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## Strengthening Accountability for Attacks on Education during Insecurity and Armed Conflict

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The Hague Institute for Global Justice and Education Above All<sup>1</sup>

**Working Paper**

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## Introduction

The goal of the joint project of the Education Above All (EAA) Foundation and The Hague Institute for Global Justice, *Law, Education and the Sustainable Development Goals* (2017 – 2018), is to contribute through evidence-based advocacy to decreasing the incidence of attacks on students, teachers and schools, and to protect the right to education and education in times of insecurity and armed conflict.<sup>2</sup> This project seeks to ensure that all violations of rights of students, teachers and other school staff stop; that schools and related places that should be safe for civilians do not come under threat; and that those who perpetrate education-related violations of international law are held to account.<sup>3</sup>

As the first working paper of this project, the authors critically assess the gaps and challenges in relation to accountability for education-related violations. It begins by focusing directly on legal and other forms of accountability for these violations. The second section considers how protection of education in insecurity and armed conflict and accountability for education-related violations can be strengthened through some of the Sustainable Development Goals (SDGs). On this basis and as a potential solution for attacks on education and education-related violations during insecurity and armed conflict, the authors test and promote the application of **5 Ps** (**P**revention, **P**rotection, **P**rosecution, **P**ost-conflict recovery, and **P**artnerships) as an integrated cross-sectoral framework and approach (the 5Ps approach). Against this backdrop, the third section identifies some feasible institutional reforms within the United Nations Security Council (UNSC) that would plausibly help decrease the incidence of education-related violations. The final section of the working paper summarizes the main conclusions and next steps to strengthen accountability for education-related violations in insecurity and armed conflict.

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<sup>2</sup> As a point of clarification, the remainder of this paper refers to education-related violations, rather than crimes against education, because not all violations of the right to education might rise to the level of international crimes, as will be explained in more detail below. For example, those will only be international crimes if certain contextual elements are also present, e.g. a widespread or systematic attack (for crimes against humanity) and international and/or non-international armed conflict (for war crimes). Therefore, while a state can be held accountable, bearing state responsibility for education-related violations of international human rights and humanitarian law, this does not yet mean that any of the actors involved can be held criminally accountable for such violations. The reason for this is that those violations of international law might not amount to international crimes, which are strictly construed, as explained on the basis of the example of contextual elements. This does not mean that the act of attacking education cannot amount to being a national crime, of course, depending on the context. Then, perpetrators can be held criminally accountable at the national level, of course, but not at the international level.

<sup>3</sup> The term “education” used in this paper refers to all levels of education (pre-school, primary, secondary, tertiary, and adult education), and covers access to education, standard and quality of education and conditions under which education is provided. Furthermore, the term includes: (i) the protection of education itself, (ii) the protection of students and education staff, (iii) the protection of educational facilities, and (iv) the remedies and reparations for education-related violations, which must be available and accessible to the victims. Thus, as laid down in K. Hausler, N. Urban and R. McCorquodale. *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook*, London and Doha: British Institute of International and Comparative Law and Protecting Education in Insecurity and Conflict, 2012; “an attack on education” refers to any acts against education, students and education staff and educational facilities.

The first impetus to require the 5Ps approach that seeks to enhance accountability for education-related violations is the right to education itself.<sup>4</sup> The right to education is a human right. Every person is entitled to having their right to education respected, promoted and remedied where violated. Also, the right to education is an enabling right.<sup>5</sup> Thanks to education about one's rights, individuals will be able to exercise these rights and have them protected. This is also one of the reasons why the authors call for enhanced accountability for education-related violations.

For obvious reasons, preventing attacks is ideal. By drawing on conflict and mass atrocity prevention knowledge, as well as rule of law expertise, the authors make recommendations for how to decrease the prevalence of education-related violations. Despite the international community's efforts, prevention is often impossible. We therefore turn to other mechanisms to address attacks on education. We focus on legal accountability but also include other forms of accountability measures. We seek to strengthen legal accountability through improved procedures that works toward establishing individual criminal accountability, but also enhances measures aimed at holding states and non-state actors to account, as well as on providing aid and reparations to victims. In this context, we pursue innovative means to achieve these goals given the far from perfect existing institutions. Post-conflict recovery is important in itself to help rebuild human and physical capital and ensure traumatized students are given the resources they need to recover and flourish. Considering the complexities of education-related violations and the multitude of actors involved, partnerships among numerous individuals and institutions will be essential to realize our goals. In the paper, we consider policy and institutional reforms consistent with these aims. Our recommendations are grounded in research.

Our thesis is that accountability can and should be improved for attacks on students, educational facilities, and education more broadly, and that, based on evidence from closely related fields, this should contribute to decreasing the incidence of such education-related violations. In other words, *actors should take concrete steps in order to decrease the incidence of attacks on students and schools and this can be achieved by increasing accountability for education-related violations*. The paper addresses targeted and indiscriminate attacks on schools and education outside of

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<sup>4</sup> See for example: UN General Assembly. *Universal Declaration of Human Rights*. Resolution 217A, 10 December, New York: UN, 1948. United Nations Educational, Scientific and Cultural Organisation (UNESCO). *Convention Against Discrimination in Education*. Paris: UN, 14 December 1960. UN General Assembly. *International Covenant on Economic, Social and Cultural Rights*. Resolution 2200A (XXI), New York: UN, 16 December 1966. UN General Assembly. *International Covenant on Civil and Political Rights*. Resolution 2200A (XXI), New York: UN, 16 December 1966 (indirectly). UN General Assembly. *Convention on Elimination of Discrimination of Women (CEDAW)*. New York: UN, 1979. UN General Assembly. *Convention on the Rights of the Child (CRC)*. Resolution 44/25, New York: UN, 20 November 1989. UN General Assembly. *Convention on the Rights of Persons with Disabilities (CRPD)*. New York: UN, 2006. UN General Assembly. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*. Resolution 39/46, New York: UN, 10 December 1984.

<sup>5</sup> Hausler et al. *Protecting Education in Insecurity and Armed Conflict*. 2012. pp. 2, 129, 268. See also United Nations International Children's Fund (UNICEF). "A Human Rights-Based Approach to Education for All", 2007.

schools as well as the right to education and other human rights of students and education staff.

In adding to this argument, the authors will propose to gather original data on situations where education might be used as a ‘weapon of war’ with specific reference to Syria and to use these data to call for enhanced accountability for education-related violations also in new accountability mechanisms. This potential path stems from recently started original research with the assistance of Syrian human rights defenders who have been collecting information on human rights violations. It needs to be determined whether this data points to a “weaponization” of education, as is currently alleged for the other public good of health care in Syria.<sup>6</sup> Accordingly, there may be comparable data on how students, educational staff and educational facilities have come under direct and repeated targeting.<sup>7</sup> To follow through on this argument, the paper will outline a similar method of triangulation, as for health care, as a basis to call for enhanced accountability measures for education-related violations. For this purpose, the paper will also address the importance of existing and new fora, for example, the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI) and the unprecedented and new accountability mechanism – the International, Impartial and Independent Mechanism for Syria (IIIM).

## 1. Enhancing Accountability for Education-related Violations

In early May 2017, Boko Haram released more than eighty school children who were kidnapped three years ago by the militant group.<sup>8</sup> Already in November 2016, Geert Cappelaere, UNICEF MENA Regional Director, urged all parties to the Syrian conflict to “stop bombing schools, hospitals and other civilian infrastructure - actions which are against international law and may amount to war crimes”.<sup>9</sup> Moreover, on an unknown date, a Syrian NGO Justice for Life Observatory, on the basis of interviews conducted with students, parents and teachers, exposed efforts of Daesh in Deir Ezzor to control the education system and recruit children.<sup>10</sup> These three examples, which are quite different in nature, represent critical issues that this project will address when seeking to propose evidence-based solutions that ultimately achieve a decrease of education-related violations during insecurity and armed conflict through enhanced accountability for these violations. This section will address, in particular,

<sup>6</sup> *The Lancet*. “Syria Suffers as the World Watches”, Editorial, Vol. 389, no. 10074, 14 March 2017. p.1075.

<sup>7</sup> See the Global Coalition to Protect Education from Attack (GCPEA). *Education under Attack*, 2014 as a valuable source of data on attacks on education. The GCPEA’s 2018 Education Under Attack report is scheduled to be launched in May 2018. Relevant data also comes from UNICEF. “[Stop Bombing Schools and Hospitals, says UNICEF](#)”, 21 November 2016; UNICEF. “[Hitting Rock Bottom, how 2016 became the Worst Year for Syria’s Children](#)”, March 2017; Independent International Commission of Inquiry on the Syrian Arab Republic. *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic “Special inquiry into the events in Aleppo”*, A/HRC/34/CRP. 2 February 2017.

