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Rethinking the Place of International Humanitarian Law in the Protection of Displaced Children During Humanitarian Crisis

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ABSTRACT

Humanitarian Crisis in its own nature and nomenclature has produced devastating effects and most of those affected vulnerable persons in which children as a minority group are comprehensibly and unsurprisingly strongly affected by the effects of armed conflict. This negative experience by children becomes precarious for these children in situations as most of them are separated from their families. As a maiden remark, it should be acknowledged that while the effects of armed conflict are not always noticeable and quantifiable in children, they remain present and multi-dimensional to such an extent that it would be extremely ambitious for any legal or normative framework to pretend to tackle them holistically. For those separated from their families, the risk of abuse and exploitation mathematically increases. In that sense, the quality of the experiences does not differ fundamentally between Displaced Children or refugee children in that they are both deprived of their primary role model, their parents. In legal terms, however, displaced children do not benefit from the same level of protection that the status of refugee affords. The otherwise clear-cut legal distinction of human rights law and humanitarian law between Internally Displaced Persons and refugees appears, nevertheless, increasingly complicated to distinguish in its practice as both 'internal' and 'external' conflicts result often in refugee flows into the neighboring countries.

Keywords: *Displaced Children, Family Reunification, Conflict, Crossing Legal Borders, International Humanitarian law, Human Right Law.*

I. INTRODUCTION

It is an undeniable school of thought and principle that during armed conflict, most family become separated as a result of armed conflict or flight, and to this, the concept of international humanitarian law established special measures that must be implemented to enable it reunification and so as in facilitating the mission and responsibilities of humanitarian

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organisation. . This right as to family reunification is an upshot to the principle of family unity, established in the Convention of the Right of the Child², the International Covenant on Civil and Political Right³, and even those adumbrated in the International Covenant on Economic, Social and Cultural Right. This right in its application has been translated into customary international law⁴. The right is linked to the right to be informed of the fate of missing and the dead in times of conflict. In recent permissible history, a comprehensive legal framework has been developed with the intention to promote and protect the needs of unaccompanied children that become refugees or internally displaced persons (IDP) as a result of armed conflict. It would be premature in assuming that however, that the developments in human right law have fully solved the matter, where children as a social group, are understandably and predictably strongly affected by armed conflict. This negative experience becomes further enhanced in situations where these children are separated from their families. As a preliminary remark, it should be acknowledged that while the effects of armed conflict are not always discernible and quantifiable in children, they remain present and multi-dimensional to such an extent that it would be extremely ambitious for any legal or normative framework to pretend to tackle them holistically.⁵ Establishing the aspect that children separated from their families, the risk of abuse and exploitation almost scientifically increases. Though there is no constant decoration in the way that children are affected by each type of conflict, statistically over 20 million children have been displaced by war within and outside their corresponding countries. This figure serves well the purpose of demonstrating the size and earnestness surrounding child dislodgment⁶.

As an admittedly gloomy picture, the aim of this paper is to discuss the legal aspects of the protection of separated children from both the viewpoint of international humanitarian law as well as of international human rights law. The main question addressed, through the comparative study of the two legal frameworks, will concern the compatibility and complementarities of the two regimes but also their responsiveness and adequacy for current humanitarian crises. Do the two regimes award similar or contradictory rights? Do they result in the creation of legal gaps? Or do they simply follow radically different orientations?

² Article 9, 10, and 12 of the 1989 Convention of the Right of the Child

³ Article 23(1) of the International Covenant on Civil and Political Right 1966,

⁴ The notion of *jus cogen* regarded as a peremptory norm generally accepted by the international community without the possibility of deviation or derogation.

⁵ In conflict situations, where families are often torn apart and communities are displaced and divided, youth experience the political, social, economic and psychological effects of the war. These range from sexual abuse, grave psychological trauma to malnutrition, disease and lack of education. *See* United Nations, World Youth Report 2005: Young People Today and in 2015, Department of Economic and Social Affairs 141–152 (Oct. 2005) [hereinafter Word Youth Report 2005].

