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WHAT IF GOLIATH KILLED DAVID? THE COALITION TO COUNTER ISIS AND THE STATUS AND RESPONSIBILITY OF ISIS’ CHILD SOLDIERS

SAMANTHA BRADLEY*

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Legally, the term child soldier is paradoxical. International Humanitarian Law tells us that a child is a protected person: that is,

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that a distinction needs to be made between children and combatants, as children cannot be legitimate objects of military attack. International Human Rights law tells us of other rights of children: their rights to safety, bodily integrity, liberty, and not to be charged with crimes they lack the *mens rea* to commit. It is a crime under both Humanitarian and Human Rights Law for children under fifteen to be recruited as soldiers. This is reflected by Rules 136 and 137 of Customary International Humanitarian law and by the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. In contrast, a soldier under Humanitarian Law is a combatant, a person who can lawfully both kill and be killed and who is a legitimate military target. How can a child be both a protected person and a combatant? Does one supersede the other?

**I. INTRODUCTION**

A coalition of international states—including the United States (U.S.), Canada, France, the United Kingdom (U.K.) and Australia—is currently engaged in military operations against the Islamic State in Iraq and Syria (ISIS). Material distributed by ISIS, and reports from the field, show that ISIS employs child combatants as it does adult combatants, and on a large scale, with an estimated 1500 persons under eighteen years old serving as of late 2016. This raises

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1. See, e.g., Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict preamble, art. 1, May 25, 2000, 2173 U.N.T.S. 222 [hereinafter Optional Protocol to the Convention on the Rights of the Child] (ensuring that State Parties “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”); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 479-88 (Int’l Committee of the Red Cross 2005).

two significant legal questions, under three areas of law—
International Humanitarian Law (IHL), also known as the laws of
war; International Human Rights Law (IHRL), embodied in human
rights treaties; and, International Criminal Law (ICL), the
enforceability mechanism of IHL, customary law, and specific
international criminal law instruments.

The first question raised is this: what is the status of ISIS’ more
than 1500 child soldiers, and how should coalition forces legally
regard them? IHRL reinforces a child’s right to life, and that all
children should be protected in times of conflict. IHL provides that,
whilst it is illegal to enlist child soldiers, once they are part of the
military they may be lawfully attacked as combatants where they
wear the uniform of combatants and can be considered actively
engaged in hostilities. ICL, however, has held that child soldiers
only lose protections afforded to children and civilians under IHL
when they are actively engaged in hostilities.

The second question is one of speculative post-conflict transitional
justice. ISIS has published propaganda footage of its child soldiers
committing executions and bombings. Post-conflict, what will be the
culpability of ISIS’ former child soldiers under international law?
IHRL is unclear on the issue. Some provisions of IHRL deal with
issues of the minimum age of criminal responsibility. IHL protects
the conditions alleged child criminals may be detained in, and
prohibits the death penalty, indicating that IHL is consistent with a
former child soldier being charged for crimes committed whilst a
minor. In ICL, however, there has never been a prosecution of any
person for crimes committed while a child. The Special Court for
Sierra Leone had the jurisdiction to make such prosecutions, yet
chose not to do so, instead criminalizing the act of recruiting child
soldiers. The Rome Statute of the International Criminal Court
expresses that it only has jurisdiction over crimes committed by
persons who were eighteen or over at the time of the crime.

II. RECRUITING CHILD SOLDIERS AS
PROHIBITED UNDER INTERNATIONAL LAW

Child soldiers are not a new phenomenon and depictions of child
combatants are frequent in both history and literature. The Old
Testament’s Book of Samuel tells the story of David, the youngest son of Jesse the Bethlehemite, who, while still a “youth”\textsuperscript{3} fought against the Philistine warrior Goliath, and won.\textsuperscript{4} As a child combatant, David self-described himself as indestructible, as if he believed he was a deity, demonstrating a distinct lack of awareness regarding the risks of contesting an adult soldier experienced in hand-to-hand combat, as is evidenced by David proclaiming to his adversary: “Thou comest to me with a sword, and with a spear, and with a shield: but I come to thee in the name of the Lord of hosts, the God of the armies of Israel.”\textsuperscript{5} In 1429, during the Hundred Years War, Jeanne d’Arc was only seventeen years old when she led French soldiers against the British occupation of France.\textsuperscript{6} The most recent analysis of child soldier engagement globally was undertaken in 2008 by the Coalition to Stop the Use of Child Soldiers. The report found evidence of military recruitment of children and the use of child soldiers in hostilities in eighty-six states and territories worldwide.\textsuperscript{7}

