

COUNTING CHILDREN IN WAR: REIMAGINING THE PROPORTIONALITY ANALYSIS

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Children hold protected status under international law, yet their suffering under armed conflict is only increasing. International law should do more to protect their rights. This Note argues that children's lives should be given greater weight in proportionality analyses conducted under international humanitarian law. This Note will examine the mechanisms for this first under black-letter law and then under three models of customary international law. It will then discuss the implications of crystallizing a new rule of customary international law. This Note argues that the foundations for this law already exist. Increasing uptake by the global citizenry, state governments, international organizations, and tribunals, make the development of this rule not only necessary, but likely, and astute states should work quickly to help crystallize this new rule.

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I. INTRODUCTION

As of December 28, 2024, over 473 million children around the world – over one in six – were living under armed conflict.¹ A record number of children suffered from acts of violence in conflict.² The United Nations verified 41,370 grave violations against children in that year alone.³ More children today live and die in armed conflict than in any time over the past thirty years – and the global populace is paying attention to their suffering like never before.⁴

As interconnectivity of the world through social media and technology increases, so does the rapid spread of stories of children's suffering during conflicts. With this spread comes increased public attention. Civilian casualty reports frequently list child deaths separately from adult casualties. This reflects a deep societal belief that children's deaths carry a heightened emotional weight. In reporting on the Russo-Ukrainian war, child casualties are often presented in this way. For example, UNICEF publishes child-specific counts for the war.⁵ U.N. human-rights bulletins covering the war likewise break out the number of children among monthly casualties.⁶ Major outlets also isolate child victims in when reporting fatalities from an incident in the war.⁷ The

1. UNICEF, “Not the new normal’ – 2024 ‘one of the worst years in UNICEF’s history’ for children in conflict” (press release, Dec. 28, 2024), <https://www.unicef.org/eca/press-releases/not-new-normal-2024-one-worst-years-unicefs-history-children-conflict>.

2. Kaamil Ahmed, *Children suffered record levels of violence in conflict zones in 2024*, UN report shows, The Guardian (June 20, 2025), <https://www.theguardian.com/global-development/2025/jun/20/violence-against-children-conflict-zones-un-report>.

3. U.N. Secretary-General, *Children and Armed Conflict - Report of the Secretary-General*, U.N. Doc. A/79/878-S/2025/247, ¶ 5 (June 17, 2025).

4. Gudrun Østby & Siri Aas Rustad, *473 million Children Live in Conflict Zones*, Peace Research Institute Oslo (PRIO) Commentary (Oct. 31, 2024), <https://www.prio.org/comments/1152>.

5. UNICEF, *Threefold Increase in Number of Children Killed or Injured in Ukraine* (Aug. 25, 2025), <https://www.unicef.org/ukraine/en/press-releases/threefold-increase-number-children-killed-or-injured-ukraine>.

6. United Nations in Ukraine, *Protection of Civilians in Armed Conflict — October 2024* 1, <https://ukraine.un.org/en/283659-protection-civilians-armed-conflict-%E2%80%94-october-2024>.

7. See e.g. AP, *Russia-Ukraine War: Apartment Strike Death Toll*, AP News (Jan. 2023), <https://apnews.com/article/russia-ukraine-war-apartment-strike-death-toll-1b518f84fc4e70708d56e1a1ea708929>; Reuters, *Russian Strikes Kill 16 People in Kyiv, Including Two Children* (July 31, 2025), <https://www.reuters.com/world/russian-strikes-kill-16-people-kyiv-including-two-children-2025-07-31/>.

same practices exist in other conflicts like the 2023 Israeli-Hamas war. For example, the Washington Post published the names of children killed in that war in a single list focused exclusively on children.⁸ Al Jazeera and others also highlight child deaths in headlines.⁹ International organizations and advocacy groups have increasingly called for stronger protections for children, and in doing so have highlighted the growing threats faced by children in conflicts worldwide.¹⁰ Between efforts from human rights organizations and reporting on children's deaths in conflict, the message is clear: today's global population demands more protection of children.

As this Note will demonstrate, children already have special legal protection in armed conflict, but more can, and should, be done. Specifically, this Note calls for the crystallization of a specific rule: assigning additional weight to children's lives in proportionality analyses used for military operations. Practitioners, scholars, institutions, political leaders, and people writ large are already moving in this direction.

First, this Note will show that the language of the existing proportionality rule is compatible with what the Note "a child-sensitive" reading – meaning a reading of the proportionality rule that allows child casualties to be given greater weight in the proportionality calculus. It will then supplement this analysis by looking to customary law, as custom can develop such that it alters the application of

8. Katie Shepherd & Sarah Dadouch, *Israel-Gaza War Interactive: Children Death Toll*, Washington Post (Apr. 2025), <https://www.washingtonpost.com/world/interactive/2025/israel-gaza-war-children-death-toll/>.

9. Al Jazeera, *Over 13,000 Children Killed in Gaza, Others Severely Malnourished: UNICEF* (Mar. 17, 2024), <https://www.aljazeera.com/news/2024/3/17/over-13000-children-killed-in-gaza-others-severely-malnourished-unicef>.

10. See, e.g., U.N. Children's Fund (UNICEF), *Protect Children in Conflict: UNICEF's Call to Action for 2025*, UNICEF USA, <https://www.unicefusa.org/stories/protect-children-conflict-unicefs-call-action-2025> (urging the international community to strengthen protections for children affected by conflict); InterAction, *Addressing Growing Protection Needs of Children on the Move*, <https://www.interaction.org/blog/addressing-growing-protection-needs-of-children-on-the-move/> (noting increasing global numbers of vulnerable children and corresponding protection needs); U.N. Children's Fund (UNICEF), *The United Nations Convention on the Rights of the Child*, UNICEF UK, <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/> (emphasizing states' obligations to ensure the protection and rights of all children).

treaties.¹¹ This Note will outline three paths of customary international law and show that under each of these, strong underpinnings for the proposed rule already exist, and furthermore, each provides a path to full crystallization. This Note will then discuss how a crystallized rule might look and the potential implications of that rule. It will conclude with an explanation of why self-interested states should act to crystallize this rule now.

II. THE BLACK-LETTER BASELINE

A. *Primary Sources and Context*

This Note begins by looking at the black-letter law: Additional Protocol I (“AP I”), Rome Statute of the International Criminal Court (Rome Statute), and the International Committee of the Red Cross (ICRC).¹² AP I, Article 51 provides the underpinning for the rule of proportionality, writing that one may not “launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³ Building on AP I, the Rome Statute criminalizes “intentionally launching an attack in the knowledge that such attack will cause . . . incidental loss of life or injury to civilians or damage to civilian objects, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁴ Then the ICRC *Customary International Humanitarian Law Study* (2005) (ICRC

11. For an argument illustrating how subsequently developed CIL can and does modify treaty obligations, see Rebecca Crootoft, “Change Without Consent? How Customary International Law Modifies Treaties,” 41 *Yale J. Int’l L.* 237 (2016).

12. Additional Protocol I (“AP I”) is a 1977 treaty supplementing the Geneva Conventions, elaborating the conduct of international armed conflict and on targeting (distinction and proportionality). The Rome Statute of the International Criminal Court (“Rome Statute”) is the treaty that established the International Criminal Court and defined the crimes for which the Court has jurisdiction: war crimes, crimes against humanity, and genocide. The International Committee of the Red Cross, or ICRC, is an independent, neutral humanitarian organization, with a stated mission of protecting and helping victims of war and promoting and enforcing international humanitarian law.

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3. See ICRC Commentary on AP I.

14. Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90.

Study),¹⁵ sets out an equivalent customary formulation: “Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”¹⁶ None of these texts mention age. They treat civilians as one general category without age-based differentiation. But the law is not as clear-cut as it may appear, and this Note argues that its ambiguity allows for a child-sensitive interpretation.

B. *Child Sensitivity Via Ambiguity*

The law contains separate protections for children. Article 77(1) of AP I says that “children shall be the object of special respect and shall be protected against any form of indecent assault.”¹⁷ Additional treaties and U.N. resolutions and reports also provide children with extra protection.¹⁸

15. The International Committee of the Red Cross (ICRC) Customary International Humanitarian Law Study is a 2005 study, based on an extensive survey of state practice and *opinio juris*, of customary rules of international humanitarian law.

16. ICRC, *Customary International Humanitarian Law, Rule 14: Proportionality in Attack*, Customary IHL Database, Int’l Comm. of the Red Cross, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14> (last visited Aug. 30, 2025).

17. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 77(1), June 8, 1977, 1125 U.N.T.S. 3. See ICRC Commentary on AP I.

18. Convention on the Rights of the Child arts. 6, Nov. 20, 1989, 1577 U.N.T.S. 3; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, May 25, 2000, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (2000); S.C. Res. 1261 (1999). See U.N. Secretary-General, *Annual Reports on Children and Armed Conflict* (1999–2024); Shaheed Fatima, ed., *Protecting Children in Armed Conflict* (Hart 2018) (chapters 3, 7, and 8) (hereafter Fatima); For additional examples of the extra protections children receive during wartime see René Provost & Vishakha Wijenayake, *Collateral Kids: Weighing the Lives of Children in Targeting*, 37 *Leiden J. Int’l L.* 1018, 1036 (2024) (“For example, Article 14 of the Fourth Geneva Convention dictates that children under 15 shall be admitted in hospital and safety zones and localities which have been established to protect certain categories of the population from the effects of war. Children are also to be removed from besieged or encircled areas by concluding agreements to that effect, as per Article 17 of the Fourth Geneva Convention. Moreover, according to Article 4 of Protocol II, whenever possible or necessary, and subject to the consent of the parents or persons who have been entrusted with the principal responsibility by virtue of the law or custom, children are to be temporarily evacuated from where hostilities are taking place to a safer sector of the same country.”).

Treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT) instructs one to pay attention to text, context, object, and purpose, as well as subsequent practice.¹⁹ Under this logic, some of the aforementioned instruments – like AP I’s Article 77(1) and the other treaties provided the same parties signed both AP I and those instruments – can be relevant for understanding AP I Article 51. That alone can lead to multiple interpretations and ambiguity. The ambiguity only heightens when one considers that the proportionality rule as written in Article 51 (“launch an attack . . . which would be excessive in relation to the concrete and direct military advantage anticipated”²⁰) is malleable given the vagueness of the threshold “excessive.” How does one measure “excessive”? Indeed, in her famous work on children’s rights in international law, noted scholar Fatima Shaheed reads AP I and the Rome Statute as allowing for giving children additional weight in proportionality analyses.²¹

C. *Child Sensitivity Via “Foreseeability” and Balancing*

Proportionality is composed of two moving parts. The first is foreseeability, or what incidental effects the attacker reasonably could expect at the time of the attack.²² Foreseeability is judged against what the person carrying out the strike knows at the time of the strike. This may include surveillance, human reporting, updates from NGOs, and

19. Vienna Convention on the Law of Treaties arts. 31(1)-(3), 32, May 23, 1969, 1155 U.N.T.S. 331. The Vienna Convention on the Law of Treaties is a 1969 treaty that establishes the rules governing the formation, interpretation, and application of treaties between states.

20. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3
See ICRC Commentary on AP I.

21. Shaheed Fatima, *Protecting Children in Armed Conflict* 121, 145 (Hart Publ’g 2018) (“We suggest that consideration should be given to whether children should be given greater weight in the application of the principle of proportionality and the obligation to take precautions . . . the scope of these provisions [AP I and the Rome Statute] requires clarification and consideration should be given to whether they can be interpreted as including additional protection for children.”).

22. Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment* 7–9 (Chatham House, Dec. 2018), <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf> (explaining that foreseeability, what incidental harm could reasonably have been foreseen at the time the attack was planned or launched, is a core component of the proportionality assessment).

routine patterns.²³ The foreseeability question is important because an expanding literature demonstrates that children are particularly vulnerable to long-term psychological and developmental harms.²⁴ If such harms are reasonably foreseeable, then commanders can, in principle, include them in their proportionality calculations.