⁶ G. Sadoway, 'Canada's Treatment of Separated Refugee Children', 3 *European Journal of Migration and Law*, 2001, pp. 348–50.

(A) An Understanding of Legal Regimes Protecting Children during Armed Conflict, and the Right to Family Reunification

The protection of Children in moments of armed conflicts encompasses predominantly in two areas of international law concerned: first, the rule in international humanitarian law (IHL) that deals with the rules and means of warfare, including the treatment of civilians in times of war and second, human rights law that seeks in regulating the treatment of individuals by States, and not necessarily restricted to times of peace. The scope and area of competence of this paper extend to a certain category of children, as mentioned previously: Internally Displaced Children. These children can be defined as persons under the age of 18 that have fled their home as a result of armed conflict but have chosen to resettle within the territory of their country. In a broader term, children' encountered in policy documents characterizes the same categories of children but also those that may appear accompanied but in practice the accompanying adult is not able to assume responsibility for their care. The advantage of this wider definition can be summarized in the fact that a larger number of children displaced as a result of armed conflict may benefit from international law protection. The term displaced children' will only be used in this paper if there is no substantial difference in the legal status of IDPs children in relation to the point made each time. Formally, however, and as the following part will show, IDPs are provided less protection by international law due to the fact that they remain under the jurisdiction of their originating state.

a. The need in Determining and Recognising the Geneva's Conventions

The first child-oriented steps in International Humanitarian Law are established under the 1949 Geneva Conventions. Two fundamental texts are responsible for their protection, which is the Third Convention; relative to the Treatment of Prisoners of War⁷ refer to age as a reason for privileged treatment with **Article 16** "Equal Treatment" and **Article 49** "Labour of Prisoner of War⁸." The first creates an exception from equality (privilege) that may be accorded by reason of age; the second demands to take into consideration the age when utilizing POWs' labour. The Fourth Geneva Convention relates to civilians in general, but it included also specific texts on children, that can be seen as an embryo of a child-oriented development in IHL. An embryo indeed, rather than a baby "*as these provisions are pretty limited and insufficient*" for children caught up in armed conflict."⁹

⁷ Geneva Convention Relative to the Treatment of Prisoners of War (Aug. 12, 1949), 75 U.N.T.S. 135 herein referred as GC III.

⁸ This will otherwise be referred to as POW

⁹ Carolyn Hamilton, *Armed Conflict: the Protection of Children under International Law*, available at www.essex.ac.uk/armedcon/international/comment/Text/paper001.htm (last visited April 6, 2018).

i. The Position of the Geneva Convention and Child Protection

Articles 24 of the Fourth Geneva Convention provides “*that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources. The parties to the conflict must facilitate the reception of such children in a neutral country for the duration of the conflict.*”

This entirely child-oriented article is restricted only to those children; deprived of their parents, for it does not cover all other children who may equally need subsistence, maintenance, education, etc¹⁰. Fourth Convention failed in providing and recognising the child as a vulnerable person, it shows more concern with family break-ups, with parents or parties in conflict losing their children through improper emptying or poor care. Another provision of countless importance under the Fourth Convention is provided in **Article 50** which obliges the occupying power to facilitate the proper working of all institutions devoted to the care and education of children, listing in great detail all steps that need to be taken. **Article 51** excludes persons under eighteen from any circumstances that might necessitate them to be enlisted and compel to labour by occupying power. **Article 68** excludes from the death penalty children under eighteen at the time of the offence. All these provisions, however, suffer from the same shortages, as they apply only to protected persons or civilian population in occupied territories; and the protection does not cover all indirect, and even direct, effects on children from the conduct of military hostilities.

ii. According a Special Protection of Children, the existence of Additional Protocols to the Geneva’s Conventions

The Additional Protocols (AP) to the Geneva Conventions are appetizing, as it tries to provide an understanding as to what will amount to protection of these children who suffered from the effects of armed conflict. **Article 77** of the Additional Protocol I establish the principle of offering special protection to children. The law emphasises that Children shall be the object of special respect and shall be protected against any form of impolite assault. That Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.”¹¹The principle of special care for children is also extended to apply in non-international armed conflicts in **Article 4** of Additional Protocol II.¹² It is the role of the

¹⁰ P. Weis (1995) (ed.), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* (Cambridge University Press, p. 380).