The Cape Town Principles of 1977 provide an early, broad and widely accepted definition of a child soldier as:

\begin{quote}
[A]ny person under eighteen years of age who is part of any kind of regular or irregular armed force or armed group in any capacity . . . other than family members. The definition includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.\textsuperscript{8}
\end{quote}

It is well established under international law that recruiting child soldiers is prohibited, and there has been a strong global movement

\begin{itemize}
\item \textsuperscript{3} 1 Samuel 17:33 (King James).
\item \textsuperscript{4} Id. at 17:4, 51.
\item \textsuperscript{5} Id. at 17:45.
\item \textsuperscript{6} See James A. Freeman, Joan of Arc: Soldier, Saint, Symbol – of What?, 41 J. POPULAR CULTURE 601, 601-02 (2008) (explaining that Joan of Arc was also only nineteen years old when she was burnt at the stake, and, in 1920, almost 500 years later, she was canonized).
\item \textsuperscript{7} COALITION TO STOP CHILD SOLDIERS, CHILD SOLDIERS: GLOBAL REPORT 2008 3 (2008).
\item \textsuperscript{8} See UNICEF, Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa (1999) (resulting from a symposium held on the issue in Cape Town, South Africa from Apr. 27-30, 1997).
\end{itemize}
to eliminate the practice. Looking to IHL, Additional Protocols I and II to the Geneva Conventions prohibit the recruitment of child soldiers: Article 77(2) of Additional Protocol I prohibits recruitment of soldiers under fifteen-years-old and imposes an obligation on parties to a conflict to ensure that children under fifteen are not directly participating in hostilities; Article 4(3)(c) of Additional Protocol II also stipulates that children under fifteen should neither be recruited to armed forces or permitted to participate in hostilities.9 Article 4 of Additional Protocol II is widely regarded as being customary international law.10 Other IHL instruments also affirm these provisions and prohibit the military engagement of children. The 1991 Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia affirms Article 77 of Additional Protocol I, which sets fifteen as the minimum age of military recruitment.11 The 1992 Agreement on the Application of IHL between the parties to the Conflict in Bosnia and Herzegovina, at paragraph 2.3(3), also affirms Article 77 of Additional Protocol I.12 The Protocol of Agreement between the Government of Rwanda and the Rwandese Patriotic Front on the Integration of the Armed Forces of 1993 prohibits the enlistment of any children who have not reached the age of eighteen years of age.13


The Military Manuals of a number of states indicates that state practice is largely in line with obligations under IHL. For example, Australia sets a minimum voluntary enlistment age of seventeen. The U.S. also stipulates that soldiers enlisted who are under eighteen years should not take direct part in hostilities.

Looking to IHRL, the Convention on the Rights of the Child and the Convention on the Worst Forms of Child Labour both prohibit recruitment of child soldiers. Article 38(3) of the Convention on the Rights of the Child stipulates fifteen years as the minimum age of recruitment, and Article 1 of the Convention on the Worst Forms of Child Labour proscribes compulsory recruitment of children under eighteen years of age as one of the worst forms of child labour. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol) states that persons under eighteen years cannot be compulsorily recruited to armed forces and that voluntary recruitment of children between fifteen and eighteen years must be fully informed and with the consent of parents and guardians.


18. See Optional Protocol to the Convention on the Rights of the Child, supra
Additionally, the Optional Protocol states that non-state armed groups may not, regardless of the circumstances, recruit persons under eighteen years old.\textsuperscript{19}

The crime of recruiting child soldiers is also enforceable under ICL. The Rome Statute of the International Criminal Court provides that “conscripting or enlisting children under the age of fifteen years” into both state and non-state armed groups in both international and civil armed conflicts is a war crime.\textsuperscript{20} Similarly, recruitment of children under fifteen as soldiers was also a war crime under the Statute of the Special Court for Sierra Leone.\textsuperscript{21}