<sup>8</sup> *New York Times*. “Years After Boko Haram Kidnapping, Dozens of Girls Are Freed, Nigeria”, 6 May 2017; *The Guardian*, “Boko Haram Releases Dozens of Chibok Schoolgirls, say Nigerian Officials”, 6 May 2017.

<sup>9</sup> UNICEF. “Stop bombing schools and hospitals”. 2016.

<sup>10</sup> Justice of Life Observatory in Deir Ezzor. “How do Civilians Teach their Children in ISIS-held Deir EzZor?” 20 July 2016.

accountability through individual criminal responsibility but includes other forms of accountability, which are non-legal in nature.

The aforementioned examples are all relevant because they indicate the multi-faceted nature of the problem addressed. Education-related violations can be direct and the targeting of schools or related buildings can be intentional and thus amount to a war crime. They can also manifest when other places are targeted and the school is in the vicinity. Such instance will most likely not be a war crime. Education-related violations may also concern access to or the quality of education itself. The question is whether those types of violations may rise to the level of international crimes. For example, those might be instances of incitement to genocide or persecution. There might also be other forms of education-related violations that never move to the level of international crimes and for which legal avenues will be less effective. For such instances, other forms of accountability, which are addressed below, will be more effective. Consequently, it is important to explore what education-related violations are and how we can pursue enhanced accountability through measures that attribute individual criminal responsibility for these violations.

Moreover, continuing on the aforementioned example of education-related violations in Syria, preliminary research findings indicate that there might be evidence of a war-crime strategy to ‘weaponize’ health care on an unprecedented scale.<sup>11</sup> This working paper refers to this example because health care is a public good that is comparable to education in many ways. While there is now evidence, albeit limited, that all parties to the conflict in Syria are engaged in a war-crime strategy of using people’s need for health care as a weapon against them by violently depriving them of it and that this information is used as a foundation to call for accountability, possibly education-related violations are still largely overlooked.<sup>12</sup> This lack of attention for students, including the vulnerable group of children and minorities, for example, and the short-term and long-term consequences on societies whose students are not being educated, also contributes to an absence of denunciation and especially to bringing perpetrators to justice.<sup>13</sup> This aspect of education-related violations will also be considered in this working paper because of its importance for the entire project.

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<sup>11</sup> Fouad, Fouad M et al. “Health Workers and the Weaponisation of Health Care in Syria: A Preliminary Inquiry for *The Lancet*–American University of Beirut Commission on Syria”, *The Lancet* 390. issue 10111, March 2017. 2516 – 2526.

<sup>12</sup> To follow through on this conclusion, when this project can ensure similar research findings on education under attack on the basis of a similar method of triangulation, as was used for health care, it will be used as a basis to call for enhanced accountability measures for education under attack, e.g. through the Independent International Commission of Inquiry on the Syrian Arab Republic (established in 2011) and the IIIM to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (established through the adoption by the UN General Assembly. “Resolution 71/248”. 19 December 2016).

<sup>13</sup> In its 2016 report on education for Syrian refugees in Lebanon, Human Rights Watch stressed that more than 250,000 children are out of school: less than 3 percent of the 82,744 registered Syrian refugees aged 15-18 as of August 2015 enrolled in public secondary schools during the 2015-2016 school year. Human Rights Watch. “Growing Up Without an Education Barriers to Education for Syrian Refugee Children in Lebanon”, 19 July 2016. In September 2016, United Nations High Commissioner for Refugees (UNHCR) issued a report indicating that “more than half – 3.7 million – of the 6 million school-age children under its mandate have no school to go to.” UNHCR.

As mentioned, the lack of emphasis on accountability is not just prevalent for education-related violations in the form of using violence to restrict access to and delivery of (quality) education to children and adults, to attack educational staff, and to attack educational facilities such as schools and related premises. It is also present for other manifestations of education-related violations. It is on this basis that we shall propose measures to strengthen accountability and policy imperatives to prevent, prosecute, protect victims of, ensure post-conflict recovery in case of and to ensure better equipped partnerships which are concerned with education-related violations.

While cognizant of the fact that accountability is only one solution for the complex problem and given the inadequate nature of international criminal justice, where education-related violations rise to the level of international crimes, prosecutions can serve multiple objectives that are relevant for achieving (enhanced) accountability for education-related violations.<sup>14</sup> These suggestions are put forward with the realization that because of the complex nature of education-related violations, a relevant approach needs to combine several disciplines and will require more than prosecution of perpetrators of education-related violations. Also, such an approach will only work if it encourages all relevant actors to take concrete steps in their own ways in order to decrease the incidence of attacks on students and education-related violations. Accountability mechanisms, especially those that promote individual responsibility for education-related violations that rise to the level of international crimes, thus contribute to but are never sufficient for (enhanced) accountability of education-related violations.

This section focuses on prosecutions as one of five components. It considers legal accountability, and specifically international criminal responsibility, as a measure of last resort only.

### 1.1. Prosecutions

Accountability is an important rule of law principle that refers to notions of legal responsibility of states, individuals and, though mostly under soft law, non-state actors. The emphasis on legal accountability in this working paper leads to a focus on international criminal responsibility in so far as the international criminal courts and

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“Missing Out Refugee Education In Crisis”, September 2016. In 2017, the International Rescue Committee published the report entitled “Impact of war on Syrian children’s learning” in which it highlights that around 1.75 million children do not go to school. International Rescue Committee. “Impact of War on Syrian Children’s Learning”, March 2017.

<sup>14</sup> Cryer, Friman and Robinson (2016) have identified five main aims of international criminal justice: (i) retribution (punishment for wrongdoing), (ii) deterrence (prevention of future wrongdoings in general), (iii) incapacitation, (prevention of future wrongdoing by detaining the offender concerned), (iv) rehabilitation (reformation of offender concerned), (v) denunciation/education (communication to offender concerned and the general public about the condemnation of a specific wrongdoing). Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press. 2016.

tribunals are concerned. Before the International Criminal Court (ICC), the issue of education-related violations has been relevant for the case of *Lubanga Dyilo*.<sup>15</sup>

**Defining education under attack.** As we see it now, education-related violations are multi-dimensional and can include practices such as attacking children or adults in or on their way to school, attacking education facilities, targeting educational and support staff, obliterating good quality education, and using educational methods to incite crimes. While examples from Syria occur in the context of armed conflict, we certainly do not overlook situations of peace time or hybrid situations such as the Boko Haram example might point to. Although education-related violations seem to be manifested most notably in the targeting of students, education staff and schools and other facilities, we will also not neglect indiscriminate, non-targeted education-related violations of international law. For good reason, criminal law at both the national and international levels is mostly seen as the *ultimum remedium*, which as a system of complementarity also translates into the requirement of the ICC only to hold individuals to account when the nation state is unwilling or unable to do so.

**The circular, thus non-linear, nature of the approach.** While we refer to prosecution, we do not only mean procedures that are designed to hold individuals criminally responsible for objectives of punishment and deterrence, for example, but also measures that are taken to hold perpetrating states or non-state actors to account. Moreover, we see all 5Ps as intricately linked and mutually reinforcing. Where the prevention of education-related violations fails, prosecution might be the only solution. Also, often the greatest preventive actions to education-related violations can be designed best on the basis of actual knowledge gained during prosecutions. There is some preliminary evidence to suggest that international criminal prosecutions, more specifically the ICC, can have a deterrent effect and thus prevent violations of international law and can have some positive impact on the respect of human rights under certain circumstances. Further, where prosecution is pursued, it should seek to ensure protection of the victims, for example, by ensuring reparations in the form of repairing individual or collective harm by way of education schemes or restoring educational facilities and seeking to prevent recurrence on the basis of facts established during prosecutions. Prosecution can be an essential precondition for post-conflict recovery as there often is no peace without justice. This also means that good quality education is essential for post-conflict recovery and can benefit from the historic truth as sometimes recorded through prosecutions. Last, considering the complexities of education-related violations facing the world today and the multitude of actors involved, none of these efforts will actually be effective if not taking place through partnerships.

