicable to Them in Armed Conflicts which Are Relevant to the Child' 1518

C38.P21 (a) 'Applicable to Them' 1518

C38.P22 (b) 'The Rules of International Humanitarian Law Applicable in Armed Conflicts 1518

C38.P23 5. The Rules of International Humanitarian Law Relevant to the Child 1521

C38.P24 (a) Identification of the Relevant Rules 1521

C38.P25 (b) Protection Afforded to Child Civilians in International Armed Conflicts 1524

C38.P26 (i) General Protection 1524

C38.P27 (ii) Specific Protection under Geneva Convention IV 1524

C38.P28 (iii) General and Specific Protection under Additional Protocol I 1526

C38.P29 (c) Protection of Child Civilians in Non-International Armed Conflicts 1528

C38.P30 (i) General Protection under Additional Protocol II 1528

C38.P31 (ii) Specific Protection under Additional Protocol II 1529

C38.P32 (iii) The Protection of Child Civilians Residually under Common Article 3 1530

C38.P33 6. Protection of Child Combatants under International Humanitarian Law 1530
C38.P34 (a) Recruitment and Participation 1530
C38.P35 (b) Child Prisoners of War 1531
C38.P36 (c) Prosecution for Criminal Offences 1532
C38.P37 (d) The Use and Effects of Landmines 1535
C38.P38 B. Paragraph 2: The Obligation to Take all Feasible Measures to Ensure Persons Under Fifteen do not Take a Direct Part in Hostilities 1536
C38.P39 1. Overview 1537
C38.P40 2. 'Take All Feasible Measures' 1538
C38.P41 3. 'To Ensure' 1538
C38.P42 4. 'Persons Who Have Not Attained the Age of fifteen Years' 1538
C38.P43 5. 'Do Not Take a Direct Part' 1539
C38.P44 6. 'In Hostilities' 1541
C38.P45 C. Paragraph 3: The Obligations to Refrain from Recruiting Any Person Under Fifteen into a State's Armed Forces, and Where Persons Fifteen or Older Have been Recruited to Endeavour to Prioritize the Oldest 1542
C38.P46 1. Overview 1542
C38.P47 2. The Obligation to Refrain from Recruiting Persons under Fifteen into a State's Armed Forces 1543
C38.P48 3. The Obligation to 'Endeavour to Give Priority to the Oldest' 1545
C38.P49 4. Individual Criminal Responsibility for Adults Who Unlawfully Conscript, Enlist, or Actively Use Children under the Age of Fifteen in Hostilities 1546
C38.P50 (a) Special Court for Sierra Leone ('SCSL') 1546
C38.P51 (b) International Criminal Court 1547
C38.P52 D. Paragraph 4: The Obligation to Take all Feasible Measures to Ensure Protection and Care of Children Affected by Armed Conflict 1550
C38.P53 1. Overview 1550
C38.P54 2. 'In Accordance with Their Obligations under International Humanitarian Law to Protect the Civilian Population in Armed Conflicts' 1550
C38.P55 3. 'States Parties Shall Take All Feasible Measures' 1551
C38.P56 4. 'To Ensure Protection and Care of Children Who Are Affected by an Armed Conflict' 1552
C38.P57 5. The Rules of International Humanitarian Law Relevant to the Protection of Child Civilians Affected by Armed Conflicts 1553
C38.P58 (a) The Principle of Special Protection 1553
C38.P59 (b) Safety Zones, Corridors of Peace, and Days of Tranquillity 1553
C38.P60 (c) Evacuation 1554
C38.P61 (d) Right to Care and Aid 1555
C38.P62 (e) Children and their Families 1556
C38.P63 (f) Unaccompanied Children 1556
C38.P64 (g) Education 1556
C38.P65 (h) Arrested, Detained or Interned Children 1557
C38.P66 (i) Other Feasible Measures: Looking Beyond Settled Rules 1557
C38.P67 **III. Conclusion: The Future Of Article 38** 1558
C38.P68 **Select Bibliography** 1560

C38.S1

I. Introduction

C38.S2

A. A Foundation for Evolving Standards

C38.P69 Article 38 proceeds along two axes. First, it establishes parameters regarding the ability of states to recruit or directly use children in hostilities. Article 38 thereby addresses the

'child soldier' or, in more contemporary parlance, the 'child associated with armed forces or armed groups'.[1] Armed forces are national militaries, which article 38 explicitly mentions, while armed groups are non-state actors (eg rebel groups and militias). The reach of article 38 over children associated with armed groups is narrower than it is for children associated with armed forces.

C38.P70 Second, article 38 protects children who, though not recruited into the armed forces or groups or directly used to participate in hostilities, are otherwise affected by armed conflict ('child civilians'). On this note, article 38 references the rules of a separate body of law: international humanitarian law.[2] Article 38's linkage of international human rights law with international humanitarian law is both exciting and cumbersome. On this latter note, article 38 requires a detailed assessment of international humanitarian law, particularly as regards the child, which amounts to a massive undertaking in light of the complex and fluid nature of this area of law. While certainly offering a minimal baseline of protection during armed conflict, international humanitarian law does not aim to singularly promote children's rights.

C38.P71 Certainly, article 38's twin axes entwine insofar as restricting children's recruitment and use in hostilities helps preserve their civilian status in times of armed conflict, with the intention—pursuant to international humanitarian law—that they receive specific protections that exceed those available to adults.

C38.P72 Article 38 has been hailed as an innovation but has also elicited considerable disappointment.[3] Its failure to adopt the 'straight 18 approach' (an absolute prohibition of the military use *and* recruitment of children under 18) has meant that, since its inception, it has been the object of a concerted effort to augment its protective content. This impetus became evident during drafting[4] and quickly escalated once the Committee on the Rights of the Child ('CRC Committee', 'the Committee') began agitating for the development of an optional protocol that would adopt the 'straight 18 approach'.[5] Indeed the CRC Committee's disdain for the compromise adopted in article 38 is such that it has essentially bypassed the text of this provision and has taken the view 'that in order to ensure the full realisation of children's rights as recognised by the Convention [on the Rights of the Child], States parties should not recruit into their armed forces persons below the age of 18'.[6] Global civil society has reinforced this position. The 1996 report of Graça

C38.N1 [1] On the incidence of child soldiers and children affected by armed conflict see: Children and Armed Conflict, Office of the UN Special Representative of the Secretary General on Children and Armed Conflict https://childrenandarmedconflict.un.org; Annual Reports of the Secretary General on Children and Armed Conflict to the Security Council available at the Security Council Working Group on Children and Armed Conflict https://www.un.org/sc/suborg/en/subsidiary/wgcaac/annual; 'Where are the Child Soldiers?' *Child Soldiers International* https://www.child-soldiers.org/where-are-there-child-soldiers.

C38.N2 [2] Louise Doswald-Beck and Sylvain Vité, 'International Humanitarian Law and Human Rights Law' (1993) 293 International Review of the Red Cross 94.

C38.N3 [3] Rachel Brett, 'Child Soldiers: Law, Politics, and Practice' (1996) 4 International Journal of Children's Rights 115, 116; Cf, Carolyn Hamilton and Tabatha Abu el-Haj, 'Armed Conflict: The Protection of Children under International Law' (1996) 5 International Journal of Children's Rights 1, 36 (noting that '[t]he rights contained in article 38 … are extremely disappointing'); Geraldine van Bueren, *The International Law on the Rights of the Child* (Kluwer 1995) 335 (questioning the usefulness of a new treaty standard which merely reiterates existing standards and approaches).

C38.N4 [4] See generally Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (United Nations 2007) ('*Legislative History*') 775–99.

C38.N5 [5] Committee on the Rights of the Child ('CRC Committee'), 'Day of General Discussion on Children in Armed Conflicts' (19 October 1992) CRC/C/10 ('CRC/C/10') para 75(e).

C38.N6 [6] CRC Committee, 'Report of the Eleventh Session' (Geneva 8–26 January 1996) (22 March 1996) CRC/C/50 para 251.

Machel, appointed by the UN Secretary General to investigate the impact of children and armed conflict, catalysed a wave of international initiatives within this area,[7] most notably, the appointment of the UN Secretary General's Special Representative on Children and Armed Conflict,[8] the adoption of the Cape Town Principles,[9] and in 2007 the Paris Commitments and related Paris Principles.[10]

C38.P73 The Rome Statute lists as a 'war crime' the conscription or enlistment of children under the age of 15 years and their use to participate actively in hostilities.[11] In 1999, the ILO Convention on the Worst Forms of Child Labour, which defines a child as any person under the age of 18, barred the forced or compulsory recruitment of children for use in armed conflict. [12] In the same year the UN Security Council placed the issue of children and armed conflict on its agenda; the Security Council remains actively seized of this matter, having adopted regular resolutions on children and armed conflict that have had considerable practical and expressive effects.[13] The African Charter on the Rights and Welfare of the Child ('ACRWC') adopted an absolute prohibition on the recruitment or direct participation in hostilities of any child under 18 years.[14] Most significantly, the Optional Protocol on the Involvement of Children in Armed Conflict ('OPAC'), referenced earlier, was adopted in 2000.[15] Although falling short of the full-'straight 18 approach', OPAC (explored fully in chapter 42) notably surpassed article 38's standards with respect to the recruitment of children and their participation in hostilities. The

C38.N8

[7] Graça Machel, 'Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General', submitted pursuant to General Assembly Resolution 48/157, A/51/306, New York, 26 August 1996 ('Machel Report').

[8] See generally Office of the Special Representative of the Secretary General on Children and Armed Conflict, https://childrenandarmedconflict.un.org.

[9] 'Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa' adopted at the Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilisation and Social Reintegration of Child Soldiers in Africa (27–30 April 1997) Cape Town, South Africa ('Cape Town Principles').

[10] UN International Children's Emergency Fund ('UNICEF'), 'The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups' (February 2007) ('Paris Principles') available at: http://www.refworld.org/docid/465198442.html.

[11] (Adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('Rome Statute') art 8(b)(xxvi).

[12] Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 10 November 2000) 38 ILM 1207 ('Worst Forms of Child Labour Convention') art 3(a).

[13] SC Res 1261, UN SCOR, 4037th mtg, S/Res/1261 (30 August 1999). For subsequent resolutions see eg: SC Res 1314, UN SCOR, 4185th mtg, S/Res/1314 (11 August 2000); SC Res 1379, UN SCOR, 4423rd mtg, S/Res/1379 (20 November 2001); SC Res 1460, UN SCOR, 4695th mtg, S/Res/1460 (30 January 2003); SC Res 1539, UN SCOR, 4948th mtg, S/Res/1539 (22 April 2004); SC Res 1612, UN SCOR, 5235th mtg, S/Res/1612 (26 July 2005) (which established the Security Council Working Group on Children and Armed Conflict); SC Res 1882, UN SCOR, 6176th mtg, S/Res/1882 (4 August 2009); SC Res 1998, UN SCOR, 6581st mtg, S/Res/1998 (12 July 2011); SC Res 1261, UN SCOR, 6838th mtg, S/Res/1261 (19 September 2012); S/RES/2068 (2012) UNSCOR 6838th mtg (19 September 2012); SC Res 2143 UN SCOR 7129th mtg (7 March 2014); SC Res 2225 UN SCOR 7466th mtg (18 June 2015). See also: Noelle Quenivet, 'The Security Council as Global Executive but not Global Legislator: The Case of Child Soldiers' in V Popovski and T Fraser (eds), *The Security Council as Global Legislator* (Routledge 2014); Shamala Kandiah Thompson, 'Children and Armed Conflict' in Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights* (CUP 2014); Gus Wascherfort, *International Law and Child Soldiers* (Hart 2015) 159–63; Vesselin Popovski, 'Children in Armed Conflict: Law and Practice of the United Nations' in Karin Arts and Vesselin Popovski (eds), *International Criminal Accountability and the Rights of Children* (CUP 2006) 37, 40–42.

[14] African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 ('ACRWC') art 22.

[15] (Adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222.

Optional Protocol requires states to take all feasible measures to ensure that members of the armed forces younger than 18 do not take a direct part in hostilities;[16] it prohibits these persons from being compulsorily recruited;[17] and it wholly prohibits their recruitment by non-state actors. OPAC does, however, allow for the voluntary recruitment of children younger than 18, albeit subject to strict safeguards.[18] Only a minority of states permit the voluntary enrolment of 16 and 17 year-olds albeit under tightly circumscribed conditions.

C38.P74 Significantly, the Paris Principles recognize that states 'have different obligations under international law', but affirm that 'a majority of child protection actors will continue advocating for States to strive to raise the minimum age of recruitment or use to 18 in all circumstances'.[19] Global civil society remains firmly committed to bending the arc of protection towards full alignment with the 'straight 18 approach'. This commitment is buoyed by the Security Council Working Group on Children and Armed Conflict, which advocates 18 as the minimum age of lawful recruitment and participation in armed conflict.[20] Moreover, the CRC Committee itself continues to advocate vigorously for the 'straight 18' position[21] and has referenced both OPAC and the ACRWC in this regard.[22]

C38.P75 In sum, the international community is edging towards the 'straight 18' position, but has not yet reached it. There is sufficient momentum, however, that the 'straight 18' position has transitioned from *lex desiderata* of the activist community to *lex ferenda* (future law that is crystallizing and coalescing).[23]

C38.P76 Much of article 38 has therefore been supplanted by these recent developments in international law, public policy, and state practice with respect to the military recruitment and use of children, whether in armed conflict or not. Hence article 38 is best understood as the starting point or floor for how international law and policy protects children during armed conflict. At the same time, these developments have not completely overruled article 38, nor cast it as being in *desuétude*, but have instead embedded it within the evolving fabric of international law and established a framework that transcends its minimalist content. What is more, the baseline requirements of article 38 (notably, the impermissibility of the recruitment and direct use of children under 15 in armed conflict) have also come to constitute customary international law.[24]

C38.N18 [16] OPAC art 1. [17] OPAC art 2. [18] OPAC art 3.

C38.N19 [19] Paris Principles (n 10) 1.14. Regarding armed groups, ibid 7.11. See also Cape Town Principles (n 9) definitions ('A minimum age of 18 years should be established for any person participating in hostilities and for recruitment in all forms into any armed force or armed group').

C38.N20 [20] UN Security Council, Working Group on Children and Armed Conflict, Conclusions on Children and Armed Conflict in Myanmar, S/AC.51/2013/2 (16 August 2013) (recommendation 7(a)(i) calls upon the Myanmar government to 'ensure that all new recruits to the Tatmadaw are over the age of 18').

C38.N21 [21] David Weissbrodt, Joseph Hansen, and Nathaniel Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law', (2011) 24 Harvard Human Rights Journal 115, 138. See also ibid 139–40.

C38.N22 [22] CO Monaco, CRC/C/MCO/CO/2-3 para 46; CO Italy, CRC/C/ITA/CO/3-4 para 72; CO Guatemala, CRC/C/GTM/CO/3-4 para 85; CO Mozambique, CRC/C/MOZ/CO/2 para 77; CO Mauritania, CRC/C/MRT/CO/2 para 72; CO Niger, CRC/C/NER/CO/2 para 69.

C38.N23 [23] See generally 'Chapter 4: Child Soldiers and Accountability' in Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP 2012) 102.

C38.N24 [24] *Prosecutor v Sam Hinga Norman* Decision on Preliminary Motion Based on Lack of Jurisdiction SCSL-2004–14-AR72(E) (31 May 2004). See generally Wascherfort (n 13) 98–102.

C38.S3 ## B. Key Issues

C38.P77 Article 38 addresses four distinct albeit interconnected issues:

C38.P78 • the relevance of international humanitarian law to children;
C38.P79 • the minimum age at which children can take a *direct part* in hostilities;
C38.P80 • the minimum age for the recruitment of children into armed forces; and
C38.P81 • the obligations of states under international humanitarian law with respect to child civilians affected by armed conflict.

C38.P82 This chapter is crafted around these four paragraphs. It makes five broad introductory observations to signal its general framing of article 38 teleologically within the Convention on the Rights of the Child ('CRC', 'the Convention') as a whole.

C38.P83 First, article 38 does not import the entire corpus of international humanitarian law. It only uploads those rules that are 'relevant to children' and only when those rules are 'applicable' to states. For a rule to be applicable to a state, the state must be a party to the pertinent treaty or the rule must have attained the status of customary international law.

C38.P84 Second, the relationship between international humanitarian law and human rights law is contentious. The parameters of this relationship are in flux and are far from clearly delineated.[25] International humanitarian law aims to guide the behaviour of those who are involved in armed conflict; international human rights law informs the relationship between the state and individuals and encumbers the state with obligations. While it is increasingly maintained that international human rights law applies in armed conflict—a finding accepted by this Commentary, which assumes that human beings do not cease to have fundamental rights just because an armed conflict has begun—this finding is not unequivocally accepted. In the event of inconsistencies between the two legal regimes ideally the higher standard of protection for children should prevail. That said, in situations of armed conflict, international humanitarian law traditionally serves as the *lex specialis* and, hence, would ostensibly override law which only governs as a general matter.

C38.P85 Third, the Committee has been reluctant to offer guidance with respect to the substantive meaning of phrases such as 'armed conflict', 'direct part in hostilities', and 'all feasible measures'. Insofar as these terms derive from international humanitarian law, a vast body of commentary has emerged that is germane to the interpretative challenges under article 38.[26] The challenge herein is to ensure that the meaning of these phrases is not mired in an antiquated conceptualization of the child.

C38.P86 Fourth, the Committee has rightly noted '[t]he need to underline the complexity of the question of children in armed conflicts, which should not be simply reduced to the C38.N25 consideration of a single provision of the Convention, namely article 38'.[27] The right

[25] See eg: Wascherfort (n 13) ch 4; Oona Hathaway and others, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883; Christian Tomuschat, 'Human Rights and International Humanitarian Law' (2010) 21 European Journal of International Law 15; Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 European Journal of International Law 161.

[26] See: International Committee of the Red Cross, Geneva Conventions and Commentaries https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions accessed 16 November 2017; Jean Pictet (ed), *Commentary on the Geneva Conventions (Volumes I–IV)* (ICRC 1952–60); Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) ('Pictet Commentary'); Andrew Clapham, Paola Gaeta, and Marco Sassoli (eds), *1949 Geneva Conventions* (OUP 2015); Wascherfort (n 13) 58–69.

[27] CRC/C/10 (n 5) para 62(d).

to social reintegration under article 39, for example, is closely linked to article 38; the Committee has emphasized the need to 'consider a coherent plan for recovery and reintegration to be planned and implemented in a combined effort by United Nations bodies and non-governmental organizations'.[28] On this note, the social, occupational, and educational reintegration of war-affected children is a pressing need in post-conflict environments, as is adequately addressing children's rehabilitative, mental, and physical health priorities. Convention rights to education and health and the protections against exploitation, abuse, torture, and other ill-treatment will also invariably be directly relevant to children affected by armed conflict. The general promotion of the child's best interests, right to participation, and evolving capacities also covers children associated with armed conflict.

C38.P87 Finally, discourse about article 38 and the press towards the 'straight 18 approach' must be contextualized. Child soldiery is not a new phenomenon, nor one confined to exceptional cultural settings.[29] Child soldiers do not constitute a monolithic block. Their experiences, and their paths to militarized lives, are diverse. While many children are brutalized and abducted as part of the process of recruitment, and compelled into horrid sexual slavery, other children come forward through demonstrations of their own initiative to serve in armed forces and armed groups. These children express many reasons for exercising such initiative, including obtaining training, seeking resources, escaping oppressive home environments, and participating in liberation movements and anti-colonial campaigns. Youth have stood on the front lines of self-determination and have struggled against racism, autocracy, and governmental abuse, often energizing resistance and being heralded as heroes.[30] The point here is not to glorify or sanction children's involvement in armed conflict. Rather, the point is to underscore that child soldiering cannot be effectively deterred and child soldiers meaningfully reintegrated without the activist community first coming to terms with the myriad of ways through which young people become militarized in the first place. Many criminal syndicates which lack the capacity to engage in armed conflict, moreover, recruit children in similar ways to those deployed by armed groups: it is important not to excessively focus on militarized youth at the expense of criminalized youth. Furthermore, a need arises to ensure that neither the protective agenda of article 38 nor the push towards the 'straight 18 approach' loses sight of children's capacity, resilience, and agency. These qualities are celebrated elsewhere in the Convention, most notably articles 5 and 12, but tend to be downplayed in the context of children's transitions into and away from armed conflict. The Convention's dual protective and empowering impulses should be approached in a mutually reinforcing fashion.

C38.N28 [28] ibid para 74. This is also a common theme in the CRC Committee's concluding observations. See eg: CO Lebanon, CRC/C/LBN/CO/4-5 para 38(a) (recommending that Lebanon 'Strengthen implementation of the national plan of action to prevent and address the involvement of children with armed violence in Lebanon and undertake and ensure other awareness raising initiatives; and ensure the demobilization of children involved in armed conflicts and their psychological and social rehabilitation'); CO Cameroon, CRC/C/CMR/3-5 para 41(c) (recommending that Cameroon 'Establish and adequately resource community-based support structures to reintegrate children associated with armed groups, including vigilante groups, promoting their physical and psychological recovery and social reintegration in an environment which fosters the health, self-respect and dignity of the child').

C38.N29 [29] See generally David Rosen, 'Child Soldiers, International Humanitarian Law, and the Globalization of Childhood' (2007) 109 American Anthropologist 296.

C38.N30 [30] Drumbl (n 23) 27.