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. hereinafter referred to as AP I.

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 hereinafter referred to as AP II.

conflicting parties in ensuring the establishment of hospital and safety zones¹³, evacuations during armed conflict; release and return after conflict¹⁴, priority in care, for example in delivery of food, medical supplies, clothing¹⁵, family reunification¹⁶, education¹⁷, special care of detained or interned children¹⁸ and Immunity from death penalty.¹⁹

Additional Protocol I and Protocol II has developed the prohibition of the participation of children in armed hostilities in any capacity from the level of assisting combatants to members of armed forces. In situation the children are nevertheless recruited and take part in hostilities, they are recognized as combatants and accordingly, in the event of capture, are entitled to POW status under the Third Geneva Convention.

(B) Protection convened by International Humanitarian Law

Geneva Convention IV (GC IV)²⁰ is unambiguously relevant to children and to civilian in a broader sense, when victims of war and offers a net of general protection. Pertinent and specific obligations are imposed on state parties in order to protect children who are separated or orphaned.²¹ The major legal weakness of GC IV lies in its scope of application for it applies to inter-state but not to intra-state conflicts.²²

¹³ Article 14 Geneva Convention IV;

¹⁴ Articles 17, 24(2), 49(3), 78, and 132(2) Geneva Convention IV; Article 78 Additional Protocol I; Article 4(3)(e) Additional Protocol II

¹⁵ (Articles 23, 38, 50(5) and 89 Geneva Convention IV;

¹⁶ Articles 24, 25, 26, 49(3), 50, 82 Geneva Convention IV; Article 78 Additional Protocol I; Article 4(3b), 6(4) Additional Protocol II;

¹⁷ Article 24(1), 50, 94 GC IV; Article 78(2) AP I; Article 4(3) (a) AP II;

¹⁸ (Articles 76(5), 82, 85(2), 89, 94, 119(2), 132 GC IV; Article 77(3) and (4) AP I; Article 4(3)(d) AP II);

¹⁹ Article 68(4) GC IV; Article 77(5) AP I; Article 6(4) AP II

²⁰ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1956).

²¹ Article 24(1) GC IV in particular stipulates: “The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.”

²² Common Article 3 to all four Geneva Conventions constitutes an exception to this limitation insofar as it obliges parties, even in situations of internal conflicts, to provide limited protection to civilians. It disposes: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

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

and in any place whatsoever with respect to the above-mentioned persons:

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

(b) taking of hostages;

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

II. GENEVA CONVENTION IV AND THE CHILDREN RIGHTS

Geneva Convention IV, two additional protocols to the Geneva Conventions was adopted in 1997. The first Additional Protocol updated the rules applicable to the conduct of hostilities²³ while the second Protocol laid down minimum guarantees specifically for internal conflicts.²⁴ Additional Protocol I protects children against indecent assault and requires from states provisions of care and aid.²⁵ It also sets the minimum age for participation in the armed forces commit a crime connected to warfare.²⁶ Two broad categories of situations can be distinguished regarding population movements of children in the context of conflict: cases where children are sent abroad to allied or neutral countries in order to avoid the dangers of hostilities as part of an evacuation scheme and situations where children opt individually and independently to leave their country.

(A) The Implications of Additional Protocol I on Displaced Persons Rights

Article 78 of the Additional Protocol I is of high essence as it calls for the evacuation of children from war-affected countries but only if compelling reasons impose it,²⁷ and specifies that unglued children shall be reunited with their parents when the danger has passed. It also stressed that while away, children should continue their education. The interpretation of **Article 78(1)** suggests that children who are nationals of the party to the conflict carrying out the evacuation are not included and thus the children concerned are those of enemy nationality, of refugees or of stateless persons.²⁸ At the same time, such an interpretation indicates that for children-nationals of the party to the conflict carrying out the evacuation, arrangements lie at

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

(2) The wounded and sick shall be collected and cared for. . . .”