The second component is the balancing test, or whether the expected incidental harm would be excessive compared with the military advantage expected.²⁵ This harm is not quantified and, as such, is flexible. Someone applying this rule, whether a scholar or a commander, can decide the death of a child means that the incidental harm is excessive to the expected military advantage, even if, had an adult been in the child's place, the harm would not be excessive. That hypothetical commander can do this at every strike, thereby prioritizing the lives of children, and still technically adhere to the rule of proportionality.

Both foreseeability and the balancing test are fact-sensitive and somewhat open. That means that in any given case, different interpretive moves are possible. It also means that children's lives and

23. See U.S. Dep't of Def., *Law of War Manual* (June 2015, updated July 31, 2023), §§5.5–5.7 (on information sets and proportionality); see Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment* 7–9 (Chatham House, Dec. 2018), <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf> (explaining that incidental harm to be considered is what was reasonably foreseeable “on the basis of information that the attacker had or could reasonably be expected to have,” and urging systems to collect/use information from “all sources,” including public-domain and intelligence-gathering systems and data on “urban patterns and rhythms”), North Atlantic Treaty Organization (NATO), *Allied Joint Doctrine for Joint Targeting (AJP-3.9)* §§ 5.3.3–5.3.6, at 88–89 (Ed. B, v.1, Nov. 9, 2021) (directing use of JISR to maintain positive identification, track targets, and maintain information on “pattern of life,” expressly to ensure compliance with IHL/LOAC), NATO, *Allied Joint Doctrine for Civil-Military Cooperation (CIMIC) (AJP-3.19)* 23–27, 35–36 (Ed. A, v.1, Nov. 1, 2018) (stating that civil-military interaction with international and local non-military actors - including NGOs - expands knowledge networks and shared situational understanding of the civil environment; sets expectations for information sharing/liaison).

24. Sarah Knuckey, Alex Moorehead, Audrey McCalley & Adam Brown, *The Proportionality Rule and Mental Health Harm in War*, in *Necessity and Proportionality in International Peace and Security Law* 367, 382–384 (Claus Kieß & Robert Lawless eds., Oxford Univ. Press 2020) (Lieber Studies vol. 5) (arguing that children are particularly susceptible to mental harms from conflict as compared to adults, and this should be factored into the proportionality analysis to give greater weight to children's suffering).

25. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3

children's suffering can be weighed more heavily without rewriting the language of the existing black letter law.

D. *Child Sensitivity Via International Human Rights Law (IHRL)*

To understand the meaning of a treaty's text (in this case AP I), the VCLT allows one to look at context, subsequent agreements and practices, and relevant rules of international law applicable between the parties.²⁶ This allows for space for other treaties to which signatories to AP I are parties, such as international human rights law ("IHRL") treaties.²⁷

International humanitarian law ("IHL") and IHRL are not separate from each other but rather are frequently interrelated. The International Court of Justice (ICJ) has repeatedly confirmed that human rights obligations continue to apply in times of armed conflict, working together with IHL.²⁸ The European Court of Human Rights has applied a similar line of reasoning in several cases, applying Article 2 of the European Convention on Human Rights, which provides for the right to life and prohibits arbitrary killings by the states, showing that human rights law applies in addition to international humanitarian law during armed conflicts.²⁹ The ability to apply IHRL concurrently with IHL is especially important in cases where IHL has open and flexible standards, needing additional guidance to apply those standards – such as proportionality under AP I, Article 51.³⁰

26. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

27. The overlap between signatories to AP I and some of these other treaties are not 100% but there is significant enough overlap to make them worth considering.

28. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶ 25–30; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 102–06.

29. In *Estamirov and Others v. Russia*, for example, the Court found a violation of Article 2, condemning indiscriminate killings that included child victims. See *Estamirov & Others v. Russia*, App. No. 60272/00, ¶¶ 9–16, 95, Eur. Ct. H.R. (2006) (noting that the killings in the case included a one-year old child, and listing the holding which was a violation of Article 2's right to life).

30. For more discussion on the many ways in which IHRL impacts the interpretation of IHL and vice versa see, e.g.: Matt Pollard, *The Human Rights Committee's General Comment No. 36 and the Right to Life in Armed Conflict, Opinio juris* (Jan. 21, 2019), <https://opiniojuris.org/2019/01/21/the-human-rights-committees-general-comment-no-36-and-the-right-to-life-in-armed-conflict/>; Todeschini, *The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee's Engagement with International Humanitarian Law*, 35 Nordic J. Hum. Rts. 203 (2017), <https://doi.org/10.1080/18918131.2017.1353213>; Cordula Droegge & Eirini Giorgou,

In the field of IHRL, there are several treaties that create special obligations toward children in armed conflict. The Convention on the Rights of the Child (CRC),³¹ for example, requires states to “respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child” and to “take all feasible measures” to protect and care for children affected by conflict.³² Article 6 of the CRC states that “(1) States Parties recognize that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the children.”³³

Furthermore, the 2000 Optional Protocol to the CRC on Involvement of Children in Armed Conflict (OPAC) condemns “the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places that generally have a significant presence of children, such as schools and hospitals.”³⁴

The Inter-American Court of Human Rights has applied IHL and IHRL concurrently in armed conflict to give children additional protection. In *Masacre de Santo Domingo v. Colombia*, which examined an aerial attack in a non-international armed conflict, the Court wrote that it “has repeatedly stated that ‘both the American Convention and the United Nations Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of children that should serve [...] to establish the content and scope of the general provisions defined in Article 19 of the American Convention.’”³⁵ In other words, it applied both the CRC’s and the

How International Humanitarian Law Develops, 104 Int’l Rev. Red Cross 1798 (2022); Yuval Shany, *Co-application of IHL and IHRL: Some Takeaways from the Ukraine and Gaza Wars*, Lieber Institute (2024), <https://lieber.westpoint.edu/co-application-ihl-ihrl-some-takeaways-ukraine-gaza-wars/>.

31. The Convention on the Rights of the Child (CRC) is a 1989 treaty that sets out the civil, political, economic, social and cultural rights of children and obliges states to observe, respect and protect the rights it recognizes.

32. Convention on the Rights of the Child arts. 38(1), 38(4), Nov. 20, 1989, 1577 U.N.T.S. 3.

33. *Id.* at art. 6.

34. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict pmbl., May 25, 2000, 2173 U.N.T.S. 222.

35. *Case of the Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, ¶ 238 (Nov. 30, 2012).

American Convention's protections of children to situations of armed conflict.³⁶

Given all of this, between more flexible readings of the black letter law and the addition of IHRL, the core texts on proportionality, offer significant space for weighing children's lives differently, despite initially appearing to be quite rigid.

III. HOW CUSTOMARY INTERNATIONAL LAW FORMS: THREE ANALYTICAL FRAMES

In addition to reading child-sensitivity in existing texts, Customary International Law ("CIL"), supports giving children greater weight in proportionality analyses. To understand how CIL can support this idea, one must first understand how CIL is identified. This Note presents three frames for CIL and applies each one to the question of weighing children's lives in proportionality analyses.

A. *The classical Paquete/North Sea frame (Model A)*

Under the classic model of CIL formation, custom requires (1) state practice that is general and consistent and (2) *opinio juris*, which means states act the way they do because they believe these actions are legally required.³⁷ The cases *Paquete Habana* and *North Sea* are the classic examples of, and guides to, this model of CIL identification.³⁸ The *Paquete Habana* framework is demanding. Practices confined mainly to a cluster of high-capacity states are insufficient to prove CIL. Rather, the practice must be near-universal. *Opinio juris* must be shown by explicit legal statements, sustained treaty interpretation, or other solid evidence.³⁹ This can be challenging because a state may follow a

36. The "American Convention" refers to American Convention on Human Rights, also called the Pact of San José, the main regional human-rights treaty in the Inter-American system. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

37. *The Paquete Habana*, 175 U.S. 677 (1900); *North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment*, I.C.J. Rep. 3 (1969). See ILC, *Draft Conclusions on the Identification of Customary International Law*, with commentaries, U.N. Doc. A/73/10 at 2 (2018) ("To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).").

38. *North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment*, I.C.J. Rep. 3 (1969).

39. ILC, *Draft Conclusions on the Identification of Customary International Law*, with commentaries, U.N. Doc. A/73/10 at 2-4 (2018) (outlining the requirements for demonstrating general practice and offering examples of *opinio juris* such as public statements, official publications, treaties, diplomatic correspondence, and others).

practice for moral or political reasons not because it feels legally obligated to follow that practice. This distinction is important in identifying CIL. It is why Model A requires rigid evidence of *opinio juris*. For example, binding domestic legislation citing a treaty is a compelling form of evidence. Meanwhile, the automatic conduct of state operations not stated in any publicly available document is weaker, and only becomes more compelling when paired with statements indicating that the conduct is something the state considers itself legally obliged to do.⁴⁰

Model A therefore requires two things for identifying a child-sensitive proportionality rule: (1) demonstrable, repeated practice by a large number of diverse states – that means not just high-capacity militaries but also states at various political, socioeconomic, and geographic points; and (2) a set of explicit statements, declarations, laws, or rulings showing that states consider the practice to be legally required.⁴¹

B. Modern Alternative Frameworks: Treaties and Tribunals (Model B)

Over the past few decades, scholars and practitioners have described the rise of alternative frameworks for CIL which differ from a strict *Paquete Habana* analysis and rely more on institutional tools. These schemes reflect greater emphasis on institutional articulations of norms and on general assent of states than on the wide-ranging element of state practice.⁴² One such approach looks to treaties and resolutions to find custom – it takes broadly ratified treaties or unanimous U.N. General Assembly as *de facto* evidence of CIL.⁴³ This is often the case with conventions related to human rights. Scholars have argued that

40. Monica Hakimi, “Making Sense of Customary International Law,” 118 Mich. L. Rev. 1487, 1500 (2020) (noting that all of the “raw data” must be assessed together in determining if state practice and *opinio juris* exist and therefore routine operational adjustments are part of that “raw data” but without explicit legal framing, are weaker indicia).

41. Although note that while the *Paquete Habana* is often used as a typical example of identifying CIL, it itself has been criticized for not looking at a broad enough swath of state practices. For more details on this criticism, see Goldsmith, Jack L., & Eric A. Posner, *The Limits of International Law* 71 (Oxford University Press 2005).

42. Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 Eur. J. Int’l L. 173, 174 (2010).

43. *Id.* at 177 (“Multilateral treaties, on the other hand, can transform into sources of customary international law, binding on all states in the international system, whether they are parties to the particular treaty or not, if a large enough portion of non-signatory states in the international system adheres to their provisions out of a sense of legal obligation, i.e., *opinio juris*.”).

human rights and humanitarian norms codified in widely adopted treaties (e.g., the Genocide Convention or Torture Convention) are binding on all states as CIL, not just on the treaty parties.⁴⁴

The ICJ has, at times, supported this tradition. In cases like *North Sea Continental Shelf* (although in many ways this case parallels traditional CIL identification) it has allowed a more flexible approach to custom creation, such that custom no longer requires the practice and *opinio juris* of all or most states but rather a “very widespread and representative” participation, needing a shorter period of time for that practice to translate into CIL.⁴⁵ In his study on custom, legal academic Roozbeh B. Baker summarized the court’s approach as “a treaty provision adopted by a sufficiently representative sample of states could undergo a near instantaneous transformation into a norm of CIL.”⁴⁶

A closely related pattern is the growing role of international tribunals in identifying CIL. In the 1990s and 2000s, the *ad hoc* criminal tribunals (ICTY, ICTR) and then the International Criminal Court began identifying and applying customary rules in their jurisprudence, effectively accelerating CIL’s development.⁴⁷ For instance, the ICTY in *Prosecutor v. Tadić* famously formulated a new method to identify customary international law in non-international armed conflicts (NIACs). The Appeals Chamber “accepted the two-element approach to CIL” yet it “discarded operational state practices contrary to *opinio juris*,” thereby reversing the traditional methodological order for identifying customary IHL applicable in NIACs, starting with *opinio juris* and only afterwards adding state practice.⁴⁸

44. *Id.* at 180.; Int’l Law Comm’n, Report of the International Law Commission on the Work of Its Sixty-Seventh Session, U.N. Doc. A/CN.4/682, at 24 n.88 (2014). (“Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.”); Int’l Law Comm’n, Report of the International Law Commission on the Work of Its Sixty-Seventh Session, U.N. Doc. A/CN.4/682, at 23 n.85 (2014) (“[T]reaty-making efforts . . . contribute to an acceleration of State practice . . . and to securing the communal *opinio juris*. The treaty then articulates the crystallized custom as positive law.”).