C38.S4

II. Analysis of Specific Phrases

C38.P88 *1. States Parties undertake to respect and to ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.*

C38.S5

A. Paragraph 1: The Undertaking to Respect and to Ensure Respect for the Rules of International Humanitarian Law

C38.S6

1. The Importation of Humanitarian Law

C38.P89 Article 38(1) uploads international humanitarian law into the Convention. Although the CRC Committee has made no attempt to define the phrase 'international humanitarian law', the International Committee of the Red Cross ('ICRC') defines it as the:

C38.P90 international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.[31]

C38.P91 International humanitarian law is also known as the law of armed conflict since it acts as the *jus in bello* (law in war)[32] and only applies during armed conflict. Hence, the definition of 'armed conflict' is crucial. Moreover, international humanitarian law applies equally to all participants in armed conflict. Certain violations constitute war crimes (which may be prosecutable by international courts such as the International Criminal Court ('ICC') and *ad hoc* tribunals, by national courts, or by military commissions).

C38.P92 International humanitarian law seeks to limit the effects of war on people, property, cultural patrimony, and the natural environment by protecting certain classes of persons and prohibiting the use of certain weapons and methods of warfare, notably, those that are inherently indiscriminate or of a nature to cause superfluous injury. Contemporary international humanitarian law is rooted in norms found in many ancient civilizations. Throughout history, societies have developed codes of permissible and impermissible martial conduct.

C38.P93 Broadly speaking, international humanitarian law consists of two conceptual branches. The first is Hague law, which is motivated by the need to preclude the use of weapons and methods that are inhumane, cause unnecessary suffering, have indiscriminate effects, and whose deployment is disproportionate to military advantage. Examples include bullets that explode upon impact, chemical and biological weapons, and landmines.[33]

C38.N33 The second conceptual branch of international humanitarian law is Geneva law (notably,

[31] Cited in Jean Pictet, 'International Humanitarian Law: Definition' in UNESCO, *International Dimensions of Humanitarian Law* (Henry-Dunant Institute/UNESCO 1988) xxi.

[32] International law also regulates the circumstances in which it is legal for a state to use force (known as *jus ad bellum*).

[33] See eg Hague Declaration (IV,3) concerning Expanding Bullets (adopted 29 July 1899, entered into force 4 September 1900) (1907) UKTS 32; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 8 February 1928) (1929) XCIV LNTS 65–74; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 13 January 1993, entered into force 29 April 1997) [1997] ATS 3; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) [1999] ATS 3 ('Ottawa Convention').

but not exclusively, the four Geneva Conventions of 1949 ('GCI', 'GCII', 'GCIII', and 'GCIV') and Additional Protocols I and II of 1977 ('API' and 'APII').[34] Geneva law protects certain groups (the wounded/sick, shipwrecked, prisoners of war, and civilians). The CRC Committee has referenced GCIV to underscore the importance of distinguishing between civilians and combatants; it has also drawn from GCIV to emphasize the legal requirement that attacks be proportional.[35]

C38.P94 International humanitarian law contains many international instruments other than those previously discussed.[36] It also includes customary international law,[37] general principles of international law,[38] and *jus cogens*.[39] It is also subject to interpretation and application by the International Court of justice ('ICJ')[40] and international criminal courts and tribunals,[41] along with domestic courts and military commissions. Many national rules of engagement also operationalize domestic understandings of international humanitarian law for the purposes of commanders and soldiers.

C38.S7 ## *2. The Perceived Tension Between Human Rights Law and Humanitarian Law*

C38.S8 ### (a) Divergent Interests?

C38.P95 The infusion of international humanitarian law into article 38 was intended to bolster the protections afforded to children affected by armed conflict. That said, international humanitarian law's fundamental features are not always readily reconcilable with human rights principles, particularly children's rights animated as they are by the best interests principle.[42] As Hamilton and El-Haj point out, '[t]he guiding principle of best interests does not find a place in humanitarian law'.[43] International humanitarian law does not ban war, however aspirationally attractive this may be, but only endeavours to regulate it. International humanitarian law limits the ability of parties to a conflict to utilize the methods and means of their choice, but does not preclude the killing of enemy forces

C38.N34 [34] Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 2.

C38.N35 [35] CO Israel, CRC/C/15/Add.195 para 51; CO Israel, CRC/C/ISR/CO/2-4 para 26 (explicitly calling on Israel to comply with GCIV). GCIV has been proposed to have attained the status of customary international law: see *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 paras 81–82, citing 'Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808' (3 May 1993) UN Doc S/25704 paras 34–35.

C38.N36 [36] The ICRC's 'IHL database' lists the many treaties relevant to international humanitarian law: see <www.icrc.org/eng/ihl> accessed on 7 November 2017. See also Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* (3rd edn, Martinus Nijhoff 1988).

C38.N37 [37] See generally Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP 2005) 3 vols.

C38.N38 [38] See Georges Abi-Saab, 'The 1977 Additional Protocols and General International Law: Some Preliminary Reflexions' in Astrid Delissen and Garard Tanja (eds), *Humanitarian Law of Armed Conflict—Challenges Ahead; Essays in Honour of Frits Kalshoven* (Martinus Nijhoff 1991) 121–22.

C38.N39 [39] Georges Abi-Saab, 'Specificities of Humanitarian Law' in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff 1984) 270–73.

C38.N40 [40] See eg *International Court of Justice, Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports 265–67 (the threat or use of nuclear weapons is contrary to international humanitarian law, except perhaps in extreme circumstances of self-defence).

C38.N41 [41] See eg *Prosecutor v Tadic* (Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 55–56, 61 (holding a number of rules protecting civilians to be customary law).

C38.N42 [42] CRC art 3. [43] Hamilton and El-Haj (n 3) 33.

or even certain civilians.[44] A tension therefore arises insofar as this outcome is often perceived to be 'incompatible with the right to life provisions of the [Convention]'.[45]

C38.S9 **(b) Arbitrary Distinctions?**

C38.P96 Furthermore, the protections of international humanitarian law may hinge upon the civilian/non-civilian distinction. This distinction is explored at length further on in this chapter. For the moment, Goodwin-Gill and Cohn observe that:

C38.P97 only children who do not take part in hostilities are entitled to benefit from the regime of special protection established under the Geneva Conventions and Additional Protocols. If they do participate they lose their inviolability as non-combatants: indeed they become legitimate military targets. [46]

C38.P98 In contrast, the Convention draws no such distinction and requires simply that the rights which it protects be secured without discrimination for all children. Although the CRC Committee adopts a broader children's rights discourse,[47] it continues to refer in its concluding observations to international humanitarian law principles.[48]

C38.S10 **(c) Blurred Distinctions**

C38.P99 An approach that blurs the differences between child combatants and child civilians may prima facie enhance the protection of children in armed conflict. This blurring fuels influential non-binding documents, such as the Cape Town and Paris Principles, such that these documents address the reality that child civilians suffer greatly in conflict. Prioritizing the needs of children associated with fighting forces over civilian children (often the overwhelming majority of children in conflict zones) may nonetheless spark tension in post-conflict spaces. Hence, the Paris Principles favour collective post-conflict reparations,[49] which is an approach mirrored by the Trust Fund for Victims (established by the Rome Statute), for example, in its activities in northern Uganda and the Democratic Republic of the Congo. The International Center for Transitional Justice has found that some children involved with armed groups are uncomfortable with receiving reparations since they see themselves not as victims but instead as owing an obligation to others.[50]

C38.P100 Article 38(1) speaks of 'armed conflicts'. International humanitarian law nonetheless admits a legal distinction, albeit a progressively narrowing one, between international and non-international armed conflict. The proscription of unlawful conscription, enlistment,

C38.Nag

[44] Fiona Ang, 'Article 38. Children in Armed Conflicts' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2005) para 14, citing Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 240 (observing that international humanitarian law 'allows the killing and wounding of combatants and, under certain conditions, even civilians: as long as the "rules of the game" are observed … it is permissible to cause suffering or even to kill').

[45] Hamilton and El-Haj (n 3) 22.

[46] Guy Goodwin-Gill and Ilene Cohn, *Child Soldiers: The Role of Children in Armed Conflicts* (Clarendon Press 1994) 70.

[47] CO Cambodia, CDC/C/15/Add.128 para 48; CO Sudan, CRC/C/15/Add.190 para 35. See also CO Myanmar, CRC/C/15/Add.237 para 67 (including child combatants as victims).

[48] See eg CO Ethiopia, CRC/C/ETH/CO/3 para 80. See also CO Burundi, CRC/C/15/Add.133 para 72 (recommending that 'full respect of the provisions of international humanitarian law be guaranteed').

[49] Paris Principles (n 10) Principle 7.30 notes that '[i]nclusive programming which supports children who have been recruited or used as well as other vulnerable children benefits the wider community'. The Paris Principles also discourage simply granting cash to demobilized child soldiers (see Paris Principle 7.35).

[50] International Centre for Transitional Justice, *Program Report: Children and Youth* (9 August 2013) 6 (on file with the authors).

or active use of children under 15 in international criminal law operates regardless of the international/non-international distinction. While international criminal law is not explicitly referenced by paragraphs 38(1) or 38(4) (which gesture towards international humanitarian law), an argument can be made that international criminal law, in particular insofar as it relates to breaches of the law of armed conflict (ie war crimes), is implicit within this reference.[51]

C38.S11 **(d) Protection of Children as an Afterthought?**

C38.P101 During the early development of international humanitarian law, the 'regulation of children's participation in hostilities was perceived as being a primarily internal matter'[52] and therefore fell short of being a major motivator. GCIV, API, and APII, however, do consider children. But they do so in patchwork and uncoordinated fashion. GCIV, which addresses civilians, grants a number of special protections to children, which are discussed at length below. These protections commence at different ages (7, 12, 15, or 18). International humanitarian law does not approach children with any specific universal age in mind, though historically 15 is a common baseline reference.[53] Ostensibly, one of the reformist goals of the 'straight 18' position would be consistency in this regard.

C38.S12 **(e) Towards Complementarity**

C38.P102 Notwithstanding some divergence and a distinct history, it is hoped that the underlying aims of international humanitarian law merge with those of international human rights law.[54] The CRC Committee itself has noted that the framework for the realization of children's rights under the Convention is 'very often reflected in the provisions of humanitarian law'.[55] Among these, it has identified:

C38.P103 the importance of protecting the family environment; ensuring the provision of essential care and assistance; ensuring access to health, food and education; prohibiting torture, abuse or neglect; prohibiting the death penalty and the need to preserve the children's cultural environment as well as the need of protection in situations of deprivation of liberty.[56]

C38.P104 International humanitarian law, moreover, increasingly focuses on individuals' rights—in other words, individuals enjoy certain levels of protection, and the state cannot forfeit or remove their rights, or permit the enemy to disregard them. For example, an abusive state's civilians and soldiers *hors de combat* are entitled to protection against reprisals, even if that state initiated armed conflict in violation of the *jus ad bellum*. The prohibition of reprisals has arguably attained *jus cogens* status.[57] The flip side of this trend towards individualization involves the imposition of individual punishment for grave breaches of the laws of armed conflict. In this regard, international humanitarian law and international human rights law each prioritize individual action and agency while also shedding the conditionality of these rights on reciprocity (rejection of the *tu quoque* defence), victory (development of the law of occupation), or the interpretively amorphous just war doctrine.

C38.N51 [51] Ang (n 44) para 20. This commentary presents international criminal law as germane to art 38, as central to its legacy and as related to the welfare of children in armed conflict.

C38.N52 [52] Matthew Happold, *Child Soldiers in International Law* (Manchester University Press 2005) 55.

C38.N53 [53] Pictet explains that the age of 15 was agreed upon because 'from that age onwards a child's faculties have generally reached a stage of development at which there is no longer the same necessity for special measures': Pictet Commentary (n 26) 186.

C38.N54 [54] Meron in Ang (n 44) 239. [55] CRC/C/10 (n 5) para 73. [56] ibid.

C38.N57 [57] See Jerôme de Hemptinne, 'Prohibition on Reprisals' in Clapham et al (n 26) ch 29.

C38.S13 **(f) Reconciling Conflict**

C38.P105 Article 38's outreach to international humanitarian law reflects the orthodox view that international humanitarian law was *lex specialis* during armed conflict. Had this orthodoxy been maintained, the special protection afforded to children would have been determined largely by reference to international humanitarian standards. In intervening years, however, the contemporary international law applicable in armed conflict has evolved such that it is now informed both by international humanitarian law and human rights law. The ICJ observed in the Wall Case that human rights law, including the Convention, applies during armed conflict.[58]

C38.P106 The ICJ anticipated that circumstances would arise in which either international humanitarian law or international human rights law would be *lex specialis* and the relationship between the two must be seen as complementary.[59] The broad overlap in protections offered under each regime indeed reflects this complementarity. With respect to certain issues, such as evacuation for example, international humanitarian law offers explicit guidance regarding the substantive measures required in order for children's rights to be realized. [60] The CRC Committee has indeed recalled 'that the Convention, under its article 41, invites States parties to always apply the norms which are more conducive to the realization of the rights of the child, contained either in applicable international law or in national legislation'.[61] On the other hand, the Convention offers greater guidance on other issues, such as juvenile justice (art 40) and children's health (art 24).

C38.P107 The reality, however, is that the Convention offers a far more ambitious range of entitlements to children associated with armed conflict than those contained specifically within article 38. A thorny issue next arises, namely, states' capacities to secure these other rights during armed conflict. The Convention grants children rights to freedom of expression, association, play, leisure, cultural activities, liberty, education, health, and an adequate standard of living.[62] Unsurprisingly, military commanders may remain anxious about such claims, in particular regarding how these claims may interface with the principle of military necessity under international humanitarian law.

C38.P108 A fundamental question therefore persists: are these twin regimes that are supposed to cohabitate mutually in fact hobbled by irreconcilable differences? The point to stress here is that, subject to few exceptions such as torture, children's rights remain subject to limitation. The real issue is therefore whether a particular limitation can be justified as being reasonable. As a general rule, reasonableness will hinge upon:

C38.P109 • whether the limitation was undertaken pursuant to a relevant law;
C38.P110 • whether it pursued a legitimate aim or pressing social need; and
C38.P111 • whether more proportionate measures to achieve the aim or need were available.

C38.P112 In turn, proportionality will be contingent on:

C38.P113 • the existence of a rational connection (usually based on evidence) between the measure taken and aim pursued; and

C38.N60

[58] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICR Rep 136 para 106 ('*Wall Case*').

[59] ibid.

[60] See Keiichiro Okimoto, 'Evacuation and Transfer of Prisoners' in Clapham et al (n 26) ch 47 (discussing relevant provisions under GC III).

[61] CRC/C/10 (n 5) para 68.

[62] CRC arts 13, 15, 31, 37, 28, 24, and 27, respectively.

C38.P114 • the availability of a reasonably alternative measure which would minimally impair the right.[63]

C38.P115 This methodological process, and particularly its emphasis on proportionality, does help to align human rights with humanitarian law. Where, for example, a child's best interests must be a primary consideration, those interests do not automatically trump all other considerations. Decisions made during armed conflict must, however, give genuine consideration to children's interests. Moreover, the state bears the onus of justifying why compromising those interests may be reasonable.[64] Thus, the normative tensions between humanitarian law and human rights law may be less than is commonly assumed.

C38.S14 ### *3. The Undertaking 'To Respect and to Ensure Respect'*

C38.P116 The undertaking of states '*to respect and ensure respect*' for international humanitarian law derives from common article 1 of the Geneva Conventions[65] and article 1 of API.[66] It differs slightly from the formulation in article 2 of the Convention, which provides that states '*shall respect and ensure*' the rights recognized in the Convention. It remains questionable whether this difference conveys any substantive implications:[67] there is certainly nothing in the drafting history or work of the CRC Committee to suggest otherwise. As outlined in chapter 2 of this Commentary, the obligation to respect and ensure respect obliges states to refrain from unreasonable interference with a child's rights, to ensure that non-state actors do not unreasonably interfere with a child's rights, and to adopt measures to secure the full enjoyment of a child's rights. Importantly, these obligations extend beyond a state's territory where the state exercises effective control.[68]

C38.P117 The commentary to AP1 suggests that the undertaking to 'respect and ensure respect' amounts to an obligation to comply 'in good faith'.[69] This is based on the fundamental rule of international law expressed in the maxim *pacta sunt servanda*, reproduced in article 26 of the Vienna Convention on the Law of Treaties ('VCLT'), which states that '[e]very treaty is binding upon the parties to it and must be performed by them in good faith'. In the context of international humanitarian law, the undertaking to respect arises even if a state's enemies fail to respect this same law or are bound by it at all.[70] Reciprocity is not required.

C38.P118 The commentary to AP1 also suggests that 'undertake' is a more solemn turn of phrase than the normal usage of 'shall'.[71] In the context of the Convention, such an undertaking

C38.N63 [63] See chapter 2 II.D.3(c) of this Commentary; Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984) ('Siracusa Principles').

C38.N64 [64] Siracusa Principles (n 630 art I(A)(12) ('[t]he burden of justifying a limitation upon a right … lies with the state'). See also chapter 3 of this Commentary on art 3 .

C38.N65 [65] Common art 1 states that the 'High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'

C38.N66 [66] AP1 art 1 states that the 'High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.'

C38.N67 [67] cf Ang (n 44) 30–32.

C38.N68 [68] See *Wall Case* (n 58). See also: Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13. para 10; Tracey Begley, 'The Extraterritorial Obligation to Prevent the Use of Child Soldiers' (2012) 27 American University International Law Review 613; Robin Geib, 'The Obligation to Respect and to Ensure Respect for the Conventions' in Clapham et al (n 26) 117.

C38.N69 [69] Sandoz, Swinarski, and Zimmerman (n 26) 35 para 39; Geib (n 68) 117.

C38.N70 [70] cf VCLT art 60(5). [71] Sandoz, Swinarski, and Zimmerman (n 26) 35 para 40.

would arguably require mandatory action, thus underscoring the serious nature of the obligation.

C38.P119 The undertaking is supplemented by an obligation to 'ensure respect'. The commentary to AP1 dismisses any suggestion that this obligation is superfluous and notes that it imposes an obligation to ensure that civilian and military authorities, members of the armed forces, and the *population as a whole* each respect the rules of international humanitarian law.[72] Furthermore, it indicates that states have a duty both to take preparatory measures permitting implementation and to supervise implementation.[73] The commentary adds that the phrase 'ensure respect' reflects the idea that:

C38.P120 In the event of a Power failing to fulfil its obligations, each of the other Contracting Parties, (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.[74]

C38.P121 This phrase should therefore be read as obliging all states parties to ensure universal respect and compliance with the rules of international humanitarian law.

C38.P122 In the context of the obligation to 'ensure respect', this reasoning suggests that states must ensure that non-state actors[75] comply with international humanitarian law (an obligation also derived from the obligation to 'respect' under human rights law). Non-state actors cannot become parties to the Convention, so this obligation is important in terms of compliance. The CRC Committee has taken a generous view of the undertaking to ensure respect, opining that it extends to the actions not only of armed groups, but also of paramilitary groups and private companies.[76] It has also stated that this undertaking obliges states to cooperate financially to ensure other states' respect for international humanitarian law.[77] Presumably this would involve denouncing those states which violate article 38.

C38.P123 The commentary to the Additional Protocols indicates that during drafting there was no discussion of the substantive measures required in order to fulfil the obligation to 'ensure respect'.[78] The same can be said of article 38. Arguably, in determining the appropriate measures, States Parties ought to draw on the wide range of diplomatic and/or legal measures available to them in order to ensure respect for the rules of international

C38.N75

[72] ibid para 41. See also Pictet Commentary (n 26) 16.

[73] Sandoz, Swinarski, and Zimmerman (n 26) 35 para 41. API, art 80 states that:

> The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of the obligations under the Conventions and this Protocol.
> The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol and shall supervise their execution.

See also Yves Sandoz, 'Implementing International Humanitarian Law', in UNESCO (n 31) 259.

[74] Sandoz, Swinarski, and Zimmerman (n 26) 36 para 42.

[75] Generally, a state may be responsible for breaches of international humanitarian law committed by non-state actors over which it exercises effective control. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)(Merits)* [1986] ICJ Rep 14, 98 ('*Nicaragua*'); paras 105–15.

[76] CO Indonesia, CRC/C/15/Add.223 para 71(d) (paramilitary groups); CO Democratic Republic of the Congo, CRC/C/15/Add.153 para 6 (Private companies). See also CO Sudan, CRC/C/15/Add.190 para 6 (emphasizing the full responsibility of States Parties even when non-state actors assume *de facto* control).

[77] Ang (n 44) para 56.

[78] Sandoz, Swinarski, and Zimmerman (n 26) 36 para 46.

humanitarian law. These could include disseminating knowledge of international humanitarian law, criminalizing grave breaches thereof (which the CRC Committee has urged), and actuating educational programs.

C38.S15 ### *4. The 'Rules of International Humanitarian Law Applicable to Them in Armed Conflicts which Are relevant to the Child'*

C38.S16 #### (a) 'Applicable to Them'

C38.P124 The original draft of paragraph (1) did not contain the words 'applicable to them'.[79] This addition was made to assuage concerns about ambiguity, sovereignty, and legality and to clarify that states would not be bound by the provisions of international humanitarian law to which they were not a party (unless those provisions constituted customary international law).[80] Presumably, unless a state was a persistent objector to a particular rule of customary international humanitarian law, that rule would apply to it.