²³ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) (hereinafter AP I).

²⁴ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) (hereinafter AP II).

²⁵ Article 77(1) of Additional Protocol I

²⁶ Article 77(4)

²⁷ Article 78(1) disposes. “No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.”

²⁸ Article 77 AP I, *supra* note 19, and Article 4(3)(c) AP II, *supra* note 18.

the state's discretion and no specific rule or limitation applies. Forcible transfers from occupied territories are nevertheless prohibited under **Article 49** Geneva Convention IV but the same does not apply to voluntary transfers. Evacuations within occupied territories are possible only for the reasons pertaining to the security of the population or to military necessity. In the same vein, Article 49 (6) GC IV also prohibits the transfer by an occupying power of its own population into territory that it occupies. AP II largely reflects a similar content to AP I, yet is applicable only to the conduct of parties in non-international conflicts.

(B) Facilitating Family Reunion of Separated Families

Of particular relevance to this aspect is Article 4(3)(b) that strains once more that “*all appropriate steps shall be taken to facilitate the reunion of families temporarily separated.*”

For ‘voluntary’ departures of children belonging to the second category, the situation appears more complex. While family separation and family reunification are addressed, International Humanitarian Law provisions do not provide a definition of refugees. Accordingly, the legal status of the unaccompanied minor who crosses the border will depend on which country he or she chooses to flee to. Children population movements vary according to the situation in the country of departure to the one in the country where refuge is sought. This variation affects the level and kind of legal protection that the child will be afforded. The scope *ratione personae* of Geneva Convention IV covers in Article 4 the persons, whether caught in conflict or under occupation, found in the hands of a party to the conflict of which they are not nationals. More explicitly, it is conceivable to distinguish four different categories of situations: first, nationals fleeing hostilities in their own state and seeking refuge to another state-party to the conflict are protected under IHL and in particular Article 44 GC IV. Second, for refugees fleeing from a country not involved in a conflict to a country at war with a third state, once more the GC IV applies. The third situation covers refugees who flee to a country not involved in conflict. These individuals are only covered by the 1951 Refugee Convention.

Finally, for refugees to a state not involved in international conflict but facing an internal conflict, GC IV in particular in its common Article 3 and the AP II, if relevant, apply. Very approximately, to enjoy protection under International Humanitarian Law, and more particularly GC IV, a refugee must flee to a country that is also part to the conflict but if he or she decides to flee to a country which is not involved in any international or internal conflict, the only available protection will be outside the strict remit of IHL, namely the 1951 Convention relating to the status of refugees, which provides narrow protection to children²⁹.

²⁹ P. J. van Krieken, ‘Family Reunification’, in *The Migration Acquis Handbook* (ed. P. J. van Krieken, T. M. C.

(C) The Situation offered by Human Right Protection

Contrary to International Humanitarian Law that counting a legal protection for children caught in warfare, international human rights law has created legally binding obligations for states with regards to children. The Convention on the Rights of the Child (CRC), adopted in 1989, represents the most noticeable constituent of this advancement. In general terms, the CRC's scope of application is not restricted to the protection of children in times of armed conflict but extends also in times of peace. The only exception to this rule is **Article 38** that refers to the absence of a duty of states to protect children during hostilities.³⁰ The Convention applies to both IDPs and refugee children without discrimination of any kind³¹. This Article resonance **Article 22** of the 1951 Refugee Convention whereby refugees must receive the same treatment as nationals in education. Given the resemblance of Convention of the Right of the Child with the 1951 Refugee Convention on this specific point, the former widely ratified will guarantee the rights of refugee children in the field of education even when a state has not ratified any refugee treaty

a. Understanding the conception of a Child in Human Right Dispositions.