45. *North Sea Continental Shelf, (W Germany v. Denmark, W Germany v. Netherlands)* [1969] ICJ Rep 3 (where the ICJ held that ‘widespread and representative’ adoption of a conventional/treaty rule by those who were not signatories, combined with the passage of a ‘short period’ of time, was what was needed to turn this into custom.).

46. Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 Eur. J. Int’l L. 173, 179 (2010).

47. *Id.* at 173.

48. Alexandre Skander Galand, *Approaching Custom Identification as a Conflict Avoidance Technique: Tadić and Kupreškić Revisited*, 31 Leiden J. Int’l L. 403 (2018).

It then stated explicitly that, when appraising custom in this area, “reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions” (quoting *Tadić* ¶ 99), which are evidence of *opinion juris*, disregarding inconsistent state practice on the battlefield.⁴⁹ Scholars have called this the “*Tadić* method,” observing that it “takes the *Nicaragua*⁵⁰ method one step further: not only does it play down inconsistent state practice, notably on the battlefield, in the face of more humane verbal state practice and *opinio juris*; it even seems to deem battlefield practice methodologically irrelevant because of its untrustworthiness.”⁵¹

The court took a similarly innovative approach in *Prosecutor v. Kupreškić et al.* The Trial Chamber admitted that state practice was insufficient to confirm a CIL prohibition of reprisals against civilians under the traditional approach, but declared that “[t]his is however an area where *opinio juris* is decisive to establish a customary rule.”⁵² It then invoked the Martens Clause to support its resort to “modern custom,” explaining that principles of IHL “may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent,” and for the court, *opinio necessitatis* could potentially be “the decisive element.”⁵³

Also relevant is Marko Milanović and Sandesh Sivakumaran’s recent study of how custom is made, citing the example of how Article 3 common to the four Geneva Conventions became recognized as custom, in part because the ICJ asserted that it was custom in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.⁵⁴ Other courts then cited the ICJ’s decision as evidence that Common Article 3 was custom, creating a reinforcing feedback loop.⁵⁵

49. *Id.*

50. Referencing *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27).

51. Alexandre Skander Galand, *Approaching Custom Identification as a Conflict Avoidance Technique: Tadić and Kupreškić Revisited*, 31 LEIDEN J. INT’L L. 403 (2018).

52. *Id.*

53. *Id.* The Martens Clause is a principle of international humanitarian law, which states that in cases not covered by the law, civilians and combatants remain under the protection and authority of the principles of humanity and the dictates of public conscience.

54. Marko Milanovic & Sandesh Sivakumaran, *Assessing the Authority of the ICRC Customary IHL Study* (manuscript, 2022), <https://ssrn.com/abstract=4151995>, at 4.

55. *Id.*; see also Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 Eur. J. Int’l L. 173, 200-203 (2010) (outlining examples of Belgium and Yugoslav laws directly influenced by tribunal rulings).

After being adopted by tribunals, the customary status is reinforced by states, as the jurisprudence of these tribunals has “begun to seep into the domestic (mainly criminal) law of several countries.”⁵⁶

This jurisprudential model allows for a faster and more proactive formation of custom: judges and even prosecutors (through the charges they bring) act as norm entrepreneurs, defining rules which then gain broad acceptance as customary through their repeated affirmation in judgments. Critics object that such moves are essentially “shortcuts” in law-creation, risking excessively loosening the state practice requirement, and undermining the idea that international law creation should be based on state consent. Anthea Roberts, a critic of the modern approach, has written that modern CIL risks creating laws that are “utopian” rather than enforceable, rejected by states, difficult to implement, and vulnerable to accusations of ideological bias.⁵⁷ However, the trend toward institutionally driven custom has become significant.⁵⁸ By 2010, as Baker observes, “the debate over whether consistent state practice and *opinio juris* are the only building blocks of customary international law is over...clearly, for better or worse, they no longer are.”⁵⁹

Model B is therefore easier to satisfy than model A, not because it necessarily weakens standards but because it accepts a wider range of authoritative evidence, looking at treaty obligations and the work of international tribunals.

C. The Institutional “Shortcut” Dynamic: Authoritative Guidance and Soft Law Instruments (Model C)

A third track is the institutional shortcut. The form of this is generally a well-crafted document, created by a broad array of practitioners or actors who have credibility in the field and whose work is accepted by states, giving guidance on how to operate in a field of law. Especially in areas where the law is unclear or lacking, militaries

56. Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 Eur. J. Int’l L. 173, 175 (2010).

57. Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 Am. J. Int’l L. 757, 774, 789 (2001), available at <https://ssrn.com/abstract=1514331> (“Similarly, deducing modern custom purely from *opinio juris* and substance can create utopian laws that cannot regulate reality Substantive aims are frequently criticized as being subjective value judgments that serve as a vehicle for normative chauvinism.”).

58. Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 Eur. J. Int’l L. 173, 174 (2010).

59. *Id.* at 173.

need practical, operationally useful guidance to train and to defend decisions, so this document becomes the gold standard. The Safe Schools Declaration, discussed in greater detail later, exemplifies this mechanism. Although it is not a treaty, it sets out clear standards and offers implementation guidance that has influenced state practice and produced quantifiable results.⁶⁰

In particular, the ICRC's monumental *Customary International Humanitarian Law Study*, referenced earlier, has become a paradigmatic example of how non-state institutional outputs can quickly gain acceptance as CIL. The ICRC Study systematically identified 161 rules of IHL that it defined as custom, based on extensive research. In the two decades since, it "has become a standard reference work for practitioners and academics alike,"⁶¹ to the point that "a particular proposition will be found to reflect customary international law simply on the basis that the [ICRC] Study says so."⁶² Recent empirical analysis by Milanović and Sivakumaran confirms that courts, tribunals, and governments now commonly cite the study as the foremost, or even only, proof for the existence of a CIL rule, often "without any independent analysis and often as if it was a quasi-legislative text."⁶³ Through acceptance and repeated practice, the ICRC's expert determination of a rule has become a proxy for the *Paquete Habana* test – a convenient "shortcut" embraced by many in the field.

This phenomenon extends beyond the ICRC to other instruments, as Milanović and Sivakumaran describe how scholars or courts will simply cite an article from the International Law Commission's (ILC) Articles on State Responsibility as custom, relying on the ILC's authority.⁶⁴ Practitioners find such compilations useful to, for instance, quickly determine rules in new sectors of law. As they continue using and referring to these instruments, evidence builds up that these instruments define custom. Finally, a consensus emerges (through judicial and state practice using these materials) defining that

60. See Fatima, at Chapter 7 (discussing the rapid and wide-spread uptake of the Safe Schools Declaration).

61. Marko Milanovic & Sandesh Sivakumaran, *Assessing the Authority of the ICRC Customary IHL Study* (manuscript, 2022), <https://ssrn.com/abstract=4151995>, at 1.

62. *Id.* at 2.

63. *Id.* at 25.

64. *Id.* at 2-3.; for another example of an influential soft law instrument arguably influencing CIL see Wouter G. Werner, Custom as Rewritten Law – The Text and Paratext of Restatement Reports, ESIL Reflections, Vol. 11, Issue 3 (Sept. 28, 2022), <https://esil-sedi.eu/esil-reflection-custom-as-rewritten-law-the-text-and-paratext-of-restatement-reports/> (among other instruments, examining the Tallin Manual as "rework[ing]" the customary international law around cyber warfare).

instrument as CIL. For this reason, authoritative guidance documents or soft law instruments published by institutions or experts become a *de facto* source of CIL, especially in fields where guidance is lacking, like technical, ambiguous, or highly normative fields.

These kinds of “shortcuts” are efficient, but they can suffer from a lack of legitimacy. Two kinds of legitimacy claims frequently arise: were the relevant global actors meaningfully included in drafting and review? Otherwise, certain countries or blocs may see such an instrument as an imposition from powerful actors. The second claim is about substantive legitimacy: does the instrument reflect the real conditions on the ground which would make it useful to lawyers and commanders? The U.S. has made both types of claims. It has argued that the ICRC Study “gives undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States” and “often fails to pay due regard to the practice of specially affected States.”⁶⁵ It has also argued that the state practice cited in the ICRC Study is too thin and unrepresentative to result in a practically useful rule.⁶⁶

One of the most important critical international law movements is Third World Approaches to International Law (“TWAAIL”), which has explored this type of legitimacy question, highlighting the colonial origins of international law, and the manner in which international law often reproduces instances of global inequality. This means that TWAAIL scholars argue that where international norms are set through documents produced by powerful states or organizations, these norms reproduce elite preferences rather than meaningfully and fairly engaging with the needs of weaker states.⁶⁷ For example, a soft

65. John B. Bellinger, III & William J. Haynes II, A U.S. Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*, 89 *Int'l Rev. Red Cross* 443, 445 (2007), available at https://international-review.icrc.org/sites/default/files/irrc_866_11.pdf.

66. *See id.* at 444-445 (“For many rules . . . the State practice cited is insufficiently dense The Study places too much emphasis on written materials, such as military manuals, as opposed to actual operational practice . . . manuals cannot be a replacement for a meaningful assessment of operational State practice.”).

67. *See* B. S. Chimni, “Customary International Law: A Third World Perspective,” 112 *Am. J. Int'l L.* 1, 5 (2018) (arguing that modern CIL formation routinely privileges the practice and voices of powerful (advanced capitalist) states and their scholars, marginalizing Third World practice); *see* Makau W. Mutua, *Human Rights: A Political and Cultural Critique* 10 (Oxford Univ. Press 2002) (highlighting how mainstream human-rights production is authored by powerful institutions such as UN bodies, Western states, INGOs, and elite academics, so the “universal” corpus of international law around human rights can reflect their preferences and hierarchies).

document produced by a coalition of a few developed states can become CIL and bind developing states. This is meaningful for both ethical and practical reasons, as these legitimacy concerns might serve to weaken the CIL regime, preventing it from becoming stable and effective. To address these concerns, the “shortcuts” (i.e. the instruments) should be produced inclusively, alongside capacity support (money, technical and human resources, administrative bodies, monitoring systems, legal infrastructure, and access to relevant scientific or technical information) for low-capacity states.

D. *What Each Frame Demands*

To summarize: under Model A, one needs broad practice plus clear *opinio juris*; under Model B, one needs the rule in question to be written into widely ratified treaties and/or in judgments of international tribunals; and under Model C, one needs many states supporting a soft law instrument that contains the CIL rule in question plus implementation of the instrument. This framework outlines what must be shown to consider a child-sensitive proportionality analysis to be a rule of CIL. As a result, it also demonstrates what kinds of evidence one should look for to understand where the law stands today and where it still needs to go.

IV. APPLYING THE THREE MODELS

A. *Model A*

Model A is the classic approach to customary international law: a broad pattern of state practice and *opinio juris* supporting a rule of CIL. Under this model, the consistent actions of states to prioritize children in proportionality analyses, combined with statements demonstrating a legal duty to undertake these actions, can crystallize into a CIL rule.