C38.S17 #### (b) 'The Rules of International Humanitarian Law Applicable in Armed Conflicts

C38.P125 Article 38(1) refers to the rules of international humanitarian law which apply in *armed conflicts*. This phrase is critical because the characterization of a conflict determines which rules of international humanitarian law apply or whether international humanitarian law even applies at all. The Convention may simply speak of armed conflicts, but this term belies the need to effect a much deeper set of legal determinations.

C38.P126 International humanitarian law acknowledges two categories of armed conflict: international armed conflict and non-international armed conflict. An *international armed conflict*, as defined in common article 2 of the Geneva Conventions, involves 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'.[81] An international armed conflict also arises if a state partially or totally occupies the territory of another state, even in the absence of armed resistance.[82] Pursuant to AP1, moreover, an international armed conflict also arises where it occurs in the territory of a state 'in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination'.[83] The Geneva Conventions and AP1, inter alia, will apply to each such situation.

C38.P127 The second category of conflict recognized by international humanitarian law is *non-international armed conflict*.[84] In principle, APII applies to this kind of armed conflict (at times colloquially referred to as 'high-intensity' non-international armed conflict),[85] as does common article 3 of the Geneva Conventions.[86] Specifically, article 1(1) of APII applies to conflicts that:

C38.N79 [79] See the Polish proposal: *Legislative History* (n 4) 780.

C38.N80 [80] See the comment of the US representative: *Legislative History* (n 4) 781–82. See Wascherfort (n 13) (discussing the standards under IHL which have attained the status of customary international law).

C38.N81 [81] For a discussion of art 2, see Pictet Commentary (n 26) 17–25; Andrew Clapham, 'The Concept of International Armed Conflict' in Clapham et al (n 26) ch 2.

C38.N82 [82] According to common art 2, the Geneva Conventions apply 'to all cases of partial or total occupation of the territory of a High Contracting Party even if the said occupation meets with no armed resistance'.

C38.N83 [83] AP1 art 1(4). See Pictet Commentary (n 26) 71–74.

C38.N84 [84] See generally Lindsay Moir, 'The Concept of International Armed Conflict' in Clapham et al (n 26) ch 19.

C38.N85 [85] AP2 art 2 provides that '[t]his protocol shall be applied … to all persons affected by armed conflict as defined in article 1'.

C38.N86 [86] Common art 3 applies to any 'armed conflict not of an international character'. For a discussion of the humanitarian law provisions applicable to non-international armed conflict, see, Georges Abi-Saab, 'Non-International Armed Conflicts', in UNESCO (n 31) 217; Sandesh Sivakumaran, 'The Addresses of Common

C38.P128 take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

C38.P129 Article 1(2) therefore precludes APII from applying to 'situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. There remains a threshold requirement that a conflict amount to an 'armed conflict' for the purposes of international humanitarian law, as distinct from situations 'in which a small group of individuals mount an armed attack against for example a bank or police station'.[87] Moreover, the mere fact that individuals may be armed will not 'turn the incident into an armed conflict'.[88] According to Hampson, 'at least two elements … must be present: a minimum level of severity … and such degree of organisation in the non-State forces as to enable a command structure to function'.[89]

C38.P130 Hence, some interstitial space emerges between situations that are not armed conflicts (to which international humanitarian law does not apply whatsoever) and situations in which the armed conflict is not between a state's armed forces, on the one hand, and dissident armed forces or other organized armed groups that exercise control over territory, on the other, to which APII applies. For example, armed conflict may arise between armed groups *inter se*, or be sustained and ongoing but involve factions lacking in responsible command or that are simply not seen as 'dissident armed forces' or as 'organized' because of the lack of a chain of command, the movement of fighters from one group to another, and a focus on criminal activity; or whose military operations are not 'concerted' but haphazard; or groups who are simply unable to implement APII. This sort of armed conflict, which fails to meet the APII threshold, remains governed by common article 3 to the Geneva Conventions (which also applies to armed conflicts covered by APII).[90] Sometimes, this latter type of armed conflict may be colloquially referred to as a 'low-intensity' non-international armed conflict. These are common and frequently implicate children.

C38.P131 Common article 3, which reflects customary international law, makes no explicit reference to children. It embodies a minimum standard from which departure is not permitted. In *Hamdan v Rumsfeld*, a majority of the US Supreme Court—cutting against the position taken by the US President—determined that common article 3 applied to the armed conflict not of an international character occurring between the United States and al Qaeda.[91]

C38.P132 Identifying the nature of the conflict is crucial because international humanitarian
C38.N99 law offers descending levels of protection as among international armed conflicts,

Article 3' in Clapham et al (n 26) ch 20; Jann K Kleffner, 'The Beneficiaries of the Rights Stemming from Common Article 3' in Clapham et al (n 26) ch 21.

[87] Françoise Hampson, 'Legal Protection Afforded to Children under International Humanitarian Law: Report on the Study on the Impact of Armed Conflict on Children' (May 1996, University of Essex) 8.

[88] ibid. [89] ibid.

[90] Common art 3 states that '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum' the provisions listed in common art 3. Discussion of the protections provided by common art 3 is set out in section II.A.5.(b) of this chapter.

[91] *Hamdan v Rumsfeld* (2006) 548 US 557 (US Supreme Court) (invalidating the military commission convened to try Hamdan at Guantánamo as falling short of the requirements of common art 3).

non-international armed conflicts, and 'low-intensity' non-international armed conflicts. While the trend-line arcs towards diminishing the variation among the levels of protection, in part because of legal developments from within and outside international humanitarian law, these differences remain tangible.[92] There is, however, 'no determining body, standard or internationally accepted method for characterising conflicts',[93] which is largely left to states' discretion. This characterization is critical for it determines not only *which* rules of international humanitarian law apply, but indeed *whether* international humanitarian law applies at all. International humanitarian law will not apply to armed conflicts falling below the 'not of an international character' threshold of common article 3. Where violence becomes subject to the jurisdiction of international criminal courts or tribunals, at times judges must determine the nature (and even existence) of an armed conflict in order to determine the applicable law. To some extent, these determinations have arisen in the ICC and before the International Criminal Tribunal for the former Yugoslavia ('ICTY').[94]

C38.P133 In the context of article 38, the CRC Committee would need to determine the nature of a conflict before it can assess compliance with international humanitarian law. This need persists despite the fact that article 38 applies to all types of armed conflict. The problem faced by the Committee, however, is that there is no independent third party to provide an authoritative assessment of the nature or existence of a conflict. Consequently, the Committee must make its own determination. It is yet to engage in such an assessment and, given the difficult and complex nature of this task, seems unlikely to do so.[95] Consequently, the Committee is more likely to confine itself to broad recommendations regarding state compliance with general obligations, rather than identifying states' failure to comply with international humanitarian law. What is more, the Committee's focus on broadly protecting children's rights, which is understandable in light of the Convention's teleological purpose, has led it to look beyond (or over) the language of international humanitarian law. For example, in its concluding observations for the Central African Republic, the Committee recommended protection of children from the 'effects of armed conflict *or other strife*' (emphasis added).[96] The Committee deployed the term 'armed conflict' generally, and expansively, without attention to its character. This is arguably progressive but also problematic given that international humanitarian law does not apply to '*other strife*'.

C38.N92 [92] Cf Ang (n 44) para 28. [93] Goodwin-Gill and Cohn (n 46) 60.

C38.N94 [94] According to the ICTY, 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. See *Prosecutor v Tadić (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-AR72, 2 October 1995) para 70. Art 8(2)(b) of the Rome Statute (n 11) provides that armed conflicts not of an international character do not include 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'.

C38.N95 [95] This reticence has prompted criticism. See eg Ang (n 44) para 24 (finding it 'regrettable' that the CRC Committee 'does not seem to find itself an apt forum to extensively monitor States Parties compliance with IHL via Article 38'). That said, the Security Council has also been cautious. See eg S/RES/2068 (2012) preamble, ('*stressing* that the present resolution does not seek to make any legal determination as to whether situations which are referred to in the Secretary-General's report are or are not armed conflicts within the context of the Geneva Conventions and Additional Protocols') (emphasis in original).

C38.N96 [96] CO Central African Republic, CRC/C/15/Add.138 para 83; see also at para 82 (CRC Committee indicating its concern over 'incidents of internal disturbance, including mutinies').

C38.S18 ## *5. The Rules of International Humanitarian Law Relevant to the Child*

C38.S19 ### (a) Identification of the Relevant Rules

C38.P134 The CRC Committee has not attempted to identify precisely which rules of international humanitarian law are relevant to children. Its preference has instead been to generally urge states to ratify or comply with GCIV[97] and the Additional Protocols[98] or to respect international humanitarian law.[99] It has, to be clear, on occasion engaged in a more detailed discussion of international humanitarian law, albeit almost exclusively within the context of its reports on Israel.[100] In its 2013 report, for example, the Committee expressed concern that air and naval strikes on Gaza in areas heavily populated by children disregarded the proportionality principle,[101] which the Committee identified as a fundamental rule of humanitarian law.[102] It also referenced that the 'construction of the Wall as well as the Gaza blockade imposed since 2007 … was considered by the International Committee of the Red Cross as a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law'.[103] These references remain sporadic, however, and unaccompanied by further analysis of the relevant rules or justification for finding a violation thereof. Thus, the Committee's work is not particularly helpful to discern which rules of international humanitarian law are relevant to children.

C38.P135 Brett pithily suggests that '[i]t is hard to conceptualise an armed conflict which is not "relevant to the child"'.[104] Hence, she considers the 'relevant to the child' language applicable only to the 'rules of international humanitarian law'. On this note, Krill explains that there are some twenty-five provisions of international humanitarian law which accord special protection and assistance to children;[105] children's involvement in virtually every aspect of contemporary armed conflict, ranging from combatants to civilian casualties, means that any particular rule of international humanitarian law could be relevant to a child. The challenge therefore is not only to compile a list of all the rules which are relevant to children but to interpret all existing rules from a child's rights perspective.

C38.P136 Numerous GCIV articles offer specific protection to children. That said, the exact nature of this protection hinges upon whether the child is a civilian or combatant. This, in turn, opens up a massive definitional and legal quagmire, to wit, how are the terms combatant and civilian understood?[106] What happens when civilians revolve into combatant roles and then exit them? What concept of combatancy applies in non-international

C38.N99

[97] See eg: CO Israel, CRC/C/ISR/CO/2-4 para 26 and CO Turkey, CRC/C/TUR/CO/2-3 para 69.

[98] See eg: CO Pakistan, CRC/C/PAK/CO/4 para 87(c) and CO Philippines, CRC/C/PHL/CO/3-4 para 71.

[99] CO Sudan, CRC/C/SDN/CO/3-4 para 73.

[100] See: CO Israel, CRC/C/ISR/CO/2-4 paras 19–26 and CRC/C/15/Add.195 paras 50–51, 58–59.

[101] CO Israel, CRC/C/ISR/CO/2-4 para 25. See also, CO Sudan, CRC/C/SDN/CO/3-4 para 73(a) (recommending 'adherence to the principles of proportionality and distinction').

[102] CO Israel, CRC/C/ISR/CO/2-4 para 26. [103] ibid para 25(c).

[104] Rachel Brett, 'Child Soldiers: Law, Politics, and Practice' (1996) 4 International Journal of Children's Rights 115, 116.

[105] Françoise Krill, 'The United Nations Convention on the Rights of the Child and his Protection in Armed Conflicts' (1986) 4:3 Mennesker og Rettigheter 39, 41. See generally Geraldine van Bueren, 'The International Legal Protection of Children in Armed Conflicts' (1994) 43 International and Comparative Law Quarterly 809; Denise Plattner, 'Protection of Children in International Humanitarian Law' (May–June 1984) International Review of the Red Cross.

[106] GCIII art 4(A) and AP1 art 43 provide an initial definition of who is a combatant. These provisions do so ostensibly within the context of international armed conflict. AP1 art 50(1) states that '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian'.

armed conflict? Consideration of these knotty matters lies beyond the remit of these Commentaries. What must be assessed herein, however, is whether a child ever can be found to be a combatant. International humanitarian law seems to indicate so, in particular within the context of an international armed conflict, but also inferentially within the context of individuals with a continuous combat function in non-international armed conflict. What is more, any person, including a child civilian, who takes a direct part in hostilities would in principle lose the general protections attaching to civilians under GCIV and AP1 for so long as he or she directly participates in those hostilities.[107] This means that the child could be targeted. This outcome assuredly belies the fact that the direct participation of the child in hostilities (or the recruitment of the child) may itself be unlawful. This outcome also belies the moral dilemma as to whether the means used to target a child, or the assumptions therein, should differ from those that apply to the targeting of adult combatants.

C38.P137 Combatants become permissible military objectives: which presents a painful reality in the case of children, particularly if an understanding of 'direct' participation is expanded to include children who do not carry weapons or serve on the front lines. Civilians who participate directly in hostilities retain civilian status but become lawful targets for attacks (thereby ceding their civilian immunity) and may face criminal charges for their conduct. Either way, then, children might become permissible targets. This conundrum, in turn, bedevils national rules of engagement, which must balance the threat that children pose as combatants with the moral quandary arising where a trained soldier is being shot at by a child combatant.[108]

C38.P138 International humanitarian law offers certain specific protections to combatants, to be clear. Combatants, for example, would benefit from prisoner of war status upon capture.[109] Combatants cannot face criminal sanction for lawfully killing the enemy, although they can face criminal sanction for war crimes (ie violations of international humanitarian law). Civilians, on the other hand, can be held criminally accountable simply for killing the enemy.

C38.P139 To muddy the waters further, under international humanitarian law the definitions of 'civilians' and 'combatants' are rendered all the more complex by the use of terms such as 'non-combatants' and 'unlawful enemy combatants'. These terms lack any firm footing in international humanitarian law. These terms, however, infused the political lexicon,

C38.N107 [107] GCIV art 3 defines civilians as '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause'. An individual taking a direct part in hostilities would fall outside of this definition. Direct participation in hostilities, further discussed *infra*, has its definitional starting points in AP1 art 51(3) for international armed conflict and Common art 3 of the Geneva Conventions and AP2 art 13 for non-international armed conflicts. Judgments of international criminal courts and tribunals to convict adults for the crime of unlawfully using children as active participants in armed conflict, moreover, have broadly interpreted the scope of active participation. They have done so to protect children from unlawful use but, paradoxically, have thereby expanded the possibility that those children could be lawfully targeted in hostilities. Herein lie the tensions that emerge when three bodies of law—international humanitarian law, international criminal law, and international human rights law—regulate child soldiering.

C38.N108 [108] For a discussion of these tensions see: Sam Pack, 'Targeting Child Soldiers: Striking a Balance between Humanity and Military Necessity' (2016) 7(1) Journal of International Humanitarian Legal Studies 183; Rene Provost, 'Targetting Child Soldiers' EJIL: Talk January 12, 2016 https://www.ejiltalk.org/targeting-child-soldiers/.

C38.N109 [109] API and APII accord special protection to children who take a direct part in hostilities and are captured, regardless of whether they are prisoners of war.

in particular following the September 11 terrorist attacks. One risk here is that these categories may be artfully designed so as to exempt their members from the protections that accrue *either* to combatants or to civilians, thereby creating a rights-free vortex. In any event, while Baxter posits that GCIV appears to prefer the term 'non-combatant' over 'civilian',[110] article 3(1) of that instrument obliges each party to a conflict to apply certain minimum provisions to, inter alia, 'persons taking no active part in the hostilities'. AP1 defines 'combatants' as members of the armed forces of a party to a conflict[111] and 'civilian' as any person who is not a member of the armed forces in the sense of article 4 of GCIII or article 43 of API.[112]

C38.P140 For many, a full-bodied child rights perspective would view all persons under 18 associated with any fighting force (whether armed forces or armed groups) as part of a protected class and would therefore bypass all of these definitional hurdles. This certainly appears to be the preference of the CRC Committee, which remains steadfast in its insistence that no child under 18 should be involved in armed conflict.[113] That said, care should be exercised not to offer such children greater post-conflict entitlements than children not associated with armed forces or armed groups, since many children go to great efforts to resist such association (and thereby unequivocally maintain civilian status) and, conversely, some children who are associated with fighting forces do so through exercises of some degree of volition. Relatedly, care should be exercised not to present unrealistic scenarios to trained adult soldiers on the battlefield when they may face lethal threats at the hands of child soldiers. As Provost remarks, the question of whether, when, and through what means child soldiers ever may be targeted has hardly elicited any discussion.[114] Guidance on this topic nonetheless remains crucial. Provost suggests the development of a targeting approach that recognizes the threat, on the one hand, but mandates respect for the specially protected status of children and the moral impulse to protect children, on the other. Provost posits that direct targeting of child combatants or of children directly participating in hostilities could only be justifiable to the extent that it is a necessary evil, 'meaning that no viable option can be identified and that there is a tangible military necessity for this attack'.[115] This standard would differ from that applicable to adult soldiers. Of course, this regime of special protection for children on the battlefield assumes that soldiers are able to actually determine whether the threat posed to them emanates from a child.

C38.P141 In any event, article 38(1) extends protections to both child civilians and combatants. Article 38(4) only covers child civilians. These sections ought to be read together to obtain the full picture of these protections.

C38.N119

[110] Richard Baxter, 'The Duties of Combatants and the Conduct of Hostilities', in UNESCO (n 31) 117.

[111] API art 43(2) states that '[m]embers of the armed forces of a Party to a conflict … are combatants, that is to say, they have a right to participate directly in hostilities.'

[112] API art 50(1) states that '[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A) (1) (2) (3) and (6) of the Third Convention and in article 43 of this Protocol. In case of doubt whether a person is a civilian that person shall be considered a civilian.' For a discussion of the definition of civilians under API see: Sandoz, Swinarski, and Zimmerman (n 26) 609–12; Richard Baxter, 'The Duties of Combatants and the Conduct of Hostilities' in UNESCO (n 31) 117–18.

[113] See eg CRC/C/50 (n 6) 42 ('it is the belief of the Committee that persons below 18 should never be involved in hostilities'). See also CRC/C/10 (n 5) para 75(e).

[114] Provost (n 108). [115] ibid.

C38.S20 **(b) Protection Afforded to Child Civilians in International Armed Conflicts**

C38.S21 *(i) General Protection*

C38.P142 The rules of international humanitarian law which are relevant to the protection of child civilians in international armed conflicts are found in GCIV[116] and API. GCIV article 27 expresses the overall principle that protected persons, including child civilians, are entitled to humane treatment, respect for their honour, family rights, religious convictions, practices, and customs, and protection against all acts of violence, including rape, forced prostitution, and indecent assault. [117] Civilians are distinguished from combatants; attacks against civilians are forbidden. In addition, GCIV also prohibits inter alia coercion, corporal punishment, torture, collective penalties, reprisals, and the taking of hostages.[118] The CRC Committee has assessed torture that occurs during armed conflict as a violation of Convention article 37.[119]

C38.P143 Child civilians are also protected by API, which safeguards civilians generally during hostilities. Kuper points out that among these rules 'is the familiar admonition that the right of the parties to the conflict to choose methods or means of warfare is not unlimited'.[120] Specifically, API article 48 requires that 'the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'.

C38.P144 Furthermore, an attack which 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated' will be indiscriminate and therefore prohibited.[121] A presumption arises that a location usually used for civilian purposes—such as a place of worship, house or school—will not be a legitimate military target.[122] Equally, attacking objects indispensable to survival of civilian populations, such as foodstuffs, crops, livestock, and drinking water, are also prohibited,[123] and civilian medical units are similarly protected.[124]

C38.S22 *(ii) Specific Protection under Geneva Convention IV*

C38.P145 Several articles of GCIV offer specific protections to children beyond the general protections for all civilians. As mentioned earlier, the protections afforded to children depend on their age (though in some cases 'children' is used without reference to any specific age).[125] In one article (regarding due process and carceral rights), moreover, GCIV deploys the term 'minor'. Mothers gain special protections when pregnant, breastfeeding, or because they have a child under the age of 7; fathers are not explicitly mentioned. GCIV accords families and parents some entitlements, which may paradoxically conflict with human rights standards where, for example, reunification under international humanitarian law is not in a child's 'best interests' (see CRC art 3).

C38.N116 [116] For a discussion, see Jean Pictet, *Humanitarian Law and the Protection of War Victims* (Henry Dunant Institute 1975) 115–36.

C38.N118 [117] See Pictet Commentary (n 26) 199–207. [118] See GCIV arts 31–34.

C38.N119 [119] CO Sierra Leone, CRC/C/15/Add.116 paras 44–45.

C38.N120 [120] Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Clarendon Press 1997) 64.

C38.N122 [121] API arts 51(4), 51(5). [122] APII art 52(3). [123] API art 54(2).

C38.N124 [124] GCIV arts 18–19; AP1 arts 12–13.

C38.N125 [125] CRC art 1 presumes that a child is any person under the age of eighteen.

C38.P146 Part II of GCIV deals with the 'general protection of populations against certain consequences of war'. Part II also includes the following articles which make specific reference to children:

C38.P147 **Article 14:** Parties … may establish … hospital and safety zones and localities so organized as to protect from the effects of war … children under fifteen, expectant mothers and mothers of children under seven.

C38.P148 **Article 17:** The Parties … shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm and aged persons, children and maternity cases …

C38.P149 **Article 23:** Each … Party shall … permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases [subject to conditions].

C38.P150 **Article 24:** The Parties … shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

C38.P151 The Parties … shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power …

C38.P152 They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.[126]

C38.P153 GCIV Part III, which deals with the 'status and treatment of protected persons'[127] includes:

C38.P154 **Article 38:** providing that children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.

C38.P155 **Article 50:** 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.

C38.P156 The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organisations subordinate to it.