A child is defined in **Article 1** of the Convention of a Child as “*every human being below the age of eighteen years.*” As the primary legally binding international instrument, it contains a full range of human rights with the intonation on the special care and protection that children need in a variety of circumstances. The Convention understands and defining a child embraces four core principles all in guiding its actions and desired effects. These principles involved; non-discrimination prohibiting any discrimination on the basis of the status of the child being displaced or refugee or asylum seeker, devotion to the best interests of the child for every decision impacting on the child's life, the right to life, survival, and development including protection from violence and exploitation and especially trafficking, and finally respect for the views of the child. In its universal terms, the Convention of the Right of the Child's scope of application is not restricted to the protection of children in times of armed conflict, but extends also in times of peace. The only exclusion to this rule is **Article 38** that refers to the absence of a duty of states to protect children during hostilities. The Convention applies to both Internally Displaced Persons and refugee children without discrimination of any kind. **Article 2** of the Convention on the Right of the Child ricochets **Article 22** of the 1951 Refugee Convention

Asser Press, The Hague, 2001), p. 116.

³⁰ This provision also retains the age of 15 years as a threshold for the recruitment of child soldiers and their direct participation in hostilities. Article 38(1) nevertheless contains a “bridging” provision with IHL legal texts by requiring the “respect for rules of IHL . . . which are relevant to the child.”

³¹ Article 2 of the Convention of the Right of the Child

whereby refugees must receive the ‘same treatment’ as nationals in education. Given the congruence of CRC with the 1951 Refugee Convention on this specific point, the former widely ratified will guarantee the rights of refugee children in the field of education even when a State has not ratified any refugee treaty.

b. The Convention of the Child and the respect for Family Reunification of Displaced Children.

The CRC restates the expedition for special protection and support by states parties in Article 20 but definitely and explicitly for children temporarily or permanently deprived of his or her family environment. The convention constitutes a crucial provision that is rich in content and heavy in obligations for states parties as it concerns a vast number of areas where it can find application. Alternative care, in accordance with national laws, should be provided by state parties³² with due regard to the child’s ethnic, religious, cultural, and linguistic background³³. With respect to displaced children who are at the same time seeking adequate protection, Article 22(1) of CRC insists on the need for them to receive appropriate protection and humanitarian assistance in accordance with the rights set forth in the Convention, particularly in their attempts to reunite with families³⁴. Article 27 of the convention furthers obliges State obligations *vis-à-vis* these children also cover the right to an adequate standard of living appropriate to their physical, moral, and mental development, full access to education in accordance with Articles 28, 29(1)(c), 30 and 32 of CRC without any discrimination, in particular for girls as well as prevention of trafficking, abuse, violence, and exploitation.

III. UNDERSTANDING THE VARIOUS DISPLACED CHILDREN UNDER HUMANITARIAN LAW AND HUMAN RIGHT LAW

A weighty number of policy discussions, some of them with declared convincing force, stimulates the debate on the need of enhanced legal protection for children, particularly those separated from their families, in warfare. They have been called to provide some background to the existing legal provisions, indicating the appropriate interpretation and extent that these norms should be given. While it is beyond the scope of this Article to provide a full account of all, some of them merit special mention due to their impact and/or content.

(A) Internally Displaced Unaccompanied Children

If “it is fair to say that the international community is more inclined than it is prepared, both

³² Article 20(2) of the Convention of the Child

³³ Ibid, article 20(3) CRC

³⁴ Article 22(2) CRC

normatively and institutionally, to respond effectively to the phenomenon of internal displacement,” the efficiency of the current provisions is limited in providing adequate levels of protection and assistance to such individuals. In order to compensate for this void, a set of Guiding Principles devised by the United Nations addressing the specific needs of children IDPs. Intended as an influential statement, these principles refer to internally displaced children as beneficiaries of special assistance and protection due to the specificity of their needs, reproducing the contents of the Convention of the Right of the Child. More specifically, however, they protect these children against attacks to their physical and mental integrity, prohibit their recruitment in hostilities, and impose an obligation on state authorities to guarantee their education. Principles 16, 17, and 28 respectively organize tracing of family, prevention of separation to the extent possible, and, in cases of separation, return and resettlement. Despite complementing the current legal frameworks, these guidelines have not been embraced by the states parties concerned by them, partly by reason of their weaker legal force and partly due to the width of the obligations they impose. In the case of identification of the said child, Children are found either to qualify for asylum, in which case they are locally integrated or resettled in a third country on the grounds of family reunification, or they are refused asylum, having therefore to return in their country of origin provided that their family has been traced, a suitable care-giver been found and the return is considered as in the best interest of the child³⁵.