\textbf{III. BACKGROUND: EVIDENCE OF ISIS’ RECRUITMENT OF CHILD SOLDIERS AND DIRECT ENGAGEMENT OF CHILD SOLDIERS IN HOSTILITIES}

ISIS uses child soldiers on a level unprecedented by other violent extremist associations.\textsuperscript{22} According to Mia Bloom, ISIS’ estimated more than 1500 child soldiers can be distinguished into five groups: “those born to foreign fighters or emigrants; those born to local fighters; those who had been abandoned and found their way into an ISIS-controlled orphanage; those coercively taken from their parents; and those who voluntarily joined the Islamic State.”\textsuperscript{23} News organizations have reported on parents in ISIS-controlled territories

\textsuperscript{19} Id. art. 4.
\textsuperscript{21} Statute of the Special Court for Sierra Leone art. 4, Mar. 8, 2002, 2178 U.N.T.S. 145.
\textsuperscript{22} See Mia Bloom, John Horgan & Charlie Winter, \textit{Depictions of Children and Youth in the Islamic State’s Martyrdom Propaganda, 2015 – 2016}, 9 CTC SENTINEL 29, 29 (2016) (“The Islamic State has so heavily championed the mobilization of children—on a scale rarely associated even with VEOs [violent extremist organizations]—that it suggests organizational concerns that far outweigh short-term propaganda benefits… Indeed, the publicity hungry organization vividly depicts the wide-ranging and routine participation of children in its jihadist media projects.”).
being forced to surrender their children to ISIS, under the threat of death, for soldier training. In some situations, children in ISIS-controlled territories may choose to join, perceiving that enlisting will provide them with better opportunities. Human Rights Watch has reported that ISIS has previously detained large groups of children caught in ground operations and taken these children to child soldier training camps. An Article published in ISIS’ publication, Dabiq, called on mothers to surrender their sons to ISIS, stating: “As for you, O mother of lion cubs . . . And what will make you know what the mother of lion cubs is? She is the teacher of generations and the producer of men.” The organization has also published footage of public “fairs” and forums seeking to attract potential child soldiers with ideological tools, free confectionary and bouncing castles.

Child soldiers have also been recruited through ISIS’ de-facto control of school systems in occupied areas. A report published by the activist group Raqqa is Being Slaughtered Silently details the educational system and curriculum ISIS established after the city of Raqqa fell to their control in 2014. According to the report, ISIS-administered schools allegedly taught only religious doctrine and

25. Id.
Arabic language, “along with fitness classes which start with vigorous exercises and then trainings on different types of weapons.”

The group also reportedly burnt students’ previous exercise books and forced pre-existing teachers to undergo “repentance courses and pledge not to teach the old curriculum.”

All scientific subjects were banned, though children were reportedly taught how to make bombs.

Due to forced conscription of children via the school system, many families took the risk of fleeing occupied areas.

There are furthermore reports of child soldier “cubs” training camps in both Syria and Central Asia.

To accommodate and train the children of foreign fighters, ISIS also reportedly established two military schools for English speaking children.

Mia Bloom and John Horgan describe programs of systematic

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32. See id.
35. See Joanna Paraszczuk, Kazakh IS Militant Posts Photos of Central Asian ‘Caliphate Cubs’, RADIO FREE EUR. RADIO LIBERTY (June 16, 2015, 1:51 PM), https://www.rferl.org/a/islamic-state-militant-posts-photos-of-kids/27075404.html (providing that an ISIS militant has posted numerous photographs of Central Asian children to his social media account, alleging that these children are ethnic Kyrgyz).
indoctrination and desensitization to extreme violence used by ISIS against its child soldiers.\textsuperscript{37} Children are encouraged to observe public executions, stoning, and crucifixions, to foster rationalization and acceptance of extreme violence as being an appropriate form of punishment against “traitors” and “non-believers.”\textsuperscript{38} Escaped former child soldiers describe being told by their captors that their ISIS handlers were now their only family and reported children as young as five-years-old being forced to undertake intensive military training\textsuperscript{39} with those who refused to participate being subjected to beatings.\textsuperscript{40} Footage uploaded by ISIS members shows children younger than ten years old being shot at with ostensibly live ammunition whilst crawling under barbed wire during training exercises.\textsuperscript{41} Children are trained to “take captives, serve as snipers, and ambush moving vehicles.”\textsuperscript{42} Families fleeing the region report their children having been sent home from training schools with “caucasian dolls dressed in orange jumpsuits to behead as ‘homework.’”\textsuperscript{43}

