

The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law

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INTRODUCTION

The interaction between human rights law and international humanitarian law (“IHL”) has received a great deal of scholarly attention.¹ Much of the inquiry has focused on the conceptual space and normative interplay of these two areas of law.² In support of these analyses, commentators sometimes note the increased presence of IHL in the work of human rights bodies.³ Indeed, it is often in situations of armed conflict that many human rights abuses occur.⁴ However, there remains an interesting gap in the debate: while human rights bodies may include international humanitarian law, what are they *doing* with it? To what extent are they interpreting its protections under a human rights framework? Are they performing substantive or precedential analysis of IHL?

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1. See, e.g., THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989); RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002); Noëlle Quénivet, *The History of the Relationship Between International Humanitarian Law and Human Rights Law*, in *INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 1* (Roberta Arnold & Noëlle Quénivet eds., 2008).

2. See, e.g., Vesselin Popovski, *Protection of Children in International Humanitarian Law and Human Rights Law*, in *INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW*, *supra* note 1, at 383, 384 (noting the differences but gradual convergence of IHL and human rights law); PROVOST, *supra* note 1, at 13 (contending that “there exists a real and meaningful difference between the normative frameworks” of IHL and human rights law); Louise Doswald-Beck & Sylvain Vita, *International Humanitarian Law and Human Rights Law*, 293 INT’L REV. RED CROSS 94 (1993) (“The separate development of these two branches of international law has always limited the influence which they might have had upon each other.”).

3. See, e.g., FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 200 (3d ed. 2001) (“In recent times, both intergovernmental and non-intergovernmental human rights bodies have become increasingly inclined to include humanitarian law in their activities.”).

4. See *id.*

This article addresses one measure of that gap by comprehensively examining the work of the Committee on the Rights of the Child (“CRC” or “the Committee”) as it relates to the interpretation of international humanitarian law.⁵ Comprised of eighteen independent human rights experts, the Committee monitors States parties’ implementation of the Convention on the Rights of the Child (“Children’s Convention”) and the Optional Protocols to the Convention. The Committee’s monitoring role is rooted in its review of periodic reports from each State party detailing the State’s progress toward the child rights protections mandated by the Convention.⁶ The Committee’s constitutive treaty is unique both in the range of its substantive provisions⁷ and in the breadth of its international acceptance: with 193 States parties, the Children’s Convention is the most widely ratified human rights treaty in history.⁸

The Committee has an important role in interpreting international humanitarian law. Of the core international human rights treaties with interpretive bodies to monitor implementation,⁹ the Children’s Convention is the only one that discusses humanitarian law explicitly, through its Article 38.¹⁰ As a result, the CRC is the only human rights treaty body with a

5. Indeed, two of the more comprehensive analyses of the relation between the Children’s Convention and IHL examine the structural overlaps and gaps without considering the actual work product of the Committee. See JENNY KUPER, INTERNATIONAL LAW CONCERNING CHILD CIVILIANS IN ARMED CONFLICT 111 (1997); Popovski, *supra* note 2, at 395.

6. This obligation flows from Article 44 of the Convention. Convention on the Rights of the Child art. 44, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Children’s Convention] (“States Parties undertake to submit to the Committee . . . reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights . . .”).

7. Cynthia Price Cohen & Susan Kilbourne, *Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis*, 19 MICH. J. INT’L L. 633, 634 (1998) (“Only the [Children’s Convention] has followed the Universal Declaration’s comprehensive model by establishing a full panoply of rights for children which includes civil-political rights, economic-social-cultural rights, and humanitarian rights.”).

8. Only Somalia and the United States have not ratified the Convention. See UNITED NATIONS TREATY COLLECTION, *Convention on the Rights of the Child*, in MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, available at <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-11.en.pdf> (last visited Oct. 23, 2010).

9. Both the Convention for the Protection of All Persons from Enforced Disappearances arts. 16, 43, *adopted* Dec. 20, 2006, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 [hereinafter Disappearances Convention], and the Convention on the Rights of Persons with Disabilities art. 11, *adopted* Dec. 13, 2006, G.A. Res. 61/106, U.N. Doc. A/61/49 [hereinafter Disabilities Convention] refer to international humanitarian law.

10. Article 38 of the Convention on the Rights of the Child (“Children’s Convention”) provides in pertinent part:

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

. . . .

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

Children’s Convention, *supra* note 6, art. 38(1), (4).

substantial existing humanitarian law jurisprudence.¹¹ Indeed, as elaborated below, the Convention's reference to humanitarian law in Article 38 is crucial to understanding the Committee's role in interpreting IHL. Further, the CRC considers reports from States under the Optional Protocol on Children in Armed Conflict ("Child Soldier Protocol"), which recalls in its preamble the obligation of States parties "to abide by the provisions of international humanitarian law."¹² Various international humanitarian law instruments also contain provisions related to the protection of children, allowing for substantial overlap.¹³

These features suggest that the CRC has unique institutional potential to interpret humanitarian law — perhaps greater than that of the Human Rights Committee ("HRC"), whose constitutive treaty, the International Covenant on Civil and Political Rights ("Civil and Political Covenant"),¹⁴ does not refer explicitly to humanitarian law. Because the HRC is widely considered the premiere UN treaty body focused on human rights, it offers a useful baseline against which to compare the CRC's treatment of IHL. Accordingly, this article occasionally contrasts the approaches of the HRC and CRC with a view to better illuminating the contributions of the latter.¹⁵

In spite of several factors suggesting that the CRC plays an important role in interpreting IHL, others point in a different direction. Unlike the Civil and Political Covenant, there is no general derogation provision in the Children's Convention. The CRC is thus not compelled to scrutinize States' derogation of rights to ensure that "such measures are not inconsistent with their other obligations under international law"¹⁶ and is thereby deprived of a direct opportunity to address the relation between the Children's Convention and humanitarian law.¹⁷ Further, the CRC is not able to

11. The nascent Committee on the Rights of Persons with Disabilities ("CRPD") has yet to put forth any interpretations of its convention. In this regard, some of the CRC recommendations may provide guidance to the CRPD's interpretation of Article 11 of the Disabilities Convention, which provides that States parties shall act "in accordance with their obligations under international law, including international humanitarian law and international human rights law," to ensure protection of disabled persons. Disabilities Convention, *supra* note 9, art. 11.

12. Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, at 3, U.N. Doc. A/54/263 (May 25, 2000) [hereinafter Child Soldier Protocol].

13. See KUPER, *supra* note 5, at 74–111 (detailing the various IHL instruments: the four Geneva Conventions, the two additional Protocols, the Declaration on the Protection of Women and Children in Periods of Emergency and Armed Conflicts, the Declaration on the Rights of the Child, and the Convention on the Rights of the Child).

14. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter Civil and Political Covenant].

15. For a more detailed treatment of the Human Rights Committee's treatment of IHL, see David Weissbrodt, *The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law*, 31 U. PA. J. INT'L L. 1185 (2010).

16. Civil and Political Covenant, *supra* note 14, art. 4(1).

17. Article 41, however, may provide a similar opportunity to elaborate upon humanitarian law protections where States adopt an unduly narrow interpretation of the Convention: "Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights

consider individual communications, as is the HRC under the Optional Protocol to the Civil and Political Covenant.¹⁸ This deficiency deprives the CRC of potentially the most fruitful avenue for issuing precedential interpretations of humanitarian law: the fact-specific individual decision.¹⁹

How, then, has the CRC approached international humanitarian law? The Committee produces three forms of written interpretations, each of which this article comprehensively examines and analyzes. Part I considers the CRC's General Comments, which elaborate on thematic issues rooted in particular provisions of the Convention. Part II examines its Concluding Observations, issued in response to periodic reports from States parties under Article 44 of the Convention, which assess the reporting State's implementation of and compliance with the Convention. Part III considers the analogous Concluding Observations in response to the Optional Protocol on Children in Armed Conflict. Part IV details the Recommendations adopted by the CRC after holding annual thematic days of general discussion. The final Part synthesizes the Committee's work product and summarizes its approach to international humanitarian law.

This article finds that the CRC's interpretations incorporate the entire IHL corpus into the Children's Convention. It performs implicit analysis of IHL, however, rather than explicit substantive analysis. By assembling various pronouncements in the Concluding Observations, it is possible to find examples of States parties' obligations under IHL as they relate to respect for and protection of children. Nonetheless, the Committee's structure and mandate have thus far prevented it from performing fact-specific and potentially precedential analysis. By slightly modifying the format of its Concluding Observations, however, the Committee may be able to create more explicit links between IHL and the Convention. Moreover, this article contends that through its consistent pronouncements on certain protections that States parties must ensure for children in situations of armed conflict, the Committee may be developing and solidifying norms of customary international humanitarian law.

I. GENERAL COMMENTS

The CRC General Comments elaborate on rights enshrined in the Convention, clarify States' responsibilities, and encourage State action. The General Comments address broad themes that become apparent during the Committee's consideration of periodic reports; the General Comments are

of the child and which may be contained in . . . international law in force for that State." Children's Convention, *supra* note 6, art. 41.

18. See Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

19. Of course, if the HRC is any indication, while individual communications may offer a promising means of developing precedent, the Committee may be reluctant to utilize them in this manner. See Weissbrodt, *supra* note 15, at 1190.

topical, rather than country-specific.²⁰ This Part considers how the CRC approaches international instruments in its General Comments to understand more fully its treatment of international humanitarian law. Whereas the Human Rights Committee utilizes other human rights instruments to delineate Civil and Political Covenant protections, the CRC considers other international instruments as functionally interrelated. Consequently, it deems itself competent to evaluate States' overall human rights obligations as they relate to children.

A. *Approach to Other International Instruments*

The CRC's approach in its General Comments to instruments other than the Children's Convention is somewhat similar to that of the HRC. The CRC characterizes the scope of its General Comments as such: "While the mandate of the Committee is confined to its supervisory function in relation to the Convention, its interpretation efforts must be conducted in the context of the entirety of applicable international human rights norms and, therefore, the general comment adopts a holistic approach . . ." ²¹ This "holistic approach" is similar to the HRC's recognition that it "has the competence to take a State party's other international obligations into account when it considers whether the [Civil and Political Covenant] allows the State party to derogate from specific provisions . . ." ²²

The HRC, however, only infrequently references other international instruments in its General Comments and does so either in the context of determining non-derogable rights or fleshing out Civil and Political Covenant protections.²³ By contrast, the CRC takes a different normative stance: rather than simply refer to other international instruments to construe Convention obligations, the CRC recognizes that "all human rights . . . are indivisible and interdependent."²⁴ Conceptually, such an approach implies that the CRC deems itself competent to construe general human rights obligations concerning children.

In its General Comments, the CRC routinely draws on other international instruments in a variety of ways: (1) as guidelines for States' imple-

20. *E.g.*, U.N. Comm. on the Rights of the Child ("CRC"), General Comment No. 7: Implementing Child Rights in Early Education, ¶ 1, U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006) [hereinafter General Comment 7] (noting the necessity of addressing the implications of the Convention for young children, which became apparent during the Committee's review of periodic reports); CRC, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 4, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter General Comment 6] ("This general comment will compile and consolidate standards developed, inter alia, through the Committee's monitoring efforts and shall thereby provide clear guidance to States on the obligations deriving from the Convention with regard to this particular vulnerable group of children.").

21. General Comment 6, *supra* note 20, ¶ 6.

22. *See* U.N. Human Rights Comm. ("HRC"), General Comment No. 29: States of Emergency (Article 4), ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

23. *See* Weissbrodt, *supra* note 15, at 1206.

24. General Comment 6, *supra* note 20, ¶ 6.

mentation of rights; (2) as tools in interpreting the Convention; (3) to highlight the relation between the Convention and States' other international obligations, affirming States' broader responsibilities; and (4) to situate the Children's Convention among its historical antecedents. The remainder of this section addresses each function in turn.

(1) *Guidelines for Implementing Convention Rights:*

In several General Comments, the CRC uses other international human rights instruments as guidelines to assist States in carrying out their obligations under the Convention. The initial assessment process of determining the best interests of the child, for example, entails information-gathering along the lines described in the Convention relating to the Status of Refugees.²⁵ In its General Comment on national human rights institutions, the CRC states that such mechanisms "should be established in compliance with the [Paris Principles]."²⁶ The Committee urges States to, *inter alia*, regulate working environment and conditions for adolescents "in accordance with article 32 of the Convention, as well as ILO Conventions Nos. 138 and 182."²⁷ Similarly, in interpreting the Convention's provisions about treatment and confinement, the Committee "draws the attention of States parties to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty"²⁸ and the Beijing Guidelines²⁹ and urges that States incorporate these rules into domestic law.³⁰

25. *Id.* ¶ 31; *see also* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

26. CRC, General Comment No. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, ¶ 4, U.N. Doc. CRC/GC/2002/2 (Nov. 15, 2002) (citing Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights, G.A. Res. 48/134, 48 U.N. GAOR Supp. No. 49 at 253, U.N. Doc. A/48/49 (Dec. 20, 1993)); *see also* CRC, General Comment No. 9: The Rights of Children with Disabilities, ¶ 24, U.N. Doc. CRC/C/GC/9 (Feb. 27, 2007) [hereinafter General Comment 9].

27. CRC, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, ¶ 18, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) [hereinafter General Comment 4] (citing International Labour Organization ("ILO"), Convention Concerning Minimum Age for Admission to Employment (No. 138), *opened for signature* June 26, 1973, 1015 U.N.T.S. 297 (entered into force June 19, 1976); ILO, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (No. 182), *opened for signature* June 17, 1999, 2133 U.N.T.S. 163 (entered into force Nov. 19, 2000); *see also* General Comment 9, *supra* note 26, ¶ 75 (encouraging States parties to ratify these conventions "in [the] context" of addressing the economic exploitation to which children with disabilities are particularly susceptible).

28. U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, Annex, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49/Annex (Dec. 14, 1990).

