

## ANNEX 2

### SUGGESTIONS TO IMPROVE INTERNATIONAL LAW PROTECTION FOR CHILDREN IN ARMED CONFLICT SITUATIONS

1. **NEED FOR WIDER RATIFICATION** of the following international law instruments in order to enhance (i) the substance of the available protections and (ii) accountability:
  - 1.1 Additional Protocol I (API) and Additional Protocol II (APII). This would assist in strengthening the protection of children in international armed conflict and non-international armed conflict that is governed by APII since those instruments contain more detailed provisions regarding children than the Fourth Geneva Convention and customary international law (CIL).
  - 1.2 Optional Protocol on the Involvement of Children in Armed Conflict (OPAC). This would strengthen the protection of children regarding recruitment and use in armed conflict.
  - 1.3 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC). This would strengthen the protection of children regarding sexual exploitation and abuse.
  - 1.4 Optional Protocol on a Communications Procedure (OP3). This would enable the greater use of the CRC Committee, and thereby enhance the possibility of greater accountability.
  - 1.5 The Rome Statute. This would enable greater use of the International Criminal Court (ICC), and thereby enhance the possibility of greater accountability.
2. **CLARIFY** existing substantive legal protections that are vague/ambiguous:
  - 2.1 The general international humanitarian law provisions regarding children's entitlement to care and aid/special treatment which are, at present, different under API, APII and CIL should be standardised and explained in further detail. Consideration should also be given to whether 'children' should be defined so as to include all persons aged 18 and under.
  - 2.2 The scope of application of the Convention on the Rights of the Child – and whether all of it applies in armed conflict – should be clarified by, for example, the CRC Committee issuing a General Comment.

- 2.3 The law regarding the recruitment and use of children should be clarified by addressing the existing conceptual inconsistency between international criminal law and international humanitarian law. This could be done by revising international humanitarian law to reflect the higher standards in international criminal law except where there is adequate justification for a difference in approach. For example, international humanitarian law should be revised to make clear that the prohibition against the recruitment of children under 15 in armed forces or groups applies to voluntary enlistment – as well as conscription – in line with the higher standards of conduct embodied in international criminal law.
- 2.4 In the context of the use of children in armed conflict: the meaning of ‘active participation’ in the Rome Statute is unclear (for example, it is not clear which acts of indirect participation by a child in hostilities will constitute the war crime of ‘active’ participation in hostilities). The meaning of ‘active participation’ ought to be clarified in the jurisprudence of the ICC.
- 2.5 The gaps and inconsistencies between the relevant international humanitarian law and international human rights law regarding the recruitment and use of children could be clarified by the CRC Committee issuing a General Comment.
- 2.6 The position of ‘child soldiers’ sexually abused by their own group would benefit from further clarification in the ICC’s jurisprudence. Specifically, principled consideration should be given as to whether the international humanitarian law prohibitions on rape and sexual slavery can be described as applying regardless of whether the child victim is a civilian or soldier.
- 2.7 The law should be clarified by defining ‘abduction’ in the context of armed conflict, possibly by adopting the definition in the Monitoring and Reporting Mechanism (MRM) field manual (viz., ‘unlawful removal, seizure, capture, apprehension, taking or enforced disappearance of a child either temporarily or permanently for the purpose of any form of exploitation of the child’) with the addition, at the end, of ‘for the purpose of any form of exploitation of the child or a prohibited act’. The definition should state that the taking may be done by anyone (private citizen, armed forces or non-state armed groups), and that the taking of the child does not need to be across an international frontier and encompasses both domestic and international abductions.

- 2.8 The international human rights law framework does not expressly address the context of armed conflict in relation to attacks on hospitals and schools (for example, whether there is an obligation to repair and maintain facilities). Guidance should be developed in a General Comment by the CESCR (the Committee of the International Covenant on Economic, Social and Cultural Rights) and/or the CRC Committee.
- 2.9 In relation to denial of humanitarian access, international humanitarian law should be clarified to provide that (i) arbitrary or capricious denials of humanitarian access are unlawful and that (ii) denying access will always be arbitrary or capricious in certain circumstances, including: (1) where it may lead to the starvation of civilians; (2) where it violates international humanitarian law prohibitions (for example the prohibition on collective punishment), and (3) where it breaches international humanitarian law obligations (including, for example, the obligation to provide 'care and aid' for children).
- 2.10 In relation to denial of humanitarian access, consideration should be given to whether international humanitarian law may be clarified so as to expressly standardise two protections for children across **all** armed conflicts, viz., (i) in the distribution of humanitarian aid, priority should be afforded to children (aged 18 and under) and (ii) parties to conflicts should endeavour to reach local agreements to evacuate children (aged 15 and under) from besieged and encircled areas. Consideration should also be given to whether to extend the protection of (ii) to children aged 15-18.
- 2.11 In relation to denial of humanitarian access, the law regarding the obligations of non-parties to a conflict should be clarified. For example, consideration should be given to whether measures adopted by non-parties to conflicts – such as collective or unilateral sanctions or counter-terrorism measures – should be designed by reference to express consideration of the impact on humanitarian access and assistance, especially on children and their caregivers.
- 2.12 The extent to which states are obliged, under international human rights law, to accept and facilitate the provision of humanitarian services to children by impartial humanitarian organisations is limited and unclear. The scope of Article 38(4), Convention on the Rights of the Child, could be clarified, for example by the CRC Committee issuing a General Comment on Article 38.

2.13 Consideration should be given to clarifying 'humanitarian assistance mission' (as used in the Rome Statute), for example by providing illustrations of 'humanitarian assistance missions' that include (i) missions authorised by the UN Security Council (UNSC) and (ii) relief operations by established humanitarian assistance providers.