C38.P157 Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

C38.P158 A special section of the [official Information] Bureau … shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

C38.P159 The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers and mothers of children under seven years.

C38.N125

[126] GCIV arts 25 (family news) and 26 (dispersed families) also bear upon these concerns. Art 24 has been chided for 'fail[ing] to address the needs of children who are still with their parents but have similar problems of maintenance and education'. See Hamilton and El-Haj (n 3).

[127] Protected persons are defined in GCIV art 4 as '[p]ersons … who at any given moment and in any manner whatsoever find themselves in the case of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.

C38.P160 **Article 51:** The Occupying power may not compel protected persons to work unless they are over eighteen years of age …

C38.P161 **Article 68:** In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.[128]

C38.P162 **Article 76:** Proper regard shall be paid to the special treatment due to minors [accused or convicted of offences].

C38.P163 **Article 82:** Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health… Internees may request that their children who are left at liberty without parental care shall be interned with them.

C38.P164 Whenever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.[129]

C38.P165 **Article 89:** [When interned], [e]xpectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.

C38.P166 **Article 94:** All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside.

C38.P167 Special playgrounds shall be reserved for children and young people.

C38.P168 **Article 132:** The Parties … shall… endeavour … during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children.

C38.S23 *(iii) General and Specific Protection under Additional Protocol I*

C38.P169 API applies in international armed conflicts and protects child civilians in two respects. First, it extends general protection to all civilians in international armed conflicts, including children, from the conduct of hostilities.[130] Second, it contains specific protections for children under articles 77 and 78.[131]

C38.P170 Article 77 'is not subject to any restrictions as regards its scope of application; it therefore applies to all children who are in the territory of States at war, whether or not they are affected by armed conflict'.[132] This is significant since certain provisions under GCIV apply more restrictively, for example only to children in occupied territories. Article 77 provides that:

C38.P171 1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

C38.N128 [128] This is consistent with CRC art 37(a).

C38.N129 [129] This article also proceeds without reference to the best interests of the child.

C38.N130 [130] See especially arts 51 (protection of the civilian population); 52 (general protection of civilian objects); 69 (basic needs in occupied territories); 74 (reunion of dispersed families); 75 (fundamental guarantees which include a prohibition against discrimination, all forms of violence, murder, torture, corporal punishment, enforced prostitution and indecent assault, and detailed guarantees to ensure a fair trial). The Commentary identifies art 51 as 'one of the most important articles in the Protocol. Article 51 explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and must enjoy general protection against danger arising from hostilities' (see Pictet Commentary (n 26) 615 para 1923.

C38.N131 [131] In addition, art 70(1) requires that priority be given in distribution of relief consignments 'to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection'.

C38.N132 [132] Sandoz, Swinarski, and Zimmerman (n 26) 899 para 3177.

C38.P172 2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

C38.P173 3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.[133]

C38.P174 4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

C38.P175 5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.[134]

C38.P176 Article 78 deals with children's evacuation and adopts a more 'cautious approach'[135] than GC article 24. It addresses the reality that in the past evacuations had been:

C38.P177 carried out for other reasons, for example, to educate children according to certain political or religious views or to prepare them to serve in the armed forces of a State. Sometimes they had been carried out in conditions such as to result in the children losing their identity or being raised in a manner foreign to that of their family or their country.[136]

C38.P178 Article 78 responsively provides that:

C38.P179 1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

C38.P180 2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.

C38.P181 3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross.[137]

C38.P182 Paragraphs 77(3) to 77(5) of AP1 are relevant to child combatants and are discussed below, as is paragraph 77(2), which inform Convention paragraphs 38(2) and 38(3).

C38.N139

[133] The reference to 'exceptional' here does not mean that protection will only be provided in exceptional circumstances. Rather, it emphasizes that the participation in hostilities of children under fifteen ought to remain exceptional: Sandoz, Swinarski, and Zimmerman (n 26) 902 para 3192.

[134] For a commentary on the content of art 77 see Sandoz, Swinarski, and Zimmerman (n 26) 897–905.

[135] ibid 909 para 3211. [136] ibid 909 para 3211.

[137] For a comprehensive discussion of art 78 see ibid 907–15.

Once again, the recursive nature of many of these protections reveals how article 38 functionally serves as a baseline set of protections for children in armed conflict.

C38.P183 Paragraph 77(1) and the entirety of AP article 78 are relevant to child civilians in international armed conflicts. Paragraph 77(1) requires special respect and protection for children and also provides specific protection against indecent assault. The commentary to API explains that:

C38.P184 > this is a welcome supplement to article 27 of the fourth [Geneva] Convention as experience has shown that children, even the youngest children are not immune from sexual assault. [Further] the second sentence demands that Parties to the conflict should provide children with the care and aid they require.[138]

C38.P185 Indecent assault in this context includes rape and other sexual abuse and is therefore particularly relevant to girls.[139] The sexual abuse of boys (whether combatants or civilians) nonetheless persists as a painfully under-discussed issue and these prohibitions should also be rigorously applied to such situations.

C38.P186 According to the commentary on API, a definition of 'child' was intentionally[140] omitted and 'the limit of fifteen years of age which is given many times in the Fourth Geneva Convention and is also given in paragraphs 2 and 3 of this article seems to provide a reasonable basis for a definition'.[141] This observation reflects a historical conceptualization in international humanitarian law which is at odds with the conception adopted under the Convention. It thus serves as a reminder of the context in which the rules of international humanitarian law concerning children were adopted and of the need to reflect on the adequacy and appropriateness of these rules in light not only of the Convention but also the contemporary experiences of children in armed conflict.

C38.P187 Although API paragraph 77(2) speaks of the recruitment of children, this terminology belies the diverse paths through which children become militarized. These paths include conscription (which could be forcible, through kidnapping, brutalization, threats, the draft, or press-ganging) or enlistment (when children volunteer for service). Volunteerism—a fraught term, indeed—may be more prevalent in independence movements or anti-authoritarian activities. The term recruitment semantically connotes some action on the part of the armed forces or groups that transcends merely enrolling a volunteer. The momentum in international law and policy nevertheless is to abandon the term 'recruitment' and flatly prohibit the enlistment, conscription, or active use in hostilities of persons under the age of 15 (minimum floor) or, increasingly, 18. To achieve uniformity, the tendency is to presume parsimoniously that voluntary enlistment is the same as forcible conscription, thereby disregarding the actual path to militarization.

C38.P188 Article 78 deals with children's evacuation;[142] unlike the Convention, it does not require a consideration of their best interests.

C38.S24 **(c) Protection of Child Civilians in Non-International Armed Conflicts**

C38.S25 *(i) General Protection under Additional Protocol II*

C38.P189 APII protects child civilians in certain non-international armed conflicts and offers similar general protections to those found in API, namely, to require armed forces to distinguish between civilians and persons taking part in hostilities (with the former protected from

C38.N138 [138] ibid 900 para 3181–2. [139] Kuper (n 120) 79.
C38.N140 [140] Sandoz, Swinarski, and Zimmerman (n 26) 899 para 3178. [141] ibid (n 26) para 3179.
C38.N142 [142] ibid paras 3209–44.

attack).[143] Similarly, objects indispensable to the survival of civilians cannot be attacked[144] and 'all persons who do not take part or who have ceased to take part in hostilities … are entitled to respect for their person, honour and convictions and religious practices'.[145] APII also prohibits specific acts of ill-treatment such as torture, rape, and slavery[146] and provides minimum guarantees to detainees and internees,[147] including due process rights in criminal proceedings.[148]

C38.S26 *(ii) Specific Protection under Additional Protocol II*

C38.P190 APII article 4(3) provides specific protections to children enmeshed in those non-international armed conflicts that fall within the remit of APII. Article 4(3) states that:

C38.P191 Children shall be provided with the care and aid they require, and in particular:

C38.P192 (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

C38.P193 (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

C38.P194 (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

C38.P195 (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;

C38.P196 (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

C38.P197 Article 6(4) further provides that the '[t]he death penalty shall not be pronounced on persons who were under the age of 18 years at the time of the offence and shall not be carried out on pregnant women or mothers of young children'.

C38.P198 Article 4(3) is important in that it applies to the under-regulated context of non-international armed conflict, where it insists upon certain absolute requirements.[149] Significantly, paragraph (c) categorically prohibits any recruitment and participation in hostilities of children under 15 (without the qualifier 'direct'). In contrast, API article 77(2) and Convention article 38(2) only require that states take 'all feasible measures' to prevent children under 15 from taking a 'direct' part in hostilities. Hence APII contains a firmer prohibition.

C38.P199 Despite frequently referring to the age of 15, AP2 contains no consistent definition of 'child'. A child's right to education under paragraph (a) is drafted from the parents' perspective and contains no requirement that the child's best interests be considered. (In contrast, article 18(1) of the Convention requires that the child's best interests be parents' basic concern.) Paragraph (b), which deals with reunification, also is silent on the child's best interests; paragraph (e), which addresses temporary evacuation, aims to obtain parental or caregiver consent to the removal of children from areas in which hostilities are occurring. The fact remains that children in conflict zones are not self-evidently protected by their family members insofar as these family members may encourage them to associate with fighting forces for various reasons, ranging from defending communities, to making money, to satisfying the wishes of local leaders.

C38.N143

[143] APII arts 13(1), 13(2). [144] APII art 14. [145] APII art 4(1). [146] APII art 4(2). [147] APII art 5. [148] APII art 6. [149] Happold (n 52) 66.

C38.S27 *(iii) The Protection of Child Civilians Residually under Common Article 3*

C38.P200 Common article 3 of the Geneva Conventions is the only source of protection under international humanitarian law for child civilians (and members of the armed forces *hors combat*) in non-international armed conflicts that fall outside the remit of APII. In short, common article 3 entitles persons not taking active part in hostilities to rudimentary core guarantees. It states that:

C38.P201 In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

C38.P202 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

C38.P203 2) To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

C38.P204 (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

C38.P205 (b) taking of hostages;

C38.P206 (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

C38.P207 (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

C38.P208 3) The wounded and sick shall be collected and cared for.

C38.P209 Common article 3 reflects customary international law.[150] Although not specifically oriented towards children, Common article 3 codifies baseline protections in those conflicts that would otherwise escape international legal regulation.

C38.S28 *6. Protection of Child Combatants under International Humanitarian Law*

C38.P210 International humanitarian law addresses three aspects of children's participation in armed conflicts as combatants: recruitment and participation in hostilities, treatment when captured, and prosecution for serious criminal offenses. Assuredly, child combatants generally benefit from the protective regime established by the first three Geneva Conventions. That said, these instruments accord scant attention specifically to children. API and APII do offer special protection to child combatants, in some instances regardless of whether they are prisoners of war.

C38.S29 **(a) Recruitment and Participation**

C38.P211 In the context of international armed conflict, API article 77(2) requires states to refrain from recruiting children under 15 into the armed forces and to take all feasible measures to prevent them from taking a direct part in hostilities. APII article 4(3) provides that in non-international armed conflict falling within its remit, children under 15 shall not be recruited or allowed to take part in hostilities. These prohibitions, keyed to the age of 15, also constitute customary international law.

C38.N150 [150] *Prosecutor v Naletilic and Martinovic* Case No IT-98-34-T, ICTY Trial Chamber, 31 March 2003 para 228 ('[i]t is . . . well established that Common Article 3 has acquired the status of customary international law').

C38.P212 These provisions, already mentioned above, are discussed in detail below in the commentary on paragraphs 38(2) and 38(3).

C38.S30 **(b) Child Prisoners of War**

C38.P213 GCIII deals with prisoners of war and, hence, captured child combatants.[151] GCIII article 4 entitles individuals satisfying certain criteria to prisoner of war status.[152] This is complemented by API article 44(1), which provides that any combatant falling into enemy hands is a prisoner of war. Since prisoner of war status is not dependent on age, captured child combatants are therefore entitled to such status. Where doubts exist regarding an individual's prisoner of war status, that person is to be treated as a prisoner of war until his or her status is formally determined.[153] Article 16 of GC III references *passim* that age may in fact justify privileged treatment.[154]

C38.P214 GCIII contains extensive protections for prisoners of war, to which children are equally entitled.[155] However, GCIII fails to stipulate expressly any special protection for child prisoners of war.[156] API article 77(3), in contrast, provides that children under 15 who take direct part in hostilities and are captured 'shall continue to benefit from the special protection' accorded under article 77 regardless of whether they are prisoners of war. Pursuant to Article 77(4), '[i]f arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units'. It has been argued that one logical outcome of these provisions is that children below the age of lawful recruitment who are captured must be demobilized by their captors.[157] Paris Principle 1.5 affirms 'a child rights-based approach to the problem of children associated with armed forces or armed groups, [and] underscore[s] the humanitarian imperative to seek the unconditional release of children from armed forces or armed groups at all times'.[158] In General Comment 6, the CRC Committee addresses the situation where a child soldier over the age of 15 'poses a serious security threat',[159] noting that 'exceptional internment' may be 'unavoidable' in such instances, but that this internment should be in compliance with international human rights and humanitarian law.[160]

C38.P215 No equivalent to prisoner of war status exists for combatants captured in non-international conflicts. This is because 'in the eyes of the State they are probably engaged

C38.N159

[151] For a discussion of the protection of child prisoners of war under international humanitarian law see Maria Teresa Dutli, 'Captured Child Combatants' (1990) 278 International Review of the Red Cross 424.

[152] GCIII art 4 contains a complex definition of 'prisoner of war' for the purposes of GCIII, which requires careful and considered analysis that lies beyond the scope of the current chapter.

[153] See eg AP1 art 45(1).

[154] GCIII art 16 reads: '[t]aking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.'

[155] See Claude Pilloud, 'Protection of the Victims of Armed Conflicts—Prisoners of War' in UNESCO (n 31) 169–82.

[156] van Bueren explains that as a matter of practice, the ICRC does request special assistance for child prisoners of war, such as privileged treatment 'during their detention and in arguing their case for priority during repatriation': van Bueren (n 105) 339.

[157] Ang (n 44) para 45. [158] See also OPAC art 6(3).

[159] CRC Committee, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (2005) CRC/GC/2005/6 (' CRC GC 6') para 57.

[160] ibid.

in activity not merely of a criminal but also a treasonable character'.[161] Article 4(3)(d) of APII does, however, extend to children under 15 special protection if they take a direct part in hostilities and are captured, despite the prohibition in article 4(3)(c). As an aside, the special protection under paragraph 4(3)(d) is limited to children under the age of 15 who take direct part in hostilities, whereas paragraph 4(3)(c) applies to those who have been recruited or have taken a part in hostilities. Thus, it is possible that some unlawfully recruited or used children will not be entitled to special protection upon capture.

C38.S31

(c) Prosecution for Criminal Offences

C38.P216

Assessing the child accused of committing serious international crimes during armed conflict remains a delicate exercise.[162] The fact nevertheless remains that some children associated with fighting forces do commit terrible atrocities. While their actions may often be the result of adult coercion, this is not always the case. In any event, children also are found among the victims of such atrocities and they, too, have rights to justice and redress. International humanitarian law contemplates that children can incur responsibility for international crimes committed during armed conflict. GCIV and both Additional Protocols prohibit only the harshest punishment, namely, the death penalty.

C38.P217

The Convention itself does not explicitly contemplate children accused of committing international crimes during armed conflict. That said, its approach to criminal responsibility, which is explored in chapters 37 and 40, remains of general applicability. It is worth noting here that the Convention:

C38.P218

- permits the 'arrest, detention or imprisonment of a child', but requires that these measures 'shall be used only as a … last resort and for the shortest appropriate period of time' (art 37(b));

C38.P219

- precludes the death penalty and, in addition, life imprisonment without parole as sentences for children who are convicted of offenses (art 37(a));

C38.P220

- requires that 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so' (art 37(c));

C38.P221

- specifies a minimum level of due process protection for children subject to criminal proceedings,[163] but also encourages the development of enhanced frameworks attuned to their specific needs;

C38.P222

- favours rehabilitation and reintegration, but does not bar incarceration (art 40(1));

C38.P223

- requires establishment of 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law' (art 40(3)(a)) but in fact sets no such age. That said, the CRC Committee has considered 14 as a low age for criminal responsibility and 'has welcomed … proposals to set the age of criminal responsibility

C38.N161

[161] Hampson (n 87) 41.

C38.N162

[162] See generally: Noëlle Quénivet 'Does and Should International Law Prohibit the Prosecution of Children for War Crimes?' (2017) 28 European Journal of International Law 433; Tyler Fagan, William Hirstein, and Katrina Sifferd, 'Child Soldiers, Executive Functions, and Culpability' (2016) 16 International Criminal Law Review 258: Alexandre Sampaio and Matthew Mcevoy, 'Little Weapons of War: Reasons for and Consequences of Treating Child Soldiers as Victims' (2016) 63 Netherlands International Law Review 51; Brittany Ursini, 'Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility' (2015) 89 St John's Law Review 1023.

C38.N163

[163] CRC art 40. The CRC Committee emphasizes the grounding of criminal responsibility on objective (albeit categorical) factors, such as age, instead of subjective factors such as 'the attainment of puberty, the age of discernment or the personality of the child'; see CRC Committee, 'Report on the 10th Session' (1995) CRC/C/46 para 218.

at eighteen'.[164] In General Comment No 10, the CRC Committee asserts that a minimum age of capacity that is under 12 would not be internationally acceptable.[165] This issue is explored more fully in chapter 40.[166]

C38.P224 The non-binding Paris Commitments address children who perpetrate atrocities:

C38.P225 Commitment 11. To ensure that children under 18 years of age who are or who have been unlawfully recruited or used by armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators. They should be treated in accordance with international standards for juvenile justice, such as in a framework of restorative justice and social rehabilitation.

C38.P226 Commitment 12. In line with the [Convention] and other international standards for juvenile justice, to seek alternatives to judicial proceedings wherever appropriate and desirable, and to ensure that, where truth-seeking and reconciliation mechanisms are established, the involvement of children is supported and promoted, that measures are taken to protect the rights of children throughout the process, and in particular that children's participation is voluntary.

C38.P227 The Paris Principles expound considerably on the skeletal frame of the Paris Commitments. Principle 3.6 exhorts that:

C38.P228 children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators.

C38.P229 Wherever possible, principle 3.7 mandates alternatives to judicial proceedings. Principle 3.8 emphasizes, but also adds to, the Paris Commitments:

C38.P230 Where truth-seeking and reconciliation mechanisms are established, children's involvement should be promoted and supported and their rights protected throughout the process. Their participation must be voluntary and by informed consent by both the child and her or his parent or guardian where appropriate and possible. Special procedures should be permitted to minimize greater susceptibility to distress.

C38.P231 Principle 7.53 notes that '[i]n some communities, children are viewed and view themselves as carrying bad spirits from their experiences with armed forces or armed groups;' in such instances, '[a]ppropriate cultural practices, as long as they are not harmful to children, can be essential to a child's reintegration and should be supported'. Principle 7.31 guardedly encourages reintegration to be carried out in ways that facilitate local and national reconciliation. Principle 7.41 supports non-violent conflict management and the provision of mediation and support following children's return. Principle 7.48 mentions engaging children in community service as a way to break stigma.

C38.P232 Principle 8.6 nevertheless states that '[c]hildren should not be prosecuted by an international court or tribunal'. Children cannot be prosecuted or punished domestically either, 'solely for their membership' in armed forces or armed groups.[167] Principle 8.8

C38.N165

[164] Amnesty International, 'Child Soldiers: Criminals or Victims?' (Amnesty International 22 December 2000) 15. The CRC Committee has asked some states to increase the minimum age as stipulated domestically: see eg: CO Guyana, CRC/C/GUY/CO/2-4 para 62(b); CO Cook Islands, CRC/C/COK/CO/1 para 59(c); CO Singapore, CRC/C/SGP/CO/2-3 para 69(a); CO Sri Lanka, CRC/C/LKA/CO/3-4 para 78(a); and CO Japan, CRC/C/JPN/CO/3 para 85(b).

[165] CRC Committee, 'General Comment 10: Children's Rights in Juvenile Justice' (2007) CRC/C/GC/10 para 32.

[166] See chapter 40 of this Commentary.

[167] Paris Principles (n 10) Principle 8.7.

affirms that any proceedings that do implicate children must be consistent with international juvenile justice standards. Alternatives to judicial proceedings 'should be sought for children at the national level;' where judicial proceedings do occur, 'every effort should be made to seek alternatives to placing the child in institutions'. Section 8 of the Paris Principles addresses truth-seeking and reconciliation mechanisms:

C38.P233 8.15 All children who take part in these mechanisms, including those who have been associated with armed forces or armed groups should be treated equally as witnesses or as victims.

C38.P234 8.16 Children's participation in these mechanisms must be voluntary. No provision of services or support should be dependent on their participation in these mechanisms.

C38.P235 What is the international criminal law stance? None of the Nuremberg Statute, Control Council Law No 10, or Control Council Ordinance No 7 mentioned the age of criminal responsibility. Equally, the ICTY and the International Criminal Tribunal for Rwanda ('ICTR') Statutes offer no guidance. Article 26 of the Rome Statute straightforwardly provides that: 'The Court [ICC] shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime'. At its core, however, article 26 is procedural. It does not deem persons under the age of 18 to lack legal responsibility per se. Article 26 elicited only brief discussion at the Rome Conference, where delegates were reluctant to engage with children's perpetration of atrocities, particularly given the differences among national jurisdictions regarding the age of criminal responsibility. In addition, Rome Conference delegates evoked concerns about resource constraints, curial competence regarding juvenile justice, sentencing issues, and the ability to provide specialized detention facilities for juveniles and properly trained staff. Rome Conference delegates also felt that children would never meet gravity requirements.