1. *State Practice: Military Manuals and Legislation.*

Many states have incorporated the protection of children into their military manuals and domestic laws. For example, the ICRC Study found that many armed forces, from Argentina and Australia to the UK and United States, include directives to grant “special respect and protection” to children in armed conflict.⁶⁸ Germany’s Military Manual

68. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 479 (Int’l Comm. of the Red Cross &

(1992) provides: “Children shall be the object of special respect and protection . . . [t]hey shall be provided with the care and aid they may require”⁶⁹ and the Philippine Army Soldier’s Handbook on Human Rights and IHL (2006) writes that “[c]hildren shall be considered as zones of peace and shall enjoy the protection of the State.”⁷⁰ While “special protection” does not directly translate to a different weighing in proportionality assessments, it is a related, broader concept, which could include more narrow forms of protection like child-sensitive proportionality analyses. The fact that these ideas are so widespread throughout military manuals demonstrates that, in practice, militaries are trained and expected to treat children differently from adults, whether it be protecting them against all forms of sexual violence, making sure they have food, or evacuating them from zones of active combat.⁷¹

More directly, other manuals have set out that “a pattern of life, indicating the potential for harm to children in the target area, creates a ‘high risk’ situation,” that is too risky for a strike. This kind of clause explicitly directs militaries to take protective action or abort strikes when there is a possibility that children could be targeted.⁷² As legal scholars René Provost and Vishakha Wijenayake have noted, the United States follows this practice.⁷³ One example comes from the Chairman of the Joint Chiefs of Staff Instruction on *No-Strike and the Collateral Damage Estimation Methodology*, a U.S. military guidance that establishes procedures for identifying protected objects that cannot be targeted and for estimating and limiting expected civilian harm from military operations. To illustrate a high-risk target with potentially too great an amount of collateral damage, the document uses the example

Cambridge Univ. Press 2005) (writing that “[n]umerous military manuals require special respect and protection for children” and listing manuals from Argentina, Australia, Canada, Colombia, France, Germany, India, Indonesia, Italy, Kenya, Madagascar, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, Philippines, Spain, Sweden, Switzerland, Togo, UK, and United States).

69. ICRC, Customary IHL Study, Rule 135—Children: Germany’s Military Manual (1992) provides: “Children shall be the object of special respect and protection . . .” (Vol. II, ch. 39, sec. B), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule135?country=de#sectionb> (accessed Sept. 3, 2025).

70. ICRC, Customary IHL Study, Rule 137—Children Must Not Be Allowed to Take Part in Hostilities (Vol. II, ch. 39, sec. D), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule137>.

71. *Id.*

72. René Provost & Vishakha Wijenayake, *Collateral Kids: Weighing the Lives of Children in Targeting*, 37 *Leiden J. Int’l L.* 1018, 1020 (2024).

73. *Id.* at n. 11.

of a pattern of life suggesting two women and three children in the area.⁷⁴ The high likelihood that two women and three children are present is enough to warn a practitioner not to proceed with the operation. This implies that, in practice, women's and children's lives are given greater weight in assessing collateral damage.

The North Atlantic Treaty Organization's (NATO's), targeting guidelines include similar precautions. They write that "NATO recognizes that all feasible measures must be taken to avoid, minimize and mitigate harm to civilians . . . [w]hen planning and implementing such measures, NATO should consider those groups most vulnerable to violence within the local context,"⁷⁵ later showing that children are considered one such vulnerable group and merit additional consideration in conflict settings.⁷⁶

2. *State Practice: Battlefield Conduct and Policies.*

Beyond manuals, state practice is evidenced in actual operations. In some cases, armed forces abort or alter missions to avoid child casualties. For instance, a retired military attorney argued that in the Israel Defense Forces (IDF), "for targeted killings, there was a basic rule that you cannot kill children."⁷⁷ Similarly, the New Zealand Defence Force's manual writes that a "very young child or an old woman is unlikely to be taking a direct part in hostilities," warning soldiers that children are generally not legal targets and in that way giving children extra protection.⁷⁸ In their study on how states treat collateral casualties who are children, Provost and Wijenayake found an overall consensus across militaries that "[e]ven in the internal, informal discussions of targeting within the military, if children are present in the strike zone, that fact will most often be noted . . . [and]

74. United States Chairman of the Joint Chiefs of Staff Instruction, 'No-Strike and the Collateral Damage Estimation Methodology, CJCSI 3160.01 (2009), Appendix F To Enclosure D- Plain Language Guide to CDE Terminology, 1.d.1'.

75. NATO Standardization Office, *Allied Joint Doctrine for Targeting* (AJP-3.19), ed. A, v.1, at Annex B (2016).

76. NATO Standardization Office, *Allied Joint Doctrine for Targeting* (AJP-3.19), ed. A, v.1, Annex B, at B-2 (2016) (writing that "[t]he pattern of armed conflict has led to an increased risk for civilians and especially children. The involvement of children in today's conflicts has long-term (destabilizing) implications for society" and "[c]hildren, who have been victims of warfare . . . show psychosocial disturbances. Rehabilitation of children affected by conflict is essential to breaking cycles of violence").

77. See René Provost & Vishakha Wijenayake, *Collateral Kids: Weighing the Lives of Children in Targeting*, 37 LEIDEN J. INT'L L. 1018, 1021 (2024).

78. NEW ZEALAND DEFENCE FORCE, *MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT* ch. 6, ¶ 6.5.12 n.63 (2d ed. 2019).

a striking point of convergence in the otherwise varied practice of targeting was that no one seems to be indifferent to the presence of children among collateral victims of an attack.”⁷⁹ These examples show soldiers and commanders in militaries around the world exercise extra restraint when children are present, which is evidence of state practice.⁸⁰

3. *State Practice: Reactions to Child Casualties.*

When, despite precautions, children become victims, states often acknowledge the harm as a wrongful deviation from the norm. This too is evidence of practice, an indication that such incidents violate the state’s standards. Notably, following a 2018 bombing of a school bus that killed 40 children, the Saudi-led coalition in Yemen conducted an investigation and admitted the strike was “unjustified.”⁸¹ The coalition’s official statement expressed regret for the “mistakes made in abiding by the rules of engagement” and pledged to hold those responsible accountable.⁸² It even announced a review of its rules of engagement “to ensure compliance” with law and to prevent such tragic errors in the future.⁸³ This was a rare public admission. It was made more startling by the fact that Saudi Arabia had faced countless accusations of disproportionate civilian casualties in the Yemen war yet has failed to take responsibility for them. It chose an attack with significant child collateral damage to admit fault. This shows that heavy child casualties are seen by the world as unacceptable conduct, reinforcing the norm that even in war, children should not be harmed. Likewise, when U.S. airstrikes have unintentionally killed children, American officials have issued public apologies and offered condolences, again implying that these actions are not accepted by the

79. See René Provost & Vishakha Wijenayake, *Collateral Kids: Weighing the Lives of Children in Targeting*, 37 LEIDEN J. INT’L L. 1018, 1021 (2024).

80. Although, the same study also noted a few instances in which this practice was not observed. *Id.* at 1022 and 1026 (outlining two separate strikes by the U.S. in which preventable children were killed and corresponding conversations).

81. Sudarsan Raghavan, *In Rare Admission, Saudi-Led Coalition Says Airstrike Killed Yemeni Children Last Month*, *Wash. Post* (Sept. 1, 2018), https://www.washingtonpost.com/world/middle-east/in-rare-admission-saudi-led-coalition-says-airstrike-killed-yemeni-children-last-month/2018/09/01/1cbdc878-ae06-11e8-8a0c-70b618c98d3c_story.html; Reuters, *Saudi-Led Coalition Admits Deadly Yemen Strike on Bus Was Unjustified* (Sept. 2, 2018), <https://reuters.com/article/world/saudi-led-coalition-admits-deadly-yemen-strike-on-bus-was-unjustified-idUSKCN1LH3JR>.

82. Raghavan, *supra* note 78; Reuters, *supra* note 78.

83. Reuters, *supra* note 78.

global community (and that the U.S. recognized this fact).⁸⁴ After a strike killing seven children in Kabul in 2021, the U.S. military even promised to improve their procedures to ensure that “children and other innocent civilians are not present before launching a time-sensitive strike.”⁸⁵ The practice of investigating, apologizing, and compensating for child deaths (as the Saudi-led coalition and U.S. did) underscores that states view these incidents as departures from the required standard operating procedure as it relates to children in conflict. Because it is rare for powerful states to admit wrongdoing in war, it is notable that such admissions have often come after the deaths of children.⁸⁶

4. *Opinio Juris: Statements from Government Officials Affirming Legal Obligation.*

The analysis next turns to whether state practice is also supported by *opinio juris*, which begins by looking at the statements of government officials. Some of these statements are carefully constructed to articulate a normative commitment to minimizing harm to children, but they stop short of asserting a legal obligation to do so.⁸⁷ After all,

84. See Phil Stewart and Idrees Ali, *U.S. military says civilians killed in Kabul drone strike last month, including children*, REUTERS (Sept. 17, 2021) <https://www.reuters.com/world/asia-pacific/us-military-says-10-civilians-killed-kabul-drone-strike-last-month-2021-09-17/> (outlining an incident in which a U.S. drone strike killed 7 children, resulting in an investigation and the U.S. admitting that the strike was “a tragic mistake.”)

85. Lolita C. Baldor, *No troops disciplined in United States strike killing Afghan civilians*, AP NEWS (Dec. 13, 2021), <https://apnews.com/article/afghanistan-kabul-lloyd-austin-5c1d8217bf421ab75b9c679b850a6ca4>.

86. See, e.g., Dan Sabbagh et al., *Denmark Admits Role in Nato Airstrikes on Libya that Killed 14 Civilians in 2011*, THE GUARDIAN (Jan. 25, 2024) (referring to Denmark’s admission to its role in Libyan airstrikes that killed civilians as the “first time any of the 10 countries involved . . . has acknowledged a possible link to non-combatant casualties . . . militaries, including those in the west, have often been reluctant to admit when civilians were killed and wounded”); Human Rights Watch, *New DoD Policy on Amends Needs to Address Transparency Gap* (Apr. 23, 2019) (ex gratia condolence payments are made “in which there is no admission of legal wrongdoing,” illustrating routine avoidance of admissions even when harm is acknowledged). For a detailed history of powerful states avoiding responsibilities for casualties during war see Jennifer Lind, *Sorry States: Apologies in International Politics* (Cornell Univ. Press 2008).

87. See, e.g.: Scottish Parliament, Official Report, Meeting of the Parliament, Nov. 21, 2023, <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-21-11-2023?meeting=15559&ciob=132762> (Humza Yousaf, First Minister of Scotland)

it is costly for states to admit wrongdoing or to bind themselves to a practice.⁸⁸ Binding oneself to an international legal obligation opens the doors to cases from tribunals and international law's overall normative power (such as widespread global criticism that a country is breaking the law). However, some states have provided statements that indicate a belief that they are legally obligated to give children special protection during war, including in collateral damage assessments. India has explicitly condemned military operations causing disproportionate harm to children, framing such harm as legally unacceptable. During the 2006 Israel-Lebanon hostilities, India's Ministry of External Affairs criticized Israel's response as "excessive and disproportionate," not explicitly referencing AP I's proportionality analysis but using terminology that evokes it. In the next sentence, it voiced particular concern that Israeli actions "resulted in the killing and suffering of innocent civilians, including women and children, [which] is likely to exacerbate an already tense situation."⁸⁹ India's statement not only deplored the loss of children but implied that under IHL, attacks causing such child casualties violate the proportionality principle. By highlighting women and children as the victims, India signaled that their suffering carries special weight in assessing excessiveness in the Article 51 balancing calculation.