(B) The position of Human Right Protection of Unaccompanied Children Seeking Refugee

Article 3(1) of Convention of the Right of the Child emphasised on the absolute prioritization of the best interests of the child. The added value of these guidelines lays in the detailed analysis of the process of accommodating claims from unaccompanied children, from identification procedures including age assessment, to registration by means of a child-friendly interview and then to the appointment of an adviser/guardian able to represent the child’s best interest and not jeopardize its fragile situation, the collection of information relevant to the child, and finally attempts to trace the family. Regarding the asylum application *per se*, it is stressed that children seeking asylum should not be kept in detention, especially if unaccompanied. In line with the CRC, the guidelines also address issues of access to health care and education. Such children should benefit also from legal representation for their claim and their applications should be

³⁵ G. S. Goodwin-Gill(1996), ‘Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities’, in *Children on the Move: How to Implement their Right to Family Life* (eds. J. Doek, H. van Loon, P. Vlaardingerbroek, Martinus Nijhoff, The Hague, p. 97.

given priority

IV. IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHT IN SITUATIONS OF ARMED CONFLICT

Implementation of Human Right Law especially when dealing with children in armed conflict is only a small part in international law, the real test for norms and rules comes when they have to be ratified and applied by states, when the obligations need to be monitored and enforced through sanctions imposed on the violators. The implementation of International Humanitarian Law has intrinsically suffered from the fact that this special law *has* to be applied against the thresholds of military necessity; it always co-exists with the extraordinary excesses of the armed conflicts. One can even argue that International Humanitarian Law is not “humanitarian” as the protection of non-combatants arises not so much from humanitarianism, but rather from a calculation; that it would be militarily advantageous to evacuate non-combatants from the battlefield and concentrate on targeting the military strength of the enemy. Due to these problems concerning the implementation of IHL children continue to suffer from armed conflict in many ways. In recent conflicts notorious anti child methods, such as starvation of population; forceful deportation; separation of men from women and children; mass rape, including of young girls; child soldiers’ recruitment etc. have been on the rise.

(A) Inconsistencies disturbing the adequate Protection of Children Rights in Situation of Displacement

The effects of violence and insurgency on children have not been quantified and so far no corresponding information seems available.⁶⁴ It is hence very difficult at this stage of the conflict to assess the situation of unaccompanied children both within and outside

a. The Interest of the Children in Distress

The child although firmly established in legal terms, suffers from weak implementation. Individual states apply the principle relatively successfully in domestic cases but substantially more restrictively in immigration cases and durable situation decisions. Registration and documentation issues constitute on the other hand one of the omissions of the system, as also mentioned previously. Mechanisms of identification of unaccompanied and separated children are also lacking. This last point, together with access to the appropriate legal and institutional mechanisms of the host state for refugee children, demand a certain degree of participation and good will on behalf of the states concerned. International Human Law and Human Right Law can only influence that in a limited way by encouraging states to comply with the relevant legal

texts and by putting some pressure on them to follow the rule of law and the available guidelines within the confines of international law and sovereignty principles broadly understood. In that respect, it is indicative for instance that the whole asylum process in most cases does not adapt to the specificities of unaccompanied children who even at that stage continue to face an increased risk of abuse and trafficking, despite the existence of comprehensive international legislation on the matter. With regard to separated children, there are reports of individual cases which confirm diagnosis of clinical depression due to displacement. Health assessment in the country has also indicated signs of acute malnutrition in children. Some efforts are geared towards the reactivation of the primary education system so as to allow displaced minors to overcome their security concerns and in a sense return to 'normality' but the overall lack of security renders this task just as challenging.