C38.P236 The SCSL Statute limited the Court's jurisdiction to defendants over 15 years at the time of the alleged offense[168] and accords special consideration to 'juvenile offenders', to wit, those under 18 at the time of the alleged offense. Pursuant to article 7(1) of the SCSL Statute, any juvenile offender before the SCSL:

C38.P237 shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

C38.P238 The SCSL Statute exempts juvenile offenders from incarceration[169] and instead favours:

C38.P239 care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.[170]

C38.P240 The SCSL's first Chief Prosecutor stated that he never would prosecute children under the age of 18, including child soldiers, inter alia because they do not bear the greatest responsibility.[171] None were prosecuted.

C38.N168 [168] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 145 ('SCSL Statute') art 7.1.

C38.N169 [169] ibid arts 7(2), 19(1).

C38.N170 [170] ibid art 7(2); see also art 15(5).

C38.N171 [171] Press Release, Special Court for Sierra Leone, Public Affairs Office, 'Special Court Prosecutor Says He Will Not Prosecute Children' (2 November 2002).

C38.P241 In sum, international criminal law does not formally prohibit the prosecution of persons under the age of 18 at the time of the offense. A firm practice, advanced by global civil society and influential UN actors, however, has emerged not to prosecute such persons before international criminal tribunals where they face charges of serious international crimes, such as genocide, crimes against humanity, and war crimes.[172] Although this practice does not extend to national institutions, where children have been prosecuted on such charges, it certainly helps to sculpt national conversations and portends future directions. This practice moulds transitional justice initiatives for child soldiers. In non-penal proceedings, for example truth commissions, children participate largely along the lines exhorted by the Paris Principles, that is, as victims and witnesses only. Within this particular context, failing to address former child soldiers heterogeneously as victims, witnesses, and perpetrators — depending on the circumstances—may, however well-intentioned, under-actualize their reintegrative and restorative needs, as well as those of the community.

C38.S32 **(d) The Use and Effects of Landmines**

C38.P242 The CRC Committee has on occasion expressed deep concern that 'children are killed and maimed by anti-personnel landmines and unexploded ordinance' and recommended that states '[t]ake all necessary measures to protect children against landmines, including by ending the use of landmines and carrying out mine clearance programmes, programmes for mine awareness and physical rehabilitation of child victims'.[173] Its concerns are justified given the egregious impact of landmines on children, who are especially vulnerable given their size and lifestyle, which often involves scavenging or working in areas which expose them to greater risk of contact with such devices.[174]

C38.P243 Two international humanitarian law instruments focus on landmines:

C38.P244 • Amended Protocol II to the Convention on Certain Conventional Weapons ('Conventional Weapons Convention');[175] and

C38.P245 • Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction ('Ottawa Convention').[176]

C38.P246 The Conventional Weapons Convention seeks to ban or restrict the use of specific weapons considered to be indiscriminate or to cause unnecessary or unjustifiable suffering. It is a

C38.N178

[172] Drumbl (n 23) 133. See also: Wascherfort (n 13) 137–38.

[173] CO Myanmar, CRC/C/MMR/CO/3-4 paras 83, 84(b). See also: CO Myanmar, CRC/C/MMR/CO/3-4 paras 61, 62; CO Chad, CRC/C/TCD/CO/2 paras 71, 72; CO Eritrea, CRC/C/ERI/CO/3 paras 70, 71(b); CO Colombia, CRC/C/COL/CO/3 paras 80, 81(d)–(e); CO Bosnia and Herzegovina, CRC/C/15/Add.260 paras 63, 64.

[174] See Hugh Watts, 'The Consequences for Children of the Unexploded Remnants of War: Landmines, Unexploded Ordnance, Improvised Explosive Devices and Cluster Bombs' (2009) 2 Journal of Pediatric Rehabilitation Medicine 217, 220. See also: Jody Williams, *The Protection of Children against Landmines and Unexploded Ordnance* (UNICEF 1996) 9–10; Shawn Roberts and Jody Williams, *After the Guns Fall Silent: The Enduring Legacy of Landmines* (1st edn, Vietnam Veterans of America Foundation 1995) 10.

[175] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 (adopted on 10 October 1980, entered into force on 2 December 1983) 1342 UNTS 137 (the amended version entered into force on 18 May 2004). The amendment extended this instrument to non-international armed conflict; the original applied only to international armed conflict.

[176] Ottawa Convention (Adopted 3 December 1997, entered into force 1 March 1999) [1999] ARS 3. For an update on the number of signatures and ratifications see International Campaign to Ban Landmines www.icbl.org/en-gb/home.aspx.

general *chapeau*, with the actual proscriptive action taking place in the Protocols annexed thereto (of which there are presently five). Amended Protocol II, which derived from an earlier Protocol II, regulates (and in some instances prohibits) the use on land of mines, booby-traps, and other devices. It prohibits the indiscriminate use of mines (art 3(8)), those designed or of a nature to cause superfluous injury or unnecessary suffering (art 3(3)), and their use against civilians (art 3(7)), but does not per se ban them. Anti-personnel landmines, however, must either be kept in clearly marked, fenced, and monitored areas or have effective self-destructing and self-deactivating mechanisms which disarm and render them unusable after a predetermined period of time. Amended Protocol II also prohibits anti-personnel mines that cannot be detected with standard demining equipment (art 4). The responsibilities for clearing, removing, destroying, or maintaining mines rest with the party employing them (art 3(2)). Amended Protocol II entered into force on 3 December 1998 (it was initially amended in May 1996); as of July 2013, ninety-nine states are parties thereto.

C38.P247 The Ottawa Convention requires that states undertake never, under any circumstances:

C38.P248 a) to use anti-personnel mines;[177]

C38.P249 b) to develop, produce, otherwise acquire, stockpile, retain or transfer to anyone directly or indirectly anti-personnel mines; or

C38.P250 c) to assist encourage or induce anyone in any way in any prohibited activity.

C38.P251 States must also destroy or ensure the destruction of all stockpiles of anti-personnel mines within four years and destroy all landmines in areas under their jurisdiction within ten years.[178] It is envisioned that, where feasible, other states will provide assistance for these purposes.[179]

C38.P252 Importantly, the CRC Committee has continued to accord 'high priority' to State Party compliance with the Ottawa Convention[180] and has emphasized the importance of international cooperation in accordance therewith.[181]

C38.S33

B. Paragraph 2: The Obligation to Take all Feasible Measures to Ensure Persons Under Fifteen do not Take a Direct Part in Hostilities

C38.P253 *2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.*

C38.N177 [177] 'Anti-personnel mine' is defined as a mine designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure or kill one or more persons. This definition excludes mines designed to be detonated by the presence, proximity, or contact of a vehicle (ie anti-tank mines) and mines that are equipped with anti-handling devices (booby-traps). See Ottawa Convention art 2(1). Nor does the Ottawa Convention address mixed mines.

C38.N178 [178] Ottawa Convention arts 4, 5.

C38.N179 [179] Ottawa Convention art 6. See: International Campaign to Ban Landmines, *Landmine Monitor 2011* (Mines Action Canada 2011) 1 (detailing the campaign to abolish landmines and noting that only three states (Israel, Libya, and Myanmar) continue to lay landmines while twelve countries continue to produce them (China, Cuba, India, Iran, Myanmar, North Korea, Pakistan, Russia, Singapore, South Korea, the United States, and Vietnam)).

C38.N180 [180] Ang (n 44) para 106.

C38.N181 [181] CRC Committee, 'General Comment No. 9: The Rights of Children with Disabilities' (2007) CRC/C/GC/9 para 23. See also: CO Senegal, CRC/C/SEN/CO/2 paras 56–57; CO Lebanon, CRC/C/LBN/CO/3 para 69.

C38.S34 ## *1. Overview*

C38.P254 Paragraph 38(2) deals with the direct participation of children in hostilities. It deploys somewhat particular language. Whereas API covers 'parties to the conflict', paragraph 38(2) refers only to '*States Parties*', thereby implying an absence of any requirement that a state must be party to the relevant conflict. API requires all feasible measures to be taken 'in order that' persons under 15 do not take a direct part in hostilities. In contrast, paragraph 38(2) requires all feasible measures to be taken 'to ensure' the same. This appears to import a more onerous standard.

C38.P255 In international armed conflicts, paragraph 38(2) provides protection which is at least equal to or in fact greater than that offered under API article 77(2). When it comes to non-international conflicts, however, article 4(3)(c) of AP2 contains a more muscular prohibition on children's involvement in hostilities insofar as it is not qualified by a requirement that states take all feasible measures.[182] Moreover, whereas paragraph 38(2) concerns itself with children's direct participation, APII article 4(3)(c) simply refers to not allowing children to take part. This does not mean, however, that article 38(2) dilutes the standard of protection insofar as States Parties to APII will be bound by the higher standard by virtue of Convention article 41.[183] But the fact that the Convention offers an apparently thinner standard than APII did trigger discontent. During drafting, the 'observer for The Netherlands … indicat[ed] that it was regrettable that the Chairman had allowed paragraph 2 to be adopted in the light of such extensive opposition to the chosen text'.[184]

C38.P256 Paragraph 38(2) was contentious at the negotiation stage. It tumbled into the Convention by default as the minimum point of consensus. Unsurprisingly, then, paragraph 38(2) was immediately bemoaned as deficient, a sentiment that catalysed states to take a second run at children's involvement in hostilities in OPAC.

C38.P257 The obligation of states under article 38(2) to take all feasible measures to prevent the direct participation in hostilities of children under 15 extends to all children within their jurisdiction, including children who fight in armed groups against the state for whom the state remains responsible.[185] The state remains responsible even if it lacks any ability to control the non-state actor. This issue arises with greater poignancy under OPAC, discussed in chapter 42, which states that armed groups 'should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years'.[186] What is more, article 4(2) of OPAC requires states to take 'all feasible measures' to criminalize such practices.

C38.N184

[182] cf Howard Mann, 'International Law and the Child Soldier' (1987) *36* International and Comparative Law Quarterly 32, 50 ('In returning to a stronger prohibition for internal armed conflicts in comparison with that adopted for international conflicts, the participating States were intending to make it more difficult … for the dissident groups within their territory to achieve this perceived military advantage'). Rosen advances a similar 'double standard' argument in regard to the flat prohibition on the recruitment or use in hostilities of children under the age of eighteen by armed groups pursuant to OPAC, which however permits the voluntary recruitment, under stringent conditions, of 16 and 17 year-olds into national armed forces: David Rosen, *Armies of the Young: Child Soldiers in War and Terrorism* 146 (Rutgers University Press 2005).

[183] According to Ang, 'as a positive note [it] can be remarked that States that are a party to both the CRC and AP2 are of course required to comply with AP2 … while States that are only a party to the [CRC] at least are under *some* obligation to take measures in this field.' See Ang (n 44) para 72.

[184] *Legislative History* (n 4) 791–98.

[185] CO Democratic Republic of the Congo, CRC/C/15/Add.153 para 64; CO Colombia, CRC/C/15/Add.137 para 54.

[186] OPCAC art 4(1).

C38.S35 ### *2. 'Take All Feasible Measures'*

C38.P258 During the Technical Review and second reading of article 38, it was suggested that 'feasible measures' (as used in both paragraphs 38(2) and 38(4)) be replaced with 'necessary measures'.[187] As noted above, 'feasible' had been used in API,[188] but firmer language animated APII ('shall' not). Consensus could not be reached on this higher standard, so the word 'feasible' remained. Van Bueren explains that the main reason for the failure to achieve consensus was states' reluctance to accept an absolute duty in relation to the voluntary participation of children under 15 in wars of national liberation.[189]

C38.P259 According to the commentary on API, the meaning of 'feasible' should be taken to mean 'capable of being done, accomplished or carried out, possible or practicable'.[190] Ang buttresses this by pointing to the official French text, which explicitly requires that states '*prennent toutes les measures possible dans la pratique*'.[191] As an aside, the commentary on article 57 of API, which deals with precautions to be taken to avoid attacking civilian populations, rejects consideration of the circumstances 'relevant to the success of military operations' when determining what is feasible.[192] Whilst an obligation to take 'feasible' measures is generally considered to be lesser than one to take 'necessary measures', the former may more accurately reflect what states are actually able to achieve.

C38.S36 ### *3. 'To Ensure'*

C38.P260 As noted above, this phrase should be given greater weight than 'in order that' as found in API. The obligation 'to ensure' imposes upon states a broader obligation than simply refraining from particular action. Arguably, this obligation requires states to oversee the compliance of other States Parties, as well as certain organizations and forces not party to the Convention. It also requires states to undertake positive action to discourage and prevent the participation in hostilities of persons under the age of 15.

C38.S37 ### *4. 'Persons Who Have Not Attained the Age of Fifteen Years'*

C38.P261 Earlier versions of paragraph 38(2) referred to 'child' or 'children'. During the Technical Review it was noted that, when read in conjunction with article 1, it was possible that 'child' may not include all persons under the age of 15 and states may enact legislation setting a lower age threshold for the attainment of majority.[193] The text of paragraph 38(2) was therefore altered to preclude this possibility. Significantly, this was the only alteration to command full support during the second reading.[194] The obligations under paragraph 38(2) extend to all persons under the age of 15, irrespective of the age of majority as defined by the state. Again, 15 is best seen as a floor, not a ceiling, in light of

C38.N187 [187] *Legislative History* (n 4) 797. A number of states, including Spain, Germany, Argentina, Colombia, and Austria, expressed concerns about the insufficiency of arts 38(2) and 38(3) upon ratification of the CRC.

C38.N188 [188] During the drafting of API, the ICRC suggested 'all necessary measures', however this was rejected by states who did not wish to undertake unconditional obligations: see Sandoz, Swinarski, and Zimmerman (n 26) para 3184. See Wascherfort (n 13) 61–62 (discussing the discussion concerning this phrase during the drafting of API).

C38.N189 [189] van Bueren (n 105) 334.

C38.N190 [190] Sandoz, Swinarski, and Zimmerman (n 26) 895 para 3171.

C38.N191 [191] Ang (n 44) para 73.

C38.N192 [192] Sandoz, Swinarski, and Zimmerman (n 26) 681–82 para 2198. This is contested by some member states, including Australia, the United Kingdom, and the United States, each of which applies a more restrictive interpretation of what constitutes feasible measures: Child Soldiers International, *Louder than Words: An Agenda for Action to End State Use of Child Soldiers* (London, Child Soldiers International 2012) 47.

C38.N193 [193] *Legislative History* (n 4) 792.

C38.N194 [194] ibid 793–98.

subsequent legal and policy developments. In any event, the age of 15 is also consistent with the chronological cut-offs of the related articles of the Additional Protocols.

C38.P262 The implementation of states' obligations under paragraph 38(2) requires age verification. This is problematic in the absence of birth certificates or a viable system of birth registration. It is therefore critical that states fulfil their obligations under article 7 of the Convention and register each child at birth. Such gaps plague criminal law proceedings, for example the *Lubanga* trial, when it came to establishing the age of the recruits (as their being younger than 15 at the point of enlistment or conscription is an element of the offense). Similar complexities have entangled the different context of assessing claims of minority on the part of accused Somali pirates in national courts.[195]

C38.S38 ### 5. *'Do Not Take a Direct Part'*

C38.P263 The 1986 Polish version of paragraph 38(2) of the Convention did not include the words 'a direct'.[196] After informal discussions, a revision was proposed containing this qualification. It is not clear from the *travaux préparatoires* why this alteration was suggested but it was presumably to ensure consistency with API. It appears that concern arose among some delegations that Working Groups to the Convention were unsuitable as a venue in which to revisit API.[197] The 1988 Working Group session saw an attempt made to remove the word 'direct' but this was ultimately unsuccessful.[198]

C38.P264 While API article 77(2) requires parties to prevent children from taking a 'direct part in hostilities', APII article 4(3)(c) does not contain the word 'direct'. Ang observes that this 'is one of the rare provisions offering a higher level of protection for non-international armed conflicts compared to the law applicable in international armed conflicts'.[199] The commentary to API discusses 'direct':

C38.P265 > The ICRC proposal did not include this word. Can this lead to the conclusion that indirect acts of participation are not covered? Examples would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc. The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services; if it does happen that children under fifteen spontaneously or on request perform such acts, precautions should at least be taken; for example, in the case of capture by the enemy, they should not be considered as spies, saboteurs or illegal combatants and treated as such.[200]

C38.P266 This comment is equivocal in that it first suggests that the drafters did not intend to allow for the participation of children under 15 in any circumstances, and then provides guidance on the appropriate treatment of children who participate both spontaneously and on request. Intuitively, however, the term 'direct' suggests that children's indirect participation might be permissible.

C38.N195

[195] In 2010, ten Somali defendants were jointly prosecuted in Hamburg, Germany, on charges related to the piratical hijacking of a German cargo ship, the *MV Taipan*, in the Gulf of Aden. Several defendants claimed to be minors. Complexities involving proof of age plagued this trial, as did translation issues. See Beate Lakotta, 'Torture? Execution? German Justice Through the Eyes of a Somali Pirate' *Spiegel Online* (7 April 2011) ('[o]ne pirate stated that he was born under a tree, while another could only say he was born during the rainy season'). At one point, questions arose whether forensic evidence had to be considered in light of the specifics of biological growth in East Africa, as opposed to in comparison with Western children: ibid.

[196] *Legislative History* (n 4) 780. [197] ibid 794–95. [198] ibid 789.

[199] Ang (n 44) para 63.

[200] Sandoz, Swinarski, and Zimmerman (n 26) para 3187. See also: Wascherfort (n 13) 62–68 (offering a detailed discussion of this phrase).

C38.P267 The ICRC has stated that 'the notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities'.[201] As such, it has developed its own cumulative criteria to determine whether participation amounts to 'direct participation':

C38.P268 1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

C38.P269 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

C38.P270 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[202]

C38.P271 Whilst these criteria provide useful guidance on this issue, they are not wholly authoritative and the opacity of the distinction between direct and indirect participation remains difficult to resolve.

C38.P272 For its part, the CRC Committee has recognized that 'in a situation of emergency it is very difficult to draw the line between what is considered direct and indirect participation'[203] and has avoided drawing this line, advocating instead 'a clear prohibition of participation in hostilities of persons below the age of 18, either directly or indirectly'.[204] Hence, the Committee advances a 'straight 18 approach' to participation. In this sense, the Committee infuses the APII language into the framework.

C38.P273 International criminal law constitutes another contemporary interpretive source, in particular the Rome Statute, which proscribes the '*active*' participation of children under 15 in hostilities and ascribes individual criminal responsibility for their use.[205] In determining what, exactly, using a child to participate actively in hostilities means,[206] the ICC's 2014 *Lubanga* appeals judgment focused on proof of a 'link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged'.[207] The Appeals Chamber found that the term 'active participation in hostilities' does not have to be given the same interpretation as the terms active or direct participation in the context of the principle of distinction between combatants and civilians as set out in international humanitarian law instruments.[208] Active participation for the purposes of international criminal law is not limited to direct participation

C38.N201 [201] International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 45. *See also* William J Fenrick, 'ICRC Guidance on Direct Participation in Hostilities' (2009) 12 Yearbook of International Humanitarian Law 287.

C38.N203 [202] CRC, *Interpretive Guidance* (n 201) 46. [203] CRC/C/50 (n 6) para 251.

C38.N204 [204] ibid; cf CRC Committee, 'General Recommendation on Children in Armed Conflict' CRC/C/80 (1998); CO Israel, CRC/C/15/Add.1950 para 32(b).

C38.N205 [205] Note that 'active' arises in common art 3 to the Geneva Conventions and has been equated to 'fighting': Ang (n 44) para 65.

C38.N206 [206] This prohibition is not dependent upon the children having been previously conscripted or enlisted into armed forces or groups.

C38.N207 [207] *Prosecutor v Thomas Lubanga Dyilo* (International Criminal Court, Case No ICC-01/04-01/06 A 5, 1 December 2014) ('*Lubanga* Appeals Judgment') paras 333, 335. Lubanga was specifically found responsible for deploying children as soldiers and their participation in combat, as well as their use as military guards and bodyguards. These acts fall pretty clearly within the remit of prohibited use.

C38.N208 [208] ibid para 324; but see para 277, where the Appeals Chamber read international criminal law, CRC art 38(3), and international humanitarian law as being of the same mind regarding the question of the prohibition of compulsory recruitment in terms of protecting children under the age of fifteen from being recruited into armed forces or groups.

in hostilities. Indirect participation may suffice, so long as it meets the linkage standard discussed above. The *Lubanga* appeals judges nonetheless rejected the approach that had been previously taken by the Trial Chamber, which inquired whether the 'support provided by the child to the combatants exposed him or her to real danger as a potential target'.[209] The trial chamber's approach may obscure the reality that some child soldiers face greater harm from members of their own side (whether adult leaders, mid-level officials, and fellow children) than from the enemy. That said, the Appeals Chamber also affirmed the Trial Chamber's finding that the expression 'to participate actively in hostilities' imports 'a wide interpretation to the activities and roles that are covered by the offence'.[210] The appeals judges also ultimately affirmed the conviction and the fourteen-year sentence handed down by the Trial Chamber.