Colombia's *Constitutional Court* has supported the principle of *pro infants*, a constitutional guarantee and an obligatory interpretive tool for judges, ensuring that when a case is seen by a judge, the preferred

("[E]very child, the world over, deserves to grow old. The children of Gaza and Israel deserve nothing less. It is our moral obligation to act."); HC Deb 14 May 2025, Vol. 767, col. 345, <https://hansard.parliament.uk/Commons/2025-05-14/debates/D0220F25-5BED-4AAF-9E15-0CDE142FCB47/GazaUKAssessment> (Hamish Falconer, Parliamentary Under-Secretary of State for Foreign, Commonwealth and Development Affairs) ("The death of any child is a tragedy."); 167 Cong. Rec. H2303 (daily ed. May 13, 2021) (statement of Rep. Rashida Tlaib) ("No child, Palestinian or Israeli or whoever they are, should ever have to worry that death will rain from the sky."); *id.* (statement of Rep. Betty McCollum) ("Tonight, no child should go to bed under the constant fear of violence.").

88. See generally Jennifer Lind, *Sorry States: Apologies in International Politics* (Cornell Univ. Press 2008) (providing an overview of this position throughout history).

89. Ministry of External Affairs, India, *Statement by MEA Official Spokesperson on the Tension at the Israel-Lebanon Border* (July 13, 2006), <https://www.indianembassyusa.gov.in/ArchivesDetails?id=680> ("We equally strongly condemn the excessive and disproportionate military retaliation by Israel which has targeted civilian infrastructure, including Beirut airport. We are particularly concerned that the actions of the Israeli Defence Forces have resulted in the killing and suffering of innocent civilians, including women and children, that is likely to exacerbate an already tense situation.").

solution is the one that gives greater protection to children's rights.⁹⁰ In an interview, Colombia's Minister of Defense said that "if prior military intelligence information confirms the presence of minors in the [target site], the armed forces, by virtue of the prevailing rights of these children and the *pro infants*, must act without the use of lethal weapons, using other methods of military control. Indiscriminate bombing should not be carried out."⁹¹ Again, children's lives are weighed more heavily in this statement than the lives of adults.

Italy, in its statement during the U.N. Security Council Open Debate on Children and Armed Conflict, reflecting on children's deaths in armed conflicts in 2024, referenced legal obligations such as the Optional Protocol to the Convention on the Rights of the Child and the Safe Schools Declaration, and then expressly referenced an IHL term (collateral damage), saying "[c]hildren are not collateral damage . . . [t]heir protection is our legal duty and our moral obligation."⁹² The commitment to a "legal" duty to protect children re-emphasizes how this treaty can be creating a rule of customary international law.

Parliament members of the UK have also made statements indicating they believe there are specific legal obligations for children in terms of the proportionality rule. For example, the UK Ambassador to the U.N., Karen Pierce, denounced attacks in Syria that killed children, calling them "breaches of International Humanitarian Law," asking "what is being done by the protagonists, Syria and Russia, to protect civilians on the ground, notably children" and demanding those responsible be held accountable.⁹³ In discussing the war in 2023 Israel-Hamas war, parliamentarian Lord Grocott tied earlier statements by the Foreign Secretary about violating international law to children's deaths and the principle of proportionality, asking if the Foreign Secretary "have in mind the principle of proportionality in armed conflict and whether it is a proportionate self-defence by Israel to have been responsible so far for some 24,000 Palestinian deaths, including

90. Corte Constitucional [C.C.], Sentencia SU-360/24 (2024) (Colom.).

91. Leonardo González Perafán, *¿Bombardeos a menores? No, señor Ministro*, INDEPAZ (Feb. 24, 2025), <https://indepaz.org.co/bombardeos-a-menores-no-senor-ministro/>.

92. Permanent Mission of Italy to the United Nations, *Statement of Italy at U.N. Security Council Open Debate on Children and Armed Conflict* (June 25, 2025), https://italyun.esteri.it/en/news/dalla_rappresentanza/2025/06/statement-of-italy-at-un-security-councils-open-debate-on-children-and-armed-conflict/.

93. U.N. SCOR, 74th Sess., 8589th mtg., U.N. Doc. S/PV.8589 (July 30, 2019).

10,000 children?”⁹⁴ Although the Foreign Secretary’s reply was carefully constructed, he noted that the Foreign Office was assessing Israel’s IHL compliance and “always urge[s] Israel to obey international humanitarian law.”⁹⁵ This conversation shows UK lawmakers believe significant child casualties are likely breach of proportionality, and the government confirms that any lawful operation must minimize harm to children.

5. *Opinio Juris: United Nations Resolutions and Pledges.*

Academic literature on customary international law continues to debate, whether, even under the classical frame (Model A), resolutions may evidence *opinio juris*.⁹⁶ Those in favor demand that the resolutions be unambiguous, legal in character, repeated over time, and command very broad support (especially from specially affected states).⁹⁷ As Michael Wood, Special Rapporteur to the International Law Commission, wrote, “it is widely accepted that resolutions adopted by States within international organizations and at international conferences may, in certain circumstances, have a role in the formation and identification of customary international law,” focusing especially on U.N. General Assembly resolutions.⁹⁸

The U.N. has a history of resolutions aimed at protecting children in armed conflict and giving them special treatment. The Security Council’s first resolution on children and armed conflict, Resolution 1261, condemned the targeting of children and “called upon all parties

94. HL Deb 16 Jan. 2024, *Israel and Gaza*, <https://hansard.parliament.uk/Lords/2024-01-16/debates/8ECD319B-753F-4D57-AA4F-E812F1103523/IsraelAndGaza>.

95. *Id.*

96. See, e.g., Malvina Halberstam, Recognition, Use of Force, and the Legal Effect of United Nations Resolutions under the Revised Restatement of the Foreign Relations Law of the United States, 19 *Isr. L. Rev.* 495 (1984) (arguing that resolutions should not be taken as *opinio juris*); see also Samuel A. Bleicher, The Legal Significance of Re-Citation of General Assembly Resolutions, 63 *Am. J. Int’l L.* 444, 450 n.30 (1969) (describing conditions under which a resolution can be seen as supporting custom formation, including providing *opinio juris*).

97. Brian D. Lepard, *The Role of United Nations General Assembly Resolutions as Evidence of Opinio Juris, in Customary International Law: A New Theory with Practical Applications* 208, 209, 211–213, 215 (Cambridge Univ. Press 2010) (setting out as convincing factors for whether the resolution counts as *opinio juris* the text of the resolution, institutional competence and procedure, repetition over time, and breadth of support).

98. Int’l Law Comm’n, *Report of the International Law Commission on the Work of Its Sixty-Seventh Session*, U.N. Doc. A/CN.4/682, at 31 (2014).

to armed conflicts to undertake feasible measures . . . to minimize the harm suffered by children.”⁹⁹ That resolution is over twenty-five years old and has been followed by many others.¹⁰⁰ This unanimous call by Security Council members, including all major powers, is a strong expression of the belief that international law mandates special care to spare children’s lives during war. Similarly, the U.N. General Assembly has adopted a number of resolutions in which it calls for the respect for the protections within IHL for children, and for the respect for children’s welfare and needs in all situations, including armed conflict. For example, GA Res. 55/116 (2000) on improving respect for humanitarian law for women and children in conflict situations).¹⁰¹ These kinds of instruments and actions, so widely supported by the global community, show that the world’s governments are converging on a legal principle that children must be shielded from the effects of war. For those who believe that *opinio juris* can come from U.N. resolutions, a substantial amount *opinio juris* for the special treatment of children exists, throughout the U.N.’s history.

To summarize: observing the requirements for Model A, there is widespread evidence of state practice affording children special protection, and evidence suggesting that this protection includes prioritizing the protection of children in targeting scenarios and proportionality analyses. The *opinio juris* is not yet universal, but this may be because it is purposefully omitted for strategic reasons, due to fear of a binding legal obligation, since in practice many states are already prioritizing children’s lives in targeting.

B. Model B

Model B looks to international institutional tools, specifically treaty law (especially treaties concerning human rights) and international jurisprudence, to elevate a rule to the status of CIL. Under this model, a rule of custom could exist that weighs children’s lives more heavily in proportionality analyses if widely ratified treaties and tribunals support this.

99. S.C. Res. 1261, U.N. Doc. S/RES/1261 (Aug. 25, 1999).

100. See, e.g., S.C. Res. 1314, U.N. Doc. S/RES/1314 (Aug. 11, 2000); S.C. Res. 1379, U.N. Doc. S/RES/1379 (Nov. 20, 2001); S.C. Res. 1460, U.N. Doc. S/RES/1460 (Jan. 30, 2003); S.C. Res. 1539, U.N. Doc. S/RES/1539 (Apr. 22, 2004); S.C. Res. 1612, U.N. Doc. S/RES/1612 (July 26, 2005); S.C. Res. 1998, U.N. Doc. S/RES/1998 (July 12, 2011); S.C. Res. 2427, U.N. Doc. S/RES/2427 (July 9, 2018).

101. G.A. Res. 55/116, U.N. Doc. A/RES/55/116 (Dec. 4, 2000).

1. Treaty Provisions

Starting again with AP I, Additional Protocol I's Article 77 explicitly mandates that "children shall be the object of special respect and shall be protected."¹⁰² Model B looks for treaties that are widely ratified. The widespread acceptance of AP I and of Article 77 gives it the kind of characteristics Model B seeks. The ICRC's 2005 Customary IHL Study concluded that this rule is customary in both international and non-international conflicts,¹⁰³ and military manuals (e.g., Germany 1992) mirror the language that children "shall be the object of special respect,"¹⁰⁴ indicating broad state acceptance.

Provost and Wijenayake argue that, given the acceptance that special protection must be given to children under Article 77 of AP I, the passage of Article 57(2)(a)(i) of Protocol I, requiring the striking actor to "do everything feasible to verify that the objectives to be attacked . . . are not subject to special protection" should be read as a requirement to take additional precautions when planning an attack in which children are present.¹⁰⁵ Under this interpretation, although controversial, any signatory to AP I or who has accepted it as customary law, has supported a legal requirement for giving children's lives greater protection when planning an attack. Relatedly, in a separate article, Provost argues that AP I's other provisions, specifically its requirement in Article 50(1) that "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian" means that any targeting of a child should *prima facie* raise doubt as to whether he or she is targetable.¹⁰⁶ However, these are interpretations rather than something unambiguously written into the treaty text itself.

The CRC, a nearly universally ratified human rights treaty, and thereby another strong contender for Model B, requires that "in all actions concerning children . . . the best interests of the child shall be

102. Médecins Sans Frontières, *Children*, The Practical Guide to Humanitarian Law, <https://guide-humanitarian-law.org/content/article/3/children/> (last visited Sept. 16, 2025).

103. *Id.*

104. ICRC, *Rule 135: Children*, Customary IHL Database, § B (Germany), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule135?country=de#sectionb> (last visited Sept. 16, 2025).

105. René Provost & Vishakha Wijenayake, *Collateral Kids: Weighing the Lives of Children in Targeting*, 37 LEIDEN J. INT'L L. 1018, 1036 (2024).

106. René Provost, *Targeting Child Soldiers*, EJIL: Talk! (Jan. 12, 2016), <https://www.ejiltalk.org/targeting-child-soldiers/>.

a primary consideration.”¹⁰⁷ The CRC’s Article 38 specifically obliges States to respect IHL applicable to children, effectively importing IHL duties (like special protection) into national law, as the CRC requires states to implement its obligations domestically.¹⁰⁸ Some interpretations link the best-interests principle to conflict decisions: for States party to the CRC, children’s welfare must be a primary factor even during hostilities.¹⁰⁹ As Amichai Cohen and David Zlotogorski, point out, there may be interpretations of this article that require children’s lives to be weighed more heavily.¹¹⁰

The OPAC, ratified by 172 States, reinforces the norm of protecting children in armed conflict by requiring all feasible measures to ensure that children under eighteen do not take direct part in hostilities. While focused on recruitment, OPAC reflects the consensus that children should be shielded from war.¹¹¹ The language that “[p]arties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities” parallels the IHL requirement of “feasible precautions” in attack, a requirement linked to proportionality.¹¹² OPAC mainly addresses child soldiers, not proportionality but it is still useful to observe for the purposes of this

107. Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

108. Convention on the Rights of the Child, art. 4, 6, 38, Nov. 20, 1989, 1577 U.N.T.S. 3 (directing that “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention” and that “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”).

109. ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Building a Culture of Compliance for IHL to Protect Humanity in Today’s and Future Conflicts*, 34IC/24/10.6 (Sept. 2024), at 21–22, https://www.clusterconvention.org/wp-content/uploads/2024/09/34IC_10.6-IHL-Challenges-Report-EN.pdf.

110. Amichai Cohen & David Zlotogorski, *General Proportionality in International Humanitarian Law*, 24 EUR. J. INT’L L. 25, 41 n.78 (2013).

111. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222.

112. *Compare* Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 1, May 25, 2000, 2173 U.N.T.S. 222, *with* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, art. 57(2)(a)(ii) (“[T]hose who plan or decide upon an attack shall take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”).

Note because it underscores a global legal commitment to protect children from conflict, supporting the argument that commanders must take more care in their targeting when children are present.

Under Model B, U.N. Resolutions would be less persuasive than the official treaties that supporters of Model B favor. However, some resolutions share many of the same characteristics as those treaties, as they are widely ratified, deal with human rights and, in the case of Security Council Resolutions, are sometimes binding. Therefore, they are worth observing. U.N. Security Council Resolution 2427 (2018), explicitly ties children's rights with IHL's proportionality requirements, as it expresses "deep concern at the high number of children killed or maimed . . . and urges all parties to comply with their obligations under international humanitarian law, in particular the principles of distinction, proportionality and the obligation to take all feasible precautions to avoid and in any event minimizing harm to civilians and civilian objects."¹¹³ This builds on a series of similar resolutions by the Security Council. For example, Resolution 2225 also ties international law to protecting children. It "[s]trongly condemns all violations of applicable international law involving the recruitment and use of children . . . killing and maiming, rape and other forms of sexual violence, abductions, attacks against schools and hospitals, as well as denial of humanitarian access . . . and demands that all relevant parties immediately put an end to such practices and take special measures to protect children."¹¹⁴ Resolution 2143 "[d]emand[s] that all relevant parties . . . take special measures to protect children."¹¹⁵ As further support for a reading of these resolutions that links extra protection for children with targeting under IHL, in a 2017 Presidential statement, S/PRST/2017/21, the "Security Council expresse[d] deep concern about the high number of children killed or maimed . . . and call[ed] on all parties to respect their obligations under international humanitarian law, in particular the principles of distinction and proportionality."¹¹⁶

The U.N.'s Children and Armed Conflict (CAAC) agenda, a framework established by the United Nations Security Council to monitor, report on, and respond to grave violations against children in situations of armed conflict, is another example of the special focus and rights accorded by the U.N. to children during wartime. It is a longstanding project, anchored by the Special Representative of the

113. S.C. Res. 2427, ¶ 12, U.N. Doc. S/RES/2427 (July 9, 2018).

114. S.C. Res. 2225, ¶ 1, U.N. Doc. S/RES/2225 (June 18, 2015).

115. S.C. Res. 2143, ¶ 1, U.N. Doc. S/RES/2143 (Mar. 7, 2014).

116. Statement by the President of the Security Council, U.N. Doc. S/PRST/2017/21 (Oct. 31, 2017).

Secretary-General and a mandate the General Assembly created in 1996.¹¹⁷ The Security Council first took up the issue in Resolution 1261 (1999), condemning the targeting of children and calling on parties to strictly comply with IHL, which effectively launched CAAC as a standing Council concern.¹¹⁸

The lengthy list of widely ratified, normatively powerful instruments, spanning decades, all aim to protect children against death and suffering in armed conflict. While none of them say the exact words children's lives should be weighed more heavily in a proportionality analysis, they are one step away from these words. They set out special protections for children during conflict, and tie those protections to IHL, setting the stage for this kind of interpretation, similar to interpretations provided by scholars like Provost and Wijenayake.

2. *Tribunals*

a. Tribunals' Emphasis on Child Victims in War Crimes

Although the ICTY did not articulate a separate legal standard for children in proportionality, its judgments nevertheless supported such an approach, because they often highlighted the presence of as a way of marking when attacks were especially egregious. In *Prosecutor v. Blaškić*, the Trial Chamber noted that in one village massacre "most [of the 89 killed] are elderly people, women, children and infants," implicitly calling attention to the inhumane nature of the attack.¹¹⁹ Similarly, the *Prosecutor v. Galić* judgment condemned a campaign of sniping in Sarajevo that intentionally targeted civilians, emphasizing that "[c]hildren were targeted while playing or walking in the streets" calling such terror a breach of the laws of humanity.¹²⁰ In its judgment, the tribunal referenced the killing or targeting of children over 30

117. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Mandate*, <https://childrenandarmedconflict.un.org/about/the-mandate/mandate/> (last visited April 10, 2026).

118. Press Release, Security Council, *Security Council Strongly Condemns Targeting of Children in Situations of Armed Conflict, Including Their Recruitment and Use as Soldiers*, U.N. Press Release SC/6716 (Aug. 25, 1999), <https://press.un.org/en/1999/19990825.sc6716.html>.

119. *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 416 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

120. *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, ¶ 589 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

times.¹²¹ In *Prosecutor v Kunarac et al*, the Trial Chamber considered the young age of the victims in sentencing.¹²² In essence, the tribunal highlighted children's presence as an aggravating factor in assessing the unlawfulness of attacks (such as proving a pattern of intentionally targeting civilians). These references appear in the part of the judgment relating to the factual analysis and sentencing, rather than as an explicit note by the tribunal establishing a separate rule, but they show tribunals treating child harm as especially significant.

Other courts have echoed this. The Inter-American Court¹²³ and the European Court of Human Rights¹²⁴ have both remarked on the heightened severity of a crime when the victims are children, supporting the idea that the law's protection of civilians should be taken especially seriously for those who are very young.

b. International Criminal Court - Office of the Prosecutor

In its Policy Paper on case selection and prioritization (2016), the Office of the Prosecutor signaled that it will pay particular attention to crimes against children.¹²⁵ In its paper on preliminary examinations, it signaled that it would consider the gravity of the crime more serious if the victims were particularly vulnerable or the crime involved children.¹²⁶ This is policy, not jurisprudence, but it predicts the future pathway of International Criminal Court (ICC) jurisprudence. The Rome Statute includes a provision that mirrors the proportionality test, essentially allowing the ICC to pass judgment on violations of the

121. *Id.* ¶¶ 116, 206, 287, 328-29, 332-34, 338-39, 348-49, 376, 386, 388, 399, 407, 436, 563, 573, 579, 584, 592, 745.

122. Gloria Atiba-Davies & Leo C. Nwoye, *Children, Gender, and International Criminal Justice, in Gender and the International Criminal Court* 138-39 (Rosemary Grey, Emily L. Camins & Valerie Oosterveld eds., Oxford Univ. Press 2022).

123. Villagrán Morales et al. v. Guatemala ("Street Children" Case), Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 146 (Nov. 19, 1999) (noting that the "Court attaches particular gravity to the events of this case because the victims were youths, three of whom were children, and because of the special measures of protection that the State must adopt with respect to children").

124. Tagayeva & Others v. Russia, App. Nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 & 37096/11, ¶ 491 (Eur. Ct. H.R. Apr. 13, 2017) ("A threat of this kind indicated a real and immediate risk to the lives of the potential target population, including a vulnerable group of school children and their entourage The authorities . . . could be expected to undertake any measures within their powers that could reasonably be expected to avoid or at least mitigate this risk.").

125. ICC, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, ¶ 46 (Sept. 2016).

126. ICC, Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, ¶¶ 63-64 (Nov. 2013).

proportionality principle (although the standards in IHL and in criminal law for this term are somewhat different).¹²⁷ Coupling this with the prosecutor's prioritization of crimes affecting children, the world may see additional jurisprudence showcasing that killing children makes an attack more likely to be disproportionate.¹²⁸ This is further supported by the fact that the ICC's early cases on war crimes that involve children (e.g., *Lubanga*, *Ntaganda*, focused on child soldiers) repeatedly cite AP I's Article 77 and customary law on children's special protection, reinforcing that such provisions are relevant in discussions around targeting.¹²⁹

C. Model C

Model C looks to highly authoritative instruments to establish custom. As discussed earlier, a classic example of these kinds of instruments is the ICRC study, which identifies Rule 135, that "Children affected by armed conflict are entitled to special respect and protection."¹³⁰ This rule binds both international and non-international armed conflicts, and courts and scholars often treat Rule 135 as a binding customary rule.¹³¹ For example, a ICRC survey of national implementation of the rule (years 2014-19) lists Germany,

127. Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 3 ("Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.")

128. Since that policy paper was issued, the prosecutor has pursued other cases involving wartime violations against children including those related to child soldiers and unlawful deportation of children during wartime. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment (July 8, 2019); Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Trial Judgment (Feb. 4, 2021); Situation in Ukraine, ICC-01/22, Warrants of Arrest for Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023); Situation in Ukraine, ICC-01/22, Warrants of Arrest for Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov (Mar. 5, 2024); Situation in Ukraine, ICC-01/22, Warrants of Arrest for Sergei Shoigu and Valery Gerasimov (June 24, 2024).

129. *See* Joshua Yuvaraj, *When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga*, 32 Utrecht J. Int'l & Eur. L. 69, 73 (2016), <http://dx.doi.org/10.5334/ujel.321> (outlining the IHL provisions that the ICC considered in the cases); *see also* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 1096 (Int'l Crim. Ct. July 8, 2019) (citing article 77 in discussing the conscription of children).

130. ICRC, *Rule 135: Children*, *supra* note 100.

131. *Id.*

Austria, France, India, Canada, and others as States whose legislation, model laws, or military doctrine acknowledges special protections for children under IHL consistent with Rule 135.¹³² Philippines' 1992 law, Act No. 7610, similarly explicitly says that children "shall be entitled to special respect."¹³³ The law draws on the principles of Rule 135 to connect them with operational planning. In the same sentence where it establishes that children are entitled to special protection, it also says that "[c]hildren shall not be the object of attack."¹³⁴ It announces that "Children are Zones of Peace."¹³⁵ In this way it prohibits the targeting of children, relying on the ICRC rule.

Another influential soft law instrument in this field is the Safe Schools Declaration, an inter-governmental political commitment launched by Norway and Argentina, now endorsed by over 120 states, to protect education from attack.¹³⁶ By endorsing, states commit to implement the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*.¹³⁷ The Guidelines are non-binding best practices urging parties to avoid using schools for military purposes and to mitigate harm to students and education.¹³⁸ The Declaration and Guidelines call for integrating these measures into doctrine, rules of engagement (ROE), and training.¹³⁹

Notably, Guideline 4(a) explicitly links children's special protection to operational conduct: "Prior to any attack on a school that has become a military objective, [the attacker] should take into consideration the fact that children are entitled to special respect and protection."¹⁴⁰ This language explicitly invokes Rule 135's principle

132. ICRC Advisory Service, *What's New in Law and Case Law Around the World? Protection of Children in Armed Conflict: Thematic Update on National Implementation of International Humanitarian Law, 2014–2019*, 101 INT'L REV. RED CROSS 805 (2020).

133. Rep. Act No. 7610, *Special Protection of Children Against Abuse, Exploitation and Discrimination Act*, § 22 (Phil.) (June 17, 1992), https://lawphil.net/statutes/repacts/ra1992/ra_7610_1992.html.

134. *Id.*

135. *Id.*

136. ICRC, *The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (Mar. 4, 2015), <https://www.icrc.org/en/document/safe-schools-declaration-and-guidelines-protecting-schools-and-universities-military-use>.

137. *Id.*

138. *Id.*

139. Global Coalition to Protect Education from Attack, *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (2014), https://protectingeducation.org/wp-content/uploads/documents/documents_guidelines_en.pdf.

140. *Id.*

(“special respect and protection”) as something that must be considered when planning an attack. It implies that if children are present or a school is involved, planners must reevaluate the strike – possibly lowering the threshold for aborting the mission or choosing another tactic.