**Concluding on the importance of accountability for education-related violations.** Accountability is an important rule of law principle that refers to notions of legal

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<sup>15</sup> ICC. *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012.

responsibility of states, individuals and, though mostly under soft law, non-state actors. But accountability also encompasses many other forms outside of the legal realm such as political, economic and social accountability in the form of economic sanctions, arms embargoes, and naming and shaming campaigns. In the remainder of this section, we focus on legal accountability. We will assess the effectiveness of various legal mechanisms and other accountability policies. Finally, we will also indicate their inherent limitations and propose solutions to overcome them.

This outline assumes that the applicable legal regimes for accountability for attacks on education that this paper include are International Human Rights Law (IHRL), International Humanitarian Law (IHL) and International Criminal Law (ICL). These regimes, while different, are interrelated and overlap. The right to education is one of the rights that states as primary holders of human rights obligations have to respect, protect and remedy where violations occur. IHRL seeks to protect human rights of individuals against their government or other (non-state) actors. States need to respect, protect and fulfil human rights provided for in treaties that they have ratified. States ought to ensure that no measure prevents or limits the exercise of human rights by individuals. This also concerns the right to education and those rights that are necessary to realize this right such as the protection of family and the right to an adequate standard of living. State responsibility is threefold: refrain from limiting the exercise by individuals of their right to education; to protect individuals by preventing third parties from violating the right to education; and implement appropriate measures to ensure the full realization of the right to education.<sup>16</sup>

Where attacks on education take place in the context of armed conflict, IHL is the regime that regulates the means and methods of war and aims to “limit the effects of armed conflict” as well as to protect individuals who do not take part in hostilities.<sup>17</sup> It obliges states to ensure that “authorities and persons under their control (including armed forces) comply with IHL”.<sup>18</sup> Of particular relevance is the principle of distinction which prohibits a direct attack on civilians or civilian objects such as schools or hospitals. Where attacks on education amount to international crimes, ICL is the set of rules governing individual criminal responsibility for certain international crimes, including genocide, war crimes, crimes against humanity and, though still to be defined in more detail, the crime of aggression.

The protection of education is not explicitly provided for in legal instruments of ICL. Article 8 (2) of the Rome Statute indicates that an attack against “buildings dedicated to [...] education” may amount to a war crime. Provided that all criteria are met, attacks on education may also potentially constitute crimes against humanity or incitement to genocide.<sup>19</sup> In an attempt to guide its staff in the efforts to address international crimes against or seriously affecting children, in November 2016, the

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<sup>16</sup> Hausler *et al.* *Protecting Education in Insecurity and Armed Conflict*. 2012.

<sup>17</sup> International Committee of the Red Cross (ICRC). *Children in War*, July 2004.

<sup>18</sup> Hausler *et al.* *Protecting Education in Insecurity and Armed Conflict*. 2012.

<sup>19</sup> Hausler *et al.* *Protecting Education in Insecurity and Armed Conflict*. 2012.

Office of the Prosecutor (OTP) of the ICC launched its policy on children, with attention also paid to “attacks on buildings dedicated to education”.<sup>20</sup> While ICL does not provide the same level of protection against violations related to education compared to IHRL and IHL, it could be used to enforce IHRL and IHL provisions addressing education.<sup>21</sup>

While there is some overlap between IHRL, IHL and ICL, there are many grey zones. Not all egregious human rights violations are criminalized. This is especially true for social, cultural and economic rights including the right to education. Similarly, as has been laid down in the *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook* (2012), it is relevant to look into (i) the protection of education itself, including the human right to education; (ii) the protection of students and education staff; (iii) the protection of educational facilities; and (iv) the remedies and reparations for education-related violations, which must be available and accessible to the victims. The remainder of this working paper will take all these four issues into account while proposing measures for enhanced accountability for attacks on education.

## **1.2. Proposals for Enhancing Accountability through Individual Criminal Responsibility**

This paper proposes that the protective power of international criminal law for education-related violations can be promoted and further developed. As the first proposal, it would help if an international criminal court or tribunal selects and prioritizes a case that helps to set global norms regarding education-related violations that amount to an international crime. Doing so would assist courts at the national and regional levels to follow this precedent – above and beyond the standing law of “only” the war crime of targeting and/or destruction of ‘educational property’, preferably.

As a second proposal, the authors assert that an unprecedented mechanism such as the IIM on international crimes committed in the Syrian Arab Republic may contribute to holding individual perpetrators of education-related violations to account, specifically in the context of Syria, and in addition to the work of the CoI. This would be relevant *per se*, but especially if empirical evidence can sustain a claim of “weaponization” of education as a public good other than health care.

As a third proposal, on the issue of education-related violations, and also the interlinked yet different applicable legal regimes of IHRL, IHL and ICL, it is proposed that human rights investigators would have to be informed as to how they can contribute to, or at least not hinder, criminal investigations. Such action can bridge what can be called the Geneva-The Hague divide on fact-finding and accountability

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<sup>20</sup> ICC (OTP). *Policy on Children*, November 2016.

<sup>21</sup> Hausler et al. *Protecting Education in Insecurity and Armed Conflict*. 2012.

(short for Geneva’s commissions of inquiry and The Hague as a host to many international criminal courts and tribunals).<sup>22</sup> This suggestion applies not only to professional human rights investigators such as Commissions of Inquiry but also to lay persons such as individuals or investigative groups such as Bellingcat or Forensic Architecture. It could also apply to private fact-finding initiatives such as Syria Justice & Accountability Centre (SJAC) and the Commission for International Justice and Accountability (CIJA). Likewise, it is pertinent for nongovernmental organizations (NGOs) that collect information on education-related violations and businesses, who under the *UN Guiding Principles for Human Rights and Business* (2011),<sup>23</sup> have to conduct due diligence and thus can also engage in collecting information on education-related violations. This paper suggests that, for this purpose, it would also be good to develop and make use of new technologies such as the International Bar Association’s app Eyewitnesses Atrocities.

### 1.2.1. Background to Proposals

For accountability in the form of prosecution,<sup>24</sup> it is important for standing law to include targeting and/or destruction of ‘educational property’ as a war crime under the Rome Statute that established the ICC.<sup>25</sup> However, there appear to be at least three other examples that show how the full protective power of ICL has not yet been realized in relation to education-related violations. As a first example, the widespread and systemic, discriminatory denial of education to a group of people, with a particular political, racial, national, ethnic, cultural, religious or gender identity, may amount to the crime against humanity of persecution. In essence, this means that where discrimination against a particular group reaches widespread and systemic proportions, ICL may protect against this through its provisions against the crime of persecution. As a second example, the application of the crime of incitement of genocide to educational content needs to be considered. Third, it is questionable to what extent indiscriminate attacks on educational facilities can be prosecuted. Nonetheless, IHL core principles of necessity, proportionality and distinction may provide some general legal framework.

Timing is right to discuss these possibilities for further understanding with prosecutors and other relevant audience members of how ICL could become a better

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<sup>22</sup> For more information see R. Grace and J. Coster Van Voorhout. “From Isolation to Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts and Tribunals”, December 2014; and S. Rapp and J. Coster Van Voorhout. “Bridging The Hague – Geneva Divide: Recommendations to Maximize Benefit and Minimize Harm for Human Rights Inquiries and Criminal Investigations at the Same Scenes of Mass Violence” (13 January 2017), in the context of The Hague Institute project “Bridging the Geneva-The Hague Divide on Fact-Finding and Accountability”, led by Ambassador S. Rapp, former US Ambassador-at-Large for global criminal justice and international prosecutor as well as non-resident Fellow at The Hague Institute and Dr. J. Coster van Voorhout.

<sup>23</sup> UN Office of the High Commissioner for Human Rights. *UN Guiding Principles for Human Rights and Business*, New York and Geneva: UN. 2012.

<sup>24</sup> This overview follows the yet mentioned structure of: (i) the protection of education itself, (ii) the protection of students and education staff, (iii) the protection of educational facilities, and (iv) the remedies and reparations for education-related violations, which must be available and accessible to the victims.