29. U.N. Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33 Annex, U.N. GAOR, 45th Sess., Supp. No. 53, U.N. Doc. A/40/53/Annex (Nov. 29, 1985) [hereinafter Beijing Guidelines].

30. CRC, General Comment No. 10: Children's Rights in Juvenile Justice, ¶ 88, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter General Comment 10] (citing U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, *supra* note 28; Beijing Guidelines, *supra* note 29).

On occasion, the Committee explicitly directs States to consider other relevant bodies of law. For example, the Committee instructs, “[w]hen assessing refugee claims of unaccompanied or separated children, States shall take into account the development of, and formative relationship between, international human rights and refugee law.”³¹ The CRC also directs States how to interpret other international instruments with respect to their applicability to the CRC; for example, “the refugee definition in [the Refugee Convention] must be interpreted in an age- and gender-sensitive manner.”³²

(2) *Other Instruments as Interpretive Tools:*

In several General Comments, the Committee uses other international standards to interpret the Convention. For example, in construing the mandate in Article 40(3) concerning the creation of a “minimum age below which children shall be presumed not to have the capacity to infringe the penal law” the Committee draws on the Beijing Guidelines to recommend that the age “not be fixed at too low an age level.”³³ The Committee derives from its Beijing Guidelines-based recommendations that a minimum age of less than twelve is not “internationally acceptable.”³⁴ Similarly, in interpreting Article 2’s requirement of non-discrimination, the CRC cites Article 56 of the Riyadh Guidelines to recommend legislation providing that any conduct not penalized when committed by an adult is likewise not criminalized when committed by a child.³⁵

The Committee also interpretively uses other instruments in a more general fashion. With respect to adolescent health and development, for example, the Committee “understands the concepts . . . more broadly than being strictly limited to the provisions defined in Articles 6 (right to life, survival and development) and 24 (right to health) of the Convention.”³⁶ In this regard, the General Comment is to be “read in conjunction with . . . other relevant international human rights norms and standards,” including the Civil and Political Covenant and five other core international human rights treaties.³⁷ Interpreting Article 37 on the detention of children, the CRC

31. General Comment 6, *supra* note 20, ¶ 74.

32. *Id.*

33. General Comment 10, *supra* note 30, ¶ 32.

34. *Id.*

35. *Id.*, ¶ 8 (citing U.N. Guidelines for the Prevention of Juvenile Delinquency art 56., G.A. Res. 45/112, U.N. GAOR, 45th Sess., U.N. Doc. A/45/49 (Dec. 14, 1990)); *see also id.* ¶¶ 17–18.

36. General Comment 4, *supra* note 27, ¶ 4 n.1.

37. *Id.* (noting specifically the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter Economic Covenant]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, *opened for signature* Dec. 10, 1984, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (entered into force June 26, 1987) [hereinafter CAT]; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Race Convention]; International Convention on the Protection of All Migrant Workers and Members of Their Families, *opened for signa-*

states that “in addition to national requirements, international obligations constitute part of the law governing detention” and notes the applicability of Article 31(1) of the Refugee Convention and “general principles of law.”³⁸

The Committee relies at times upon classificatory standards laid out in other international agreements. It notes, for example, that trafficked children may be eligible for refugee status under the 1951 Refugee Convention³⁹ and that under-age recruitment — prohibited by the Child Soldier Protocol — constitutes persecution, which should lead to the granting of refugee status where the fear of such recruitment is based on factors enumerated by the Refugee Convention.⁴⁰

The Committee also routinely draws on the General Comments of other treaty bodies.⁴¹ In General Comment 5 relating to general measures of implementation, the Committee notes “[i]n international human rights law, there are articles similar to article 4 of the Convention, setting out overall implementation obligations, such as article 2 of the [Civil and Political Covenant] and article 2 of the International Covenant on Economic, Social and Cultural Rights.”⁴² The Committee describes its General Comment as “complementary” to the relevant General Comments of those treaty bodies and proceeds to cite them repeatedly.⁴³

(3) *Using Other International Obligations to Express Broader Responsibilities:*

The Committee emphasizes that States must respect other relevant international obligations.⁴⁴ Indeed, it explicitly lists the integration into na-

ture Dec. 18, 1990, G.A. Res. 45/158, Annex, 45 U.N. GAOR, Supp. No. 49A, at 262, U.N. Doc. A/45/49, (entered into force July 1, 2003); Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/46 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

38. General Comment 6, *supra* note 20, ¶ 62. The Committee is ostensibly interpreting the mandate in Article 37(b) that “the arrest, detention or imprisonment of a child shall be in conformity with the law” Children’s Convention, *supra* note 6, art. 37(b).

39. General Comment 6, *supra* note 20, ¶ 53.

40. *Id.* ¶ 59.

41. General Comment 4, *supra* note 27, ¶ 20 (recommending the minimum age for marriage be increased to eighteen years and noting that the Committee on the Elimination of Discrimination Against Women has made a similar recommendation); *id.* ¶ 40 (referring to a General Comment of the Committee on Economic, Social and Cultural Rights); CRC, General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, ¶¶ 22, 29, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007) [hereinafter General Comment 8] (noting that other treaty bodies, including the HRC, the Committee on Economic, Social and Cultural Rights, and Committee Against Torture, have reflected the same view as to the elimination of violent and humiliating punishment of children).

42. CRC, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, ¶ 5, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter General Comment 5].

43. *Id.*

44. General Comment 6, *supra* note 20, ¶ 91 (noting that States must respect the preconditions for adoption enumerated in Article 21 “as well as other relevant international instruments, including in particular the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Coun-

tional policy of other international standards as an objective of General Comment 10.⁴⁵ In addressing the problem of armed conflict in which land mines were laid, the Committee “emphasizes the importance of international cooperation in accordance with the [1997 Ottawa Convention].”⁴⁶ Moreover, it links compliance with some of the instruments it cites to fulfillment of obligations under the Children’s Convention.⁴⁷ In this regard, the Committee repeatedly notes the interconnectedness of human rights protections in general and Convention provisions in particular.⁴⁸ The CRC makes this point quite explicitly in discussing measures for general implementation.⁴⁹ So interconnected are the provisions of the various instruments that the Committee views its repeated invitations to ratify them as a step toward implementation of the rights enshrined in the Children’s Convention.

Similarly, the CRC highlights parallels between the Children’s Convention and other international agreements by referencing the interpretations of other international bodies.⁵⁰

try Adoption and its 1994 Recommendation Concerning the Application to Refugee and other Internationally Displaced Children when considering the adoption of unaccompanied and separated children”).

45. General Comment 10, *supra* note 30, ¶ 4 (citing, *inter alia*, Beijing Guidelines, *supra* note 29).

46. General Comment 9, *supra* note 26, ¶ 23 (citing Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *opened for signature* Sept. 18, 1997, 2056 U.N.T.S. 211 (entered into force Mar. 1, 1999)).

47. General Comment 10, *supra* note 30, ¶ 41 (“[T]he rule that no heavier penalty shall be imposed than the one that was applicable at the time when the criminal offence was committed, as expressed in article 15 of ICCPR, is in the light of article 41 of CRC, applicable to children in the States parties to ICCPR.”); *id.* ¶ 50 (stating in its interpretation of Article 40(2)(b)(ii) of the Children’s Convention that the child must have adequate time to prepare his/her defense “[a]s required by article 14(3) (b) of ICCPR”); *id.* ¶¶ 51, 56, 60, 61, 75 (using Civil and Political Covenant to interpret various provisions of the Children’s Convention).

48. See CRC, General Comment No. 3: HIV/AIDS and the Rights of the Child, ¶¶ 5–6, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003) (noting that HIV/AIDS implicates not just the Article 24 right to health, but all the rights of the child — civil, political, economic, social, and cultural — and also enumerating 19 articles that embody the “most relevant” rights affected by HIV/AIDS); General Comment 6, *supra* note 20, ¶ 6 (“[The Committee’s] interpretation efforts must be conducted in the context of the entirety of applicable international human rights norms”); General Comment 4, *supra* note 27, ¶ 5 (“As recognized by the World Conference on Human Rights (1993) and repeatedly stated by the Committee, children’s rights too are indivisible and interrelated.”); General Comment 7, *supra* note 20, ¶ 10 (reminding States parties that “the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention”).

49. The Committee states:

[I]n the light of the principles of indivisibility and interdependence of human rights, the Committee consistently urges States parties . . . to ratify . . . the six other major international human rights instruments. During its dialogue with States parties the Committee often encourages them to consider ratifying other relevant international instruments.

General Comment 5, *supra* note 42, ¶ 17. The Committee appends a list of such agreements to the General Comment.

50. General Comment 8, *supra* note 41, ¶¶ 23–25 (citing interpretations of the European Court of Human Rights, European Committee of Social Rights, Inter-American Court of Human Rights, and African Commission on Human and Peoples’ Rights of the relevant provisions of their respective international agreements).

(4) *Using Other Instruments to Situate the CRC Among Its Historical Antecedents:*

The Committee notes in General Comment 8 that the Children's Convention "builds on [the] foundation" laid by the International Bill of Human Rights, comprised of the Universal Declaration of Human Rights, the Civil and Political Covenant, and the Economic, Social, and Cultural Covenant.⁵¹ In its General Comment on juvenile justice, it notes that Article 40(1) of the Children's Convention includes a provision about dignity that "reflects the fundamental human right enshrined in [the Universal Declaration]."⁵²

B. International Humanitarian Law in the General Comments

The Committee explicitly addresses humanitarian law in three of its eleven General Comments. In elaborating on Article 29(1)'s educational aims, it notes in General Comment 1 that "[t]he values embodied in article 29(1) are . . . even more important for those living in situations of conflict or emergency."⁵³ In this intersection, "[e]ducation about international humanitarian law also constitutes an important, but all too often neglected, dimension of efforts to give effect to article 29(1)."⁵⁴ Although this reference emphasizes the primacy of humanitarian law in a human rights education program, it offers no analysis of the substance of humanitarian law itself.

In considering the treatment of unaccompanied and separated children outside their countries of origin, the Committee notes that the standards developed in Comment 6 "shall in no way impair further-reaching rights and benefits offered to unaccompanied and separated children under . . . international humanitarian law."⁵⁵ This reference is effectively a reformulation of Article 41 of the Convention.⁵⁶ More substantively, the Committee notes that such children "should not normally be interned" but that if "exceptional internment of a child soldier over the age of 15 years is unavoidable and in compliance with international human rights and humanitarian law, for example, where she or he poses a serious security threat, the conditions of such internment should be in conformity with international standards."⁵⁷ This observation is the closest to a substantive interpretation of humanitarian law that the Committee performs in its General Com-

51. *Id.* ¶ 16.

52. General Comment 10, *supra* note 30, ¶ 13.

53. CRC, General Comment No. 1: The Aims of Education, ¶ 16, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001) [hereinafter General Comment 1].

54. *Id.*

55. General Comment 6, *supra* note 20, ¶ 4.

56. Article 41 provides: "[n]othing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in . . . [i]nternational law in force for that State." Children's Convention, *supra* note 6, art. 41.

57. General Comment 6, *supra* note 20, ¶ 57.

ments: a child soldier can be detained pursuant to humanitarian law at least where she or he poses a serious security threat.

In addition, the Committee states that non-refoulement obligations “deriv[e] from international human rights, humanitarian and refugee law” and emphasizes that all such obligations — including those under the 1951 Refugee Convention and the Convention Against Torture — must be respected by States parties.⁵⁸ It further provides that obligations “deriving from article 38 [of the Children’s Convention] and the [Child Soldier Optional Protocol] entail extraterritorial effects” and that States must refrain from returning a child to a State in which there is a “real risk of underage recruitment . . . or of direct or indirect participation in hostilities.”⁵⁹ States’ non-refoulement obligations, therefore, are rooted in humanitarian and refugee law, expressed in other instruments, and incorporated into the Convention through Article 38. The non-refoulement obligations embodied in these other instruments are likewise incorporated into the norms applicable to States parties via Article 38. Hence, the Committee uses other instruments to emphasize the obligations already incumbent upon States through the incorporation of IHL into the Convention and the Optional Protocol.

Likewise, in General Comment 11, the Committee encourages States parties to “pay particular attention to the risks indigenous children face in hostilities.” It notes that Article 38 “obliges States parties to ensure respect for the rules of humanitarian law, to protect the civilian population and to take care of children who are affected by armed conflict.”⁶⁰ The Committee announces that Article 22 of the Convention entails the responsibility to create a functioning asylum system, to enact legislation addressing the treatment of unaccompanied children, and to “build capacities necessary to realize this treatment.”⁶¹ States must carry out these obligations “in accordance with applicable rights codified in the Convention and in other international human rights, refugee protection or humanitarian instruments to which the State is a party.”⁶² In other words, humanitarian law applies when States implement the Convention — particularly the treatment of unaccompanied children. The Committee, however, does not delineate in General Comment 11 the precise ways in which IHL is applicable.

58. *Id.* ¶ 26.

59. *Id.* ¶ 28.

60. CRC, General Comment No. 11: Indigenous Children and Their Rights Under the Convention, ¶ 66, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009) [hereinafter General Comment 11].

61. General Comment 6, *supra* note 20, ¶ 64.

62. *Id.*

C. Summary

The CRC, guided by its understanding that all human rights are “invisible and interdependent,” frequently utilizes other international instruments to articulate States’ human rights obligations related to the protection of children.⁶³ While recognizing its mandate to supervise Children’s Convention protections,⁶⁴ the CRC does not hesitate to reference or call upon States to incorporate other international standards and protections in its General Comments.⁶⁵ Indeed, the thematic nature of the CRC’s General Comments — in contrast with the article-specific approach of the HRC — leaves the Committee substantial flexibility in utilizing other international instruments. Similarly, when General Comments refer to situations of armed conflict, the CRC reminds States of their obligations under international humanitarian law as incorporated explicitly through Article 38⁶⁶ and implicitly through Articles 22⁶⁷ and 29.⁶⁸ Nonetheless, while such an approach implies that the Committee deems itself competent to determine States’ international obligations (both human rights and humanitarian), the General Comments do not provide substantive analysis of international humanitarian law.