C38.P274 The Appeals Chamber's 2014 approach takes root in earlier decisions. During the confirmation of charges stage of the *Lubanga* litigation, for example, ICC Pre-trial Chamber I had to interpret 'active' participation. It had similarly ruled that this language was broader than 'take a direct part in hostilities', as found in API Article 77(2). Pre-trial Chamber I interpreted the Rome Statute's language to cover activities such as combat, as well as cognate activities such as reconnaissance, spying, transportation, sabotage, courier services, being dispatched as a decoy, and guarding military objects, quarters, or personnel.[211] It did note that this language was not limitless and excluded from its purview conduct such as food delivery to an airbase or domestic help in married officers' quarters. The CRC Committee appears, however, to wish to go further. The danger of the Committee's approach is that it disregards the reality that children who take part in hostilities might be denied the protection afforded to the civilian population at large under the Additional Protocols.[212] Paradoxically, one concern with a broad definition of 'direct' or 'active' participation is that it expands the category of children who may become legitimate targets of attack by the enemy side.

C38.S39 ### 6. *'In Hostilities'*

C38.P275 The prohibition against children's direct participation relates not to armed conflicts but to 'hostilities'. The *travaux préparatoires* do not clarify the significance of this distinction, but it is likely that 'hostilities' is broader than 'armed conflict'.

C38.P276 When the Additional Protocols were drafted, participants discussed the term 'hostilities'. In its preliminary documentation for the Conference of Government Experts, the ICRC placed 'hostilities' in the middle of a continuum of three terms: military/war effort, hostilities, and military operations. The first of these included all civilian activities which are objectively useful to the military and was therefore considered too broad. In contrast, 'military operation' was considered to exclude many of the activities required for a successful operation, but not immediately connected to it in time and space. 'Hostilities'

C38.Nate

[209] *Prosecutor v Thomas Lubanga Dyilo* (Judgment) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012), ('*Lubanga* Trial Judgment') para 628.

[210] ibid para 627 (also citing art 38(2) of the Convention).

[211] *Prosecutor v Lubanga* (Decision on the Confirmation of Charges) International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, (29 January 2007) paras 261–63 ('*Lubanga* Decision on the Confirmation of Charges').

[212] See API art 51(3) ('[c]ivilians shall enjoy the protection afforded by this section [relating to the protection of civilian population] unless and for such time as they take a direct part in hostilities'); and APII art 13(3) ('[c]ivilians shall enjoy the protection offered by this Part unless and for such time as they take a direct part in hostilities').

occupied a middle space. The Commentaries to the Additional Protocols indicate that 'hostilities' are acts of war that engage enemy forces, but include both preparations for combat and return from combat.[213]

C38.S40

C. Paragraph 3: The Obligations to Refrain from Recruiting Any Person Under Fifteen into a State's Armed Forces, and where Persons Fifteen or Older Have been Recruited to Endeavour to Prioritize the Oldest

C38.P277

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

C38.S41

1. Overview

C38.P278

Paragraph 38(3) evidences a compromise between states wishing to maintain the prohibition on recruitment of persons under 15 (as recognized in the Additional Protocols) and those wishing to extend that prohibition to all persons under 18. Although it imposes an absolute obligation with respect to states' recruitment of persons under 15, it also foreshadows (through the priority principle) that 18 serves as an important chronological cut-off. This principle, taken from API article 77(2), expanded the protections offered to children in non-international armed conflicts under international humanitarian law at the time of drafting since neither APII nor common article 3 to the Geneva Conventions contains any equivalent. No sanction exists under international criminal law, however, for breaching the priority principle.

C38.P279

Unlike paragraph 38(2), paragraph 38(3) only applies to armed forces and imposes obligations on states only for the conduct of their own militaries. Also unlike paragraph 38(2), paragraph 38(3) applies both in and outside of hostilities, that is, during peacetime.[214] It thereby expands states' obligations under paragraph 38(2) by precluding recruitment even where children would not take any part in hostilities directly or otherwise.

C38.P280

Despite appearing in article 38(3) and both Additional Protocols, it is important to emphasize that use of the term 'recruitment' is falling into disfavour in preference for the more illustrative terms 'conscription' and 'enlistment'.[215] For clarity, each of these paths to militarization lay well within the contemplation of the Convention drafters, as well as the Commentaries to the Additional Protocols, and are therefore covered by the umbrella term 'recruitment'.

C38.P281

International criminal law, exemplified by SCSL jurisprudence, understands conscription to imply 'compulsion' and include 'acts of coercion, such as abductions and forced recruitment'.[216] That said, conscription also refers to a legal obligation to register, whether

C38.N213 [213] Sandoz, Swinarski, and Zimmerman (n 26) 516.

C38.N214 [214] cf CO Sweden, CRC/C/15/Add.2 paras 8, 11.

C38.N215 [215] The Optional Protocol takes a middle ground, speaking as it does of 'voluntary recruitment' and 'compulsory recruitment'. Ang, surveying many concluding observations, notes that the CRC Committee uses diverse terms to describe the process by which children enter militarized life, whether within the context of armed groups or armed forces: see Ang (n 44) para 80.

C38.N216 [216] *Prosecutor v Brima, Kamara and Kanu* (Trial Judgment), Case No SCSL-04-16-T, SCSL Trial Chamber (20 June 2007) ('*AFRC* Trial Judgment') para 734.

during hostilities (the draft) or peace-time (military service). Enlistment is 'accepting and enrolling individuals when they volunteer to join an armed force or group', while recognizing that 'the child's consent is … not a valid defence'.[217] Enlistment also implies 'a nexus between the act of the accused and the child joining the armed force or group', 'knowledge on the part of the accused that the child is under the age of 15', and knowledge that the child 'may be trained for combat'.[218]

C38.P282 Under paragraph 38(3), states may only recruit children over 15 by legal conscription or voluntary enlistment. Abducting, coercing, or threatening such persons to serve (whether in armed forces or armed groups) would run afoul of other Convention protections.[219] Under no circumstances can states justify abducting children to serve in their armed forces. Where a threat of or actual abduction is perpetrated by non-state armed forces, these protections arguably oblige states to take preventative, deterrent, or punitive steps in this regard (despite the limited application of article 38(3) to state armed forces). Insofar as OPAC precludes various types of conscription of persons under 18, the only way in which persons under the age of 18 may lawfully join the armed forces of States Parties is through regulated enlistment of volunteers.

C38.P283 In General Comment 6, the CRC Committee noted states' obligation to refrain from returning a child to another state where there is a 'real risk of underage recruitment'.[220] The same *non-refoulement* obligation exists where there is a real risk of direct or indirect participation in hostilities. Here, through the General Comment, the Committee not only underscores the inclusion of indirect participation in the prohibition, but also embosses the article 38 obligation with extraterritorial effect.

C38.S42 *2. The Obligation to Refrain from Recruiting Persons under Fifteen into a State's Armed Forces*

C38.P284 During the 1986 session, the UK representative proposed replacing 'recruiting' with 'conscripting' or alternatively, to add 'compulsory' before 'recruiting'.[221] Both proposals were rejected. On this basis, an interpretation of paragraph 38(3) which limits 'recruiting' to conscription or compulsory recruitment may be excluded. By implication, as alluded to earlier, the prohibition on recruitment therefore extends to voluntary recruitment.[222]

C38.P285 The CRC Committee has expressed the view that:

C38.P286 States parties should not recruit into their armed forces persons below the age of 18. The same rule should apply as a matter of principle to voluntary enlistment. Reality shows that emergency situations often pave the way for the instrumentalization of children and lead to great risks for them.

C38.N228

[217] ibid para 735, citing *Lubanga* Decision on the Confirmation of Charges (n 211).

[218] *Prosecutor v Fofana and Kondewa* (Appeals Judgment), Case No SCSL-04-14-A, SCSL Appeals Chamber (28 May 2008) paras 141, 144 ('CDF Appeals Judgment')]('[i]f the child 'is allowed to voluntarily join … his or her consent is not a valid defence') at para 140.

[219] See eg: Convention arts 19 (prevention against all forms of abuse); 32 (protection from economic exploitation and performance of hazardous work); 35 (abduction, sale, trafficking of children); and 37(a) (prohibition of torture and cruel/inhuman/degrading treatment). The Worst Forms of Child Labour Convention (n 12) also classes compulsory and forcible recruitment of persons under the age of eighteen as prohibited child labour.

[220] See CRC GC 6 (n 159) para 28.

[221] *Legislative History* (n 4) 782.

[222] This view was supported during drafting by the comments of Finland and Austria; see ibid para 133 and van Bueren (n 105) 336. However this view was not universal. eg Algeria stated that the setting of a minimum age for recruitment should not exclude states from accepting children wishing to volunteer, especially for wars of liberation: *Legislative History* (n 4) 783.

For this reason voluntary enlistment in the armed forces should never be used as an excuse to allow for the possible direct or indirect participation in hostilities of persons below the age of 18.[223]

C38.P287 This comment indicates that, as an absolute minimum, the Committee opposes the voluntary recruitment of children under 15 in any circumstances and, in fact, advocates a 'straight 18' position. In its concluding observations on Eritrea, for example, the Committee welcomed 'that the minimum age for recruitment is set to 18;'[224] and for Cameroon, it recommended the age of 18, even when parental consent exists for younger enlistment.[225] Regarding Austria, the Committee stated:

C38.P288 While noting the State party's indication … that under 18-year old recruits may not participate in any hostilities and in UN peacekeeping operations, the Committee remains concerned that … the National Defence Act sets the minimum age of voluntary recruitment at 17 years. The Committee also notes with concern that students from age 14 are trained on the use of small arms at the Vienna military academy ('Militärrealgymnasium'), albeit on an extracurricular basis.[226]

C38.P289 The spirit of article 38 may aim to prohibit the recruitment of children under 18, and this is clearly what the Committee desires,[227] *but the text of article 38 is not so generous*. Consensus on the age of 15 in this regard emerged as a simple lowest common denominator and the priority principle helped allay further concerns. The Optional Protocol addresses this situation textually for compulsory recruitment, but not for voluntary recruitment.

C38.P290 When it comes to young people joining fighting forces, the entire concept of 'voluntariness' remains controversial. Some observers contend that youth volunteerism is real in some instances, notably for children between the ages of 15 and 18, but international law and policy-makers favour the position that volunteerism is impossible and chimerical in the case of all persons under 16 but also under 18. To be clear, the ostensible voluntary enlistment of many children is often not in reality an expression of free choice, but is driven by extrinsic pressures, which may be cultural, social, economic, or political.[228] Children may have little choice but to volunteer in order to provide money, food, or clothing for themselves or their family. That said, instead of viewing their reactions as passive and deluded, ethnographic studies suggest that youth may be adept social navigators and—like adults—join fighting forces to make the best of a bad situation, or to acquire training, resources, and seize opportunities. [229] Children—again like adults—may also feel obliged to become soldiers in order to protect themselves or their communities. Others come forward out of a sense of martial pride or to actuate a concrete political agenda; some join armed groups to topple cruel autocrats and oust abusive state officials. Some children lie about their age and travel great distances to participate in liberation movements, while others are motivated by revenge or a sense of justice. Assertions that children categorically lack the maturity or capacity to volunteer mesh poorly with Convention's embrace of juvenile rights and evolving capacities. Children have a right under Convention article 12

C38.N223 [223] CRC/C/50 (n 6) para 251.

C38.N224 [224] CO Eritrea, CRC/C/ERI/CO/3 para 70; CO Bhutan, CRC/C/15/add.157 paras 54–55. (recommending that the minimum age for recruitment be raised to eighteen).

C38.N225 [225] CO Cameroon, CRC/C/15/Add.164 para 24(c).

C38.N226 [226] CO Austria, CRC/C/AUT/CO/3-4 para 56.

C38.N227 [227] On this note, Ang concludes that the CRC Committee's statements are 'examples of [its] progressive functioning … as it actually disapproves of a standard literally provided for in the [CRC] itself, a standard [that] resulted from … fierce discussion among drafting delegates'. Ang (n 44).

C38.N228 [228] Machel Report (n 7) para 38. [229] Drumbl (n 23) 12–13.

to express their views in all matters relating to them. This is complemented by rights to freedom of expression and association under articles 13 and 15, respectively.

C38.P291 In an *amicus curiae* brief submitted in the *Lubanga* case, Special Representative Coomaraswamy contended that '[t]he line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial'.[230] Although this approach is economical and aims for maximal protection, treating enlistment as interchangeable with forcible conscription does some injustice to forcibly conscripted child soldiers, particularly abductees. Their situation is simply not the same as those who exercised some initiative in their enlistment. Abductees tend to be younger than those who present themselves for service and may be treated more harshly than volunteers.[231] A Nepalese study found that children forcibly conscripted or coerced into service were much more likely than those who volunteered to experience psychosocial problems following their return to the community.[232] Other reports also indicate that '[i]t would appear that [children] who enlisted voluntarily are less prone to long-term post traumatic stress disorder' than children who were 'brutally abducted'.[233] Conversely, volunteers may experience different obstacles and impediments upon returning home. Much depends on the nature of the armed faction and the perceived legitimacy of its cause. Volunteers fighting for a winning side may be seen as heroes; those fighting for a losing side may be vilified. In Timor-Leste, for example, 'children who fought on the side of independence were considered heroes [while] [t]hose who fought on the opposing side were stigmatized, and some were later targeted'.[234]

C38.S43 ### *3. The Obligation to 'Endeavour to Give Priority to the Oldest'*

C38.P292 Fiona Ang notes that no delegate (nor the ICRC) resisted the inclusion of 'endeavour'.[235] Yet, what does this term actually require? Its ordinary meaning is to 'exert oneself [or] use effort'[236] to achieve a particular end. This implies that there is no obligation actually to achieve the end in question. It is about process. *Arguendo*, states are therefore not legally mandated to recruit the oldest children, but only to attempt to do so. Such endeavours, while subjective, should be genuine and reasonable. Moreover, it will be incumbent upon states to demonstrate precisely which measures they employ to recruit the oldest children.

C38.P293 While 'endeavour' may ordinarily constitute a soft obligation, the Commentaries to the Additional Protocols provide (in discussing common article 3), that the term connotes 'mak[ing] an urgent request' and that it 'points to a duty'.[237] It may, therefore, represent a stronger commitment in international humanitarian law.

C38.N236

[230] Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, *Prosecutor v Lubanga* ICC Doc ICC-01/04-01/06-1229-AnxA para 14 (18 March 2008).

[231] Alice Schmidt, 'Volunteer Child Soldiers as Reality: A Development Issue for Africa' (2007) 2 New School Economic Review 49, 63.

[232] Theresa Betancourt and others, 'Psychosocial Adjustment and Social Reintegration of Children Associated with Armed Forces and Armed Groups: The State of the Field and Future Directions' (Psychology Beyond Borders 2008) 22–23 (reporting study results).

[233] REDRESS Trust, 'Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court' (REDRESS Trust 2006) 13.

[234] UNICEF and International Center for Transitional Justice, Children and Truth Commissions (UNICEF 2010) 47.

[235] Ang (n 44).

[236] *Oxford English Dictionary* (3rd edn, OUP 2011).

[237] Pictet, cited in Ang (n 44).

C38.P294 The obligation to prioritize the oldest children applies irrespective of state involvement in hostilities. Notwithstanding its safeguards regarding the voluntary recruitment of 16 and 17 year-olds, OPAC does not include a priority principle.

C38.S44 ### *4. Individual Criminal Responsibility for Adults who Unlawfully Conscript, Enlist, or Actively Use Children under the Age of Fifteen in Hostilities*

C38.P295 Whether in international or non-international armed conflict, the conscription or enlistment of children under 15 or having them participate actively in hostilities, are war crimes to which individual criminal responsibility attaches. Prosecution of these war crimes plays a key part of the work of the SCSL and the ICC.

C38.S45 #### (a) Special Court for Sierra Leone ('SCSL')

C38.P296 The SCSL Statute proscribes '[c]onscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities'.[238] The SCSL is the first internationalized institution to convict several defendants on these specific charges, including former Liberian President Charles Taylor, while acquitting three others. In September 2012, the SCSL Appeals Chamber affirmed the Taylor convictions and the fifty-year sentence.

C38.P297 In May 2004, the SCSL Appeals Chamber issued an important decision on a preliminary motion brought by defendant Sam Hinga Norman, the National Coordinator of the CDF (a government allied militia). The Appeals Chamber ruled that individual penal responsibility for recruiting child soldiers in either international or non-international armed conflict had crystallized as customary international law prior to November 1996 (the start of the SCSL's temporal mandate).[239] This ruling was not uncontroversial. Legality concerns arose.[240] Justice Geoffrey Robertson, who dissented in the Norman case, concluded that by 1996, customary international law had not yet attached individual penal responsibility to the enlistment of volunteers under the age of 15.

C38.P298 In the *AFRC* case,[241] three former militia leaders were convicted inter alia of charges related to child soldiering. These convictions were affirmed on appeal. So, too, were final global sentences of forty-five, fifty, and fifty years respectively.

C38.P299 In the *RUF* case,[242] two accused were convicted by the SCSL Trial Chamber I of planning the use of children under the age of 15 to participate actively in hostilities. A third accused was acquitted of this specific charge. Total sentences of fifty-two, forty years,

C38.N238 [238] SCSL Statute (n 168) art 4 (entitled 'Other Serious Violations of International Humanitarian Law').

C38.N239 [239] *Prosecutor v Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) Case No SCSL-2004-14-AR72(E), SCSL Appeals Chamber (31 May 2004); see also *Prosecutor v Brima, Kamara, and Kanu*, (Appeals Judgment) Case No SCSL-04-16-A, SCSL Appeals Chamber, 22 February 2008 para 295 ('*AFRC* Appeals Judgment'); CDF Appeals Judgment (n 218) para 139 (the recruitment and use of children to participate actively in hostilities had crystallized as customary international law crimes prior to November 1996).

C38.N240 [240] See eg Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (CUP 2009) 148–51; also at 158 (noting that the SCSL majority 'gave no weight to the fact that in 1996, when reporting to the CRC Committee, even the Sierra Leonean government's legal expert referred only to the fact that, pursuant to the Geneva Convention, children may not be conscripted into the armed forces; nor to the fact that under a Sierra Leonean military forces act, recruitment was legal at any age with parental consent') (emphasis in original).

C38.N241 [241] *AFRC* Case, *Prosecutor v Brima (Alex Tamba) and ors*, Sentencing judgment, Case no SCSL-04-16-T, ICL 101 (SCSL 2007).

C38.N242 [242] *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (the RUF accused) (Trial judgment), Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009.

and twenty-five years were handed down at trial. This judgment authenticated the heavy reliance of the RUF on abducted children — in some instances, as young as (or even younger) than ten years old.[243] SCSL Trial Chamber I found that, once involved with the RUF, children were either selected for combat or not. Those selected for combat were trained in military tactics and ambushes and grouped into Small Boys Units and Small Girls Units.[244] Some children between 8 and 17 years of age were used to commit terrible atrocities.[245] Other children fulfilled missions such as cooking, courier services, domestic labour, and finding food. SCSL Trial Chamber I found that active participation in hostilities included committing crimes against civilians, engaging in arson, guarding military objectives and mines, and serving as spies and bodyguards.[246] On 26 October 2009, the SCSL Appeals Chamber largely affirmed Trial Chamber I's findings. It upheld the two child soldiering convictions, the one acquittal, and the sentences.[247] The Appeals Chamber underscored that adults are 'under a duty to act with due diligence to ensure that children under the age of 15 are not recruited or used in combat'.[248]

C38.P300 In addition, SCSL Statute article 2(g) proscribes, as crimes against humanity, rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence. SCSL Statute Article 2(i) proscribes 'other inhumane acts', which the *AFRC* appeals judgment interpreted to include forced marriage perpetrated against girls.[249] This crime is not limited to forced marriage with minors, though minors are frequently the victims of such arrangements.[250] The *AFRC* appeals judgment conceptually differentiated forced marriage from sexual slavery and the other crimes listed in article 2(g) of the SCSL Statute, but declined to enter new convictions on this basis. Convictions for forced marriage (as 'other inhumane acts') and for sexual slavery (under article 2(g)) were rendered at trial in the *RUF* case and subsequently affirmed on appeal. SCSL Statute article 5(a), which covers crimes under Sierra Leonean law, provides jurisdiction over specific offenses committed against girls.[251]

C38.S46 **(b) International Criminal Court**

C38.P301 As a threshold matter, the ICC 'shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.[252] Rome Statute article 8(2)(b)(xxvi) proscribes, during international

C38.N245

[243] ibid paras 1616–17, 1625–32, 1695, 1708, 1711, 1714.

[244] ibid paras 1619–22, 1632, 1637.

[245] ibid para 1649 ('[f]ighters were armed with sticks, knives, cutlasses, guns and RPGs, with which they would kill children, elderly men and women, and teenagers. They also engaged in beating people and raping children, and those children who were permitted to live were forced to join the movement').

[246] ibid paras 1712–31. Domestic chores, farm work, and conducting food finding missions were found not to constitute active participation in hostilities: ibid para 1739, 1743.

[247] *Prosecutor v Sesay, Kallon, and Gbao*, (Appeals Judgment), Case No. SCSL-04-15-A, SCSL Appeals Chamber (26 October 2009) ('RUF Appeals Judgment').

[248] ibid para 923.

[249] Forced marriage is defined as 'a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim': see *AFRC* Appeals Judgment (n 239) para 196.

[250] ibid para 200.

[251] Proscribing: Offences relating to the abuse of girls under the *Prevention of Cruelty to Children Act* 1926 (Cap 31): abusing a girl under 13 years of age, contrary to s 6; abusing a girl between 13 and 14 years of age, contrary to s 7; abduction of a girl for immoral purposes, contrary to s 12.