The instrument is so powerful that the ICRC, which is generally cautious about extending IHL obligations, supports using the Safe Schools Declaration as an operational reference. In 2018 the ICRC stated that implementing the Guidelines can “limit the effect of armed conflict on students, teachers, [and] educational facilities”¹⁴¹ and has integrated the Guidelines into training for armed forces delegates.¹⁴² This indicates the ICRC sees these commitments as informing operational behavior.

Many countries explicitly connect these norms to their military planning processes. For instance, Norway, in its 2015 Safe Schools Conference speech,¹⁴³ explained how it interpreted the Guidelines in practice – by adding clauses in military property leases to cancel school-use arrangements in conflict.¹⁴⁴ More broadly, Norway’s commitment at the 2016 World Humanitarian Summit, a U.N. global summit on strengthening humanitarian response, pledged to “enhance the protection of civilians . . . by sparing civilian infrastructure from military use . . . increasing the protection of education from attack . . . [and] by sparing, as far as possible, schools and educational facilities from military use.”¹⁴⁵ After the passing of the Safe Schools Declaration, Denmark, Ecuador, New Zealand and Switzerland “have updated their military manuals including explicit protections for schools from military use . . . [t]he United Kingdom and Norway have updated their military policies to reflect their commitments.”¹⁴⁶ Countries like Sudan

141. ICRC, *The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (Dec. 18, 2018), <https://www.icrc.org/en/document/safe-schools-declaration-and-guidelines-protecting-schools-and-universities-military-use>.

142. *Id.*

143. The 2015 Safe Schools Conference refers to a state-led international conference in Oslo, hosted by Norway, at which governments and organizations endorsed and promoted the Safe Schools Declaration.

144. Human Rights Watch, *Protecting Schools from Military Use: Law, Policy, and Military Doctrine* (Mar. 20, 2017), <https://www.hrw.org/report/2017/03/20/protecting-schools-military-use/law-policy-and-military-doctrine>.

145. *Id.*

146. Global Coalition to Protect Education from Attack, *Practical Impact of the Safe Schools Declaration*, at (Jan. 2022), <https://protectingeducation.org/wp-content/uploads/documents/SSD-Fact-Sheet.pdf>.

and Nigeria have passed laws and policies integrating the Safe School Declaration's principles into its domestic policies.¹⁴⁷ After Yemen's government endorsed the Safe Schools Declaration in 2017, the U.N. Group of Eminent International and Regional Experts on Yemen reported in 2019 that "the Yemeni armed forces have commenced to vacate some schools they had been using."¹⁴⁸

Note, in response to the earlier TWAIL critiques of Model C, a wide range of geographically, politically, and culturally diverse countries have all taken up the Safe School Declaration and Rule 135 and integrated it into their operational practices.

To summarize: although there is no widely upheld soft law instrument explicitly saying that "children's lives should be weighed more heavily in proportionality analyses," implementation of both Rule 135 and the Safe Schools Declaration has actively worked to create an environment where attacks take fewer child lives, and linked targeting considerations to children's protection.

D. *Synthesis: Where Do Children Stand Under Each Model?*

Under each of the three models, there is explicit special consideration given to children in armed conflict already. There is a deep sensitivity to children's lives. The foundations of a more robust rule protecting children in proportionality analyses already exist, but the rule is not yet crystallized. Fortunately, under each model, there is a path towards crystallization.

1. *Under the classical Paquete/North Sea test (Model A).*

There is evidence of sustained practice among militaries, in their actions, ROEs, and manuals. The biggest missing piece is *opinio juris*. There are some clear statements of *opinio juris* and other statements that approach *opinio juris*, ones which are one step removed. Often, these statements link IHL and child protection, but do not explicitly argue for a change in the proportionality rule, or they highlight the loss of children's lives without explicitly saying that a legal obligation has been broken. The lack of completely universal *opinio juris* is likely intentional, given the costs to states of binding themselves to an additional legal obligation – cost in terms of implementation, compliance, and military

147. *Id.* at 1.

148. *Id.* at 4.; The U.N. Group of Eminent International and Regional Experts on Yemen was an independent U.N.-mandated investigative body (2017-2021) tasked with documenting violations of international humanitarian and human rights law in Yemen.

advantage – even if states choose to do much of this in practice, anyway. However, much of the necessary framework for this model already exists and state practice and *opinion juris* seem to be moving in the direction of an explicit rule.

2. *Under the modern interpretive test (Model B)*

A dense corpus exists in which various resolutions and treaties which link children's care to IHL, including academic interpretations of these which, while not widespread, promisingly read these instruments as weighing children's lives more heavily, and various courts and tribunals which frequently consider the age of victims in their judgments. Again, some of this is one step removed – combining discussion of children's protection, for example, with IHL or targeting, without explicitly saying that such a rule exists. However, given how much evidence already exists, only one more step would be needed to reach a rule. Given prosecutorial priorities at the ICC, that step may be coming.

3. *Under the "shortcut" test (Model C)*

Rule 135 and the Safe Schools Declarations show that soft law instruments have made significant impact in protecting children during conflict and there is significant appetite among states to support this work. The instruments, and their implementation, have successfully linked operational conduct to the principle of providing children with additional protection during wartime, with some going as far as to explicitly tie the instruments to targeting. Should either of the described instruments be more widely interpreted as explicitly supporting the proposed rule, or should another such instrument be signed, the rule could crystallize. As noted in the previous discussion of Model A, states have some reticence about binding themselves to a new rule. However, state practice, and the success of the instruments discussed under Model C, shows that the reticence is challenged by an increasing desire to protect children.

Under each of the models, the world is far from the initial rigid interpretation of AP I, Article 51, and there is appetite to reinforce children's rights' further. If a rule does crystallize, it would entail a reshaping of the way "harm" is calculated in Article 51's balancing test. This could look several different ways.

V. DESCRIPTIVE TEMPLATES — WHAT A CRYSTALLIZED RULE

COULD LOOK LIKE

There is already a specific concern for children's lives in targeting but that is not to say that there is not room to solidify children's status further. Three plausible relationships between child protection and proportionality deserve focus.¹⁴⁹ They are presented in order from the most flexible to the most rigid, meaning from options that just require practitioners taking additional steps when considering an operation, to options that would dictate a specific reading of the Article 51 rule.

The first option is what this Note calls "procedural modification." Under this option, scholars and practitioners would interpret Article 51 to require that when credible information suggests that children are present in the planned attack area, heightened verification, recording, and abort duties are required. That is, children's presence makes commanders take additional steps to reduce risk, but it does not automatically change the substantive threshold for what counts as "excessive."¹⁵⁰ The second option is what this Note calls "substantive sensitivity." In this option, foreseeable harm to children is given greater qualitative weight in the balancing exercise than foreseeable harm to adults. Commanders must consider reasonably foreseeable durable harms (like susceptibility to lifelong trauma and mental health conditions) to children among the incidental effects they evaluate when doing a proportionality analysis, which will give child harm a greater

149. Provost and Wijenayake point out that previously IHL defined a "child" as being under the age of fifteen in the context of protection of children in armed conflict. However, under the influence of international human rights law, especially the 1989 Convention on the Rights of the Child and its Optional Protocol, the threshold has shifted toward eighteen. The ICRC Study supports the eighteen threshold. The article also highlights that the definition of "child" is not purely factual a social and normative concept that interacts with perceptions of the value of children in collateral damage assessments. See René Provost & Vishakha Wijenayake, *Collateral Kids: Weighing the Lives of Children in Targeting*, 37 LEIDEN J. INT'L L. 1018, 1027-1030 (2024).

150. See René Provost & Vishakha Wijenayake, *Collateral Kids: Weighing the Lives of Children in Targeting*, 37 LEIDEN J. INT'L L. 1018, 1020-21 (2024) (outlining procedures used by certain military manuals and the IDF to lower the risk of children being killed as collateral victims); see also Sarah Knuckey, Alex Moorehead, Audrey McCalley & Adam Brown, *The Proportionality Rule and Mental Harm in War, in Necessity and Proportionality in International Peace and Security Law* 367, 404 (Claus Kreß & Robert Lawless eds., Oxford Univ. Press 2020) (hereinafter Knuckey et al.) ("Consideration of mental harms may . . . affect how and when [an attack] is conducted," and the U.S. military "collects general population density data . . . suggesting it may be possible . . . to estimate the number of people . . . likely to . . . witness the trauma," while considering that children are more vulnerable to certain kinds of mental harms).

weight.¹⁵¹ The same military advantage that might allow an attack where only adults are at risk could be insufficient if children are likely to be harmed.¹⁵² Importantly, the balancing here remains more qualitative as it has historically been done.¹⁵³

The final option is a “rule-style adjustment,” a more rigid option than the other two because it would impose requirements on how Article 51 is read and hard thresholds into how the “balancing” calculation is done. It would impose an explicit numerical or threshold reduction in permissible incidental harm where children are present. Putting in an explicit numerical threshold like this is doctrinally bold and operationally risky; it has significant practical downsides and is generally avoided in contemporary doctrinal debate.¹⁵⁴ However, it is not outlandish. Returning to the example from the US Chairman of the Joint Chiefs of Staff Instruction, *No-Strike and the Collateral Damage Estimation Methodology*, the civilians, including the number of children, are explicitly quantified and then an assessment is given based on that number (two women and three children equals a high-risk target).¹⁵⁵ This means that countries already likely do some form of quantification so the adoption of a formal threshold would not be impossible.

151. Knuckey et al., *supra* note 23, at 382–84 (arguing that children are particularly susceptible to mental harms from conflict as compared to adults, and this should be factored into the proportionality analysis to give greater weight to children’s suffering).

152. See Provost & Wijenayake, *supra* note 146, at 1018, 1018–19, 1034, 1037 (2024) (“We argue that . . . the incidental harm to a child must be given a higher value as compared to incidental harm to an adult [that] Article 51(5)(b) . . . should be understood . . . to demand that a higher value be allocated to children’s lives within the requirement of proportionality. Even if the parameters of proportionality are ‘always relative, situational and immanent’, the fact that children are among collateral victims per se augments the collateral damage estimate Where . . . the attacking side knows or could reasonably know that some . . . expected to be harmed . . . are children, there is a legal obligation to accord greater weight to the harm to children than to adults in assessing excessiveness.”).

153. Fatima suggests a similar formulation. See Shaheed Fatima, *Protecting Children in Armed Conflict* 464 (Hart Publ’g 2018). (“The law could be developed so as to require the express consideration of children in the application of the principles of proportionality and precautionary measures. The position of children could be specified as an express factor that needs to be given weight and considered in evaluating proportionality, for example in military manuals.”).

154. See Charles P. Trumbull IV, *Collateral Damage and Individual Rights in Armed Conflict*, 48 Fordham Int’l L.J. 521 (2025) (critiquing rule-style mechanical thresholds) (“Third, even if we accept the utilitarian calculus embedded in the DDE, the LOAC principle of proportionality requires the balancing of two incomparable values (military advantage and civilian life). Military advantage is not a moral good itself but rather a means of promoting a moral good.”).

155. CJC SI 3160.01, *supra* note 71, app. F to encl. D, ¶ 1.d.1.

VI. RISKS AND MITIGATIONS

If a CIL rule does crystallize or AP I is widely read to require giving greater value to children's lives, several complications remain that are worth considering.

1. *Distributional inequality.*

Any rule that requires greater intelligence collection to accurately identify the presence of children or more accurate targeting to avoid harming children automatically favors wealthier countries with more established militaries over poorer countries. The international community could potentially respond to this concern with economic subsidies, on the ground assistance, and technological transfers.

2. *Perverse incentives.*

If children's lives are weighed more heavily, bad actors have more incentive to use them as human shields. In such a scenario, either the attack is halted and the bad actor is protected, rewarding his egregious behavior, or the attack proceeds, killing children, and the state conducting the attack suffers legally. International institutions like the ICC and individual states could potentially mitigate this by militantly pursuing those who engage in this practice through legal action, soft power, and economic and (depending on the situation) military pressure.