II. CONCLUDING OBSERVATIONS IN RESPONSE TO PERIODIC REPORTS

The Committee on the Rights of the Child considers States parties’ periodic reports pursuant to Article 44 of the Children’s Convention.⁶⁹ Its Concluding Observations review each report and assess the State party’s progress toward implementing the rights guaranteed by the Convention. The reporting process is intended to function in a dialogic manner that facilitates policy development and, eventually, the full realization of Convention rights.⁷⁰ The Committee asks, for example, that States parties

63. *Id.* ¶ 6.

64. *Id.*

65. *See, e.g.*, General Comment 10, *supra* note 30, ¶ 4 (calling upon States to implement a comprehensive juvenile justice policy as required by several articles of the Children’s Convention, but also noting that such a policy requires compliance with various other international standards).

66. *See* General Comment 6, *supra* note 20, ¶¶ 4, 26, 28, 57; General Comment 11, *supra* note 60, ¶ 66.

67. *See* General Comment 6, *supra* note 20, ¶ 64.

68. *See* General Comment 1, *supra* note 53, ¶ 16.

69. *See* Children’s Convention, *supra* note 6, art. 44 (“States Parties undertake to submit to the Committee . . . reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights.”). States submit the first report within two years of the entry into force of the Convention and submit an additional report every five years thereafter. *Id.*

70. *See* CRC, Overview of the Reporting Procedures, ¶¶ 1, 3–5, U.N. Doc. CRC/C/33 (Oct. 23, 1994) [hereinafter CRC Reporting Procedures]; *see also* U.N. Office of the High Commissioner for Human Rights, Fact Sheet No. 10 (Rev. 1), The Rights of the Child, <http://www.ohchr.org/Documents/Publications/FactSheet10Rev.1en.pdf>.

make each Concluding Observation widely available within their borders.⁷¹ This Part first assesses the CRC's approach in its Concluding Observations to other international instruments generally. It finds that the CRC takes the position, as in its General Comments, that children's rights are protected by an interconnected web of different human rights and humanitarian standards. Consequently, the CRC draws regularly on a wide variety of international instruments, standards, and recommendations in its Concluding Observations.

This Part then evaluates the Committee's treatment of international humanitarian law and finds that while in at least some cases it has offered analysis of IHL, such an approach is atypical. Generally, while the CRC is clearly aware of and considers issues of humanitarian law as they relate to children, it offers little explicit analysis of IHL in its Concluding Observations and only once expressly links provisions of IHL to the Children's Convention.

Nonetheless, by examining the implications of the Committee's statements, it is possible to identify clear segments of IHL in the Concluding Observations. By assembling piecemeal the Committee's statements relevant to particular situations of armed conflict, it becomes clear that over time the Committee has clarified the protections of IHL as incorporated through Article 38. This Part finds, however, that the Committee has not simply included IHL in the requirements of Article 38, but has added its own gloss onto humanitarian law doctrine as incorporated into the Children's Convention. Indeed, this Part contends that through slight modifications to IHL protections apparent in the Concluding Observations, the CRC may actually be developing and solidifying norms of customary international humanitarian law.

A. *General Use of International Instruments*

The Committee on the Rights of the Child is much more outward-looking in its Concluding Observations than is the HRC, making reference to other international instruments in nearly every Concluding Observation.⁷² Consistent with its position that "all human rights . . . are indivisible and

71. CRC Reporting Procedures, *supra* note 70, ¶ 22 (citing Children's Convention, *supra* note 6, art. 44(6)) ("States Parties shall make their reports widely available to the public in their own countries.").

72. While the HRC does refer to other international instruments, the frequency of such references is less pronounced than that of the CRC. For a discussion of the HRC's approach to assessing periodic reports, see Weissbrodt, *supra* note 15, at 1216–22. In a few of its first Concluding Observations, however, the CRC did not refer to any other international instruments. *See, e.g.*, CRC, Concluding Observations: El Salvador, U.N. Doc. CRC/C/15/Add.9 (Oct. 18, 1993); CRC, Concluding Observations: Peru, U.N. Doc. CRC/C/15/Add.8 (Oct. 18, 1993); CRC, Concluding Observations: Rwanda, U.N. Doc. CRC/C/15/Add.12 (Oct. 18, 1993). *But see* CRC, Concluding Observations: Costa Rica, ¶ 15, U.N. Doc. CRC/C/15/Add.11 (Oct. 18, 1993) (recommending Costa Rica conform its juvenile justice system with the Riyadh Guidelines); CRC, Concluding Observations: Bolivia, ¶ 15, U.N. Doc. CRC/C/15/Add.1 (Feb. 18, 1993) (recommending Bolivia ratify the CAT); CRC, Concluding Observa-

interdependent,”⁷³ the CRC welcomes ratification of international instruments⁷⁴ and calls upon States “to accede to all core human rights instruments.”⁷⁵ It also calls on States parties to implement the recommendations of other treaty bodies and often refers to the jurisprudence of these bodies when making its own recommendations or expressing concerns.⁷⁶

Beyond simply acknowledging concurrent international obligations, the CRC explicitly incorporates other instruments into its analysis of Children’s Convention protections. For example, the Committee locates the general right to a juvenile justice system in Articles 37, 39, and 40 of the Children’s Convention,⁷⁷ which broadly cover deprivation of liberty, rehabilitation and social integration, and a fair trial.⁷⁸ In nearly every Concluding Observation, the Committee supplements the literal language of the Children’s Convention by recommending that States parties bring their juvenile justice systems into conformity with such standards as the Beijing Rules, the Riyadh Guidelines, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), and the CRC’s General Comment 10 on juvenile justice.⁷⁹ Based on the various interna-

tions: Russian Federation, ¶ 22, U.N. Doc. CRC/C/15/Add.4 (Feb. 18, 1993) (recommending Russia adopt the standards in the Riyadh Guidelines).

73. General Comment 6, *supra* note 20, ¶ 6.

74. *See, e.g.*, CRC, Concluding Observations: Belize, ¶ 5, U.N. Doc. CRC/C/15/Add.252 (Mar. 31, 2005) (“The Committee also welcomes the ratification of a number of international and regional human rights instruments, such as the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, ILO Convention No. 138 concerning Minimum Age for Admission to Employment, ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and several regional inter-American conventions relating to the rights of the child.”).

75. *See, e.g.*, CRC, Concluding Observations: Burkina Faso, ¶ 78, U.N. Doc. CRC/C/BFA/CO/3-4 (Feb. 9, 2010).

76. *See, e.g.*, CRC, Concluding Observations: Nepal, ¶ 36, CRC/C/15/Add.261 (Sept. 21, 2005) (expressing concern based on findings of the Committee on the Elimination of Racial Discrimination); CRC, Concluding Observations: Uzbekistan, ¶¶ 30–31, 40, 47–48, CRC/C/15/Add.167 (Nov. 7, 2001) (urging implementation of recommendations by the Committee Against Torture, CEDAW Committee, and HRC); CRC, Concluding Observations: Democratic Republic of the Congo, ¶ 23, U.N. Doc. CRC/C/15/Add.153 (July 9, 2001) (recommending implementation of Concluding Observations of Race Committee and CEDAW Committee); CRC, Concluding Observations: Armenia, ¶ 24, CRC/C/15/Add.119 (Feb. 24, 2000) (referring to concerns of three other UN treaty bodies); CRC, Concluding Observations: : Russian Federation, ¶ 29, U.N. Doc. CRC/C/15/Add.110 (Nov. 10, 1999) (endorsing implementation of recommendations of the CAT); CRC, Concluding Observations: Iraq, ¶ 5, CRC/C/15/Add.94 (Oct. 26, 1998) (citing a General Comment of the Committee on Economic, Social and Cultural Rights).

77. *See, e.g.*, CRC, Concluding Observations: Brazil, ¶ 69, U.N. Doc. CRC/C/15/Add.241 (Nov. 3, 2004).

78. Children’s Convention, *supra* note 6, arts. 37, 39–40.

79. The following recommendation is repeated in some form in most Concluding Observations: The Committee recommends that the State party establish a Juvenile Justice system “in full compliance with the Convention, in particular articles 37, 40, 39, as well as with other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile

tional standards, the Committee then provides detailed substantive provisions for the appropriate form a juvenile justice system should take, addressing such factors as pre-trial detention, prison staff behavior, and medical treatment accessibility.⁸⁰

Similarly, regarding discrimination, the Committee periodically requests that “specific information be included in the next periodic report on the measures and programmes relevant to the Convention on the Rights of the Child undertaken by the State party to follow up on the Declaration and Programme of Action adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. . . .”⁸¹ These recommendations demonstrate the Committee’s willingness to incorporate other international standards explicitly into the body of Children’s Convention protections. As a result, the Committee seems to view compliance with other international standards as necessary to the fulfillment of States parties’ obligations under the Children’s Convention.⁸²

Overall, the CRC is not hesitant to reference or incorporate other international instruments, treaty body recommendations, or other international standards in its Concluding Observations.

B. International Humanitarian Law in Concluding Observations

Many of the countries that report to the CRC have recently experienced or are currently experiencing situations of armed conflict. As noted above, Article 38 of the Children’s Convention is crucial to the CRC’s treatment of IHL. That provision requires that States (1) “undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child;” (2) take “all feasible measures” to prevent children under the age of fifteen from participating in hostilities; (3) refrain from recruiting children under age fifteen; and (4) “take all feasible measures to ensure protection and care of children.”⁸³

Delinquency (the Riyadh Guidelines).” *E.g.*, CRC, Concluding Observations: Colombia, ¶ 91, U.N. Doc. CRC/C/COL/CO/3 (June 8, 2006); CRC, Concluding Observations: Albania, ¶ 77, CRC/C/15/Add.249 (Mar. 31, 2005); CRC, Concluding Observations: Sudan, ¶ 70, U.N. Doc. CRC/C/15/Add.190 (Oct. 9, 2002) (citing also the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System); CRC, Concluding Observations: Andorra, ¶ 46, CRC/C/15/Add.176 (Mar. 11, 2002); CRC, Concluding Observations: Uzbekistan, *supra* note 76, ¶ 70; CRC, Concluding Observations: Uganda, ¶ 36, U.N. Doc. CRC/C/15/Add.80 (Oct. 21, 1997).

80. *See, e.g.*, CRC, Concluding Observations: Brazil, *supra* note 77, ¶ 70 (providing twelve bullet points for the State party to follow in order to bring its juvenile justice system into better conformity with the relevant international standards).

81. CRC, Concluding Observations: Bosnia and Herzegovina, ¶ 27, U.N. Doc. CRC/C/15/Add.260 (Sept. 21, 2005); *see also* CRC, Concluding Observations: Libyan Arab Jamahiriya, ¶ 26(d), U.N. Doc. CRC/C/15/Add.209 (July 4, 2003).

82. *See, e.g.*, CRC, Concluding Observations: Angola, ¶ 59, U.N. Doc. CRC/C/15/Add.246 (Nov. 3, 2004) (recommending that the State “ensure compliance with the Norms on the Resettlement of Displaced Populations (Decree 1/01 of 5 January 2001) . . .”).

83. *See* Children’s Convention, *supra* note 6, art. 38.

As a result, a violation of international humanitarian law concerning a child equates to a violation of Article 38 and the Committee is compelled to consider, at least implicitly, applicable humanitarian law in evaluating compliance with Article 38.⁸⁴

When international humanitarian law is potentially relevant, the Concluding Observations contain a section labeled “Armed Conflict” or “Children in Armed Conflict.” These comments vary significantly in the level of detail and analysis. Indeed, many make no explicit reference to international humanitarian law. On this end of the spectrum, the Committee simply notes the presence of internal armed conflict and “recommends that the State party protect children from the effects of armed conflict or other strife within the State party.”⁸⁵ On the other end, in its Concluding Observations directed to Israel, the CRC engaged in specific analysis of IHL protections.⁸⁶

Most often, however, the sections on armed conflict fall somewhere between these two poles. For example, in its response to Cambodia’s report, the Committee first noted the legacy of twenty years of armed conflict and went on to recommend “that the State party take effective measures for the identification, demobilization and psychological rehabilitation and reintegration in society of child soldiers and to undertake awareness-raising campaigns for army officials to prevent the further recruitment of child soldiers.”⁸⁷ In another typical example, in its response to Chad, the Committee expressed “grave concerns about the persistence of widespread violations and abuses committed against children, the continuation of recruitment and use of children by all parties to the conflict,” and then recommended that the State set the minimum age of 18 for recruitment, release underage fighters, prevent recruitment of children, extend the DDR program (disarmament, demobilization, and reintegration) to better address girls, consider the recent conclusions by the Security Council Working Group on Children and Armed Conflict (S/AC.51/2008/15), and raise awareness “combating the involvement of children in armed conflict.”⁸⁸ As in these instances, most of the sections on armed conflict do not classify the nature of the armed conflict nor use language explicitly invoking international humanitarian law.

84. See, e.g., CRC, Concluding Observations: Uganda (1997), *supra* note 79, ¶¶ 19, 34 (“The Committee is deeply concerned that the rules of international humanitarian law applicable to children in armed conflict are being violated in the northern part of the State party, in contradiction to the provisions of article 38 of the Convention.”).

85. E.g., CRC, Concluding Observations: Central African Republic, ¶ 83, U.N. Doc. CRC/C/15/Add.138 (Oct. 18, 2000).

86. See CRC, Concluding Observations: Israel, ¶ 51, U.N. Doc. CRC/C/15/Add.195 (Oct. 9, 2002).

87. CRC, Concluding Observations: Cambodia, ¶¶ 8, 59, U.N. Doc. CRC/C/15/Add.128 (June 28, 2000).

88. CRC, Concluding Observations: Chad, ¶¶ 69, 71, U.N. Doc. CRC/C/TCD/CO/2 (Feb. 12, 2009).

The Committee explicitly refers to international humanitarian law in only fifteen Concluding Observations.⁸⁹ In two of these, the Committee simply expresses concerns about “violations of provisions of international humanitarian law,” without providing any concrete recommendations.⁹⁰ In the other thirteen, however, the Committee provides more detailed consideration of IHL.