<sup>25</sup> There is no international criminal law treaty that deals with the protection of education itself.

protective power for education in insecurity and armed conflict, especially considering the recently launched Children's and Case Selection Policies of the OTP of the ICC.<sup>26</sup> The children's policy refers to "[...] the importance of the effective investigation and prosecution of crimes against or affecting children, as well as the protection of children's rights and interests." Additionally, this policy mentions that these include "[...] enumerations both of crimes directed specifically against children, such as the war crimes of enlistment, conscription and use of children under the age of 15 years to participate actively in hostilities, and also of crimes that disproportionately affect children, such as the war crime of attacks on buildings dedicated to education and healthcare."<sup>27</sup>

There is scope under current ICL to incorporate the protection of education within current crimes through either persecution or incitement to genocide. This would also help to close gaps in legal regimes with respect to the issue of a specific lack of protection for education under ICL. ICL is, in this sense, different from IHRL and IHL because ICL provisions on the crime of persecution and the crime of incitement to genocide have the potential to be used to protect education. Further, the mechanisms of ICL, for example, the reparations mechanism of the ICC, can attempt to provide redress for education-related violations of ICL (protection). This is possible because, despite the lack of specific provisions, the provisions of ICL are not incompatible with IHL and IHRL. As will be discussed below, ICL can be an important mechanism to hold individuals accountable for many of the IHRL and IHL provisions that protect against education-related violations, including the protection of the lives of students and educational personnel and the protection of educational facilities.

There are several aspects of the regulatory framework that include enumerations both of crimes directed specifically against children, such as the war crimes of enlistment, conscription and use of children under the age of 15 years to participate actively in hostilities, and also of crimes that disproportionately affect children, such as the war crime of attacks on buildings dedicated to education and healthcare. However, as noted, this project is not limited to education-related violations against or affecting children alone but rather will also consider attacks on adult students and educational staff.<sup>28</sup> If an international criminal court or tribunal is to select and prioritize a case that also ensures a finding of a violation of education itself within an international setting, so far, the only mention found of it has been at the internationalized Extraordinary Chambers in the Courts of Cambodia (ECCC), where the Co-Investigating Judges, in their Closing Order in Case 002, found that workers at Trapeang Thma Dam were also denied schooling.<sup>29</sup> This is important because, in this

<sup>26</sup> ICC (OTP). "Policy Paper on Case Selection and Prioritisation". 15 September 2016.

<sup>27</sup> ICC. *Policy on Children*. 2016.

<sup>28</sup> The Regulatory Framework mentioned in the OTP's policy on children refers to: (a) Conscription, enlistment and use of children under the age of fifteen years to participate actively in hostilities; (b) Forcible transfer of children and prevention of birth; (c) Trafficking of children as a form of enslavement; (d) Attacks against buildings dedicated to education and health care; (e) Torture and related crimes; (f) Persecution; and (g) Sexual and gender-based crimes. ICC. *Policy on Children*. 2016.

<sup>29</sup> See the ECCC. "Closing Order", para.345. 2007.

case, the defendants were not charged with a crime in relation to an education-related violation of denial or restriction of access to education.

To conclude, so far, there are no ICL provisions or case law dealing with the protection of education itself. Further recognition of many violations of ICL, which impact on the protection of education, still need to be recognized as education-related violations in order to help promote at an international level the recognition of the effect of insecurity and armed conflict on education. In this regard, lessons can be learned from many other efforts that help to prevent education-related violations in insecurity and armed conflict. These efforts include: direct appeals to political actors; threats and implementations of sanctions; fact-finding missions; exposing and naming and shaming of (potential) perpetrators; and putting governments on notice of occurring violations so as to persuade them to take adequate measures to protect education in insecurity and armed conflict.

In addition to what has been mentioned in relation to the protection of education itself, it is important to look into the legal protection of students and education staff with an emphasis on holding those who failed to offer such protection to account. For prosecution, it is important that the legal protection of students and education staff under the three legal regimes of IHRL, IHL and ICL is strong and complementary. However, the effectiveness of these provisions can be improved through increased implementation and enforcement at the international, regional and national levels. Additionally, as noted above, the protection of students and educational staff could benefit from further clarification on how the relationship between the relevant provisions of IHRL, IHL and ICL ought to be considered by the mechanisms charged with enforcing each of them. Again, for international lawyers and particularly those involved in shaping ICL, the timing is right, considering the recently launched Children's and Case Selection Policies of the OTP of the ICC (see also below).

As a last remark on prosecution, it is also relevant that the interaction between IHRL, IHL and ICL in relation to the protection of educational facilities and therefore on holding those who failed to offer such protection individually accountable, is unclear. For the deliberate and direct destruction of private (and to some extent) communal property, including some educational facilities, in situations of armed conflict, there is a strong core of protection under each regime of IHRL, IHL and ICL as explained above. However, outside of this core position, few IHRL cases exist. It is not possible to say to what extent the provisions of IHRL, IHL and ICL might diverge in relation to, for example, incidental damage to a public educational facility for primary age students during an armed conflict. For prosecution, such ambiguity means that the exact obligations imposed on an individual in relation to this situation are difficult to ascertain and impossible to predict, similar to IHL and IHRL impositions on a state. This complicates holding individuals to account because there is little guidance for those making operational decisions during armed conflict as to the legality of their conduct. Where such potential gaps in protection exist, education is placed at serious risk from education-related violations. There is considerable scope for clarification in this area

through, for example, the development of guidelines and pressure for international legal protection of educational facilities. Again, for ICL, the timing is right, considering the recently launched Children's and Case Selection Policies.

### 1.2.2. Complementarity

This proposal to ensure enhanced accountability through individual criminal responsibility rests on the complementarity system, which entails that international criminal cases should always be the last resort and only take place when states are unable or unwilling to try cases of education-related violations themselves. It also takes into consideration inherent limitations of a forum such as the ICC.

For instance, only about two-thirds of UN General Assembly States have ratified the Rome Statute establishing the ICC, and of those, states do not always comply with their legal obligations such as arresting suspects with outstanding arrest warrants. Kenyan and South African governments for instance did not arrest Omar Al-Bashir despite him being accused of genocide, among other, international crimes. In this way, this paper also calls on states to implement domestic legislation so that perpetrators of education-related violations can be held accountable. For domestic courts to have jurisdiction, the aforementioned crimes have to be part of domestic law. In fact, this may even be required under some international legal instruments. Article 5 of the 1948 Genocide Convention, for example, states that "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III."<sup>30</sup> Article 49 of the 1949 Geneva Convention I, article 50 of the 1949 Geneva Convention II, article 129 of the 1949 Geneva Convention III and article 146 of the 1949 Geneva Convention IV state that "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." It continues by stating that "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts".<sup>31</sup> Similarly, modes of liability have to be part of domestic law. This means, for example, that individuals can also be held accountable for ordering, inciting or aiding and abetting a crime.

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<sup>30</sup> UN General Assembly. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

<sup>31</sup> ICRC. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Convention), 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention), 12 August 1949, 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

### 1.2.3. Universal Jurisdiction

This is another important avenue that should not be overlooked considering the multiple prosecutions predominantly within European Union countries of international crimes committed in Syria, for example. If all the proposals in this paper become a coordinated and concerted effort, it will also support such national prosecutions of international crimes in countries that seek to prosecute perpetrators on this jurisdictional basis.

### 1.2.4. Developing Further Proposals through State Responsibility and Responsibility of Non-state Actors

This project will later address in more detail issues of state responsibility and the responsibility of non-state actors. While not its focus, this paper has identified the links to how the applicable legal regimes of IHRL and IHL, for which the primary holders of responsibilities are states, and ICL can become more mutually reinforcing. Certainly, where states are responsible for education-related violations, they can be and should be held accountable.

One way to do so is through the system of Universal Periodic Review organized by the UN Human Rights Council. Similarly, states can be held responsible by treaty monitoring bodies established for the protection of rights and provision of remedies. For example, these bodies monitor whether states abide by and have not breached their obligations regarding children under the CRC, and women under CEDAW. Equally, bodies monitor that states are not involved in: torturing of persons under the CAT; that persons are not discriminated against under the Convention on the Elimination of all forms of Racial Discrimination; for persons with disabilities under the CRPD; migrant workers under the Convention on the Protection of All Migrant Workers; next of kin of disappeared persons under the Convention on Enforced Disappearances as well as the Human Rights Committee.<sup>32</sup>

Finally, states can be held responsible by regional human rights bodies such as the African human rights mechanisms, namely: the African Court of Human and Peoples' Rights; the African Commission on Human Rights; the Economic Community of West African States Court of Justice; the African Committee of Experts on the Rights and Welfare of the Child; the Inter-American Commission of Human Rights; the Inter-American Court of Human Rights; the European Court of Human Rights (ECtHR);<sup>33</sup> the

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<sup>32</sup> UN General Assembly. *International Convention on the Elimination of all forms of Racial Discrimination*. Resolution 2106 (XX). New York: UN, 21 December 1965. UN General Assembly. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. Resolution 45/158. New York: UN, 18 December 1990. UN General Assembly. *International Convention for the Protection of All Persons from Enforced Disappearance*. Resolution 47/133. New York: UN, 18 December 1992.