[252] Rome Statute (n 11) art 8(1).

armed conflict, '[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities'. Article 8(2)(e)(vii) proscribes comparable conduct when undertaken during armed conflict not of an international nature.[253]

C38.P302 The elements of the child soldiering crime under Rome Statute article 8(2)(b)(xxvi) are as follows:

C38.P303 1) The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.

C38.P304 2) Such person or persons were under the age of 15 years.

C38.P305 3) The perpetrator knew or should have known that such person or persons were under the age of 15 years.

C38.P306 4) The conduct took place in the context of and was associated with an international armed conflict.

C38.P307 5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[254]

C38.P308 Elements of the crime under article 8(2)(e)(vii) read identically, save for reference to non-international armed conflict. In both cases, a negligence standard of 'failing to exercise due diligence' applies.[255]

C38.P309 The architecture of the Rome Statute presents a disturbing gap. No sanction arises for commanders of children aged 15 years or older serving in armed forces or groups. By virtue of article 26, moreover, the Rome Statute excludes these children from the ICC's jurisdiction even when they abduct younger children, commit atrocities, or order other children to do so.[256] Inadvertently, the ICC's statutory framework may incentivize adult soldiers (including low-level cadres) to see that heinous crimes, brutal abductions, and actual enlistments are performed by children aged 15, 16, or 17.

C38.P310 The ICC has thus far publicly indicted several individuals inter alia with the war crime of unlawful conscription, enlistment, or use of children. Indictees include LRA leader Joseph Kony (not in custody) and, in a severed proceeding, LRA Brigade Commander Dominic Ongwen (a former child soldier who is in custody); and Congolese rebel leader Bosco Ntaganda (also in custody with his trial underway as of the time of writing). On December 18, 2012, ICC Trial Chamber II acquitted another Congolese defendant, Mathieu Ngudjolo Chui, of all charges, including those relating to child soldiers. He was

C38.N253 [253] Several other Rome Statute proscriptions bear upon violence that may disproportionately, though not exclusively, harm children. In terms of war crimes, one example is intentionally attacking schools and buildings dedicated to education; the crimes against humanity of enslavement, sexual slavery, and enforced prostitution also come to mind. See Rome Statute (n 11) arts 7(1)(c), 7(1)(g), 7(1)(k), 7(2)(c), 8(2)(b)(ix), and 8(2)(e)(iv). Furthermore, Rome Statute art 6(e) includes within the definition of genocide the forcible transfer of children of one enumerated group to another enumerated group.

C38.N254 [254] Assembly of States Parties, Elements of Crimes, ICC Doc ICC-ASP/1/3 (part II-B) art 8(2)(b)(xxvi) (9 September 2002).

C38.N255 [255] *Prosecutor v Katanga and Chui* (Decision on the confirmation of charges) Case No ICC-01/04-01/07, ICC Pre-trial Chamber I (30 September 2008) para 252; see also Gerhard Werle, Principles of International Criminal Law 417 (2nd ed, TMC Asser 2009) ('those who purposely close their eyes to a child's age are also acting intentionally—for example, by failing to make inquiries about the child's age even though the child could, by his or her appearance, be younger than 15') (citation omitted).

C38.N256 [256] cf Amnesty International (n164) 15 (noting that 'there may be examples of young commanders of units who committed mass atrocities, including murder and rapes, who were clearly willing and acted without coercion, and who may have forced other children to commit such acts').

released from custody on December 21, 2012. The Trial Chamber found that child soldiering was a widespread phenomenon, but that the evidence failed to establish a nexus between the accused and the child soldiers. On February 15, 2015, a majority of the Appeals Chamber affirmed his acquittal. In March 2014, Germain Katanga was acquitted of child soldiering charges, owing to concerns about witness reliability, uncertainty regarding age, and a lack of a nexus between the defendant and the illicit recruitment.[257]

C38.P311 On 14 March 2012, ICC Trial Chamber I convicted Thomas Lubanga Dyilo, another Congolese rebel leader, as co-perpetrator of the war crimes of conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities, from early September 2002 to 13 August 2003, in a non-international conflict in the Ituri region of the Democratic Republic of the Congo. He was only charged with child soldiering crimes. On 10 July 2012, ICC Trial Chamber I sentenced Lubanga—the ICC's first convict—to fourteen years' incarceration. In the majority sentencing judgment, article 38 was cited in support of how various international treaties recognize '[t]he vulnerability of children', meaning 'that they need to be afforded particular protection that does not apply to the general population'.[258] As discussed earlier, the Appeals Chamber has affirmed Lubanga's conviction and sentence.

C38.P312 Paragraphs 38(2) and (3) were referenced in the *Lubanga* trial judgment and cited as an example of how Rome Statute article 8(2)(b)(xxvi) fell within the established framework of international law.[259] They also were cited to support the proposition that the requirement not to recruit any person under the age of 15 years, and to ensure that they not take a direct part in hostilities, applies to all armed conflicts.[260] In her dissent, Judge Odio Benito pointed to article 38 as an example of a source of law that 'seek[s] to protect children under the age of 15 from the multiple and different risks which they are subject to in the context of any armed conflict, such as ill treatment, sexual violence and forced marriages'.[261]

C38.P313 The Rome Statute also permits reparations to victims, including child soldiers, and this was interpreted in the *Lubanga* case as well in a decision regarding reparations.[262] Although the Trial Chamber *Lubanga* reparations decision (7 August 2012) made reference to the Cape Town and Paris Principles, and the UN Basic Principles on the right to a Remedy and Reparation, it made no reference to Convention art 38 (though it did refer to Convention arts 3, 12, 29, and 39). On 3 March 2015, the Appeals Chamber amended the Trial Chamber's order for reparations and instructed the Trust Fund for Victims to present a draft implementation plan for collective reparations.[263]

C38.P314 In order to achieve maximal protection, *lex ferenda* is slowly collapsing the distinctions between combat and other forms of involvement with armed forces and groups to ensure that the protections flowing from designation as a child associated with armed forces or groups covers as many children as possible. Unsettlingly, however, when sex slaves and forced conjugal partners are determined to fall within this protective regime, for example

C38.N269

[257] Katanga was convicted of other charges and sentenced to twelve years' imprisonment. In November 2015, a panel of three judges reduced his sentence such that it is to be completed in January 2016.

[258] *Prosecutor v Thomas Lubanga Dyilo* (Sentencing Judgment) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06 (10 July 2012) para 37.

[259] *Lubanga* Trial Judgment (n 209). [260] ibid. [261] ibid.

[262] *Prosecutor v Lubanga* (Decision establishing the principles and procedures to be applied to reparations) Case No ICC-01/04-01/06 (7 August 2012).

[263] No reference was made therein to the CRC.

as being actively used in hostilities, this creates the perverse risk of normalizing their military use and moreover, opening up the possibility that such girls might be deemed combatants and therefore targets. By protecting children from intra-group violence, paradoxically, they may become exposed to inter-group targeting.

C38.P315 National jurisdictions also have criminalized the unlawful conscription, enlistment, or use of children in hostilities, in some cases under the age of 15 and in other cases under the age of 18. The CRC Committee has repeatedly encouraged the prosecution of persons who use children as soldiers, sex slaves, or otherwise unlawfully recruit them.[264] The Security Council has also encouraged this approach.[265]

C38.S47 ## D. Paragraph 4: The Obligation to Take all Feasible Measures to Ensure Protection and Care of Children Affected by Armed Conflict

C38.P316 *4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.*

C38.S48 ### *1. Overview*

C38.P317 Like paragraph 38(1), paragraph 38(4) recognizes and affirms states' international humanitarian obligations, although it focuses on the rules regarding the protection of civilians in armed conflicts as they apply to children. The CRC Committee considers conduct infringing article 38(4) relevant not only to that provision but also to other substantive rights as protected by the Convention regardless of the existence of an armed conflict.

C38.S49 ### *2. 'In Accordance with Their Obligations under International Humanitarian Law to Protect the Civilian Population in Armed Conflicts'*

C38.P318 The various dimensions of this obligation are similar to those of paragraph 38(1). The reference to 'their obligations' here clarifies that it is only the rules of international humanitarian law by which a state is bound that are relevant when assessing that state's obligations to child civilians. This phrase was not included in some of the earlier drafts;[266] the *travaux préparatoires* do not contain any discussion of its adoption. It is reasonable to assume, however, that it was intended to have the same effect as the words 'to them' in paragraph 38(1) and to emphasize that states are only bound by customary international law and the provisions of treaties to which they are a party.

C38.P319 Key rules under international humanitarian law designed for the protection of civilians are found in GCIV, Part IV of AP1 (arts 48–79), Part IV of AP2 (arts 13–18), and common article 3 to the Geneva Conventions. To reiterate, child civilians are entitled to the same general protections as all civilians and also to the child-specific protections.

C38.N264 [264] See eg: CO Indonesia, CRC/C/15/Add.223, 2004 para 71; CO Nepal, CRC/C/15/Add.261 paras 12, 82; CO Colombia, CRC/C/COL/Co/3 paras 51, 81(g).

C38.N265 [265] See generally S/RES/2068 (2012) para 3(a) (calling upon states 'to bring to justice those responsible for [violations and abuses against children in situations of armed conflict] through national judicial systems, and where applicable, international justice mechanisms').

C38.N266 [266] eg the 1986 Polish proposal (UN Doc A/C.3/40/3) referred only to the 'relevant rules of international humanitarian law': see *Legislative History* (n 4) 782.

C38.S50 ### *3. 'States Parties Shall Take All Feasible Measures'*

C38.P320 During the drafting of paragraph 38(4), discord emerged within the Working Group in relation to states' obligation to protect child civilians. As with paragraph 38(2), the question arose whether states should be obliged to take all *feasible* or all *necessary* measures. Consensus could not be achieved at the second reading. The US delegate expressed a strong preference for the qualifier 'feasible'.[267] In contrast, some twenty countries and the ICRC advocated for a more demanding standard.[268] As a compromise, the United Kingdom suggested the word 'practicable', while the Australian delegate recommended 'possible'.[269] The subsequent failure to reach consensus prompted the Chairman to opt for 'all feasible measures', which ultimately appeared in the final text, on the seemingly expedient basis that no Working Group participants had objected thereto.[270]

C38.P321 The result is that paragraph 38(4) is somewhat paradoxical. On the one hand, states must take all feasible measures to ensure the protection of children in accordance with their obligations under international humanitarian law. On the other, some of these international humanitarian obligations may already be binding and therefore transcend being satisfactorily discharged only through feasible measures. It not surprising, therefore, that paragraph 38(4) has drawn criticism for risking the dilution of pre-existing responsibilities regarding child civilians where, arguably, there ought to be an even stronger good faith obligation to comply.[271] In this vein, API article 51(2) and AP2 article 13(2) state '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack'.[272] Similarly, API article 57(1) states, '[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects'. These obligations are absolute.

C38.P322 How, then is the paragraph 38(4) obligation to 'take feasible measures' to be reconciled with pre-existing and concurrent absolute obligations under international humanitarian law? One resolution would be to envisage the obligation to take all feasible measures as requiring states to take measures *in addition* to their extant obligations under international humanitarian law, if such measures secure the care and protection of children. In a teleological sense, this admittedly purposive interpretation guards against the prospect that the Convention softens states' general obligations in a fragmentary race to the bottom.

C38.P323 There is evidence in the *travaux préparatoires* to support this purposive interpretation. Commentators have criticized the drafters' failure to include a rule in article 38 specifically prohibiting attacks on civilians, therefore including children.[273] During drafting, the US representative suggested the inclusion of the phrase: 'and *shall* refrain from making children the object of armed attack'.[274] Although this was not adopted, the *travaux préparatoires* indicate that there was still a general understanding that the provision 'includes a prohibition on making civilian children the object of armed attack'.[275] This suggests that the drafters considered paragraph 38(4) to impose an absolute prohibition, similar to that under GCIV and the Additional Protocols, on subjecting civilians—including children—to military attack. Despite the eventual inclusion of an obligation

C38.N269

[267] ibid 797. [268] ibid 797. [269] ibid 797. [270] ibid 797.

[271] See: comments by Rädda Barnen and the ICRC with respect to the first draft: *Legislative History* (n 4) 786–87; and 784–86, respectively. See also van Bueren (n 105) 342; Ang (n 44) para 110.

[272] AP1 art 51 has been described as explicitly confirming the customary norm that 'innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities'. See Sandoz, Swinarski. and Zimmerman (n 26) para 1923.

[273] van Bueren (n 105) 341–42. [274] ibid. [275] *Legislative History* (n 4) 783.

only to take feasible measures, the *travaux préparatoires* intimate that paragraph 38(4) was anticipated to be sufficiently elastic to contemplate higher standards.

C38.P324 In this vein, the CRC Committee has routinely invoked more vigorous language than 'feasible' when discussing the requirements of article 38(4). For example, it has urged states to 'make every effort to ensure' or 'continue taking effective measures' or 'at all times ensure respect for'.[276]

C38.S51 ### *4. 'To Ensure Protection and Care of Children Who Are Affected by an Armed Conflict'*

C38.P325 Paragraph 38(4) extends the obligation for states to take all feasible measures to ensure the 'protection and care of children affected by an armed conflict'. The failure to refer specifically to civilian children as beneficiaries of this obligation raises a question as to whether all children, including child combatants, are entitled to these protections. Given that paragraph 38(4) creates a specific nexus between a state's obligations to ensure protection and care for children and its obligations under international humanitarian law to protect the civilian population in armed conflicts, however, it is difficult to argue that paragraph 38(4) was intended to benefit child combatants.

C38.P326 To be clear, paragraph 38(1) covers child combatants, but in some respects paragraph 38(4) would have been more effective in affirming the principle of special protection if it had not included the qualifier to international humanitarian law as it relates to the protection of the civilian population. A child civilian needs only to establish that he or she is affected by armed conflict to benefit from paragraph 38(4). The *travaux préparatoires* and observations of the CRC Committee offer no guidance on when a child will be 'affected' by armed conflict. Nevertheless, this term could be broadly construed to include any impact felt by the child, including loss of life, injury, illness, malnutrition, disability, torture, abuse, imprisonment, conscription, family separation, emotional trauma, displacement, family impoverishment, education interruption, social disruption, and distortion of values.[277] That said, many children suffer in situations independent of armed conflict and lack adequate healthcare or education, even in peaceful regions; and furthermore, ethnographic accounts underscore the painful reality that armed conflict may provide economic, political, social, and training opportunities for both child combatants and child civilians.[278] It is also important to recognize children's resilience and not treat them paternalistically as hapless victims. The Committee, for its part, has repeatedly emphasized the deleterious effect of armed conflict upon children, invoking themes of trauma and long-term harm.[279]

C38.P327 Gender is also significant in determining the impact of armed conflict. Machel observes that:

C38.P328 > In armed conflict, girls and women are threatened continually by rape, mutiliation, violence, sexual exploitation, and abuse. The dangers lurk in all settings whether at home, during flight, or in camps for displaced persons.[280]

C38.N276 [276] CO Ethiopia, CRC/C/15/Add.144 para 69; CO Peru, CRC/C/15/Add.120 para 18; CO Uzbekistan, CRC/C/15/Add.167 para 62(a).

C38.N277 [277] The literature on the effects of armed conflict on children is vast. See eg Machel Report (n 7).

C38.N278 [278] Krijn Peters and Paul Richards, '"Why We Fight": Voices of Youth Combatants in Sierra Leone' (1998) 68 Africa 183, 187; Drumbl (n 23) 75–79.

C38.N279 [279] See examples at Ang (n 44) para 108.

C38.N280 [280] Graça Machel, *The Impact of War on Children: A Review of Progress Since the 1996 United Nations Report on the Impact of Armed Conflict on Children* (Hurst 2001) 54.

C38.P329 Furthermore, displacement will also have an impact on children, particularly where they are separated from parents or family. In many armed conflicts, 'mass displacement is not merely a by-product of the conflict, it is one of the main objectives of the warring parties'.[281] Consequences of displacement include scarcity of food and shelter, health challenges, and potential for re-recruitment into armed forces or armed groups.

C38.P330 As previously noted, states' obligations under international humanitarian law arise under each of the Geneva Conventions and Additional Protocols. The remaining parts of this chapter thematically categorize and analyse pivotal elements of such obligations. Since paragraph 38(1) covers child civilians, many of the general and specific protections contemplated by paragraph 38(4) are detailed elsewhere in this commentary. Accordingly, this discussion centres on aspects that have not been detailed elsewhere. To acquire the full sense of how article 38 protects child civilians, then, the discussion of paragraphs 38(1) and 38(4) should be conjoined.

C38.S52 ### *5. The Rules of International Humanitarian Law Relevant to the Protection of Child Civilians Affected by Armed Conflicts*

C38.S53 #### (a) The Principle of Special Protection

C38.P331 GCIV contains numerous provisions specifically relating to children, while AP1 and AP2 require special protection for them. Details of these references and protections are extensively discussed above.

C38.S54 #### (b) Safety Zones, Corridors of Peace, and Days of Tranquillity

C38.P332 International humanitarian law contemplates the creation of different zones for the protection of civilians. For example, GC1 article 23 permits the creation of hospital zones to protect the wounded and sick from the effects of war, while GC4 article 14 provides for hospital and safety zones for, among others, children under 15 and, for children under 7, also their mothers. GC4 article 15 encourages parties to a conflict to establish neutral zones in which to shelter wounded and sick combatants, non-combatants, and civilians (including children). These differ from hospital zones in that they are open to all civilians rather than just a certain category. AP1 develops the safety zone concept by allowing for non-defended localities (which is grounded in the concept of an 'open town') (art 59) and demilitarized zones (art 60). Although Hampson concludes that 'it would appear pointless to attempt to elevate the concept of safe areas for the benefit of children to a norm of international law',[282] the principle underlying safety zones has been drawn upon with respect to the provision of relief supplies[283] and adapted in negotiations to establish 'corridors of peace' and 'days of tranquillity'[284] for the benefit of children. For example, the parties to conflicts in El Salvador,[285] Lebanon, and Afghanistan each agreed to temporary ceasefires in order to allow children to be vaccinated. In Uganda, a 'corridor of peace' provided access for personnel responsible for administering vaccinations; a similar corridor

C38.N283

[281] UN High Commission for Refugees, 'The Impact of Armed Conflict on Children: The Refugee and Displaced Children Dimension, A UNHCR Report for the United Nations Study on the Impact of Armed Conflict on Children' (Preliminary Draft) (UNHCR 1996) 4.

[282] Hampson (n 87) 66. [283] GCIII art 73(1); GCIV art 59(1); see Hampson (n 87) 65.

[284] See Hampson (n 87) 64–67.

[285] In 1985 a 'beacon of hope' was created for three days in El Salvador, during which hostilities ceased and 3,000 health workers immunized nearly 250,000 children of a target population of 400,000 up to the age of three against polio, measles, diphtheria, tetanus, and whooping cough in all parts of El Salvador: see E/ICEF/1986/CRP2 (10 March 1986) para 94.

was created as part of Operation Lifeline Sudan, where the reduction in hostilities led to increased movement generally and not only movement required for vaccinations. The CRC Committee[286] and Security Council[287] have commended such initiatives (regardless of their precise status as obligations under international humanitarian law) and urged that they be explored and developed by states as a means of providing child civilians with protection and care.

C38.S55 **(c) Evacuation**

C38.P333 According to Machel, 'parents living in zones of armed conflict can become so concerned for the safety of their children that they decide to evacuate them, sending them to friends or relatives or having them join large scale programs'.[288] She adds that:

C38.P334 To parents evacuation may appear at the time to be the best solution but this is frequently not the case. In Bosnia and Herzegovina for example evacuations were often hastily organised with little documentation. Evacuation also poses a long term risk to children including the trauma of separation from the family and the increased danger of trafficking or of illegal adoption.[289]

C38.P335 Following World War II, moreover, many evacuated children experienced considerable tragedy, including an inability to trace their parents and families.[290] Studies indicate that 'children separated from their families during times of war are placed at increased psychological risk'.[291] That said, at times children suffer trauma, violence, coerced conscription, and abuse at the hands of their own family members. In such instances, evacuation may constitute a form of emancipation. Hence, evacuation must reflect a child's best interests to the greatest extent possible.

C38.P336 GCIV article 17 allows for the removal from besieged or encircled areas of 'children and maternity cases'. There is no upper age limit for evacuation but Pictet had suggested that '15 . . . seems reasonable and would appear to merit adoption in the circumstances'.[292] AP1 article 78 sets a higher bar. It states that children may only be evacuated temporarily for compelling reasons relating to the health, medical treatment, or the child's safety. Parents or guardians must provide consent to evacuation and the child must be educated in accordance with the religious and moral convictions of his or her parents to the greatest extent possible. A state may only evacuate its own nationals and an Occupying Power may only evacuate children from occupied territories for reasons of health.[293] AP1 article 78(3) sets out detailed requirements designed to facilitate children's return to their

C38.N286 [286] CRC/C/10 (n 5) para 73.

C38.N287 [287] The Security Council has called 'upon parties to armed conflicts to undertake feasible measures during armed conflicts to minimize the harm suffered by children such as days of tranquility to allow the delivery of basic necessary services' (UN Doc S/RES/1261 (1999) para 8]). The Declaration from the World Summit on Children also asked 'that periods of tranquility and special relief corridors be observed for the benefit of children where war and violence are still taking place'; see UNICEF, *First Call for Children: World Declaration and Plan of Action from the World Summit for Children* (UNICEF 1990) para 20(8).

C38.N288 [288] Machel Report (n 7) para 38.