The most direct analysis of IHL — and the only Concluding Observation to substantively reference any of the Geneva Conventions or Protocols⁹¹ — came in the Committee’s response to Israel’s 2004 report. The Committee drew on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War⁹² to recommend that Israel “fully comply with the rules of distinction (between civilians and combatants) and proportionality (of attacks that cause excessive harm to civilians)” and “refrain from the demolition of civilian infrastructure, including homes, water supplies and other utilities.”⁹³ The Committee further recommended that Israel:

(a) Establish and strictly enforce rules of engagement for military and other personnel which fully respect the rights of children as contained in the Convention and protected under international humanitarian law; (b) Refrain from using and/or targeting children in the armed conflict and comply fully with article 38 of the Convention, and as much as possible with the Optional Protocol on the involvement of children in armed conflict.⁹⁴

The CRC thus directly pronounced a violation of a principal humanitarian law instrument. The Committee tethered the violation to a sufficiently

89. CRC, Concluding Observations: Bhutan, U.N. Doc. CRC/C/15/Add.157 (July 9, 2001); CRC, Concluding Observations: Burundi, U.N. Doc. CRC/C/15/Add.133 (Oct. 16, 2000); CRC, Concluding Observations: Democratic Republic of the Congo, *supra* note 76; CRC, Concluding Observations: Ethiopia, U.N. Doc. CRC/C/ETH/CO/3 (Nov. 1, 2006); CRC, Concluding Observations: India, U.N. Doc. CRC/C/15/Add.228 (Feb. 26, 2004); CRC, Concluding Observations: India, U.N. Doc. CRC/C/15/Add.115 (Feb. 23, 2000); CRC, Concluding Observations: Indonesia, U.N. Doc. CRC/C/15/Add.223 (Feb. 26, 2004); CRC, Concluding Observations: Iraq, *supra* note 76; CRC, Concluding Observations: Israel, *supra* note 86; CRC, Concluding Observations: Myanmar, ¶ 42, U.N. Doc. CRC/C/15/Add.69 (Jan. 24, 1997); CRC, Concluding Observations: Russian Federation (1999), *supra* note 76; CRC, Concluding Observations: Sudan, *supra* note 79; CRC, Concluding Observations: Tajikistan, U.N. Doc. CRC/C/15/Add.136 (Oct. 23, 2000); CRC, Concluding Observations: Uganda (1997), *supra* note 79; and CRC, Concluding Observations: Uzbekistan, *supra* note 76.

90. CRC, Concluding Observations: Russian Federation (1999), *supra* note 76, ¶ 56 (expressing concern at the involvement of children in armed conflict and “violations of provisions of international humanitarian law.”); *see also* CRC, Concluding Observations: Uzbekistan, *supra* note 76, ¶ 62.

91. Some Concluding Observations welcome ratification of these instruments, but do not mention them further. *See, e.g.*, CRC, Concluding Observations: Saudi Arabia, ¶ 4(a) U.N. Doc. CRC/C/SAU/CO/2 (Mar. 17, 2006) (welcoming the ratification of Additional Protocol II to the Geneva Conventions).

92. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV].

93. CRC, Concluding Observations: Israel, *supra* note 86, ¶ 51.

94. *Id.* ¶ 59.

factual basis so as to be informative, although perhaps less than precedential due to its lack of specificity.

In its other Concluding Observations touching on international humanitarian law, the Committee has not specifically linked its concerns to an actual instrument. Nonetheless, the Committee encourages States to “ensure respect for” international humanitarian law and makes recommendations “with reference to” or “in the light of” international humanitarian law.⁹⁵ These recommendations can help illustrate the nature of a State’s obligations under international humanitarian law vis-à-vis the Children’s Convention.

For instance, in its Concluding Observation to Burundi, the Committee noted its concern about the participation of children in the armed forces (either as soldiers or helpers in camps), the widespread recruitment of children, the reports of sexual exploitation of children by members of the armed forces, and the mistreatment of civilians in armed conflict in violation of IHL.⁹⁶ In response to these concerns, after recommending that Burundi end the use of children in armed conflict, end sexual exploitation, prosecute perpetrators, and assist with the children’s social reintegration, the Committee concluded: “[t]he Committee recommends that full respect of the provisions of international humanitarian law be guaranteed.”⁹⁷ Similarly, in response to India’s 2004 report, the Committee expressed concern that areas of conflict had “seriously affected children, especially their right to life, survival and development.” The CRC recommended that India “ensure respect for human rights and humanitarian law aimed at the protection, care and physical and psychosocial rehabilitation of children affected by armed conflict, notably regarding any participation in hostilities by children” and that it “ensure impartial and thorough investigations in cases of rights violations committed against children and the prompt prosecution of those responsible, and that it provide just and adequate reparation to the victims.”⁹⁸

95. See CRC, Concluding Observations: India (2004), *supra* note 89, ¶ 69 (“[T]he Committee recommends that the State party ensure respect for human rights and humanitarian law. . . .”); CRC, Concluding Observations: Indonesia, *supra* note 89, ¶ 71(e) (urging the State party “[t]o abide faithfully by the principles of human rights law and international humanitarian law and the conventions to which Indonesia is party”); CRC, Concluding Observations: Uzbekistan, *supra* note 76, ¶ 62 (recommending “[i]n the light of article 38” that State party “at all times ensure respect for human rights and humanitarian law aimed at the protection and care of children affected by armed conflict”); CRC, Concluding Observations: Bhutan, *supra* note 89, ¶ 57(a) (“[E]nsure respect for human rights and humanitarian law aimed at the protection and care of children”); CRC, Concluding Observations: Tajikistan, *supra* note 89, ¶ 47 (“[E]nsure respect for human rights and humanitarian law aimed at the protection and care of children”); CRC, Concluding Observations: India (2000), *supra* note 89, ¶ 64 (same); CRC, Concluding Observations: Iraq, *supra* note 76, ¶ 15 (recommending that State party raise the legal minimum age of voluntary enlistment into the armed forces “in the light of international human rights and humanitarian law”).

96. CRC, Concluding Observations: Burundi, *supra* note 89, ¶ 71.

97. *Id.* ¶ 72.

98. CRC, Concluding Observations: India (2004), *supra* note 89, ¶¶ 68–69.

In its 2004 Concluding Observation to Indonesia, the CRC urged the State party, in the context of armed conflict, to prevent and end violence affecting children, to facilitate access for children to their families, to prevent the use of children by “regular army, paramilitary and rebel groups,” to abide by the principles of human rights and international humanitarian law, and to prosecute persons who used child soldiers or children as sex slaves in military or paramilitary operations.⁹⁹ In response to Bhutan’s report, the Committee noted its concern that the age for voluntary recruitment was fifteen years old and that an armed insurgency was having a negative impact on children.¹⁰⁰ It recommended that the State raise the minimum recruitment age to eighteen and “ensure respect for human rights and humanitarian law aimed at the protection and care of children affected by armed conflict.”¹⁰¹

The Committee recommended to Ethiopia in 2006 that it “[r]espect the life of the members of minorities groups and in particular that of children, taking into due account the humanitarian law principle of protecting civilians.”¹⁰² Responding to Sudan’s report in 2002, the Committee noted its concerns with respect to the use of child soldiers, landmines, and indiscriminate bombing of civilian areas and recommended the State address these issues.¹⁰³ Considering Myanmar, the Committee “strongly recommend[ed] that the army of the State party should absolutely refrain from recruiting under-aged children, in the light of existing international human rights and humanitarian standards” and that “[a]ll forced recruitment of children should be abolished as well as their involvement in forced labour.”¹⁰⁴ Regarding Congo, the Committee noted that Security Council Resolution 1341 (2001) had indicated violations of international humanitarian law and expressed its deep concern over recruitment and use of child soldiers and deliberate killings of children by armed forces.¹⁰⁵

Even in the Concluding Observations that do not explicitly mention international humanitarian law, the CRC expresses concerns and recommendations related to States parties’ obligations during situations of armed conflict. Most of these concerns and recommendations come within a separate subsection entitled “Armed Conflict” and, consequently, under Article 38 of the Children’s Convention. Therefore, even if the Committee does not explicitly mention international humanitarian law, it still analyzes a State’s implementation of Article 38 protections. In these Concluding Ob-

99. CRC, Concluding Observations: Indonesia, *supra* note 89, ¶ 71.

100. CRC, Concluding Observations: Bhutan, *supra* note 89, ¶¶ 54, 56.

101. *Id.* ¶¶ 55, 57; *see also* CRC, Concluding Observations: Iraq, *supra* note 76, ¶ 15 (recommending that the State party raise the legal minimum age of voluntary enlistment into the armed forces “in the light of international human rights and humanitarian law”).

102. CRC, Concluding Observations: Ethiopia, *supra* note 89, ¶ 80.

103. CRC, Concluding Observations: Sudan, *supra* note 79, ¶¶ 59–60.

104. CRC, Concluding Observations: Myanmar, *supra* note 89, ¶ 42.

105. CRC, Concluding Observations: Democratic Republic of the Congo, *supra* note 76, ¶¶ 6, 64.

servations, the Committee addresses many of the same issues as in the Concluding Observations that do explicitly refer to IHL, such as threats to children's right to life,¹⁰⁶ forcible recruitment,¹⁰⁷ sexual violence,¹⁰⁸ demobilization of child combatants,¹⁰⁹ and the general protection of children in situations of armed conflict.¹¹⁰ The Committee's Concluding Observations also note other IHL issues arising under situations of armed conflict such as torture and cruel, inhuman and degrading treatment;¹¹¹ disappearance and arbitrary detention;¹¹² reunification of family members;¹¹³ and the presence of landmines in the State's territory.¹¹⁴ Similarly, in a Concluding Observa-

106. See CRC, Concluding Observations: Colombia (2006), *supra* note 79, ¶ 40 ("The Committee expresses grave concern at the continuously high incidence of children victims of extrajudicial killings, homicides and massacres as a consequence of the armed conflict."); CRC, Concluding Observations: Philippines, ¶ 23, U.N. Doc. CRC/C/15/Add.259 (Sept. 21, 2005); CRC, Concluding Observations: Liberia, ¶ 58, U.N. Doc. CRC/C/15/Add.236 (July 1, 2004); CRC, Concluding Observations: Colombia, ¶¶ 34, 55, U.N. Doc. CRC/C/15/Add.137 (Oct. 16, 2000); CRC, Concluding Observations: Sierra Leone, ¶ 71, U.N. Doc. CRC/C/15/Add.116 (Feb. 24, 2000).

107. See CRC, Concluding Observations: Eritrea, ¶ 70, U.N. Doc. CRC/C/ERI/CO/3 (June 23, 2008); CRC, Concluding Observations: Colombia (2006), *supra* note 79, ¶ 80; CRC, Concluding Observations: Uganda, ¶ 67, U.N. Doc. CRC/C/UGA/CO/2 (Nov. 23, 2005); CRC, Concluding Observations: Nepal, *supra* note 76, ¶ 81; CRC, Concluding Observations: Philippines (2005), *supra* note 106, ¶ 75; CRC, Concluding Observations: Liberia, *supra* note 106, ¶ 58; CRC, Concluding Observations: Pakistan, ¶ 67, U.N. Doc. CRC/C/15/Add.217 (Oct. 27, 2003); CRC, Concluding Observations: Paraguay, ¶ 45, U.N. Doc. CRC/C/15/Add.166 (Nov. 6, 2001); CRC, Concluding Observations: Colombia (2000), *supra* note 106, ¶ 54; CRC, Concluding Observations: Sierra Leone, *supra* note 106, ¶ 70.

108. See CRC, Concluding Observations: Colombia (2006), *supra* note 79, ¶¶ 50, 80; CRC, Concluding Observations: Liberia, *supra* note 106, ¶ 58.

109. See CRC, Concluding Observations: Guinea-Bissau, ¶¶ 48–49, U.N. Doc. CRC/C/15/Add.177 (June 13, 2002); CRC, Concluding Observations: Comoros, ¶ 46, U.N. Doc. CRC/C/15/Add.141 (Oct. 23, 2000); CRC, Concluding Observations: Sierra Leone, *supra* note 106, ¶ 73.

110. See CRC, Concluding Observations: Philippines (2005), *supra* note 106, ¶ 76 (recommending the State "ensure protection of all children who have been involved in armed conflict"); CRC, Concluding Observations: Morocco, ¶ 57, U.N. Doc. CRC/C/15/Add.211 (July 10, 2003) ("In light of article 38 of the Convention, the Committee recommends that the State party take all feasible measures to ensure full protection and care of children who are affected by the armed conflict taking place in Western Sahara."); CRC, Concluding Observations: Yemen, ¶ 31, U.N. Doc. CRC/C/15/Add.102 (May 10, 1999).

111. See CRC, Concluding Observations: Eritrea (2008), *supra* note 107, ¶ 70; CRC, Concluding Observations: Colombia (2006), *supra* note 79, ¶ 50; CRC, Concluding Observations: Uganda (2005), *supra* note 107, ¶ 67; CRC, Concluding Observations: Paraguay, *supra* note 107, ¶ 45; CRC, Concluding Observations: Sierra Leone, *supra* note 106, ¶ 44.

112. CRC, Concluding Observations: Russian Federation, ¶ 68, U.N. Doc. CRC/C/RUS/CO/3 (Nov. 23, 2005); CRC, Concluding Observations: Nepal, *supra* note 76, ¶ 81; CRC, Concluding Observations: Philippines (2005), *supra* note 106, ¶ 77.