3. **DEVELOP** missing/under-developed legal protections:

3.1 International humanitarian law should be developed so as to require the express consideration of children in the context of the conduct of hostilities and, in particular, the principles of proportionality and precautionary measures. The position of children could be specified as an express factor that needs to be given weight and considered in evaluating proportionality, for example in military manuals. Similarly, the requirement to take all 'feasible' precautions could involve express and heightened standards for children.

3.2 Specific international humanitarian law provisions could be developed, for example, by recognising an obligation to search for children and collect them by removing them from the immediate theatre of hostilities and by requiring that arrested, detained or interned children should have their cases considered as a matter of priority.

3.3 Consideration could be given to developing the definition of 'war crimes' in the Rome Statute to include specific violations of the care and aid provisions regarding children.

3.4 If Article 38 of the Convention on the Rights of the Child does displace the other provisions of the CRC during armed conflict, the 'feasible' standard set by Article 38(4) CRC (which entails a lower degree of protection for children than international humanitarian law) could be strengthened so as to be consistent with international humanitarian law.

3.5 The question of whether international humanitarian law and international criminal law protections regarding the recruitment and use of children should be extended to include children aged 15 years or over should be monitored, and consideration should be given to increasing age limits once a consensus can be established in favour of such a change.

3.6 In relation to recruitment and use in international armed conflict and international humanitarian law regarding children aged under 15: consideration should be given to developing the law so that (i) it imposes an absolute prohibition on the participation of children

under the age of 15 years in hostilities (rather than merely requiring parties to international armed conflict to take feasible measures to ensure that children do not participate); (ii) the prohibition should apply to the use of children to participate in hostilities in general and should not be limited to their direct participation, and (iii) the voluntary enlistment of children under the age of 15 years should be prohibited as well as their recruitment. Alternatively, individual states that have ratified API could be encouraged to reflect this more protective content in their domestic laws and military manuals.

- 3.7 In relation to recruitment and use in non-international armed conflict (governed by APII) and children under 15: consideration should be given to amending APII to state, for the avoidance of doubt, that the voluntary enlistment of children under the age of 15 years during armed conflict is prohibited. Again, alternatively, individual states that have ratified APII could be encouraged to reflect this more protective content in their domestic laws and military manuals.
- 3.8 In relation to recruitment and use and international human rights law: the existing imbalance in the OPAC obligations on the armed forces of the state as compared to other armed groups could be reduced by (i) heightening the standards upon states in domestic law (for example, by domesticating the OPAC standards so that public authorities may be held accountable in domestic law for failures to meet the international law standards that are applied to non-state armed groups) and (ii) heightening the standards in international law (for example, to encourage states to raise the minimum age for voluntary recruitment so far as possible, in order to reduce the perceived inconsistency in the law).
- 3.9 The care and aid provisions in API and APII (and Common Article 1 of the Geneva Conventions) could be used as a legal prompt to encourage states to take positive measures to prevent sexual violence against children in armed conflict, and to provide child victims of such violence with the care and aid they require in order to recover and be rehabilitated. Consideration should be given to developing the law by establishing a greater focus on states' wider obligations regarding children, for example to prevent sexual violence against children and the rehabilitation of child victims.
- 3.10 Consideration should be given to whether international criminal law needs to be developed so as to expressly prohibit forced marriage.
- 3.11 The specific international human rights law treaty provisions regarding child abduction in armed conflict do not define the

meaning or scope of the 'appropriate measures' that are required to be taken thereunder. Applied to abduction, 'appropriate' measures may require (i) further consideration of how to prevent abduction and (ii) further consideration of domestic measures by which abducted children should be identified, treated and assisted. The scope of 'appropriate measures' could be developed, for example in General Comments by the CRC Committee or the African Committee of Experts. The Special Representative for Children and Armed Conflict could (potentially in conjunction with the Committees) identify measures suited to addressing the consequences of abduction in armed conflict on children and the way in which such measures should be domestically implemented.

- 3.12 Consideration should be given to developing international humanitarian law by establishing formal obligations of notification of the location of hospitals between parties to an armed conflict. Allied to the development of such notification obligations, consideration could also be given to the potential for practical (rather than legal) mechanisms to assist with independent verification in order to address challenges to the protection of hospitals.
- 3.13 Consideration should be given to developing international humanitarian law by reinforcing the use of protected zones. For example, parties could be required to designate such zones at the outbreak of an armed conflict.
- 3.14 Consideration should be given to developing international humanitarian law so as establish a specific prohibition on targeting schools (like the one that exists regarding hospitals).
- 3.15 Parties to conflicts have no specific obligation to agree specific measures such as temporary ceasefires and humanitarian pauses to ensure humanitarian access to children in conflict areas. The law should be developed so that parties to conflicts are obliged to try to agree specific measures to enable humanitarian access to children.
- 3.16 There is no Rome Statute offence of the intentional starvation of civilians in non-international armed conflict. Consideration should be given to developing the law by recognising, as a war crime during non-international armed conflict, the intentional use of starvation of civilians as a method of combat.
- 3.17 There is no specific, international law crime of denying humanitarian access in conflicts. Consideration should be given to whether the law needs to be developed by establishing a separate offence of the wilful

denial of humanitarian access as a war crime and a crime against humanity.

4. **CONSIDER A NEW LEGAL INSTRUMENT** that combines the protections of international humanitarian law and international human rights law regarding children in armed conflict in order to address the systemic underlying problems of (i) the complex and scattered nature of these regimes and (ii) the lack of compliance and enforcement.
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