<sup>33</sup> For example, the case of *Tagayeva and others v. Russia*, appl. no. 26562/07 and 6 other applications, Judgment of 13 April 2017, concerns issues related to the terrorist attack, siege and storming of school no. 1 in Beslan, North Ossetia, Russia, 1 - 3 September 2004. The Court found that Russia violated the right to life as a result of its counter-terrorism operations in North Ossetia, because its operations to address a hostage crisis at a school in Beslan resulted in the unnecessary loss of life due to its indiscriminate and disproportionate use of force. Consequently,

European Committee of Social Rights; and the Court of Justice of the European Union. Other mechanisms for reparations for victims of education-related violations are the International Court of Justice Claims Commissions and national post-conflict reparations programs. In addition to criminal prosecutions, civil lawsuits, ombudsmen, truth commissions or national human rights commissions may also be considered. For example, the OTP of the ICC explains in its case selection and prioritization policy the role that can be played by truth seeking mechanisms, reparations programs, institutional reform and traditional justice mechanisms as part of a broader comprehensive strategy.<sup>34</sup>

Similarly, this project will address accountability for non-state groups, including armed non-state groups like Daesh and Boko Haram, as well as corporations. There are many non-state actors whose actions may impact upon education and education-related violations. These include corporations and other business enterprises (transnational and local), non-state armed groups, non-governmental organizations, cultural and social groups, trade unions and employer groups and individuals. Inter-governmental organizations, such as the UN and its agencies, can be considered as a type of non-state actor. There have been several important initiatives to develop a normative framework to engage with non-state groups, such as armed non-state actors (ANSAs). Most notably, Geneva Call hosted a 3-day workshop in November 2016 with ANSAs to discuss protection of children in the relevant territories in which they operate, including significantly the protection and provision of education to children who are in the territories under their control.<sup>35</sup> A key question for this work is how to engage with ANSAs and, in particular, how international agencies of the United Nations and INGOs can do more to engage with ANSAs for the benefit of the large number of children who are under their control.

### 1.3. Proposals for Non-Legal Accountability Mechanisms and Evidence of Effectiveness

Accountability comprises the following elements:

- a *power wielder* and an *accountability holder*;
- *standards* by which the power wielder will be assessed;
- *information* by which the accountability holder can judge power wielder must be available; and

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the Court ordered \$3.1 million in compensation to the victims. ECtHR, 2017. "The Case of *Tagayeva and others v. Russia*, Appl. no. 26562/07 and 6 other applications". For the comparable situation of a complaint on the other public good mentioned of health care, in October 2016, lawyers from the firm Birnberg Pierce filed a complaint with the ECtHR on behalf of Dr. Moawyah Al-Awad, a doctor who worked at a hospital in Eastern Aleppo. See Syria Justice and Accountability Center (SJAC), "ECtHR as an Avenue for Accountability: Possibilities and Constraints", referencing this complaint lodged to the ECtHR, 9 May 2017.

<sup>34</sup> F. Capone, K. Hausler, D. Fairgrieve and C. McCarthy. *Education and the Law of Reparations in Insecurity and Armed Conflict*. 2012.

<sup>35</sup> Geneva Call. "Armed non-State Actors speak about Child Protection in Armed Conflict", 13 October 2017.

- *the ability of the accountability holder to sanction the power wielder.*<sup>36</sup>

An example of a power wielder and an accountability holder are a politician and her constituents. The accountability holder must be able to sanction the power wielder in order for a relationship of accountability to hold. This definition of accountability is useful because it allows analysis of: (1) who is being held to account; (2) which actors are holding to account; (3) according to what standards the power-wielders are being assessed; and (4) how the power-wielder is rewarded or sanctioned.

In this section, we focus on legal penalties as the sanction mechanism but other types of penalties are relevant and deserve attention such as political, economic and social accountability. This range is demonstrated by the integration of economic, political, diplomatic and legal tools developed by officials and NGO representatives in working to prevent atrocities.<sup>37</sup> The authors consider three types of penalties, which are, legal, economic/diplomatic sanctions and naming and shaming. The authors also will investigate the evidence that accountability mechanisms can decrease the incidence of education-related violations.

Starting with **legal sanctions**, accountability can be sought through international criminal prosecutions. Before discussing the deterrence power of international criminal courts and tribunals (ICCTs) in more detail, it is worth noting that assessing the deterrent effect of international tribunals is difficult. First, as deterrence involves something that did not happen (a “non-event”) it is a complex concept to examine. Second, the work of ICCTs is often part of a more comprehensive effort undertaken by the international community to end atrocities (e.g. in the Former Yugoslavia, diplomacy and peacekeeping operations ran parallel to international prosecutions). Consequently, isolating the impact of an international criminal court and tribunal and attributing the prevention of atrocities to the tribunal is challenging.

Many international criminal justice advocates have signaled the deterrence power of international criminal courts and tribunals and their ability to contribute to the prevention of mass atrocities.<sup>38</sup> There is some emerging evidence that points to a possible modest deterrent effect of criminal prosecutions. While until recently, there

<sup>36</sup> R. Grant and R. O. Keohane. “Accountability and Abuses of Power in World Politics.” *American Political Science Review* 99 (2005): 29. J. Rubenstein. ‘Accountability in an Unequal World.’ *The Journal of Politics* 69. no.3 (2007): 616–32. J. Gordon. “Accountability and Global Governance: The Case of Iraq.” *Ethics & International Affairs* 20. no. 1 (2006): 80. L. Wenar. “Accountability in International Development Aid.” *Ethics & International Affairs* 20. no. 1 (2006): 5-7.

<sup>37</sup> International Commission on Intervention and State Sovereignty. *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. Ottawa: The International Development Research Centre. 2001.

<sup>38</sup> P. Akhavan. “Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal.” *Human Rights Quarterly* 20 no. 4 (1998). P. Akhavan. “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *American Journal of International Law* 95. no. 1 (2001). P. Akhavan. “Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism.” *Human Rights Quarterly* 31. no. 3 (2009). M. Cherif Bassiouni. “International Crimes: Jus Cogens and Obligatio Erga Omnes”, 59 *Law and Contemporary Problems* (Fall 1996).

were no robust, systematic findings on whether ICL has any impact on the behavior of individuals, a study published in 2016 by Jo and Simmons conclude that the ICC can deter “some governments and those rebel groups that seek legitimacy”.<sup>39</sup> Kim and Sikkink (2010) also find that prosecutions during transitions decrease prospective human rights abuses.<sup>40</sup> In a 2016 study, Appel found that the ICC can deter human rights abuses by comparing countries that have ratified and those that have not ratified the Rome Statute.<sup>41</sup> Meernik (2015) finds that the impact of the ICC is conditioned on whether states have prior commitments to human rights.<sup>42</sup> In a more concerning finding, Prorok (2017) finds that ICC involvement in countries in civil war can prolong civil conflict when countries lack strong domestic institutions.<sup>43</sup>

As mentioned above, the ICC’s Rome Statute classifies intentional attacks on schools as war crimes (articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute). Several of its provisions also specifically refer to children: the conscription, enlistment or use in hostilities of children younger than fifteen years is a war crime (articles 8(2)(b)(xxvi), 8(2)(b)(xxii), 8(2)(e)(vi), and 8(2)(e)(vii) of the Rome Statute); the forcible transfer of children of a group to another group to intentionally destroy a national, ethnical, racial or religious group amounts to genocide (article 6(e) of the Rome Statute); and trafficking of children, enslavement, or sexual slavery (articles 7(1)(c), 7(2)(c) and 7(1)(g) of the Rome Statute) can be a crime against humanity. Violating these provisions can clearly affect children’s right to education. Several cases before the ICC concerned such education-related violations.<sup>44</sup> The Statute of The International Criminal Tribunal for the former Yugoslavia also criminalizes attacks against schools in article 3 of its Statute. At least 18 individuals have been charged with such a crime but only a few have been convicted for attacks on schools.<sup>45</sup>

With respect to prosecutions of education related violations, ICC’s first trial, the case against Thomas Lubanga, led to a conviction for using children in armed conflict. Human Rights Watch (2009) found some anecdotal evidence supporting the claim that ICC prosecutions can change the criminal behavior of those recruiting children. For instance, in Central African Republic “a rebel commander demobilized his child soldiers after learning about the ICC’s prosecution of Congolese rebel leader Thomas

<sup>39</sup> H. Jo & B. Simmons. “Can the International Criminal Court Deter Atrocity?” *International Organization* 70. No. 3 (2016): 443.