113. See CRC, Concluding Observations: Nepal, *supra* note 76, ¶ 81; CRC, Concluding Observations: Liberia, *supra* note 106, ¶¶ 58–59; CRC, Concluding Observations: Eritrea, ¶ 54, U.N. Doc. CRC/C/15/Add.204 (July 2, 2003).

114. See CRC, Concluding Observations: Eritrea (2008), *supra* note 107, ¶ 70; CRC, Concluding Observations: Senegal, ¶¶ 56–57, U.N. Doc. CRC/C/SEN/CO/2 (Oct. 20, 2006); CRC, Concluding Observations: Colombia (2006), *supra* note 79, ¶ 80; CRC, Concluding Observations: Lebanon, ¶ 69, U.N. Doc. CRC/C/LBN/CO/3 (June 8, 2006); CRC, Concluding Observations: Russian Federation (2005), *supra* note 112, ¶ 68; CRC, Concluding Observations: Bosnia and Herzegovina, *supra* note 81, ¶ 63; CRC, Concluding Observations: Guinea-Bissau, *supra* note 109, ¶¶ 48–49; CRC, Concluding Observations: Lebanon, ¶ 50, U.N. Doc. CRC/C/15/Add.169 (Mar. 21, 2002); CRC, Concluding Observations: United Kingdom of Great Britain and Northern Ireland — Overseas Territories, ¶¶ 47–48, U.N. Doc. CRC/C/15/Add.135 (Oct. 16, 2000); CRC, Concluding Observations: Georgia, ¶¶ 58–59,

tion for Colombia, the Committee encouraged the protection of the civilian population without mentioning IHL.¹¹⁵ In a Concluding Observation for Nepal, the Committee expressed dismay over “the large scale bombing, destruction and closing of schools”¹¹⁶ While destruction of schools (in the absence of a military target and military necessity) is clearly prohibited under IHL,¹¹⁷ the Committee expressed this concern in the context of the right to education, rather than protection under Article 38.¹¹⁸

Additionally, in many of its Concluding Observations related to armed conflict, the Committee reminds States of their obligations under IHL to prosecute perpetrators of war crimes.¹¹⁹ For example, in a Concluding Observation to Colombia, the Committee emphasized the need to break the “pervasive cycle of impunity” and investigate cases of serious human rights violations and war crimes.¹²⁰ The Committee further recommended that Colombia withdraw a reservation to the jurisdiction of the International Criminal Court (“ICC”) over war crimes to allow accountability for recruiting child soldiers and planting landmines.¹²¹

C. *Implications of the Committee’s Use of International Humanitarian law*

Arguably, the Concluding Observations simply remind States to comply with Article 38 of the Children’s Convention.¹²² Upon closer scrutiny, however, the Concluding Observations provide more precise concerns and recommendations than are found in the broad language of Article 38. Indeed, while these Concluding Observations do not link the Children’s Convention to explicit international humanitarian standards, they do provide clear examples of prohibitions under international humanitarian law. In the

U.N. Doc. CRC/C/15/Add.124 (June 28, 2000); CRC, Concluding Observations: Yemen, *supra* note 110, ¶ 31.

115. See CRC, Concluding Observations: Colombia (2006), *supra* note 79, ¶ 41 (“The Committee urges the State party to take, as a matter of priority, effective measures and action to protect the civilian population from all forms of violations, especially those affecting children”).

116. CRC, Concluding Observations: Nepal, *supra* note 76, ¶ 10.

117. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 52, *adopted* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979) [hereinafter Protocol I] (prohibiting the attack of civilian objects, including schools).

118. CRC, Concluding Observations: Nepal, *supra* note 76, ¶ 10.

119. See *id.* ¶¶ 12, 82 (recommending combating impunity of violence against children and criminalizing abduction and use of children for military purposes); CRC, Concluding Observations: Philippines (2005), *supra* note 106, ¶ 26 (requesting that the State investigate and bring perpetrators of extrajudicial killings to justice); CRC, Concluding Observations: Paraguay, *supra* note 107, ¶ 46 (urging investigation, prosecution, and punishment for forcible recruitment, ill-treatment, and death); CRC, Concluding Observations: Democratic Republic of the Congo, *supra* note 76, ¶ 65 (urging prosecution for killing); CRC, Concluding Observations: Guatemala, ¶¶ 48–49, U.N. Doc. CRC/C/15/Add.154 (July 9, 2001) (recommending effective investigation of disappearances during armed conflict); CRC, Concluding Observations: Burundi, *supra* note 89, ¶ 72 (urging prosecution for sexual exploitation by armed forces).

120. CRC, Concluding Observations: Colombia (2006), *supra* note 79, ¶ 51.

121. *Id.* ¶ 81(g).

122. Children’s Convention, *supra* note 6, art. 38.

Concluding Observations above, the Committee recommended that States parties end the following abuses, prohibited under IHL: deliberate killing of children,¹²³ use of children as part of the armed forces (either as soldiers or helpers in the camps),¹²⁴ forcible recruitment of children,¹²⁵ sexual exploitation of children by armed forces,¹²⁶ torture and inhumane, degrading or cruel treatment,¹²⁷ and disappearance or arbitrary detention.¹²⁸ IHL also encourages the general protection of children from the effects of armed conflict,¹²⁹ a recurring theme in the Concluding Observations.¹³⁰

These concerns and recommendations come under Article 38 of the Children's Convention, with the majority falling under either Article 38(1), which requires generally "respect for rules of international humanitarian law," or 38(4), which requires States to "take all feasible measures to ensure protection and care of children who are affected by an armed conflict" in accordance with obligations under IHL.¹³¹ As a result, the Committee's expressed areas of concern discussed above represent its analysis of a State's obligations under the rules of IHL, per Article 38. Although these recommendations do not link particular provisions of IHL to the Children's Convention (with the exception of the Concluding Observation for Israel),¹³² they do represent analysis of IHL protections by implication.

123. See, e.g., Geneva Convention IV, *supra* note 92, art. 147 (listing willful killing of a protected person as a grave breach); *id.* art. 3 (prohibiting in a non-international armed conflict "violence to life and person, in particular murder of all kinds"); see also Rome Statute of the International Criminal Court art. 8(2)(a), July 17, 1998, 2187 U.N.T.S. 90, 96 [hereinafter Rome Statute] (detailing grave breaches of the Geneva Conventions, including willful killing, as war crimes in international conflicts); *id.* art. 8(2)(c)(i) (listing a violation of Common Article 3 as a war crime). Note that the war crimes listed in the ICC Statute are generally accepted as customary international law. See Jean-Marie Henckaerts, *The Grave Breaches Regime as Customary International Law*, 7 J. INT'L CRIM. JUST. 683, 692 (2009).

124. Rome Statute, *supra* note 123, art. 8(2)(b)(xxvi) (providing as a war crime in an international armed conflict the conscription or enlistment of children under the age of fifteen into armed forces); *id.* art. 8(2)(e)(vii) (same for non-international armed conflict).

125. Protocol I, *supra* note 117, art. 77(2) (prohibiting States parties from recruiting children under fifteen).

126. See Protocol I, *supra* note 117, art. 77(1) ("Children shall be the object of special respect and shall be protected against any form of indecent assault."); Rome Statute, *supra* note 123, art. 8(2)(b)(xxii) (listing rape and sexual violence in an international armed conflict as a war crime); *id.* art. 8(2)(e)(vi) (same for non-international armed conflict).

127. See, e.g., Geneva Convention IV, *supra* note 92, art. 147; *id.* art. 3(1)(c); see also Rome Statute, *supra* note 123, art. 8(2)(a)(ii); *id.* art. 8(2)(c)(i).

128. See Sergey Sayapin, *The International Committee of the Red Cross and International Human Rights Law*, 9 HUM. RTS. L. REV. 95, 120 (2009) (citing a statement by the ICRC that enforced disappearance in a time of war is a violation of IHL).

129. See, e.g., Geneva Convention IV, *supra* note 92, art. 24, 50 (specific protections for children); Protocol I, *supra* note 117, art. 77 (protection of children). See generally SUMMARY TABLE OF PROVISIONS OF INTERNATIONAL HUMANITARIAN LAW AND OTHER PROVISIONS OF INTERNATIONAL LAW SPECIFICALLY APPLICABLE TO CHILDREN IN WAR, INTERNATIONAL COMMITTEE OF THE RED CROSS (Jan. 2003), http://www.icrc.org/eng/assets/files/other/ang03_04a_tableudih_total_logo.pdf (last visited Oct. 23, 2010); KUPER, *supra* note 5, at 111.

130. See *supra* notes 96, 107.

131. Children's Convention, *supra* note 6, art. 38. Provisions 38(2) and 38(3) deal with the relevant age of the child.

132. See *supra* notes 93–94 and accompanying text.

While the Committee's concerns and recommendations fall within the purview of international humanitarian law, its methodology of providing these comments rather than explicit analysis leads to two notable observations. First, there is an important caveat to linking the Committee's recommendations to IHL protections: the Committee does not typically delineate the nature of the armed conflict in detail. Under IHL, different standards are applicable depending on the nature or intensity of an armed conflict.¹³³ Yet the Committee uses the term "armed conflict" without categorizing it as an international armed conflict, a Protocol I armed conflict (national liberation), an internal armed conflict (as defined differently under Protocol II and Common Article 3), or simply an internal disturbance to which IHL does not apply.¹³⁴ The Committee thus appears to take an expansive view as to when a situation of conflict triggers the application of IHL. For example, in a Concluding Observation to the Central African Republic, under the heading of "Children in armed conflict," the Committee expressed concern over "several incidents of internal disturbance, including mutinies, within the State party."¹³⁵ The Committee then recommended that "the State party protect children from the effects of *armed conflict or other strife*."¹³⁶ Unlike other more specific definitions of when disturbances rise to the level of armed conflict, such as that found in the Rome Statute,¹³⁷ the Committee takes a broader approach.¹³⁸

A second observation is that, while the Children's Convention defines a child as being below eighteen years of age (unless applicable law defines the child otherwise), Article 38 offers a somewhat ambiguous stance on the relevant age of a child for the purposes of international humanitarian law.¹³⁹ On one hand, it strongly discourages recruitment or participation in hostilities of persons under fifteen.¹⁴⁰ On the other hand, it requests respect for the rules of international humanitarian law relevant to "the child," which the Children's Convention defines as below the age of eighteen.¹⁴¹ Under

133. See, e.g., PROVOST, *supra* note 1, at 247–69 (describing five distinct categories of armed conflict).

134. See KUPER, *supra* note 5, at 99 (noting that Article 38 of the Convention does not distinguish between international and non-international armed conflicts). See also PROVOST, *supra* note 1, at 247–48 (listing the types of armed conflict under the regime of IHL).

135. CRC, Concluding Observations: Central African Republic, *supra* note 85, ¶82.

136. *Id.* ¶ 83 (emphasis added).

137. See Rome Statute, *supra* note 123, art. 8(2)(d) (stating that "armed conflicts not of an international character" do not include "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.>").

138. Incidentally, this approach may be the most practical given the difficulties in determining the scope of armed conflict for purposes of IHL. See PROVOST, *supra* note 1, at 275 ("Despite efforts by writers and international bodies to develop sets of norms defining as precisely as possible the concepts of armed conflict and state of emergency, indeterminacies remain important in both human rights and humanitarian law, leaving a wide margin of appreciation to assess facts and law.>").

139. See Children's Convention, *supra* note 6, arts. 1, 38. See generally KUPER, *supra* note 5, at 102–07 (describing the heated debates during drafting over the appropriate age limitations).

140. Children's Convention, *supra* note 6, art. 38(2), (3).

141. *Id.* arts. 1, 38(1).

IHL, there are clear prohibitions on participation in armed conflict for persons under the age of fifteen, but greater ambiguity exists regarding the status of children fifteen through eighteen.¹⁴² The Committee, however, presses strenuously in its Concluding Observations for a minimum age of eighteen for all aspects of children's participation in armed conflict.¹⁴³ Indeed, despite Article 38's somewhat equivocal stance on the appropriate age of a child for activities in the armed forces, the Committee cites the Optional Protocol on Children in Armed Conflict and the African Charter on the Rights and Welfare of the Child¹⁴⁴ to demand that States parties apply a minimum age of eighteen for either recruitment or participation in hostilities.¹⁴⁵

One can interpret these observations in two ways. The first is that the Committee is not performing technical analysis of IHL since, in its concerns and recommendations, it does not focus on specific legal mechanics such as when an armed conflict actually triggers protections and concomitant obligations. According to this interpretation, the Committee's pronouncements under Article 38 merely inform as to the general nature of IHL and do not actually provide any substantive analysis under the regime. The Committee, however, is composed of a body of "experts of high moral standing and recognized competence in the field covered by" the Convention, and must interpret and ensure implementation of both the Children's Convention — including Article 38 — and the Optional Protocol on Involvement of Children in Armed Conflict.¹⁴⁶ Consequently, the view that the Committee only generically interprets IHL would cast doubt on

142. See Paola Konge, *International Crimes & Child Soldiers*, 16 Sw. J. INT'L L. 41, 56–58 (2010).

143. See CRC, Concluding Observations: Liberia, *supra* note 106, ¶ 59(b), (recommending the State "limit recruitment by all armed forces and groups to persons of 18 years of age or older"); CRC, Concluding Observations: Sri Lanka, ¶ 45(a), U.N. Doc. CRC/C/15/Add.207 (July 2, 2003) ("[E]nsure that all armed groups reintegrated into the national armed forces adhere to the minimum age of recruitment of 18 years."); CRC, Concluding Observations: Chad, *supra* note 88, ¶ 35 ("The Committee recommends that the State party ensure the enforcement of its legislation banning the recruitment of children under 18 years."); *but see* CRC, Concluding Observations: Pakistan, *supra* note 107, ¶ 68(a) (recommending the State "[t]ake effective measures to ensure that children below the age of 18 years are not involved in hostilities and that children below the age of 15 years are not recruited into armed forces").