ISIS is unusual in that it uses its child soldiers in a similar manner to its use of adult soldiers.\textsuperscript{44} A 2014 Human Rights Watch investigation reported that “both children and adults who fought with ISIS consistently reported seeing children thirteen years old or younger undergoing the same training and performing the same military duties as adults.”\textsuperscript{45} Children wear the same uniform as adult

\textsuperscript{37} See id.
\textsuperscript{38} See id.
\textsuperscript{39} See Nima Elbagir & Peter Wilkinson, ‘Like Coming Back to Life’ Says Child Soldier Who Escaped ISIS, CNN (Jan. 12, 2016), http://edition.cnn.com/2016/01/12/middleeast/isis-child-soldiers/ (reporting that that child soldiers were told that the fighters loved them and would take care of them better than their own parents).
\textsuperscript{40} See id. (describing a boy whose leg was broken in three places for disobedience).
\textsuperscript{42} See Horgan & Bloom, supra note 28.
\textsuperscript{43} Dearden, supra note 34; see Abdallah, supra note 33.
\textsuperscript{44} See Bloom, Horgan & Winter, supra note 22, at 31 (asserting that children are fighting right alongside adult males).
\textsuperscript{45} HUMAN RIGHTS WATCH, supra note 26, at 21-22.
ISIS fighters and are encouraged to imitate older fighters.46 ISIS’ child soldiers are deployed as “fighters and guards, recruiters and bomb makers,”47 and have been filmed performing executions.48 In March 2015, a video shared by ISIS on social media depicted a group of adolescent ISIS soldiers participating in the mass beheading of a group of Alawite prisoners.49 In December 2015, a group of young boys were shown in a propaganda film playing ISIS “hide-and-seek” and were filmed “running through the ruins of a castle in eastern Syria, racing each other to kill one of the handful of captives who were tied up and defenseless inside.”50 ISIS’ child soldiers also perform suicide attack missions, and a former child soldier told Human Rights Watch that there is “social pressure to do so.”51 An escaped child soldier by the name of Usaid told the New York Times about being taken from Syria to Baghdad to perform a suicide operation, where he surrendered himself to security at the mosque he had been instructed to bomb.52 In January 2016, the group uploaded propaganda photos of an eleven-year-old boy kissing his father’s

46. See Bloom, supra note 23.
47. Horgan & Bloom, supra note 28; see HUMAN RIGHTS WATCH, supra note 26, at 26 (stating that children had to have a “military lesson on how to use weapons, then a religious lesson, then noon prayer, then lessons on how to make and use hand bombs and mines”).
48. See Berlinger, supra note 24 (stating that a boy in a unit was seen standing in front of and shooting a man who was on his knees); see also Lizzie Dearden, Isis Propaganda Video Shows British Four-Year-Old Isa Dare ‘Blowing Up Car’ with Prisoners Inside in Syria, INDEP. (Feb. 11, 2016, 6:34 AM), http://www.independent.co.uk/news/world/middle-east/isis-execution-video-shows-british-four-year-old-isa-dare-blowing-up-car-with-prisoners-inside-a6866626.html (providing that a four-year-old from London was seen in a propaganda video which showed three men strapped to a car and then blown up, and in a separate video a boy was shown appearing to press a detonator button blowing up a car).
51. See HUMAN RIGHTS WATCH, supra note 26, at 23.
52. See Arango, supra note 34.
hand before undertaking a suicide mission against a truck of explosives.\textsuperscript{53}

Charlie Winter has predicted that ISIS’ engagement of child soldiers is part of a long-term strategy to ensure the longevity of the group, as rates of adult foreign recruits increasingly dwindle. According to Winter, “ISIS is integrating children into its project in a way that is more reminiscent of a state than a non-state actor. It’s thinking with the long term in mind.”\textsuperscript{54}

\textbf{IV. THE COALITION TO COUNTER ISIS}

There are sixty-seven state participants in the US-led Coalition to Counter ISIS.\textsuperscript{55} As of late 2016, the states with the largest military contributions were:

1. Australia: 380 personnel engaged advising Iraqi counterterrorist units, and were also undertaking airstrikes against targets in both Iraq and Syria. 400 Australian personnel were also engaged in support of the air missions.\textsuperscript{56}

2. Belgium: thirty-five personnel engaged in a training and advisory capacity, was undertaking airstrike operations in Iraq, and had 120 personnel engaged in a support capacity.\textsuperscript{57}

\begin{itemize}
\item[\textsuperscript{53}] See McLaughlin, \textit{supra} note 27.
\item[\textsuperscript{54}] \textit{Id.}; see also Bloom, Horgan & Winter, \textit{supra} note 22, at 32 (asserting that today’s child militants are tomorrow’s adult terrorists); Winter, \textit{supra} note 50 (explaining that children are a fundamental part of ISIS’ long term strategy because they are venerated as the inheritors of the ISIS jihad).
\item[\textsuperscript{55}] The Global Coalition to Defeat ISIS: Partners, U.S. DEP’T OF STATE, http://www.state.gov/s/seci/c72810.htm (last visited Jan. 20, 2018) (including the following: Egypt, Morocco, Nigeria, Somalia, Tunisia, Canada, Panama, United States, Afghanistan, Australia, Japan, Malaysia, New Zealand, Singapore, South Korea, Taiwan, Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Iceland, Italy, Kosovo, Latvia, Lithuania, Luxembourg, Macedonia, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Spain, Sweden Turkey, Ukraine, United Kingdom, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia and the United Arab Emirates).
\item[\textsuperscript{56}] KATHLEEN J. MCIINNIS, CONG. RESEARCH SERV., R44135, COALITION CONTRIBUTIONS TO COUNTERING THE ISLAMIC STATE 8 (2016).
\item[\textsuperscript{57}] \textit{Id.}\
\end{itemize}
3. Canada: 210 personnel engaged in a training and advisory capacity, and 640 personnel engaged in support of air missions including aerial surveillance and intelligence.\textsuperscript{58}

4. France: 1000 personnel engaged in a training and advising capacity, undertook airstrike operations, and had an additional 1000 people engaged in a mission support capacity.\textsuperscript{59}

5. U.K.: 400 personnel engaged in a training and advisory capacity, and undertook airstrikes.\textsuperscript{60}

6. U.S.: the “largest contributor of material and personnel resources to the coalition,” with 4,647 personnel authorized to engage in training and advising operations in Iraq, and 300 personnel authorized for Syria, and has undertaken airstrike operations in both Iraq and Syria.\textsuperscript{61}

Regional allies Turkey and Saudi Arabia are also members of the coalition. Turkey undertook airstrike operations in both Syria and Iraq as well as “long-range artillery strikes in northern Iraq and Syria.”\textsuperscript{62} Saudi Arabia conducted airstrike operations in Syria with an unspecified number of aircraft.\textsuperscript{63}

The coalition campaign has been characterized by airstrikes against strategic points. According to the U.S. Department of State, “the Coalition has conducted more than 13,500 airstrikes in both Iraq and Syria.”\textsuperscript{64} Airstrikes aim at “destroying their infrastructure, reducing their ability to generate financial support and impeding their command and control.”\textsuperscript{65} Coalition strikes have targeted ISIS vehicles, known ISIS-held buildings, fighting positions, mortar positions, rocket rails, weapons storage facilities and caches, bunkers, tunnel systems, tactical units, and staging areas.\textsuperscript{66} Coalition

\textsuperscript{58} Id.
\textsuperscript{59} Id. at 11.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} MCI\textsuperscript{N}NIS, \textit{supra} note 56, at 11.
\textsuperscript{63} Id. at 10.
\textsuperscript{65} Id.
forces have also targeted a health clinic that ISIS forces were positioned inside and, allegedly, a mosque; both strikes resulted in civilian casualties.\textsuperscript{67} Multiple news sources describe ISIS’ child soldiers being killed as a result of coalition airstrikes.\textsuperscript{68} A French airstrike against an ISIS camp in Eastern Syria in September 2015 was reported to have killed twelve child soldiers.\textsuperscript{69}
Notably, Iraq is also a member of the coalition, with members of their forces being trained by the powerful states listed above. Iraqi forces are conducting ground operations. In October 2016, more than 300 ISIS child soldiers were killed when Iraqi government forces and their allies initiated an offensive seeking to retake the city of Mosul in northern Iraq. Child soldiers formed the majority of ISIS combatants killed, with 180 adult fighters also being killed.