<sup>40</sup> H. Kim and K. Sikkink. “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries”. *International Studies Quarterly* 54 (2010).

<sup>41</sup> B.J. Appel. “In the Shadow of the International Criminal Court *Does the ICC Deter Human Rights Violations?*” *Journal of Conflict Resolution* 62. issue 1 (2016).

<sup>42</sup> J. Meernik. “The International Criminal Court and the Deterrence of Human Rights Atrocities”. *Civil Wars* 17. issue 3 (2015).

<sup>43</sup> A. Prorok. “The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination.” *International Organization* 71. no. 2 (2017).

<sup>44</sup> See for example the cases against Thomas Lubanga Dyilo; Germain Katanga and Mathieu Ngudjolo Chui; Bosco Ntaganda, Joseph Kony, Vincent Otti and Okot Odhiambo; Omar Hassan Al Bashir; Jean-Pierre Bemba. Brendan O’Malley. UNESCO. *Education under Attack*. Paris: UNESCO. 2010: 150.

<sup>45</sup> See for example, Prosecutor v. Dario Kordic and Cerkez, IT-95-14/2, Prosecutor v. Miodraf Jokic, IT-01-42/1, Prosecutor b. Pavle Strugar, IT-01-42. UNESCO. *Protecting Education from Attack: A State-of-the-Art Review*. Paris: UNESCO. 2010: 136.

Lubanga on charges of recruitment of child soldiers, claiming he had not known using child soldiers was a crime".<sup>46</sup> Barnett and Jefferys (2008) however note that perpetrators found ways to avert any charges by, for example, recruiting children older than fifteen years.<sup>47</sup>

**Economic sanctions** are another means by which international actors can penalize and hold to account those committing education-related violations. Sanctions can entail broad economic barricades, targeted sanctions such as asset freezes of certain individuals or travel bans, or sectoral prohibitions such as arms embargoes. Like armed humanitarian intervention, sanctions carry risks to innocent individuals. Economic sanctions can decrease the fulfilment of human rights in general<sup>48</sup> and, for women specifically, increase the risk that a country will not be democratic,<sup>49</sup> and worsen the health of many.<sup>50</sup> They can also increase discrimination against certain ethnic groups.<sup>51</sup> One method that leaders have attempted to get around such adverse outcomes is by using targeted rather than blanket economic sanctions. However, at least one study found that targeted sanctions have no better outcomes in terms of human rights than non-targeted sanctions.<sup>52</sup> What impact do sanctions have in the midst of war or atrocities? Threats and imposition of economic sanctions during civil war can also, counterintuitively, worsen violence.<sup>53</sup>

Therefore, a focus should be on outcomes because this is the ultimate aim of sanctions, and there is reason to be skeptical that economic sanctions alone are likely to help. Krain (2014) finds that neither diplomatic nor economic sanctions ameliorate the impact of atrocities and under some circumstances diplomatic engagement can worsen the atrocities.<sup>54</sup> However, there is some evidence that another type of sanctions, arms embargoes, can positively affect the severity of war.<sup>55</sup> These findings suggest caution, not that sanctions should never be used. Yet in attempting to prevent and decrease the incidence of attacks on education, actors should be aware of likely outcomes both in terms of the dependent variable of interest and for other important areas such as the protection of human rights.

<sup>46</sup> Human Rights Watch. "The International Criminal Court Trial of Thomas Lubanga", 23 January 2009.

<sup>47</sup> K. Barnett and A. Jefferys. "Full of Promise: How the UN's Monitoring and Reporting Mechanism Can Better Protect Children", HPN Paper #62. London: Overseas Development Institute. 2008.

<sup>48</sup> D. Peksen. "Better or Worse? The Effect of Economic Sanctions on Human Rights". *Journal of Peace Research* 46. no. 1 (2009).

<sup>49</sup> D. Peksen and A.C. Drury. "Coercive or Corrosive: The Negative Impact of Economic Sanctions on Democracy". *International Interactions* 36. no. 3 (2010).

<sup>50</sup> S. Allen and D. Lektzian. "Economic Sanctions: A Blunt Instrument?". *Journal of Peace Research* 50. no. 1 (2013).

<sup>51</sup> D. Peksen. "Economic Sanctions and Official Ethnic Discrimination in Target Countries, 1950–2003". *Defence and Peace Economics* 27. no. 4 (2016).

<sup>52</sup> C.L. Carneiro and L. Apolinário, L. "Targeted Versus Conventional Economic Sanctions: What Is at Stake for Human Rights?", *International Interactions* 42: no. 4 (2015).

<sup>53</sup> L. Hultman and D. Peksen. "Successful or Counterproductive Coercion? The Effect of International Sanctions on Conflict Intensity", *Journal of Conflict Resolution* 61. no. 6 (2015).

<sup>54</sup> M. Krain. "The Effects of Diplomatic Sanctions and Engagement on the Severity of Ongoing Genocides or Politicides", *Journal of Genocide Research* 16. no. 1 (2014). M. Krain. "The Effect of Economic Sanctions on the Severity of Genocides or Politicides", *Journal of Genocide Research* 19. no. 1 (2017).

<sup>55</sup> L. Hultman and D. Peksen, D. "Successful or Counterproductive Coercion? *Journal of Conflict Resolution*. 2015.

**“Naming and shaming”** or publicly excoriating those who likely have committed wrongs is another way to address attacks on education. Counterintuitively, some scholars find that naming and shaming can ameliorate atrocities. They find that NGOs, news outlets and the UN publicly reprimanding states, on average, decreases the severity as measured by the number of deaths perpetrated by governments.<sup>56</sup> Other studies, however, suggest caution because while some types of human rights abuses on which a spotlight is shown may decrease, others can increase.<sup>57</sup> Others still find that the effectiveness of international NGO pressure turns on other conditions.<sup>58</sup> While we cannot know with certainty whether this easily applies to attacks on education, according to this research, there is reason to think that publicizing such wrongs can decrease the severity of such attacks. Through annual reports of the UN Secretary-General and the UN Special Representative for Children and Armed Conflict to the UNSC, there is already some naming and shaming. A recent UN Secretary-General report contains a strong message on attacks on education. The annexes (‘list of shame’) record parties to a conflict (both states and non-state actors) which also engage in attacks on schools and hospitals (one of six grave violations).<sup>59</sup>

Another avenue of naming and shaming is publicly criticizing those countries that provide materials and support to actors that commit attacks against schools. For instance, the United States has provided weapons to a country who have in turn violated the rules of war by indiscriminately hitting schools and other civilian facilities in Yemen.<sup>60</sup> This raises a larger point, namely whether regimes are likely to respond differently to pressure because of the differences in incentives leaders face, institutions in which they operate and how they were selected to be in office.

## 2. Sustainable Development Goals

This section outlines the main interlinkages between the strengthening of accountability for education-related violations and the advancement of SDGs 4 (Quality Education), 5 (Gender Equality), 16 (Peace, Justice and Strong Institutions) and 17 (Partnerships for the Goals). Through subsequent project outputs, the authors will address these interlinkages in more detail.

The SDGs provide an unprecedented monitoring framework and set of ambitions for taking an integrated approach to economic, social, environmental and institutional

<sup>56</sup> M. Krain. “J’accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?” *International Studies Quarterly* 56. no.3 (2012). J.H.R. DeMeritt. “International Organizations and Government Killing: Does Naming and Shaming Save Lives?” *International Interactions* 38. no. 5 (2012).

<sup>57</sup> E.M. Hafner-Burton. “Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem.” *International Organization* 62. no. 4 (2008).

<sup>58</sup> A.M. Murdie and David R. Davis. “Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs1.” *International Studies Quarterly* 56. no. 1 (2012).

<sup>59</sup> UN Secretary-General. “Children and Armed Conflict”, (A/72/361-S/2017/821) 24 August 2017.

<sup>60</sup> *The New York Times*. “America Is Complicit in the Carnage in Yemen”, The Editorial Board, 17 August 2016.

development. For the purpose of this paper, the most relevant SDGs concern No. 4 in ensuring education and No. 16 in providing justice and accountability. SDG 4, through its seven targets and three means of implementation, exceed previous international education agendas.

SDG 16 has several pertinent subsections. SDG 16.1 and 16.2 include goals for decreasing violence, including violence against children. SDG 16.3 promotes the rule of law domestically and internationally. If correctly framed, preventing attacks on education and holding to account those who attack children could be integrated into states' work on the SDGs. While worthy goals, these will be difficult to implement.