144. African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999).

145. CRC, Concluding Observations: Guinea-Bissau, *supra* note 109, ¶ 20(b) (recommending that the State "define the legal minimum age at which children can be recruited into the armed forces, raising the age limit to comply, at a minimum, with the standards set in the Optional Protocol to the Convention on the Rights of the Child"); CRC, Concluding Observations: Paraguay, *supra* note 107, ¶ 46(f) (recommending ratification of the Optional Protocol and setting the minimum age for military recruitment at eighteen); CRC, Concluding Observations: Sierra Leone, *supra* note 106, ¶ 73 ("The Committee further recommends that the State party establish and strictly enforce legislation prohibiting the future recruitment, by any armed force or group, of children under the age of 18, in accordance with the African Charter on the Rights and Welfare of the Child.").

146. See Children's Convention, *supra* note 6, art. 43(2); *see also* Committee on the Rights of the Child, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/crc/> (last visited Mar. 7, 2011).

whether the Committee is able competently to fulfill its role to expertly interpret the Children's Convention, including Article 38.¹⁴⁷

The contrasting view is that the Committee is fully aware of IHL protections and, through implicit substantive analysis, is in fact interpreting and intentionally expanding international humanitarian law. In other words, the Committee's seeming nonchalance over what type of armed conflict is occurring in a State's territory represents a modern approach to the law of war that eschews traditional formality in light of the realities of twenty-first century conflicts and instead focuses on promoting minimum humanitarian standards.¹⁴⁸ Although the CRC lacks the technical force to require a State to comply with international humanitarian law, through such consistent interpretations under Article 38, the Committee may actually be developing that body of law.¹⁴⁹ Indeed, norms resulting in the formation of customary international humanitarian law "are derived from the aggregate practice and *opinio juris* of states in their relations with one another."¹⁵⁰ Since the Children's Convention is a nearly universal, binding human rights treaty, if it sets certain standards for States parties, those standards may in time become customary norms of IHL.¹⁵¹ For instance, the Committee's

147. Additionally, while not all Committee members are lawyers, some have specialized legal training, including training in humanitarian law. Still, while the HRC is comprised primarily of lawyers, the CRC is not. See *Committee on the Rights of the Child — Members*, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS (Mar. 1, 2007), <http://www2.ohchr.org/english/bodies/crc/members.htm>. See generally Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 917–18 (2009) (discussing representation of legal expertise on committees of major treaty bodies).

148. Cf. Mohamad-Mahmoud Ould Mohamedou, *The Nature and Characteristics of Contemporary Armed Conflict*, in PROTECTING HUMAN DIGNITY IN ARMED CONFLICT 20, 24 (Sanne Boswijk ed., 2008) ("[M]ilitary affairs are moving from a predictable framework of State monopoly, distinction between civilians and combatants, spatial concentration, brevity, and linearity of engagement in which the role of the State has been attenuated, to an unpredictable order of privatization, indifferentiation, dispersion, open-endedness in terms of time and space, and, ultimately, a non-linearity in which the place of non-state actors has become central.").

149. Cf. MERON, *supra* note 1, at 99 ("Through a process of accretion, in which the repetition of the articulation and the assertion of certain norms in various resolutions and declarations and treaties plays an important role, elements of state practice and *opinio juris* form new customary norms of human rights."); *id.* at 43–44 (stating for IHL that while humanitarian instruments face lesser prospects for actual compliance due to behavior in armed conflict, "states are willing to accept gradual and partial compliance as fulfilling the requirements for the formation of customary law").

150. PROVOST, *supra* note 1, at 130.

151. Cf. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 186 (June 27) ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule. . . ."); MERON, *supra* note 1, at 92 ("Through acceptance of norms stated in human rights instruments by states, especially non-parties, human rights treaties have generated new customary rules of international law."); *id.* at 93 ("[T]he initial inquiry must aim at the determination whether, at a minimum, the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted."); PROVOST, *supra* note 1, at 130–33 (describing the role of reciprocity in the complex creation process of international humanitarian and human rights law).

emphasis on a minimum age of eighteen for recruitment or participation actually may be moving the acceptable age from fifteen to eighteen. Arguably, a State does not comply with the requirements of IHL vis-à-vis Article 38 of the Children's Convention when it allows persons under the age of eighteen to be recruited into its armed forces or directly participate in hostilities.¹⁵²

Similarly, the Committee's insistence on prosecution of perpetrators of war crimes establishes both when a State is required to prosecute a perpetrator and for what crimes. The Geneva Conventions only require domestic prosecution for grave breaches, a relatively narrow category of acts for which liability only accrues under certain kinds of armed conflicts.¹⁵³ The International Criminal Court has jurisdiction over a broader range of war crimes, but its jurisdiction is limited to signatory States and also by the specific nature of the armed conflict.¹⁵⁴ The Children's Committee, by finding the requirements of Article 38 to include an obligation to prosecute perpetrators of war crimes, arguably obligates a State to conduct such prosecutions in accordance with international humanitarian law. Given the Committee's broad interpretation of armed conflict and its parallel encouragement to prosecute without explicitly analyzing the nature of the conflict, the CRC may actually be expanding a State's obligation to prosecute.¹⁵⁵ Additionally, in its Concluding Observations, the Committee has specifically requested prosecution for the use of children for military purposes, abduction, extrajudicial killings, disappearances, forcible recruitment, ill-treatment, sexual exploitation, and the planting of landmines.¹⁵⁶ By doing so, the Committee may be shaping or solidifying IHL norms: States should prosecute perpetrators of these crimes committed against children in any situation of armed conflict.

D. Summary

Through its Concluding Observations, the Committee freely considers international instruments and standards. Yet, when analyzing a State's obligations under Article 38 of the Children's Convention, the Committee does not explicitly invoke international instruments relevant to IHL. Nonetheless, by examining the concerns and recommendations related to armed conflict, it is possible to extract substantive principles of interna-

152. Cf. CRC, Concluding Observations: Paraguay, *supra* note 107, ¶ 46(f) (recommending ratification of the Optional Protocol and setting the minimum age for military recruitment at eighteen).

153. See, e.g., Lindsay Moir, *Grave Breaches and Internal Armed Conflicts*, 7 J. INT'L CRIM. JUST. 763 (2009) (examining when grave breaches are legally applicable).

154. See Rome Statute, *supra* note 123, arts. 5, 8, 12.

155. Cf. Marco Odello, *Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW, 15, 39–40 (describing new developments in international law that create consequences for individuals who violate both IHL and human rights law).

156. See *supra* notes 120–121 and accompanying text.

tional humanitarian law, such as prohibitions on forcible recruitment, killing, sexual exploitation, and torture or ill-treatment of children. Moreover, the Committee may actually be broadening IHL by consistently recommending that States parties take certain actions to fulfill their obligations under Article 38. These recommendations include ensuring that children under the age of eighteen do not participate in the armed forces or hostilities and that States prosecute perpetrators of war crimes. The backdrop for both of these recommendations is an expansive notion of when armed conflict triggers State obligations under IHL. Therefore, while the Committee is not performing facial analysis of IHL treaties or acting in an adjudicative manner by analyzing specific facts as they relate to legal standards, it is pronouncing States parties' obligations under Article 38 of the Children's Convention. In doing so it may be expanding States' general or customary obligations under international humanitarian law.

III. CONCLUDING OBSERVATIONS UNDER THE OPTIONAL PROTOCOL ON CHILDREN IN ARMED CONFLICT

The Committee issues Concluding Observations in response to reports submitted under the Optional Protocol on Children in Armed Conflict.¹⁵⁷ These reports survey States parties' implementation of and compliance with the Protocol. States parties submit a comprehensive report within two years of the Optional Protocol's entry into force, and thereafter include further information as to the implementation of its provisions periodic reports under Article 44.¹⁵⁸ The CRC emphasizes that each Concluding Observation is to be read in conjunction with previous Concluding Observations that have been issued for that State party.¹⁵⁹ The Committee routinely refers both to other international obligations in general and humanitarian law provisions in particular in these Concluding Observations. This Part assesses first the CRC's approach to reviewing reports and then its treatment of humanitarian law. It finds that the Committee places compliance with humanitarian law treaties within States' obligations under Article 38, but that it is imprecise about the contours of these obligations.

A. *Use of Other International Instruments in Assessing Reports*

As recognized in its General Comment 5 on implementation of the Convention,¹⁶⁰ the CRC routinely encourages States parties to ratify other rele-

157. The Optional Protocol has 139 States parties. See UNITED NATIONS TREATY COLLECTION, *supra* note 8.

158. Child Soldier Protocol, *supra* note 12, art. 8(1)–(2).

159. *E.g.*, CRC, Concluding Observations: Turkey, ¶ 3, U.N. Doc. CRC/C/OPAC/TUR/CO/1 (Oct. 29, 2009); CRC Concluding Observations: Philippines, ¶ 3, U.N. Doc. CRC/C/OPAC/PHL/CO/1 (July 15, 2008).

160. General Comment 5, *supra* note 42, ¶ 17.

vant instruments¹⁶¹ and occasionally makes recommendations based on international instruments.¹⁶² It similarly takes note of States parties' ratification of or accession to such instruments.¹⁶³ The Committee frequently refers to the Protocols Additional to the Geneva Conventions in this context.¹⁶⁴ These passing references constitute the most frequent use of other international instruments.

The CRC's references to other international instruments are typically more specific than those of the HRC and the universe of relevant documents is notably smaller.¹⁶⁵ This more distilled focus is, of course, not surprising in view of the more narrowly tailored purpose of the Children's Convention and especially the Child Soldier Protocol, as contrasted with the Civil and Political Covenant, interpreted by the HRC.

The main goal of the Committee in these Concluding Observations is to assess implementation of the Child Soldier Protocol, the purpose of which is to keep children out of armed conflict. To this end, the Concluding Observations frequently describe deficiencies in and propose changes to domestic law.¹⁶⁶ There is, therefore, a heavy emphasis on providing pragmatic solutions to perceived problems and a corresponding paucity of analysis of particular Convention provisions.

The same is true for the Committee's analysis of other international instruments. For example, the CRC expressed its view that Uganda's criteria for granting amnesties is "not in compliance with the international legal obligations of the State party, notably the Rome Statute of the International

161. *E.g.*, CRC, Concluding Observations: The Republic of the Maldives, ¶¶ 11, 13, U.N. Doc. CRC/C/OPAC/MDV/CO/1 (Mar. 4, 2009) (encouraging ratification of Rome Statute, ILO Convention No. 182, and accession to 1951 Refugees Convention); CRC, Concluding Observations: Republic of Moldova, ¶ 10, U.N. Doc. CRC/C/OPAC/MDA/CO/1 (Feb. 20, 2009); CRC, Concluding Observations: United States of America, ¶ 24, U.N. Doc. CRC/C/OPAC/USA/CO/1 (June 25, 2008).

162. *E.g.*, CRC, Concluding Observations: Turkey, *supra* note 159, ¶ 6 (urging State party to withdraw its reservation "in accordance with the Vienna Declaration and Plan of Action").

163. *E.g.*, CRC, Concluding Observations: Slovenia, ¶ 5, U.N. Doc. CRC/C/OPAC/SVN/CO/1 (Nov. 11, 2009); CRC, Concluding Observations: Uganda, ¶ 5, U.N. Doc. CRC/C/OPAC/UGA/CO/1 (Oct. 17, 2008); CRC, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, ¶ 6, U.N. Doc. CRC/C/OPAC/GBR/CO/1 (Oct. 17, 2008); CRC, Concluding Observations: Syrian Arab Republic, ¶ 5, U.N. Doc. CRC/C/OPAC/SYR/CO/1 (Oct. 17, 2007).

164. CRC, Concluding Observations: Philippines (2008), *supra* note 159, ¶¶ 25, 26 (expressing concern at failure to ratify the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protections of Victims of International Armed Conflicts (Protocol I) and urging State party to do so); CRC, Concluding Observations: United States of America, *supra* note 161, ¶ 24 (recommending that State party ratify Protocol I and Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II)); CRC, Concluding Observations: Qatar, ¶ 6, U.N. Doc. CRC/C/OPAC/QAT/CO/1 (Oct. 17, 2007) (welcoming State party's accession to Protocol II); CRC, Concluding Observations: Viet Nam, ¶ 7, U.N. Doc. CRC/C/OPAC/VNM/CO/1 (Oct. 17, 2006) (recommending ratification of Protocol II).

165. The Committee's annexation of a list of relevant instruments to its General Comment 5, which it will "update from time to time," reflects this more narrowly tailored focus. General Comment 5, *supra* note 42, ¶ 17.

166. *See, e.g.*, CRC, Concluding Observations: Bulgaria, ¶¶ 6, 7, U.N. Doc. CRC/C/OPAC/BGR/CO/1 (Oct. 23, 2007) (noting absence of legislation criminalizing recruitment and involvement of children in hostilities and urging appropriate changes to domestic law).

Criminal Court.”¹⁶⁷ Instead of delineating *how* Uganda’s policies deviate from its obligations under the Rome Statute, however, the Committee simply recommended that Uganda “[r]evise the provisions of its Penal Code and bring them in line with its international legal obligations, notably the Rome Statute.”¹⁶⁸

On two occasions, the Committee referred to decisions of the Inter-American Court. In response to El Salvador’s report under the Child Soldier Protocol, the CRC expressed concern that the State party had not allocated the necessary resources for full implementation of an Inter-American Court decision relating to disarmament, demobilization, and social reintegration of victims of armed conflict.¹⁶⁹ The Committee was similarly concerned with Guatemala’s failure to comply fully with the court’s judgments relating to child victims of armed conflict.¹⁷⁰

Though the Committee does occasionally announce violations of the Child Soldier Protocol,¹⁷¹ it more often expresses concern about the potential for violation and provides recommendations. The Committee thus engages in little fact-specific analysis of Protocol violations, let alone violations of other instruments. The implication is that if the Concluding Observations under the Protocol provide neither robust analysis of the Convention nor of other international instruments, the same is likely to be true of its analysis of humanitarian law.