Bloom, Horgan, and Winter analyzed ISIS propaganda eulogizing child soldiers for the period of January 2015 to January 2016, and outlined the primary ways in which the child soldiers were killed. They found that of the eighty-nine children eulogized, thirty-nine percent died in suicide missions where they detonated a vehicle-borne improvised explosive device against a target, thirty-three percent died in operations as foot-soldiers, six percent died as propagandists embedded in units, and four percent died in suicide missions against civilian targets. The remaining eighteen percent were killed in “marauding operations in which a group of mostly adult fighters infiltrates and attacks an enemy position using light automatic weapons before killing themselves by detonating suicide belts.”

With the above in mind, the following may be deduced for the purpose of analysis:

1. Coalition forces conducting airstrikes against ISIS targets may do so

middle-east-34399638.
70. See McInnis, supra note 56, at 2-3 (explaining that the U.S. and coalition forces should be focused on supporting Iraqi ground forces rather than engaging in ground combat themselves).
72. Id.
73. Bloom, Horgan & Winter, supra note 22, at 29 (claiming that the majority of images of children soldiers eulogized were sourced from ISIS propagandists on twitter).
74. Id. at 30.
75. Id.
76. Id. at 31.
with knowledge of there being child soldiers present at those targets;\textsuperscript{77} and,

2. Coalition partner Iraq, in conducting ground combat operations, will encounter ISIS child soldier adversaries.\textsuperscript{78}

V. INTERNATIONAL HUMAN RIGHTS LAW PROTECTIONS OF CHILD SOLDIERS DURING CONFLICT

The International Law of Human Rights is composed of those human rights treaties that can be established to jurisdictionally apply to members of the coalition in Iraq and Syria, as well as Customary International Law (CIL). The *Universal Declaration of Human Rights* (UDHR)\textsuperscript{79} is a political declaration and not a treaty; however, many of its provisions are binding upon states to the extent that they reflect CIL.\textsuperscript{80} The Human Rights Committee has been firm in its

\textsuperscript{77} See *French Strike in Syria Kills 30 Jihadists, Says Monitor Group*, supra note 69 (citing French President Francios Hollande as stating that more airstrikes could hit an ISIS training camp where twelve child soldiers were killed by previous strikes); *French Syria Raid ‘Killed 12 Child Soldiers’*, supra note 69; *IS Conflict: French Raid in Syria ‘Killed 12 Child Soldiers’*, supra note 69 (reporting since June that children as young as thirteen or fourteen years old were being trained in the camp that was targeted by France in July).

\textsuperscript{78} See Payton, * supra* note 71 (asserting that Iraqi forces and their allies killed over 300 ISIS child soldiers in the first two weeks of their offensive on Mosul).


\textsuperscript{80} See *Eric A. Heinze, Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention* 65 (2009) (explaining that the UDHR is not binding, but can offer evidence of customary international law if consistently practiced by states); John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Judicial Character, in Human Rights Thirty Years After the Universal Declaration* 21, 37 (B.G. Ramcharan ed., 1979) (arguing that the UDHR “is the only instrument universally applicable to all states which catalogues and defines the human rights and fundamental freedoms” that the U.N. Charter binds states to respect, and that nonmember states must respect because it is customary international law); Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn in Rights in International Law*, 19 EUR. J. INT’L L. 903, 913 (2008) (recalling that the UDHR’s status of customary international law developed from the abundance of references to it in later UN documents and state practices following its principles).
position that IHRL is not ceded in situations of armed conflict.  

There are several treaties that are significant in this context for members of the coalition. Australia, Belgium, Canada, France, Iraq, Syria, Turkey, the U.K., and the U.S. are all parties to the *International Covenant on Civil and Political Rights (ICCPR).*  

Australia, Belgium, Canada, France, Iraq, Syria, Turkey, and the U.K. are all parties to the *Convention on the Rights of the Child (CROC).* The U.S. is not a party to the CROC as it has not yet ratified the treaty, however, the U.S. did sign the treaty in 1995.