C38.N289 [289] ibid. See also Everett Ressler, 'Considerations in the Evacuation of Children from the Former Yugoslavia' (1993) 1 International Journal of Children's Rights 331 (identifying three lessons to apply to future evacuations: the identification of the underlying problems that caused families to evacuate children; the preservation of family unity in evacuation; and careful scrutiny to ensure the best interests of the child will be secured by evacuation).

C38.N290 [290] Kuper (n 120) 84.

C38.N291 [291] Everett Ressler, Neil Boothby, and Daniel Steinbock, *Unaccompanied Children: Care and Protection in Wars Natural Disasters and Refugee Movements* (OUP 1988) 154.

C38.N292 [292] Pictet Commentary (n 26) 138–39.

C38.N293 [293] GCIV art 49 allows for the evacuation of family groups from an occupied territory for reasons of safety.

families and countries of origin. In contrast, article 9 of the Convention, which deals with children's separation from their parents, stresses that such separation must be in the child's best interests. Article 12 adds that a child must be given the opportunity to express his or her views, which are to be weighted according to age and maturity. As Ressler has observed, this is significant in light of the fact that:

C38.P337 experience substantiates that sometimes the evacuation of children has been motivated by self-serving personal, political, military, organisational, financial or ideological purposes—rescuers seeking popularity, politicians seeking support, organisations seeking visibility or funds, combatants pursuing military objectives, parents seeking children to adopt or use.[294]

C38.P338 The state is obliged to guard against such motivations when deciding whether to evacuate and must base its decision only on the child's best interests.

C38.P339 Machel also notes that:

C38.P340 if evacuation is essential whole families should move together and if this is not possible children should at least move with their primary care givers and siblings. Great care must be taken to ensure that evacuation is properly documented and that arrangements are made for the effective reception and care for children and for maintaining contact with their family members.[295]

C38.P341 This last point is specifically required under article 10 of the Convention.

C38.S56 **(d) Right to Care and Aid**

C38.P342 AP1 Article 77(1) states that children affected by international armed conflict shall be provided with care and aid. Article 78(1) allows for their temporary evacuation, where required to secure health and medical treatment. AP1 also requires that children and maternity cases be prioritized in the distribution of relief consignments (art 70(1)). Kuper notes that such consignments can include a wide range of essential supplies, including clothing, bedding, and means of shelter.[296] With respect to food, article 54(1) prohibits the use of intentional civilian starvation as a method of warfare.

C38.P343 In article 23, GCIV provides that states shall—subject to some exceptions—allow for the free passage of 'all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians' and all 'consignments of essential foodstuffs, clothing and tonics intended for children under fifteen and maternity cases'.[297] Article 50 also requires occupying powers to ensure the proper functioning of institutions devoted to the care of children in occupied territories. Furthermore, article 81 requires states to provide for the dependents of internees where they are without adequate means of support or unable to earn a living. Additionally, nursing mothers and children under 15 interned for security reasons shall be given additional food in proportion to their physiological needs.[298] Finally, article 38 requires children under 15 and mothers of children under 7 to be granted any preferential treatment accorded to the same categories of nationals of the state concerned. Article 50 further provides that an occupying power shall not hinder the continued application of any preferential treatment adopted prior to occupation. Plattner explains that preferential treatment can take the form of 'additional food ration cards, facilities for medical and hospital care, social assistance, [and] protection against the effects of war'.[299] The CRC Committee has referred to these obligations

C38.N295

[294] Ressler (n 289) 345. [295] Machel Report (n 7) para 76. [296] Kuper (n 120) 87.
[297] Pictet has defined 'essential foodstuffs' as 'basic foodstuffs necessary to the health and normal physical and mental development of the persons for whom they are intended': Pictet Commentary (n 26) 179.
[298] GCIV art 89. [299] Plattner (n 105) 8.

in terms of human rights, specifically, the child's right to food and water (Convention article 6).[300] With respect to non-international armed conflicts, AP2 article 4(3) sets out a general obligation to provide children with care and aid.[301]

C38.S57 **(e) Children and their Families**

C38.P344 Numerous commentators have underscored the importance of family unity for children affected by armed conflict.[302] GCIV article 26 requires that parties to a conflict 'facilitate enquiries between dispersed family members with the object of their resuming contact'. Article 74 of API proceeds more emphatically ('shall facilitate in every possible way the reunion of families dispersed as a result of armed conflict'). Other provisions that pertain to family unity are GCIV articles 25[303] and 82,[304] and AP1 articles 75(5),[305] 76(2),[306] and 77(4).[307]

C38.P345 Notwithstanding these rules, the CRC Committee has addressed displaced children, and related situations within the context of Convention articles 10 (family reunification) and 22 (asylum-seeking and refugee children).[308]

C38.S58 **(f) Unaccompanied Children**

C38.P346 Unaccompanied children are those separated from both parents and not in the care of another adult who by law or custom has taken responsibility for them.[309] In addition to measures aimed at facilitating reunification, GCIV article 24 expressly requires states to take the necessary measures to ensure that children under 15 are not left to their own resources so as to facilitate their exercise of religion, and to ensure their education.[310] Provision is made for such children to be received by a neutral country and children under 12 must be identified by identity discs. Finally, GCIV article 50 requires occupying powers to arrange for the maintenance and education of children orphaned or separated from their parents and forbids them from changing the family or personal status of those children.

C38.S59 **(g) Education**

C38.P347 During armed conflict, schools may be targeted, expenditure on education reduced, and attendance at educational institutions imperilled.[311] In addition to the requirements

C38.N300 [300] CO Sudan, CRC/C/15/Add.190 para 59.

C38.N301 [301] Sandoz, Swinarski, and Zimmerman (n 26) 1377–78 paras 4544–51.

C38.N302 [302] See eg: Ressler, Boothby, and Steinbock (n 291) 134; UN High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (UNHCR 1994) ('UNHCR Guidelines') 23, 43; Kuper (n 120) 87.

C38.N303 [303] Grants to persons either in the territory of a party to a conflict or in occupied territory the right to give to and receive news from family members.

C38.N304 [304] Listed earlier in section II. A.5.(b)(ii) of this chapter. The Geneva Conventions establish a system which allow for a Central Tracing Agency to provide information to the parents of children who are in the power of a party to a conflict and vice versa. See GCIV arts 136–39.

C38.N305 [305] Requires inter alia that 'where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units'.

C38.N306 [306] Providing that pregnant women and those with dependent children under fifteen who are arrested, detained, or interned for reasons connected with the armed conflict must be considered with 'the utmost priority'.

C38.N307 [307] Listed earlier in section II.A.6.(b) of this chapter.

C38.N308 [308] CRC Committee, 'General Comment No 11: Indigenous Children and Their Rights Under the Convention (2009) CRC/C/GC/11 para 64; CO Ethiopia, CRC/C/15/Add.144 paras 42–43; CO Democratic Republic of the Congo, CRC/C/15Add 153 paras 62–63.

C38.N309 [309] UNHCR Guidelines (n 302); see also chapter 10 of this Commentary.

C38.N310 [310] The commentary on art 24 indicates that fifteen was determined to be the appropriate age limit as it was considered that, upon reaching fifteen, the development of a child's faculties no longer required special measures to such an extent: Pictet Commentary (n 26) 347.

C38.N311 [311] See Machel Report (n 4) paras 184-203.

noted above of GCIV article 24, article 50 further provides that occupying powers must facilitate the functioning of all educational institutions attended by children. Article 94 also requires a detaining power to ensure the education of interned children and young people. With respect to non-international armed conflict, article 4(3)(a) of Additional Protocol II, discussed earlier, addresses education.

C38.P348 The CRC Committee tends to refer to any lack of education resulting from armed conflict not in the language of international humanitarian law[312] (or even the language of article 38(4)), but as a violation of Convention article 28[313] and as fulfilment of Convention article 29(1).[314] That said, the Committee has connected a child's right to an education in times of armed conflict to GCIV and both Additional Protocols.[315]

C38.S60 **(h) Arrested, Detained, or Interned Children**

C38.P349 International humanitarian law permits parties to an international armed conflict to take measures to ensure their own security. These extend to internment, including of children, subject to certain provisions of GCIV,[316] AP1,[317] or AP2.[318] Criminal prosecution also is possible, depending on the conduct in question and whether a detained child is a combatant or civilian.

C38.S61 **(i) Other Feasible Measures: Looking Beyond Settled Rules**

C38.P350 The preceding discussion outlines states' international humanitarian obligations with respect to civilian children affected by armed conflict. If a more purposive understanding of the requirement to take 'all feasible measures to ensure the care and protection of children affected by armed conflict' were adopted, however, what other matters could be addressed?

C38.P351 These matters include the reintegration of children affected by armed conflict, consolidating children's active involvement in post-conflict peace-building and public life, and ending impunity for crimes against them. The CRC Committee has noted its concerns regarding these issues.[319] Of great interest is the interplay between the Committee's expansive approach to the definition of armed conflict and its emphasis on criminal prosecutions for adults who commit war crimes against children. The synergy between these two positions arguably 'may … be expanding a State's obligation to prosecute'.[320] The Committee, to be clear, calls for prosecution not only for adults who commit unlawful recruitment or use of children in armed conflict, but also inter alia for extrajudicial killings of children, their sexual exploitation and ill-treatment, and planting landmines.[321]

C38.P352 In line with the ethos of the Convention, gerontocratic pressures upon state and society could be minimized in favour of a child-rights approach. Treating children as passive

C38.N319

[312] CO Nepal, CRC/C/15/Add.261 para 10.
[313] CO Azerbaijan, CRC/C/15/Add.77 para 25.
[314] CRC Committee, 'General Comment No 1: The Aims of Education' (2001) CRC/GC/2001/1 para 16.
[315] CRC Committee, 'Report of the Forty-Ninth Session (2008) CRC/C/49/3 95 para 40.
[316] eg GCIV arts 76, 82, 89, 94, and 132 (discussed earlier).
[317] eg API arts 75(5), 77 (discussed earlier).
[318] eg APII art 4(3) (discussed earlier).
[319] *See* eg CO India, CRC/C/15/Add.228 paras 68–69 (recommending that India 'ensure respect for human rights and humanitarian law aimed at the protection, care and physical and psychosocial rehabilitation of children affected by armed conflict' and 'impartial and thorough investigations in cases of rights violations committed against children and the prompt prosecution of those responsible' and also the provision of 'just and adequate reparation to the victims').
[320] David Weissbrodt, J Hansen, and N Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 Harvard Human Rights Journal 115, 140.
[321] ibid.

and helpless during conflict does not augur well for ensuring that society takes them seriously in post-conflict phases. While considerable attention has been invested in dealing with children's psychological trauma, the importation of westernized and therapeutic models should not be reflexive. Excessive reliance on such methods may obscure the need for more organic and collective recovery.[322] In many instances, moreover, investments in physical and occupational therapy, responding to the impact of HIV/AIDS, and job training have been inadequately operationalized. Greater investment should also be made to promote gender equality and opportunities for girls.

C38.P353 Focus on these issues in the civilian context should not obscure their relevance for children formerly associated with armed forces or armed groups. At present, although the reintegration of such children has often proceeded successfully, two subsets of former child soldiers remain in a more precarious position: girl soldiers and children known to have committed atrocities.[323] Non-penal transitional justice initiatives may assist in the reintegration of children known to have perpetrated crimes while perhaps also assisting in the reintegration of victims, including girls, by recognizing the conduct inflicted upon them. Sexual violence against girl soldiers is committed by both boy soldiers and adult males; and at times even ordered by female commanders. Also crucial is for states to develop adequate rules of engagement in order for their national armed forces to respond with maturity to the situations which they may face when threatened by child combatants. On the other hand, these rules should in no way incentivize the recruitment of minors as some sort of cruel tactical advantage.

C38.P354 Some girl soldiers give birth while associated with armed forces or armed groups. These mothers face considerable reintegrative hurdles, as do their children.

C38.S62 III. Conclusion: The Future of Article 38

C38.P355 The dwindling attention paid by the CRC Committee to article 38 reflects the reality of its diminishing importance as an instrument to protect children from armed conflict. Article 38 has become largely redundant. This diminishing importance should not be viewed wistfully but instead joyfully. Article 38 has been supplanted by the very law that it helped inspire. It therefore plays a foundational role in contemporary law, whether conventional or customary, and has encouraged the proliferation of diverse initiatives that have contributed to the current legal and policy regime regarding children and armed conflict.

C38.P356 Responsibility for unlawful recruitment has largely passed to OPAC; activists and policymakers have advanced the non-binding Paris Principles; concerns over children and armed conflict have achieved global salience; international criminal law has jumped into the mix; and many states have addressed these issues where it matters most, that is, domestically. Assuredly, article 38 still has value, not least in relation to the obligations of states that have not yet ratified OPAC and also in offering a minimum floor accepted

C38.N322 [322] Alcinda Honwana, *Child Soldiers in Africa* (University of Pennsylvania Press 2007) 6.

C38.N323 [323] Roger Duthie and Irma Specht, 'DDR, Transitional Justice, and the Reintegration of Former Child Combatants' in Ana Cutter Patel, Pablo De Greiff and Lars Waldorf (eds), *Disarming the Past: Transitional Justice and Ex-Combatants* (Social Science Research Council 2009) 190, 192; Christopher Blattman and Jeannie Annan, 'Child combatants in northern Uganda: Reintegration myths and realities' in Robert Muggah (ed), *Security and Post-Conflict Reconstruction: Dealing with Fighters in the Aftermath of War* (Routledge 2009) 103, 115; Drumbl (n 23) 192–206.

almost universally. Moreover, article 38's call on states to abide by international humanitarian law injects the Convention with the need to continue to recognize, adjust, and analyse technological, automated, and operational evolutions in how war is waged. A need for vigilance arises to ensure that the impact of these evolutions upon children be moderated. Committee oversight also promotes transparency and conveys moral-suasive value.

C38.P357 That said, simply because there is now much more law addressing children and armed conflict—including OPAC—does not mean that in practice the law is effective. Gaps persist in the legal architecture; furthermore, the law may be motored by, and propagate, a conceptualization of children that does not match sociological realities of armed conflict nor children's aspirations thereafter. Moreover, the generic protectionism that infuses dominant conceptualizations risks skipping over children's needs as well as their profoundly different individual experiences (which in turn, turn on various characteristics, including gender). CRC article 12 provides that states 'shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child', with 'the views … being given due weight in accordance with the [child's] age and maturity'. Activists and advocates should listen to what children associated with armed forces and armed groups actually say about why and how they became enmeshed in militarized life, and what their aspirations are for their futures. It is counterproductive to wish away, ignore, or downplay children's own understandings of their experiences when these may depart from adult-driven narratives and expectations. By way of example, P W Singer, whose work on child soldiers has received considerable attention, finds the notion of voluntary recruitment 'misleading', in part because children are 'of an age at which they are not capable of making mature decisions'.[324] Helping hands may prefer to believe that child soldiers are ignorant of the absence of choice in their lives and lack the cognitive capacity for discernment. Yet this strategy, however well-intentioned, may be condescending and, furthermore, deplete the informational record, thereby leading to misguided recommendations. This strategy risks presenting youth inanimately as objects of study rather than vibrantly as sources of information. Although assertions of volunteer service made by child soldiers should not be immunized from contextual analysis, it is wrong to dismiss them summarily. Young people may understand volunteerism within the context of their lives and apply it fairly to themselves.

C38.P358 Dismissing what adolescents say owing to their putative immaturity contrasts sharply with assumptions of juvenile capacity and autonomy that animate other areas of law and policy under the Convention. For example, in many jurisdictions adolescents are presumed competent when it comes to bioethical debates regarding consent to medical treatment and access to reproductive rights and technologies. International human rights law highlights that adolescents can exercise rights of freedom of association and expression. So too, does international family law. Substantial work remains to be done on how best to consult effectively with children affected by armed conflict and to facilitate their active participation in matters affecting them.[325]

C38.P359 A need therefore arises to reconcile the protectionist agenda of article 38 with the modern sociology of childhood, which views the child as an active subject with agency

C38.N324

[324] Peter Singer, *Children at War* (University of California Press 2006) 62.

[325] John Tobin and Elliot Luke, 'Children and the Law of Armed Conflict: Looking Beyond the Protection Paradigm' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of The Law Of Armed Conflict* (Routledge 2016).

and evolving capacity and not simply as a passive, malleable object. Machel proclaimed that 'young people should be seen … as survivors and active participants in creating solutions, not just as victims or problems'.[326] This sentiment, however, tends to be overlooked in the text of article 38 and its progeny, which focus on the need to protect children and hinge upon the vulnerability of the child. This imagery also infuses international criminal law, for example in the *Lubanga* sentencing proceedings, in which the Trial Chamber was moved by one expert's testimony that depressingly posited children's inability to transcend psychologically the trauma of armed conflict.[327] Evidence from various other sources (which did not enter the trial record), however, suggests that the psychological health of former child soldiers may not be as imperilled as assumed.[328]

C38.P360 This vision of the incompetent child is difficult to reconcile with the concept of a child's evolving capacities. Article 38 therefore represents something of a contradiction when considered in the context of the Convention as a whole. The CRC Committee is yet to acknowledge this paradox or to finesse it. According to Jo Boyden, a nagging question persists, namely, 'whether conceptualising child soldiering solely in terms of adult culpability and adult infractions is adequate'.[329]

C38.P361 Another concern involves the categorism of chronological age—whether 15 or increasingly 18—in matters concerning children and armed conflict. Excessive reliance on age may indulge certain children immediately below the cut-off, in particular in the context of the Straight 18 position, while permitting the law to be terribly exigent for persons just over it. Considerable neurobiological evidence suggests that brain development continues well into the twenties, yet such persons are deemed fully responsible for their decisions. In response, perhaps another challenge for international human rights law is to see age as relevant but less categorically so, and accordingly offer graduated levels of protection. To be clear, this presents something of an existential challenge for a Convention rooted in the benchmark chronological age of 18, but engaging seriously with such challenges is essential to improving the efficacy of human rights regimes generally.

C38.P362 The true value of article 38 may lie in its historical significance. Not only was it groundbreaking for its importation of international humanitarian standards into human rights law, but it has also guided the development of international law and policy relating to children in armed conflict.

C38.S63 *Select Bibliography*

C38.P363 Amann D M, 'Securing Child Rights in Time of Conflict' (2016) 22 ILSA Journal of International & Comparative Law 483

C38.P364 Chamberlain C, *Children and the International Criminal Court* (Intersentia 2015)

C38.P365 Drumbl M, *Reimagining Child Soldiers in International Law and Policy* (OUP 2012)

C38.P366 Huynh K, D'Costa B, and Lee-Koo K, *Children and Global Conflict* (CUP 2015)

C38.N326 [326] Machel Report (n 7) para 32.

C38.N327 [327] *Prosecutor v Thomas Lubanga Dyilo* (Sentencing Judgment) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06 (10 July 2012) para 44. Trial Chamber I also directly invoked the views of the expert witness in concluding that from a 'psychological point of view children cannot give "informed" consent when joining an armed group': see *Lubanga* Trial Judgment (n 209) para 610.

C38.N328 [328] Drumbl (n 23) 53–57.

C38.N329 [329] Jo Boyden, 'Children, War and World Disorder in the 21st Century: A Review of the Theories and the Literature on Children's Contributions to Armed Violence' (Queen Elizabeth House, University of Oxford, Working Paper No 138, 2006) 8.

C38.P367 Hamilton C and El-Haj T, 'Armed Conflict: The Protection of Children under International Law' (1996) 5 International Journal of Children's Rights 1

C38.P368 Happold M, *Child Soldiers in International Law* (Manchester University Press 2005)

C38.P369 Happold M, 'The Protection of Children Against Recruitment and Participation in Hostilities: International Humanitarian Law and Human Rights Law as Complementary Legal Frameworks' (2014) 44 Collegium 99

C38.P370 Honwana A, *Child Soldiers in Africa* (University of Pennsylvania Press 2006)

C38.P371 Kuper J, *International Law Concerning Child Civilians in Armed Conflict* (Clarendon Press 1997)

C38.P372 Machel G, 'Impact of Armed Conflict on Children': Report of the expert of the Secretary-General, Ms Graça Machel, submitted pursuant to General Assembly Resolution 48/157 (26 August 1996) UN Doc A/51/306

C38.P373 Mermoune R, 'The International Legal Framework to Protect Children in Armed Conflict' (2016) 46 Revue Sciences Humaines 205

C38.P374 Quenivet N, 'Does and Should International Law Prohibit the Prosecution of Children for War Crimes?' (2017) 28 European Journal of International Law 433

C38.P375 Rosen D M, *Child Soldiers in the Western Imagination: From Patriots to Victims* (Rutgers University Press 2015)

C38.P376 Tobin J and Luke E, 'Children and the Law of Armed Conflict: Looking Beyond The Protection Paradigm' in *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016)

C38.P377 Unicef, *Machel Study 10-year Strategic Review: Conflict and Children in a Changing World* (Office of the Special Representative of the Secretary-General for Children and Armed Conflict and UNICEF, 2009)

C38.P378 Wascherfort G, *International Law and Child Soldiers* (Hart Publishing 2014)

C38.P379 Weissbrodt D, Hansen J, and Nesbitt N, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 Harvard Human Rights Journal 115

C38.P380 Wessells M, *Child Soldiers: From Violence to Protection* (Harvard University Press 2006)

MARK DRUMBL JOHN TOBIN*

C38.N*

* Special thanks to Bruce Oswald and Rain Liivoja for their constructive and helpful feedback on earlier drafts of this chapter. All errors and omissions remain those of the authors.