B. Explicit References to International Humanitarian Law

Apart from recognizing and encouraging States’ ratification of the Protocols Additional to the Geneva Conventions, the Committee specifically addresses humanitarian law in two other contexts: to emphasize its importance as a subject of training and education, and to situate the Child Soldier Protocol in the regime of international humanitarian law. The present section addresses these two functions.

The CRC sees education about and training in humanitarian law and the Child Soldier Protocol as critical to successful implementation.¹⁷² In response to Bangladesh’s report, the Committee expressed concern “at the generally low level of knowledge in the country about international human-

167. CRC, Concluding Observations: Uganda (2008), *supra* note 163, ¶ 28.

168. *Id.* ¶ 29.

169. CRC, Concluding Observations: El Salvador, ¶¶ 12–13, 21, U.N. Doc. CRC/C/OPAC/SLV/CO/1 (June 2, 2006).

170. CRC, Concluding Observations: Guatemala, ¶¶ 20, 21, U.N. Doc. CRC/C/OPAC/GTM/CO/1 (June 12, 2007).

171. *See, e.g.*, CRC, Concluding Observations: Sweden, ¶ 14, U.N. Doc. CRC/C/OPAC/SWE/CO/1 (July 6, 2007) (stating that youth military activities are “not in full conformity with the spirit of the Optional Protocol”).

172. *See, e.g.*, CRC, Concluding Observations: Slovenia, *supra* note 163, ¶ 6; CRC, Concluding Observations: Moldova, *supra* note 161, ¶¶ 5, 6.

itarian law and child rights in general, and the Optional Protocol . . . in particular.”¹⁷³

The Committee has also recommended that reform of Chile’s Code of Military Justice be “in conformity with international standards of international humanitarian law and human rights law, including the Optional Protocol.”¹⁷⁴ The Committee thus seems to declare that the Child Soldier Protocol does not merely reflect humanitarian law, but rather itself constitutes a component of the regime.¹⁷⁵ Similarly, the Committee’s approach to other instruments cannot be completely disconnected from its treatment of humanitarian law; the other instruments most frequently mentioned — the Rome Statute and the Protocols Additional to the Geneva Conventions — are pillars of humanitarian law and are inextricably linked to the Children’s Convention.¹⁷⁶

(1) *Rome Statute:*

The preamble to the Child Soldier Protocol notes the adoption of the Rome Statute and “its inclusion as a war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts. . . .”¹⁷⁷ The CRC routinely mentions the Rome Statute in the Concluding Observations under the Child Soldier Protocol.¹⁷⁸

The Child Soldier Protocol, which prohibits conscription or the participation in hostilities of children under the age of eighteen, is more restrictive than the Rome Statute.¹⁷⁹ The CRC repeatedly links war crimes with Article 38 of the Convention and with the Protocol. The Committee recommended, for example, that Monaco establish extraterritorial jurisdiction over “war crimes” involving underage conscription, “[i]n line with the minimum standards prescribed by the Convention on the Rights of the Child (art. 38), and relevant instruments of international humanitarian

173. CRC, Concluding Observations: Bangladesh, ¶ 11, U.N. Doc. CRC/C/OPAC/BGD/CO/1 (Mar. 17, 2006).

174. CRC, Concluding Observations: Chile, ¶ 20, U.N. Doc. CRC/C/OPAC/CHL/CO/1 (Feb. 13, 2008).

175. This position is consistent with that of the ICRC. See INTERNATIONAL COMMITTEE OF THE RED CROSS, LEGAL PROTECTION OF CHILDREN IN ARMED CONFLICT (2003), http://www.icrc.org/eng/assets/files/other/ang03_03_juridique_newlogo.pdf (describing the Optional Protocol within the regime of IHL as “generally strengthen[ing] protection for children in armed conflict”).

176. See generally KUPER, *supra* note 5, at 77–98 (detailing IHL treaty protections of children).

177. Child Soldier Protocol, *supra* note 12.

178. Most frequently, the Committee notes or recommends accession to or ratification of the Rome Statute and observes domestic legislation implementing it. See, e.g., CRC, Concluding Observations: Costa Rica, ¶ 5, U.N. Doc. CRC/C/OPAC/CRI/CO/1 (May 1, 2007); CRC, Concluding Observations: Canada, ¶ 7, U.N. Doc. CRC/C/OPAC/CAN/CO/1 (June 9, 2006).

179. Compare Child Soldier Protocol, *supra* note 12, art. 2, with Rome Statute, *supra* note 123, art. 8(2)(b)(xxvi), art. 8(2)(e)(vii). See generally Popovski, *supra* note 2, at 399 (describing the issue of recruitment of child soldiers under IHL and human rights law).

law.”¹⁸⁰ The Committee used the age of under fifteen, thereby apparently incorporating the Rome Statute into Article 38 for purposes of prosecution, rather than relying on the Child Soldier Protocol as creating a positive obligation to prosecute.¹⁸¹

(2) *Geneva Conventions:*

The Committee makes plain that the treatment of detained combatants falls within its interpretive ambit. Captured persons below the age of eighteen are to be “treated in accordance with international standards of human rights and humanitarian law when transferred to national authorities.”¹⁸² For example, the Committee recommends that Canada not transfer such persons unless it is “satisfied that the receiving State is willing and able to apply the Geneva Conventions.”¹⁸³

The Committee, in a Concluding Observation to Guatemala, explicitly linked a violation of the Child Soldier Protocol to a violation of Additional Protocol II, noting that forced recruitment of children during armed conflict is “in violation of provisions of the Protocol, article 38 of the [Convention], and Additional Protocol II to the Geneva Conventions”¹⁸⁴ As in its Concluding Observations responding to periodic reports, the Committee thus recognizes Article 38 as a vehicle for importing humanitarian law obligations into the realm of States parties’ responsibilities under the Convention and Protocol. Beyond announcing that the practice violates these instruments, however, the Committee provides no explicit analysis.

C. *Keeping Children out of Armed Conflict*

Similar themes emerge from the Concluding Observations relating to the Optional Protocol on Children in Armed Conflict as emerge from the General Comments. The noteworthy addition in the former is that the Committee more directly incorporates IHL treaty protections into Article 38 by citing to relevant humanitarian law treaties. Nonetheless, the analysis is still implicit rather than explicit. This outcome is not inevitable, however: the Committee could explicitly delineate this process and link the language of the humanitarian instruments to the facts presented in the State party’s reports. Such an approach would provide informative analysis of both the Convention and the Protocol’s place in the network of humanitarian law protections, and of the humanitarian law instruments themselves. For example, beyond stating that forced recruitment violates the Protocol, the Convention, and Additional Protocol II of the Geneva Convention, the

180. CRC, Concluding Observations: Monaco, ¶ 9, U.N. Doc. CRC/C/OPAC/MCO/CO/1 (June 18, 2007).

181. *Id.* Notably, Monaco has signed but not ratified the Rome Statute.

182. CRC, Concluding Observations: Canada, *supra* note 178, ¶ 11.

183. *Id.* ¶ 12.

184. CRC, Concluding Observations: Guatemala, *supra* note 170, ¶ 19.

Committee could link Article 4(3) of Protocol II to the elements of Guatemala's practice that offend that provision.¹⁸⁵

The same can be said of instances in which the Committee does not explicitly pronounce a violation of the Child Soldier Protocol. For example, in evaluating the United States' detention of child soldiers in Iraq and Afghanistan — a situation to which humanitarian law, the Convention, and the Optional Protocol are plainly relevant — the Committee mentions none of these instruments. Rather, the Committee limits itself to expressing concern and offering specific recommendations as to how the situation may be remedied.¹⁸⁶

One simple reason for the general absence of robust analysis of humanitarian law in the Concluding Observations under the Child Soldier Protocol is that the spheres of humanitarian law and the Protocol are not entirely coterminous. In broad strokes, the Protocol is concerned not just with the treatment of children in conflict, but with pre- and post- conflict procedures to improve children's welfare. In other words, the Protocol is designed as much to keep children out of armed conflict as to regulate their treatment within it.¹⁸⁷ This goal is narrower than the general obligation of a State under Article 38 of the Children's Convention to "respect and ensure respect for rules of international humanitarian law."¹⁸⁸ A main focus of the Concluding Observations under the Child Soldier Protocol, then, is to offer and critique policies, outside the context of armed conflict, designed to accomplish this goal.

Similarly, the Committee addresses at length post-conflict measures such as social reintegration of former child soldiers.¹⁸⁹ While there is an overlap between humanitarian law and the Child Soldier Protocol, the CRC's consideration of measures not directly related to humanitarian law helps account for the lack of analysis. Still, the Committee's focus on other issues need not prevent it from providing more robust analysis in those instances in which IHL is applicable.¹⁹⁰

185. Though the paucity of such information in Guatemala's report may have prevented the Committee from undertaking such an analysis in this case, its summary treatment of the potential violation is typical of its general approach. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, art. 4(3), 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) (providing special protections for children).

186. See CRC, Concluding Observations: United States of America, *supra* note 161, ¶¶ 29, 30 (expressing concern over ill-treatment and potential prosecution of children for war crimes).

187. See, e.g., CRC, Concluding Observations: Kyrgyzstan, ¶¶ 8, 9, U.N. Doc. CRC/C/OPAC/KGZ/CO/1 (May 2, 2007).

188. See Children's Convention, *supra* note 6, art. 38.

189. E.g., CRC, Concluding Observations: Croatia, ¶¶ 14, 15, U.N. Doc. CRC/C/OPAC/HRV/CO/1 (Oct. 23, 2007); CRC, Concluding Observations: Qatar, *supra* note 164, ¶¶ 18, 19.

190. Given the Committee's logistical limitations, however, providing such analysis may be difficult. See *infra* notes 228–33 and accompanying text.

IV. RECOMMENDATIONS RESULTING FROM GENERAL DISCUSSION DAYS

The Committee on the Rights of the Child periodically holds general discussion days, with the purpose of “foster[ing] a deeper understanding of the contents and implications of the Convention as they relate to specific articles or topics.”¹⁹¹ The Committee has held discussion days annually since 1992.¹⁹² The topics of discussion are broad and have included, for example, juvenile justice, HIV/AIDS, children without parental care, and the role of the family.¹⁹³ Discussion day events include addresses by experts in the area under discussion and working group sessions with these experts and Committee members.¹⁹⁴ As a result of these discussions, the Committee produces Recommendations; to date, it has produced eighteen.¹⁹⁵ Whereas the General Comments are intended to interpret the Children’s Convention,¹⁹⁶ the discussion days Recommendations are aimed at providing more detailed guidance for States parties related to specific topics.¹⁹⁷ The Committee occasionally cites these Recommendations for support in Concluding Observations,¹⁹⁸ so at a minimum they act as persuasive interpretations of Convention obligations. The Committee’s first day of general discussion concerned children in armed conflict.¹⁹⁹ The Committee likely chose to address this topic first in light of the heated debate regarding Article 38 during the drafting of the Children’s Convention.²⁰⁰ In the Committee’s words, it felt “[t]he need to underline the complexity of the question of children in armed conflicts, which should not be simply re-

191. *Committee on the Rights of the Child — Day of General Discussion*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Sept. 19, 2008), <http://www2.ohchr.org/english/bodies/crc/discussion2008.htm> (last visited Oct. 30, 2010).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *See Committee on the Rights of the Child — General Comments*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/crc/comments.htm> (last visited Oct. 30, 2010).

197. *See, e.g.*, CRC, Recommendation: General Discussion on the Right of the Child to Education in Emergency Situations, ¶ 42, U.N. Doc. CRC/C/49/3 (2008) [hereinafter Recommendation on Education in Emergency Situations] (“The Committee recalls that the purpose of the 2008 Day of General Discussion is to provide States and other actors with more comprehensive guidance as to their obligations to promote and protect the right to education as outlined in articles 28 and 29.”); CRC, Recommendation: General Discussion on the Private Sector as Service Provider and Its Role in Implementing Child Rights, U.N. Doc. CRC/C/114, Annex VIII (2002) (“In accordance with rule 75 of its provisional rules of procedures, the Committee on the Rights of the Child has decided to devote periodically one day of general discussion to a specific article of the Convention or to a child rights theme [. . .] in order to enhance understanding of the contents and implications of the Convention.”).

198. *See, e.g.*, CRC, Concluding Observations: Benin, ¶ 43, U.N. Doc. CRC/C/BEN/CO/2 (Sept. 29, 2006) (recommending the State party take into account “the recommendations adopted at the Committee’s day of general discussion on children without parental care”); CRC, Concluding Observations: Brazil, *supra* note 77, ¶ 70(k) (same for Committee’s day of general discussion on juvenile justice).

199. CRC, Recommendation: General Discussion on Children in Armed Conflicts, U.N. Doc. CRC/C/10 (1992) [hereinafter Recommendation on Armed Conflict].