3. *Institutional capture and legitimacy.*

TWAIL scholars show how elite-driven norm-production can look like law made by and for powerful states. If the ICRC, U.N. bodies, or Western governments shape this rule (depending on which model of CIL one follows) without sufficient input from the Global South, any resulting rule would suffer from lack of legitimacy. Inclusion of Global South countries would be key in developing any rule and can help mitigate this risk.

4. *Ethical Questions.*

IHL has long argued that all lives are equal and that weighing lives goes against its principles.¹⁵⁶ For some, allowing children's lives to be

156. See Provost & Wijenayake, *supra* note 146, at 1035-36 (2024) ("Another argument that can be brought against giving a higher value to children's lives in

weighed more heavily poses ethical concerns. However, the international community is already doing this with its slew of international instruments, tribunals, treaties, resolutions, and domestic state practice. The nature of CIL is that it allows for the international community's preferences and values to change over time. This is what has happened in the case of targeting questions related to children.¹⁵⁷

5. *Compliance by nonstate actors.*

Many conflicts involve nonstate armed groups that neither endorse political instruments nor feel bound by state-based practice and custom.¹⁵⁸ Compliance strategies for such actors are more complicated and may have to involve additional factors like humanitarian engagement, incentives, and pressure from state supporters. However, this is a longstanding concern in any IHL question, not specific to the topic at hand.¹⁵⁹

Addressing these obstacles would require global arrangements that explicitly considered them such as supplemental funding to certain states, technology transfers, compliance pressure from courts and states for actors seen as taking advantage of the perverse incentives, and efforts aimed at engaging with states often excluded from such decision-making. Any such measure, however, would depend on political will and priorities.

proportionality calculations is that it discriminates against other civilians . . . thereby producing a scenario of adverse distinction. One of the basic principles set out in the Geneva Conventions is that persons protected therein shall be treated without any adverse distinction.”)

157. For a deeper exploration of the ethical consequences of valuing children's rights more heavily than adult rights, see Anca Gheaus, *Children's Human Rights*, in *The Routledge Handbook of the Philosophy of Human Rights* 483, 483–95 (Jesse Tomalty & Kerri Woods eds., Routledge 2016).

158. Sandesh Sivakumaran, *The Practice of Non-State Armed Groups and the Formation of Customary International Humanitarian Law*, in *The Theory, Practice, and Interpretation of Customary International Law* 298, 305 (Panagiotis Merkouris, Jörg Kammerhofer & Noora Araj. . . eds., 2022) (“Indeed, sometimes NSAGs denied the binding force of IHL norms on them by arguing that they did (and could) not participate in the creation of those norms which is monopolised by states.”).

159. See generally Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge Univ. Press 2015) (examining factors that influence nonstate armed groups to comply with IHL rules).

VII. WHY STATES SHOULD MOVE NOW

Given that a child-sensitive proportionality analyses seem to be a likely outcome in the future of CIL, pragmatic states should move to crystalize this now.

A. *Helping Shape the Rule*

The earlier a state is involved in the formation of a rule, the more it can shape its content while the rule's meaning is still fluid. Meanwhile, if a state waits for the rule to be framed by other states and institutions, it will later discover that it has little room to influence the final product.

The formation of CIL is not a neutral, simultaneous process in which all states participate equally. States can gain advantages over latecomers by being early participants in the formulation or the shaping of an emerging rule.¹⁶⁰ They can do this because of structural features of the process of CIL formation. In the absence of predecessors' norms and in the presence of a coordination problem, the state with a proposed secure legal position might be able to provide what game theorists call a focal point: a salient solution around which others converge, not because they have to, but because coordinating on an established position is preferable to the indeterminate state of affairs that arises from a lack of mutual consent.¹⁶¹

160. See Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on Customary International Law*, 23 Mich. J. Int'l L. 191, 192-93, 198-99 (2001) (arguing that CIL develops through strategic interaction rather than neutral multilateral participation; explaining that CIL rhetoric can supply "focal points" for coordination problems, illustrated by the "success of Truman's famous proclamation" on the continental shelf; and noting that changes in CIL often "track[] the interests of powerful nations").

161. Thomas Schelling's analysis of focal points applied to international law by Goldsmith and Posner provides one example of first-mover advantage in Battle-of-the-Sexes-type coordination games. Two states want to coordinate, but do not prefer the same equilibrium outcome. This class of games has sequential action, with the first mover getting a first mover advantage. The advantage does not come from moving first by itself. It comes from being first to make one outcome stand out as the natural or expected one. See Thomas C. Schelling, *The Strategy of Conflict* 69, 79-80 (1960) (explaining that in mixed-interest situations it "can" be an advantage "to move first" and that bargaining power may come from "the ability to set the stage in such a way as to give prominence to some particular outcome that would be favorable"); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1674-75 (2000) (arguing that in a Battle of the Sexes game, if both sides recognize one equilibrium as focal at the start of bargaining, that fact may give its proponent a "decisive advantage in bargaining" because "refusing to bargain will achieve his end"); Jack L. Goldsmith

This is then reinforced by path dependence. In path-dependent processes, early moves matter because they shape later expectations, and once actors begin to align around an emerging norm, that norm can become self-reinforcing as actors' interests become more dependent on its stability. Political scientist, Paul Pierson describes such political processes generally as "self-reinforcing or positive feedback processes," marked by "formative moments or conjunctures" and rising costs of switching.¹⁶² International law scholars, Curtis Bradley and Mitu Gulati, describe a similar dynamic amongst customary international law: that states may object while the customary rule is coming into being, but not withdraw unilaterally from a customary rule once it is formed.¹⁶³ The result is that the period for shaping the CIL rule's content is concentrated in the beginning. Those states that are involved in crafting a rule while it is still emerging can entrench a position that is difficult to later undo.

For example, rationalist international law scholars, Jack Goldsmith and Eric Posner, point to Truman's 1945 continental shelf proclamation as a case in which legal rhetoric helped create a focal point around which later law coordinated, explaining that the "success of Truman's famous proclamation" shows how CIL rhetoric can convey "meaningful information about focal points when nations face a coordination problem."¹⁶⁴ And the power of early moves is not limited to great powers like the U.S. The development of the exclusive economic zone shows as much: Chile and Peru asserted 200-mile economic claims in 1947, the 1952 Santiago Declaration carried the

& Eric A. Posner, *Further Thoughts on Customary International Law*, 23 MICH. J. INT'L L. 191, 193 (2001) (arguing that CIL rhetoric can convey "meaningful information about focal points when nations face a coordination problem").

162. See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 Am. Pol. Sci. Rev. 251, 251-52 (2000) (describing increasing-returns dynamics as "self-reinforcing or positive feedback processes," explaining that "the costs of switching from one alternative to another will, in certain social contexts, increase markedly over time," and emphasizing "formative moments or conjunctures" followed by periods that reinforce divergent paths).

163. See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 Yale L.J. 202, 204-05 (2010) (describing the orthodox "Mandatory View" under which, once a CIL rule is established, states "never have the right to withdraw unilaterally from it" and there is no "subsequent objector" rule).

164. See Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on Customary International Law*, 23 Mich. J. Int'l L. 191, 193 (2001) ("The rhetoric of CIL can convey meaningful information about focal points when nations face a coordination problem. This is arguably what explains, for example, the success of Truman's famous proclamation about control over resources in the continental shelf.")

approach forward, and the idea later became part of the modern law of the sea.¹⁶⁵

The practical consequences of this for the child-sensitivity in proportionality is that states who move first to adopt and advocate for this new rule, articulate a legal position, and back it with state practice, will help shape what the final formulation of this rule will look like. On the other hand, states that fall back and wait, from caution, resource-constraints, a hope to free-ride, or another reason, will join the rule too late, and may find themselves bound to a rule that is less favorable to them than it otherwise could have been.¹⁶⁶ A state that participates early can push for a child-sensitive proportionality rule that is easier for it to implement given its own operational realities and that is consistent with its own norms, instead of later being forced to accept a requirement created by others.

B. *Gaining Reputation and Status*

Another factor that could drive an opportunistic state to change the rule now could be related to reputation, not just as ornamental concept, but also as a kind of currency that states can use at a later date. Legal academic Rachel Brewster writes that one of the few areas of agreement among all compliance scholars is that compliance can be sustained by “states’ concerns with their reputation,” because a violating state may lose “future opportunities to cooperate.”¹⁶⁷ In other words, being seen as a legally reliable player has practical value. A state that is seen as a reliable legal player has value. A state that flags early

165. S.N. Nandan, *The Exclusive Economic Zone: A Historical Perspective*, Food & Agric. Org. of the U.N., <https://www.fao.org/4/s5280t/s5280tp.htm> (last visited Apr. 16, 2026) (“The Chilean declaration proclaimed national “sovereignty over submarine areas, regardless of their size or depth, as well as over the adjacent seas extending as far as necessary to reserve, protect, maintain, and utilize natural resources and wealth”. It further established the demarcation of ‘protection zones for whaling and deep sea fishery’ to extend to 200 nautical miles from the coasts of Chilean territory” ... “[The article examines] the unilateral declarations of sovereignty by Chile and Peru in 1947 and the declarations by a number of Arab states in 1949...the development of the idea in Latin America, through the Santiago Declaration of 1952”).

166. See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 204 (2010) (“According to most international law scholars, a nation may have some ability to opt out of a CIL rule by persistent objection to the rule before the time of its formation (although even that proposition is contested), but once the rule becomes established, nations that are subject to it never have the right to withdraw unilaterally from it.”)

167. Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L.J. 231, 232 (2009).

on that it agrees with a rule that protects children can show it is a law-abiding state, one that believes in self-constraint, and one that will play by the rules, and this was rewarding in diplomatic, legal and institutional circles.

A related reason is status: humanitarian norms do not always spread because actors are “shamed” into complying with them. As political scientist Margarita Petrova shows, some norms proliferate because early supporters are praised as leaders. In her account, early norm cascades can be driven by “leadership aspirations and naming and praising,” where NGOs and others designate states as “leaders and good international citizens.”¹⁶⁸ Supporting the child-sensitive rule loudly and early can make a state more visible, more credible, and more valuable in coalitions gathered around law, diplomacy, and civilian protection.

C. Ensuring Reciprocity

Academic work on the laws of war shows how important reciprocity is in affecting state’s decision to support a law. As political scientist, James D. Morrow, explains, the laws of war operate through “publicly accepted and so legally binding agreements that create incentives for the parties to enforce those agreements through reciprocity.”¹⁶⁹ States cannot assume that just because they are the ones projecting force today, they will not be the target of force later. A state that moves quickly to adopt this CIL will have additional credibility to protest if, in a future conflict, its own children are threatened. Given that “states” are composed of individual leaders and bureaucrats – people, some with their own children, others politically susceptible to domestic pressure to protect a country’s children – these same individuals have every reason to want the additional protection for their nation’s (and their own) children down the road.

VIII. CONCLUSION

Children’s lives should be given greater weight in proportionality analyses. While this practice already exists, and children already have protective status under international law in times of armed conflict, their status should be reinforced through a formal, explicit rule. As pictures of children suffering in conflicts become ever more accessible

168. Margarita H. Petrova, *Naming and Praising in Humanitarian Norm Development*, 71 *World Pol.* 586, 587 (2019).

169. James D. Morrow, *When Do States Follow the Laws of War?*, 101 *AM. POL. SCI. REV.* 559, 559 (2007).

due to the spread of technology and attitudes about child casualties sharpen, it is increasingly likely that there will be political will for this kind of rule. In fact, state actions and statements on this issue have shown that a good deal of political will already exists. States that are already incorporating protective practices may win a comparative advantage against their less prepared adversaries if they make the first public move toward articulating this rule, by helping set the specifics of this future rule such that the rule most favors them, by creating additional status for themselves in being first movers on such a morally poignant issue, and by helping protect their own children in the future. Politically astute states already recognize that killing children harms their objectives by eroding support. Now is the time to codify this realization into law.