To this end, actors can and should integrate preventing attacks on education by mainstreaming atrocity prevention and preventing attacks on educational facilities into development practices. For instance, United States Agency for International Development (USAID) has released a field guide for how to do this by mainstreaming mass atrocity prevention<sup>61</sup> but numerous other countries should also consider how to operationalize consistently with their national priorities. The SDGs could also be a way to use accountability to increase incentives for countries to comply with their SDG obligations through public reporting on SDG contributions. International institutions, in addition to states, have a role to play. For example, and with focus on SDG 16, through its complementarity principle, the ICC has suggested it will assist states in building domestic capacity to address core crimes.

Despite the unprecedented global consensus and ambitious promise of the SDGs, there are many structural criticisms and operational weaknesses which question their potential to help strengthen accountability of education-related violations. To illustrate the former, Pogge and Sengupta (2016) have criticized the SDGs by contending that, while advocating for accountability, they do not assign responsibility or have in built accountability mechanisms. One of the problems with the SDGs is that they lack an adequate assigning of responsibility for which organizations should contribute and do. Furthermore, they lack any sort of robust accountability mechanisms and resultant consequences if they are not fulfilled.<sup>62</sup>

Operationally, and given the focus of this project on building evidence-based advocacy, there are significant monitoring challenges. For SDGs 4, 5, 16 and 17, there are at least four main types of monitoring challenges:

1. Contextualization at the national levels;
2. Insufficient indicators to cover the targets;
3. Gaps in methodology for data collection; and
4. Gaps in data including at the level of disaggregation.

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<sup>61</sup> USAID. "Field Guide: Helping Prevent Mass Atrocities." 2015.

<sup>62</sup> T. Pogge and M. Sengupta. "Assessing the Sustainable Development Goals from a Human Rights Perspective." *Journal of International and Comparative Social Policy* 32. no. 2 (2016).

As an example, for SDG 4, the degree to which there is progress will vary by country contexts, for instance, in its impact on decreasing income inequality or in terms of assessment performance based on the language of instruction.<sup>63</sup> Common contextualizing factors or drivers include culture but also levels and legacies of violent conflict and vulnerability to natural disasters. These challenges should help inform the priorities at the multilateral levels, which will inevitably take time along with accelerated commitment and new advances in data collection and accessibility. Despite important advances since 2015, the Technical Cooperation Group (SDG 4) has recently identified 22 global and thematic education indicators that need further methodological development.<sup>64</sup> Moreover, there is a notable disparity between high income and low-income states in relation to methodologies for data collection. This is particularly stark in conflict-affected and fragile states.

In addressing the challenge of contextualizing indicators, it is essential for states and multilateral agencies to employ, as much as possible, both a composition of data sources and a participatory approach at the national and local levels to verify and contextualize data. As an illustration, this is already happening through the use of household survey data in tandem with national demographic data (UNESCO and UNICEF). Throughout, the data gathering process needs to be validated, 'ground-truthed' and 'owned' at the national level and aligned to other national frameworks (for example, aligning SDG data collection with national fragility assessments in Afghanistan).

To address the second challenge above, it is essential and urgent to strengthen the capacities of national statistical offices (NSOs), especially in conflict-affected and fragile states, where such needs tend to be greater. While current ambitions should continue, it is likely that the NSOs will need to prioritize indicators.

Donors and agencies have an important role to play in enabling an integrated approach to data collection and data sharing so that knowledge, skills and resources are joined up as much as possible. Strengthening capacities will require a sustained financial investment, as well as the necessary knowledge transfer and training. Third party data and reporting will also be vital in providing an important benchmark against which to gauge progress and to independently audit NSOs data.

In further tackling these challenges and towards a more targeted approach to SDG 4 monitoring, the role of the UN High-level Political Forum (HLPF) on Sustainable Development and the SDG4–Education 2030 Steering Committee has the mandate to provide strategic support and guidance.

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<sup>63</sup> UNESCO. *Education for People and Planet: Creating Sustainable Futures for All*, The Global Education Monitoring Report, Paris: UNESCO. 2016.

<sup>64</sup> S. Montoya and J. Naidoo. "The Pressure is On! Powering Ahead with the Technical Cooperation Group for SDG 4 – Education 2030 Indicators", 12 June 2017.

### 3. Proposed Institutional Reforms to Decrease Attacks on Education

This section will address the value and feasibility of institutional reforms to help decrease the incidence of attacks on education. Rather than arguing for new norms and institutions, the authors call for the enforcement of existing norms and institutions through greater political will and financial support from governmental actors. It focuses on UNSC reform, Responsibility to Protect (R2P) and the responsibility to not veto resolutions in situations of mass atrocities. Together the proposed reforms demonstrate the cross-cutting nature of the project 5Ps framework.

In light of the problematic existing accountability mechanisms, from state governments to international institutions, reforms are essential. A whole host of them would likely be ideal, although, many are politically infeasible in the near term.

#### 3.1. UN Security Council Reform

One of the institutions that many have called to reform is the UNSC because of its dated post-World War II reflection of great power distribution. The end of the cold war brought new hope for structural UN Charter reform but this has failed to materialize. There is precedent for Charter reform. In 1965, after a wave of decolonization, the UNSC expanded its non-permanent members from six to 10, bringing the total number of members to 15. Given the gaps in the formal global governance structures and international law, actors are implementing innovative strategies to supplement institutional shortcomings. Recent and ongoing efforts for procedural reform within the UNSC, through voluntary, non-binding responses, have been driven by atrocity prevention activists and states. This is relevant to future advocacy to protect both education from attack and the right to education.

The proposal, the Responsibility to Not Veto led by France and Mexico, seeks to limit the use of P5 veto power in situations of mass atrocities. Building on the responsibility to protect norms agreed to by heads of government in 2005 at the World Summit, this proposal asks states to not veto UNSC resolutions when the actions refer to serious international crimes, specifically war crimes, genocide, crimes against humanity or ethnic cleansing. The proposal on UNSC restraint has so far attracted support from 117 states – but not from the P5. In fact, as of February 2018, Russia and China have vetoed nine UNSC resolutions regarding Syria since the crisis in 2011. There is little reason to hope that the current leaders of China and Russia would agree to this proposal.

Another proposal is to allow states to vote against a resolution without necessarily vetoing it, permitting them to at least register their disagreement.<sup>65</sup> However, like the

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<sup>65</sup> M. Albright and I. Gambari. *Confronting the Crisis of Global Governance: Report of the Commission on Global Security, Justice, and Governance*. The Hague: The Hague Institute. 2015: 85.

code of conduct proposal, there is little evidence that this would prove effective or is presently viable.

Despite the failure to get China and Russia's consent on voluntary restraint of the veto, R2P has still been extensively referenced at the UNSC. Country representatives have referenced R2P 58 times as of spring 2017, 50 of those since Resolution 1973 authorized armed humanitarian intervention in Libya in 2011.<sup>66</sup> While the intervention proved flawed, it was a significant development within the broader process of civilian protection reform as it was the first UNSC resolution to be approved without state consent in order to protect innocent people from mass atrocities.<sup>67</sup> The numerous resolutions working for the protection of civilians could be a model for how those interested in preventing attacks on schools could proceed. UN peacekeeping forces have increasingly focused on civilian protection over the past two decades. However, given the difficulties in building political support for a broad proposal, it might be more feasible to do this for a more defined initiative, that is, by seeking to add a component on the protection of students and schools.

Although a standalone UNSC resolution on preventing attacks on education would in principle be optimal in strengthening protection, the authors recognize the political difficulties in achieving this outcome. Even if a standalone resolution proves possible, the UNSC may agree on language that is interpreted by others, outside of the P5, to be diluted and ultimately insufficient in preventing or reducing attacks on education. Therefore, it is important to consider that for some state and civil society actors, it may be preferable not to have a new resolution if it is not fit for purpose. This does not mean that the pursuit of an effective UNSC resolution is not important. At a minimum, it may help sustain and further raise the profile of education-related violations at the highest levels of multilateral diplomacy and advocacy. For example, the Statement of the President of the Security Council (31 October 2017) on 'children and armed conflict' provides a recent reassertion of the responsibilities and commitments of the UNSC.<sup>68</sup>

Overall, the authors argue that there may be greater traction and change by focusing and advocating for codes of conduct to ensure protection of civilians/safe havens/R2P which would then mitigate and possibly reduce the number of attacks on education. The codes of conduct would ultimately restrain veto power.

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<sup>66</sup> UNSC. "Resolution 1973". Adopted by the Security Council at its 6498th meeting, 17 March 2011.