200. *See KUPER, supra* note 5, at 101–07.

duced to the consideration of a single provision of the Convention, namely article 38.”²⁰¹

In the Recommendation, the CRC referenced the standards of international humanitarian law related to children: the four Geneva Conventions, the two additional Protocols, the Declaration on the Protection of Women and Children in Periods of Emergency and Armed Conflicts, the Declaration on the Rights of the Child, and the Convention on the Rights of the Child.²⁰² The Committee also noted its concern over situations of internal strife where existing standards did not extend protection, and expressed the need for minimum humanitarian standards applicable in any situation of armed conflict.²⁰³ In addition, the Committee explicitly linked States parties’ obligations under the Convention to the IHL regime, noting that States had undertaken to ensure all rights to children within their jurisdiction (Article 2 of the Children’s Convention), that the best interests of the child shall be a primary consideration (Article 3), and that the State party was obligated to adopt all appropriate measures to achieve those purposes (Article 4).²⁰⁴ Moreover, the Committee stated that none of those provisions were derogable in a time of war or emergency.²⁰⁵

The only other Recommendation to address IHL directly was issued in 2008 concerning “[t]he right of the child to education in emergency situations.”²⁰⁶ While the Recommendation addressed a variety of emergency situations, it focused in part on situations of armed conflict. According to the Committee, the right to education in a situation of armed conflict is “protected under International Humanitarian Law by the Fourth Geneva Convention, and Protocols I and II.”²⁰⁷ Consequently, the Committee recommended that States parties protect schools from military attacks or seizure, prevent schools from becoming centers for recruitment, and criminalize attacks on schools as war crimes in accordance with the Rome Statute of the ICC.²⁰⁸

One passage from a third Recommendation bears mention. In its Recommendation on Juvenile Justice, the Committee noted that the universality of the Convention’s ratification had particular significance.²⁰⁹ According to the Committee, the Convention provides a common reference point by which States parties had agreed to be bound.²¹⁰ Moreover, as the Convention calls for the realization of the rights of the child, States parties

201. Recommendation on Armed Conflict, *supra* note 199, ¶ 62(d).

202. *Id.* ¶ 65.

203. *Id.* ¶ 66.

204. *Id.* ¶ 67.

205. *Id.*

206. Recommendation on Education in Emergency Situations, *supra* note 197.

207. *Id.* ¶ 3.

208. *Id.* ¶ 35. See also Rome Statute, *supra* note 123, art. 8(2)(b)(ix).

209. CRC, Recommendation: General Discussion on the Administration of Juvenile Justice, ¶ 214, U.N. Doc. CRC/C/46 (1995).

210. *Id.* ¶ 214 (describing the “binding nature of its provisions”).

should consider other relevant international instruments in pursuing their obligation to protect the specified rights.²¹¹

These Recommendations buttress one of the central points made above: the Committee sees human rights and humanitarian protections as interconnected and integral to the Children's Convention. Further, the Committee effectively incorporates other international standards into States parties' Convention obligations by explaining that States should consider other international instruments in order to meet their obligations under the binding Convention provisions.

Specifically regarding international humanitarian law, the Committee interestingly grounds the obligation to protect children under IHL in Articles 2, 3, and 4 of the Convention, rather than simply through Article 38.²¹² By locating the obligations in the general provisions of the Convention and stating that such provisions are non-derogable, the Committee provides a strong structural foundation for the application of Convention protections in situations where IHL applies. As a result, States parties are obligated to guarantee the protections of IHL both specifically through Article 38 and generally through their commitment to the Children's Convention.

Furthermore, the Committee demonstrates its understanding of specific IHL treaty protections by discussing applicable treaties, supporting the above claim that the Committee interprets IHL in its Concluding Observations. Even if the Concluding Observations do not explicitly link Article 38 to individual IHL treaties, the Committee pronounces violations with an inherent expertise on how IHL specifically protects children. Additionally, the Committee expresses its concern over potential gaps in the protections of IHL due to the nature of a conflict and its desire to see a set of minimum standards applicable in any situation of armed conflict.²¹³ This perspective sheds some light on the somewhat loose position the Committee takes when evaluating State protection of children in situations of armed conflict under Article 38.²¹⁴ It seems that the Committee's underlying approach is to resolve doubt over the applicability of IHL in favor of the conclusion that it applies.

V. SYNTHESIZING THE COMMITTEE'S APPROACH TO INTERNATIONAL HUMANITARIAN LAW

Viewed as a whole, the Committee's work product presents a cohesive picture. The Children's Convention forms a part of an interconnected web

211. *Id.*

212. *See* Recommendation on Armed Conflict, *supra* note 199, ¶ 67; *see also* Children's Convention, *supra* note 6, arts. 2, 3, 4 (requiring, respectively, that States ensure all rights to children within their jurisdiction, that the best interests of the child shall be a primary consideration, and that States must adopt all appropriate measures to achieve those purposes).

213. *See* Recommendation on Armed Conflict, *supra* note 199, ¶ 66.

214. *See supra* notes 134–38 and accompanying text.

of human rights and humanitarian protection. Rather than attempt to confine its analysis to the four corners of its constitutive treaty, as does the Human Rights Committee,²¹⁵ the Children's Committee considers other instruments, standards, and interpretations to be directly relevant to interpreting the protections of the Children's Convention.²¹⁶ Indeed, the Committee goes a step further by *incorporating* the other standards into a State's obligations under the Convention.²¹⁷

It is against the backdrop of this general interpretive approach that the CRC's analysis of international humanitarian law must be considered. Through its General Comments, Concluding Observations, and Recommendations, the Committee has made clear that beyond simply applying general IHL principles of respect and protection,²¹⁸ Article 38 incorporates the specific provisions of IHL treaties.²¹⁹ Additionally, the Committee has taken the position that States' ratification of the Convention binds them to protecting children, including in situations of armed conflict, through the non-derogable Articles 2, 3, and 4.²²⁰

Given that IHL is indisputably part of the Children's Convention, the remaining issue, and the one with which this article began, is to determine the extent to which the CRC produces substantive analysis of IHL. The General Comments and the Recommendations provide important insights into the Committee's interpretive approach, but fall short of actually analyzing international humanitarian law. The Concluding Observations to the Optional Protocol on Children in Armed Conflict provide some level of implicit analysis, but, as noted above, aim more at keeping children out of conflict than at addressing the necessary protections of IHL for children in situations of armed conflict.²²¹ This focus is understandable as the Optional Protocol itself is largely concerned with the issue of recruitment of child soldiers.²²² It is primarily through the Concluding Observations in re-

215. See, e.g., HRC, J.B. v. Canada, Comm. No. 118/1982, ¶ 6.2, U.N. Doc. CCPR/C/OP/1 at 34 (1984) (refusing to consider work by the International Labour Organization and stating, "[E]ach international treaty, including the International Covenant on Civil and Political Rights, has a life of its own and must be interpreted in a fair and just manner, if so provided, by the body entrusted with the monitoring of its provisions").

216. See, e.g., General Comment 6, *supra* note 20, ¶ 6 ("[The Committee's] interpretation efforts must be conducted in the context of the entirety of applicable international human rights norms . . .").

217. See *supra* note 66 and accompanying text.

218. KUPER, *supra* note 5, at 107 ("The provisions of international humanitarian treaty law specifically concerning child civilians . . . incorporate both the duty to respect . . . and the duty to protect.").

219. See, e.g., General Comment 6, *supra* note 20, ¶¶ 4, 26, 28, 57 (describing international standards as incorporated through Article 38); CRC, Concluding Observations: Monaco, *supra* note 180 ¶ 9 (recommending criminalization of conduct constituting a war crime under the Rome Statute through Article 38 obligations); CRC, Concluding Observations: Israel, *supra* note 86, ¶¶ 51, 59 (linking the fourth Geneva Convention to Article 38); Recommendation on Armed Conflict, *supra* note 199, ¶¶ 62(d), 73 (describing that Article 38 incorporated the overall framework of IHL).

220. See Recommendation on Armed Conflict, *supra* note 199, ¶ 67.

221. See *supra* text accompanying note 188.

222. See Child Soldier Protocol, *supra* note 12, arts. 1–4; see also Odello, *supra* note 155, at 48 (describing the U.N. Secretary-General's call for "parties to conflict to apply norms and standards

sponse to periodic reports that the Committee has the opportunity — indeed, the mandate — to consider whether States are affording the necessary IHL and Article 38 protections to children.

As addressed above,²²³ although the Committee does not provide explicit analysis, it is possible to identify clear examples of IHL protections by assembling the Committee's relevant concerns and recommendations (almost all of which come under the section of the Concluding Observations on "Children in Armed Conflict"). The prohibitions the Committee has expressed to date, distilled from the Concluding Observations, are against the deliberate killing of children; the use of children as part of the armed forces (either as soldiers or helpers in the camps); forcible recruitment of children; sexual exploitation of children by armed forces; torture and inhumane, degrading or cruel treatment; disappearance; and arbitrary detention.²²⁴

Moreover, in its pronouncements, the Committee eschews the formal categorization of armed conflicts and instead broadly accepts humanitarian law (through Article 38) as relevant in any situation of armed conflict. Accepting the Committee's jump past the nature of the conflict, the Committee may be contributing to the development of customary norms of international humanitarian law by providing consistent authoritative pronouncements on various rights, which are (at least formally) almost universally accepted, as nearly every country has ratified the Convention on the Rights of the Child.²²⁵ The Committee may be establishing (or solidifying) norms that States should keep children under the age of eighteen out of the armed forces or hostilities and that States must prosecute perpetrators of war crimes against children (again, under the expansive approach, such crimes can occur in any situation of armed conflict).²²⁶ Even if these prescriptions do not constitute customary international law, States do not meet their Convention obligations under Article 38 (and, consequently, Articles 2, 3, and 4)²²⁷ if they fail to protect children in the above ways.

There remains the issue, however, that the Committee's analysis is implicit. In order to reach conclusions about the Committee's interpretation of international humanitarian law, one must assemble the Committee's pronouncements, compare them to IHL, and draw relevant implications. Certainly, one could suggest that the Committee change its methodology to provide more substantive analyses of those IHL treaty provisions correlating to the Committee's concerns. The Committee could, for example, express concern over a State's failure to abide by Article 77(1) of the Additional Protocol I to the Geneva Conventions and then describe what exactly

protecting the recruitment and use of children in armed conflict"); Popovski, *supra* note 2, at 399–401 (detailing the aim and provisions of the Optional Protocol).

223. See *supra* Part II.C.

224. See *supra* notes 124–28 and accompanying text.

225. See *supra* notes 150–151 and accompanying text.

226. See *supra* notes 152–156 and accompanying text.

227. See Recommendation on Armed Conflict, *supra* note 199, ¶ 67.

prompted its concern.²²⁸ This approach would provide clear interpretation and analysis of IHL but also entails limitations. Alternatively, the Committee could take a step towards providing explicit analysis of IHL without engaging in a quasi-judicial analysis of a State's compliance.

The first suggested approach suffers from several problems. First, the Committee would have to fundamentally alter the nature of its Concluding Observations. Rather than expressing broad concerns and recommendations, it would need to provide specific factual analysis, which would likely exceed its capabilities due to time constraints and the wide range of categories the Convention protects. Second, the Committee would then be faced with the task of categorizing individual armed conflicts to determine which specific treaty protections apply. Such a determination is complex²²⁹ and the Committee's interest in setting minimum humanitarian standards²³⁰ would be undermined. Third, and more broadly, the Committee's interest is in encouraging compliance with the Convention, not with passing judgment on States (hence the issuance of "concerns" and "recommendations").

Accordingly, while the Committee incorporates IHL protections into the Children's Convention and makes recommendations to States parties about how to comply with them, the nature of the Concluding Observations is inapt for providing precedential analysis of IHL. Unlike the Human Rights Committee's Decisions and Views crafted in response to individual allegations of violations of the Civil and Political Covenant,²³¹ the Children's Committee does not perform an adjudicative function. Instead, it seeks to promote understanding of and compliance with the Children's Convention.²³² As a result, the Committee has neither the incentive nor structural mandate to construe specific factual violations of the Convention, including violations of IHL through Article 38.

Conversely, the Committee could perform substantially the same work that it does currently, but modify its analysis from implicit to explicit. Indeed, the Committee already does as much in the context of juvenile justice. In the section on juvenile justice in its Concluding Observations, the Committee has explicitly incorporated various international standards to provide substantive guidance to States parties.²³³ In a Concluding Observation to Burkina Faso, for example, the Committee listed the relevant

228. See Protocol I, *supra* note 117, art. 77(1) ("Children shall be the object of special respect and shall be protected against any form of indecent assault. . .").

229. See, e.g., HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 219–22 (2005) (describing what kinds of armed conflict exist under IHL, how determining their status is a factual inquiry, and how commentators differ on such determinations).

230. See Recommendation on Armed Conflict, *supra* note 199, ¶ 66.

231. See Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

232. See Children's Convention, *supra* note 6, art. 43(1) ("For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child . . .").

233. See *supra* notes 77–82 and accompanying text.

standards for juvenile justice as the Children's Convention, the Beijing Rules, the Riyadh Guidelines, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, and the Vienna Guidelines for Action on Children in the Criminal Justice System.²³⁴ Based on those standards, the Committee articulated fourteen specific substantive recommendations for the State party.²³⁵ The Children's Committee could perform the same task for its sections on armed conflict by first listing the relevant IHL standards and then providing a list of detailed substantive recommendations with which the State must comply. Such an approach would be practically feasible for the Committee and would provide a more explicit link between IHL protections and Article 38.

More fundamentally, even if the Committee does not provide substantive analysis of international humanitarian law, it may be contributing to the evolutionary development of that body of law. Given its unique, nearly universal ratification and the explicit placement of IHL in the Convention, the Committee arguably contributes to the development of customary norms of international humanitarian law through its consistent recommendations. Viewed in this light, the Committee's work may actually form a part of international humanitarian law, rather than sit above it as an external interpretive mechanism.

CONCLUSION

In sum, the Committee on the Rights of the Child, tasked with interpreting the Convention on the Rights of the Child and evaluating States parties' progress in protecting the detailed rights, must consider international humanitarian law as incorporated through Article 38. On the one hand, given the Committee's position that all such rights are interrelated and its willingness to incorporate and synthesize other international standards, the Committee is in a position to interpret and analyze international humanitarian law. On the other hand, the Committee is not a judicial body and has little incentive to analyze and detail States parties' violations of the Convention: it seeks compliance, not shame. As a result, and through its work product, the Committee does not explicitly analyze the protections of IHL. Ultimately, however, it may contribute to the development and solidification of customary norms of international humanitarian law.

234. CRC, Concluding Observations: Burkina Faso, ¶ 61, U.N. Doc. CRC/C/15/Add.193 (Oct. 4, 2002).

235. *Id.* ¶ 62.