b. The Aspect of reintegration

Incidents of sexual exploitation occur on the children after the conflict and even on the way home. Female children refugees are particularly prone to sexual exploitation by a variety of perpetrators such as border guards, humanitarian aid workers or fellow refugees. As a result, many children end up in internal displacement due to a lack of infrastructure such as housing, property disputes and insufficient livelihood means. It is therefore

Paradoxical and indeed one of the perverse effects of the conflicts of law and politics, that although IHL and HRL standards encourage the return of children refugees and IDPs to their homeland as well as the subsequent reunification with their family left behind, that in the case of International Organizations such as the UNHCR advise against such a return. The low level of security is advanced as the main reason for the postponement as Iraqi authorities are for the moment unable to provide protection to their citizens, let alone the vulnerable category of separated children.

(B) The Capacity of Family Reunification

The capacity of the family to receive a returning child is not taken into account, especially in cases where the family invested in sending the child abroad and relies on its income-earning capacity. The legal framework clearly prioritizes family reunification but arguably fails to address its complexities. Factors such as the child's level of integration in the host country, for children refugees, is often determinant as the longer the time spent in the host country the more limited memories exist of the home country. Similarly, the possibility of family reunification should not come at the expense of any application of residence in a host country, precisely because a multitude of reasons affect a final decision to return. The need of separated children

to be consulted and informed of the durable situation most appropriate for them remains a ‘need’ that has not been translated into a ‘right’ in practice.

(C) The Situation of Education of the Displaced Children

In the same context, one of the strongest concerns for separated children is education. The case is particularly telling of the low level of access to education for both male and female children. Reconstruction efforts in post-conflict settings generally give precedence to primary school education but by no means cover the extended needs of these children. While refugee children may in some cases profit from quality education that would not be otherwise available to them in host countries, internally displaced children face challenges in the educational context that could often amount to corporal punishment, exploitative labour conditions or physical abuse. In the same vein, exclusive reliance on humanitarian aid clearly insufficient in extended stays in camps and poor health services darken even further the picture for these children. Last but not least on the list of challenges that these children face, applicable mostly to refugee children, is the risk of discrimination and xenophobic treatment in countries of asylum and/or resettlement. This is so despite the CRC provisions against discrimination.

V. CONCLUSION

The experience of armed conflicts in the four corners of the globe has amply demonstrated that family separation is the beginning of a vicious circle that most often leads to child soldier recruitment, sexual exploitation, isolation from education and even significant deterioration of health. There is reduced empirical documentation on the application of norms on family separation and its effects, despite an increasing number of legal texts and policy guidelines. This is partly due to cultural factors that influence reporting, as in many cases separation from the child’s parents is not perceived as such if care is dispensed by the wider family.

It is also due to the diversity of state responses to the issue of unaccompanied or separated children, in terms of content of rights, procedures of protection and asylum rules. At the same time, there is a generalized lack of effective methods of data collection that becomes relevant at various stages of the process, especially for undocumented children. The cardinal principle of the child’s best interest despite being legally guaranteed cannot be easily translated into operational guidelines useful in decision-making and yet must be respected during the whole cycle of displacement. But even when the implementation of certain rules is more obvious, as for instance in the case of the special duty of assistance provided to unaccompanied minors, it may From a strictly legal perspective, IHL and HRL provisions are largely harmonized and harmonizing with few exceptions. They suffer nevertheless from low implementation.

Significant reliance is placed on the guidelines that fill in the gaps of the legislative frameworks. These guidelines, even if put forward as ‘soft law’ tools, tend to lose some of their persuasive force as their application depends on the goodwill of states. A typical illustration in this context is family tracing. There are no standardized models of follow-up for separated as well as reunified children in cases where immediate protection concerns arise. International standards on archiving the records of unaccompanied children could for example significantly raise the rate of success of family reunification.

VI. REFERENCES

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