The extent to which the obligations raised by these treaties apply to coalition members in their engagement in Iraq and Syria varies depending on each member’s degree of engagement. The ICCPR is applies both within a state party’s territory and in regards to individuals “subject to its jurisdiction.”  

The CROC also applies to each child within state parties’ “jurisdiction.” “Jurisdiction” is not synonymous with the territorial boundaries of the state party, or with the jurisdiction of its courts. Rather, jurisdiction has more to do with individuals and areas within the effective control of a state party. For instance, the Human Rights Committee has clarified that the obligations of state parties apply extra-territorially, to persons within the “power or effective control of that State Party, even if not

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83. UNCRC, *supra* note 17.  


85. ICCPR, *supra* note 82, at 173.  

86. UNCRC, *supra* note 17, at 46.
situated within the territory of the State Party.” Situations where
states have used military force outside of their borders, such as to
transfer refugees on a military vessel, have been found to amount to
“effective control.” The Human Rights Committee has also
confirmed that states can be accountable under the ICCPR “for the
actions of their authorities outside their own territories, including in
occupied territories.”

Additionally, coalition members should always be aware of the
IHRL obligations of their regional partners. The coalition is working
in partnership with the Iraqi government to regain its territory, a
significant element of its mandate being to train Iraqi personnel.
Because Iraq is a signatory to the above treaties, all of its actions are
subject to their jurisdiction. Noting that Syria is also a party to the
above conventions, the Coalition has also previously supported
certain Syrian rebel groups—including the Kurdish Democratic
Union Party—by providing training and equipment. According to

87. Human Rights Comm., General Comment No. 31, supra note 81, ¶ 10.
88. See Hirsi Jamaa v. Italy, 2012-II Eur. Ct. H.R. para. 37 (discussing the
Human Rights Committee’s condemnation of the Italian practice of “intercepting
boats full of migrants on the high seas and pushing them back to Libya without the
required screening”).
89. Concluding Observations, supra note 81, ¶ 11.
90. Jim Michaels, How the U.S.-Led Coalition Transformed Iraq’s Army into a
Fighting Force, USA TODAY (Oct. 19, 2016, 3:27 PM),
https://www.usatoday.com/story/news/world/2016/10/19/united-states-led-
coalition-iraq-military-islamic-state/92415314/ (discussing coalition efforts to
teach “infantry, armor and tank skills to Iraqi soldiers” and to help commanders
direct large combat formations . . . during complex operations”).
91. Cf. McInnis, supra note 56, at 1-2 (explaining that Iraq is a member of the
coalition to counter the Islamic State, and describing the legal basis for the
coalition).
92. Emile Hokayem, Obama’s Disastrous Betrayal of the Syrian Rebels,
02/05/obamas-disastrous-betrayal-of-the-syrian-rebels/.
93. W.J. Hennigan, Pentagon to Try Against Training Syrian Rebels, L.A.
TIMES (Mar. 17, 2016, 8:06 AM), http://www.latimes.com/world/middleeast/la-fg-
pentagon-syria-20160317-story.html; Tara McKelvey, Arming Syrian Rebels:
magazine-33997408; Paul McLeary, The Pentagon Wasted $500 Million Training
Syrian Rebels. It’s About to Try Again., FOREIGN POL’Y (Mar. 18, 2016, 3:05 PM),
http://foreignpolicy.com/2016/03/18/pentagon-wasted-500-million-syrian-rebels/;
Syria: Abductions, Torture and Summary Killings at the Hands of Armed Groups,
the International Law Commission, “the conduct of an insurrectional
movement which becomes the new government of a State shall be
considered an act of that State under international law,” meaning
that the group “will also be held responsible, as a state, for their
unlawful acts committed while they were a non-state actor.”

The UDHR, ICCPR, and CROC all affirm a right to life. The
ICCPR provides that “no one shall be arbitrarily deprived of his
life,” and in signing the CROC, state parties “recognize that every
child has the inherent right to life.” The CROC also obliges state
parties to “ensure to the maximum extent possible the survival and
development of the child.” None of the treaties provide an
exception to this provision. Consequently, it is reasonable to deduce
that, where military actions deprive ISIS child soldiers of their right
to life, they are acting in violation of IHRL.