<sup>67</sup> A. Bellamy. *The Responsibility to Protect: A Defence*. 1<sup>st</sup> edition. Oxford: Oxford University Press. 2015: 9-10.

<sup>68</sup> President of the UN Security Council, "Statement on Children and Armed Conflict", 31 October 2017.

## Conclusions

The goal of this joint project, *Law, Education and the Sustainable Development Goals*, is to contribute through evidence-based advocacy to decreasing the incidence of attacks on students, teachers and schools and to protect the right to education and education in times of insecurity and armed conflict. In this paper, the authors have critically assessed the gaps and challenges in relation to accountability for education-related violations. Despite the international community's efforts, it is recognized that prevention is often impossible. We therefore considered other mechanisms to address attacks on education, focusing on legal accountability while also considering non-legal forms of accountability, the feasibility of UNSC reforms to decrease the incidence of education-related violations and the current and long-term strategic opportunities to strengthen accountability through the SDGs. The authors have employed and tested the application of their 5Ps framework (**P**revention, **P**rotection, **P**rosecution, **P**ost-conflict recovery, and **P**artnerships) as an integrated cross-sectoral framework and approach for understanding and responding to attacks on education and education-related violations during insecurity and armed conflict.

Under legal accountability, we argued that accountability can be strengthened through improved procedures that seek to establish individual criminal accountability but also through enhanced measures aimed at holding states and non-state actors to account, as well as on providing aid and reparations to victims. In this context, there ought to be innovative means to achieve these goals given the far from perfect existing institutions. Post-conflict recovery is important in itself to help rebuild human and physical capital and ensure traumatized students are given the resources they need to recover and flourish. Considering the complexities of education-related violations and the multitude of actors involved, partnerships among numerous individuals and institutions are essential to realize our goals. In the paper, we consider policy and institutional reforms consistent with these aims and ground our recommendations in research.

To build on the central focus of this paper, the authors propose that the protective power of ICL for education-related violations can be promoted and further developed. Under the first related proposal, it was argued that an international criminal tribunal's selection and prioritization of a case would help set a global norm regarding attacks on education that amount to an international crime. This would facilitate courts at the national and regional levels to follow this precedent – above and beyond the standing law of “only” the war crime of targeting and/or destruction of ‘educational property’, preferably.

Under the second proposal in this area, it was asserted that an unprecedented mechanism such as the IIIM may contribute to holding individual perpetrators of education-related violations to account, specifically in the context of Syria, and in addition to the work of the Independent International Commission of Inquiry on Syria.

This would be relevant *per se* but especially if empirical evidence can sustain a claim of “weaponization” of education as a public good other than health care.<sup>69</sup>

Under the third related proposal, on the issue of attacks on education, but also the interlinked yet different applicable legal regimes of IHRL, IHL and ICL, it is proposed that human rights investigators would have to be informed as to how they can contribute to, or at least not hinder, criminal investigation, thereby bridging what can be called ‘the Geneva-The Hague divide on fact-finding and accountability’.<sup>70</sup> This suggestion applies not only to professional human rights investigators such as Commissions of Inquiry but also to lay persons such as individuals or investigative groups,<sup>71</sup> private fact-finding initiatives,<sup>72</sup> NGOs and businesses.<sup>73</sup>

As a final proposal for accountability in the form of prosecution, the authors emphasized the importance in standing law that targeting and/or destruction of ‘educational property’ is a war crime under the Rome Statute that established the ICC.<sup>74</sup> However, some examples have shown how the full protective power of ICL has not yet been realized in relation to attacks on education. As a first example, the widespread and systemic, discriminatory denial of education to a group of people, with a particular political, racial, national, ethnic, cultural, religious or gender identity, may amount to the crime against humanity of persecution. As a second example, the application of the crime of incitement of genocide to educational content needs to be considered.

There is scope, therefore, under current ICL to incorporate the protection of education within current crimes through either persecution or incitement to genocide. This would also help close gaps in legal regimes with respect to the issue of a specific lack of protection for education under ICL. ICL is, in this sense, different from IHRL and IHL since ICL provisions on the crime of persecution and the crime of incitement to genocide have the potential to be used to protect education. Further, the reparations mechanism of the ICC can attempt to provide redress for education-related violations of ICL (protection). Despite the lack of specific provisions, ICL can be an important mechanism to hold individuals accountable for many of the IHRL and IHL provisions that protect against education-related violations, including the protection of the lives of students and educational personnel and the protection of educational facilities. It is also relevant that the interaction between IHRL, IHL and ICL in relation to the

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<sup>69</sup> See F. M. Fouad et al. “Health Workers and the Weaponisation of Health Care in Syria”, 2017. Preliminary research findings indicate that the Assad government and allied forces are involved in a war-crime strategy to “weaponize” health care on an unprecedented scale.

<sup>70</sup> Short for Geneva’s commissions of inquiry and The Hague as a host to many international criminal courts and tribunals.

<sup>71</sup> Such as Bellingcat or Forensic Architecture

<sup>72</sup> Such as SJAC and CIJA

<sup>73</sup> Under the UN Guiding Principles for Human Rights and Business, businesses have to conduct due diligence and thus can also engage in collecting information on education-related violations.

<sup>74</sup> There is no international criminal law treaty that deals with the protection of education itself.

protection of educational facilities and therefore on holding those who failed to offer such protection individually accountable, is unclear.

For the deliberate and direct destruction of private (and to some extent) communal property, including, therefore, some educational facilities, in situations of armed conflict, there is a strong core of protection under each regime of IHRL, IHL and ICL. However, outside of this core position, few IHRL cases exist and it is not possible to say to what extent the provisions of IHRL, IHL and ICL might diverge in relation to, for example, incidental damage to a public educational facility for primary age students during an armed conflict.

In Section 1.3, we addressed three types of penalties, which are, legal, economic/diplomatic sanctions and naming and shaming. It was concluded, despite some emerging evidence for a possible modest deterrent effect of criminal prosecutions that attributing the impact of an international criminal court and tribunal in preventing atrocities is challenging. It was found that economic sanctions entail many risks and that their usage, as at a minimum, should be targeted and outcome focused. Actors should be aware of likely outcomes both in terms of the dependent variable of interest and for other important areas such as the protection of human rights.

“Naming and shaming” or publicly excoriating those who likely have committed wrongs can ameliorate atrocities and decrease the severity as measured by the number of deaths perpetrated by governments. Other studies, however, suggest caution because while some types of human rights abuses on which a spotlight is shown may decrease, others can increase. There is no evidence that publicizing education-related violations can decrease the severity of such attacks although more research is needed.

In Section 2, we addressed strengthening accountability opportunities through linkages to the SDGs. While this project will return to this topic in more detail through subsequent outputs, this paper introduced some of the main interlinkages, noting SDG 4, 5, 16 and 17. Two main weaknesses were noted in relation to accountability, however, the lack of assigned responsibility or in-built accountability mechanisms and a set of challenges to data collection and monitoring. Given the former, the proposals for strengthening accountability for education-related violations should add value to the broader discourse on the SDGs. To address the weaknesses in monitoring, the authors call on states and multilateral agencies to:

- employ further both a composition of data sources and a participatory approach at the national and local levels to verify and contextualize data;
- strengthen the capacities of NSOs and encourage the prioritization of indicators, especially in conflict-affected and fragile states, where such needs tend to be greater; and

- support the role of the HLPF on Sustainable Development and the SDG4–Education 2030 Steering Committee.

Section 3 linked the recent and ongoing efforts for procedural reform within the UNSC to future advocacy to protect both education from attack and the right to education. In identifying feasible proposals, the authors concluded that there may be greater traction and change by focusing and advocating for codes of conduct, which would ultimately restrain veto power and ensure the protection of civilians/safe havens/R2P. This would in turn mitigate and possibly reduce the number of attacks on education.

Overall, this paper has argued that accountability can and should be improved for attacks on students, educational facilities and education more broadly. Based on evidence from closely related fields, this should contribute to decreasing the incidence of such education-related violations. In other words, actors should take concrete steps in order to decrease the incidence of attacks on students and schools and this can be achieved by increasing accountability for education-related violations.

To advance this argument, and as a concrete next step, the authors propose a process to gather original data on situations where education might be used as a ‘weapon of war’ with specific reference to Syria, and to use these data to call for enhanced accountability for education-related violations also in new accountability mechanisms. To adopt a similar method of triangulation, as for health care, the authors have emphasized the importance of supporting existing and new fora, namely, the CoI and the IIM.

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