There are a number of other IHRL provisions that are inconsistent
with coalition forces knowingly targeting ISIS’ child soldiers. The
UDHR and ICCPR have provisions against “cruel, inhuman or
degrading treatment or punishment” of persons. The CROC, in
Article 19, obliges state parties to protect children from “all forms of
physical or mental violence, injury or abuse, neglect or negligent
treatment.” Article 37 prohibits “cruel, inhuman or degrading
treatment or punishment,” capital punishment of children, and
arbitrary deprivation of liberty. The CROC also obliges state
parties to provide “special protection” to children who are

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94. G.A. Res. 56/83, art. 10(1) (Jan. 28, 2002).
95. Andrew Clapham, Human rights obligations of non-state actors in conflict
96. ICCPR, supra note 82, at 32 (“Every human being has the inherent right to
life. This right shall be protected by law. No one shall be arbitrarily deprived of
life.”); G.A. Res. 217 (III) A, supra note 79, art. 3 (“Everyone has the right to life,
liberty and the security of person.”); UNCRC, supra note 17, at 47 (“States Parties
recognize that every child has the inherent right to life.”).
97. ICCPR, supra note 82, at 32.
98. UNCRC, supra note 17, at 47.
99. Id.
100. ICCPR, supra note 82, at 33; G.A. Res. 217 (III) A, supra note 79, art. 5.
101. UNCRC, supra note 17, at 50.
102. Id. at 55.
“temporarily or permanently deprived of his or her family environment,” to provide children with access to health care services, and to take appropriate measures to ensure children have a “standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”

VI. ARE CHILD SOLDIERS LAWFUL MILITARY OBJECTS UNDER INTERNATIONAL HUMANITARIAN LAW?

The conflict in Iraq and Syria involves a “resort to armed force between two or more states” and is consequently considered an international armed conflict under IHL. As an international armed conflict, coalition members to the conflict are subject to the provisions of the four Geneva Conventions, and Additional Protocol I. Much of IHL forms customary international law, which binds state and non-state parties to the conflict equally. Customary IHL is collated by the International Committee of the Red Cross.

103. Id. at 52.
104. Id.
105. Id. at 53.
106. INT’L COMM. RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 5 (2008); see Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”).
108. HENCKAERTS & DOSWALD-BECK, supra note 1, at xxxi.
109. Id. (asserting that the International Committee of the Red Cross initiated
Children are provided with special status in IHL. Rule 135 of Customary IHL establishes that children who are affected by armed conflict “are entitled to special respect and protection.” This rule is grounded in a number of provisions. Article 23 of the Geneva Convention IV places an obligation on states to permit free passage of “foodstuffs, clothing and tonics” to children under fifteen years of age, and article 24 obliges states to step in to protect children under fifteen who are orphaned or separated from their families as a result of conflict, so that they are “not left to their own resources.” Article 70(1) of Additional Protocol I provides that “in the distribution of relief consignments” priority should be given to children and 77(1) provides that “children shall be the object of special respect.” Article 77(1) was affirmed by both the Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia and the Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina.

To the extent that children are civilians, they are protected by the fundamental doctrine of IHL: the principle of distinction. Rule 1 of Customary IHL holds that parties to a conflict “must at all times distinguish between civilians and combatants” and that “attacks may only be directed against combatants” and not civilians. Rule 1 has its basis in the preamble of the 1868 St. Petersburg Declaration, which holds that “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces

the creation of the four Geneva Conventions).

110. Id. at 479-82.
111. Fourth Geneva Convention, supra note 107, 75 U.N.T.S. at 303-04.
112. Id. at 304.
113. Protocol I, supra note 2, 1125 U.N.T.S. art. 70(1).
114. Id. art. 77(1).
of the enemy.""\textsuperscript{117} Article 22 of the 1863 Lieber Code also calls for a "distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms,"\textsuperscript{118} and article 1 of the 1880 Oxford Manual provides that "acts of violence" are only permitted "between the armed forces of belligerent states."	extsuperscript{119} Article 25 of the Hague Regulations of 1899 and 1907 also prohibits the attack of undefended civilian buildings, such as "towns, villages, [and] dwellings ["habitations" in the 1899 document]."\textsuperscript{120} Article 48 of Additional Protocol I of 1977 codifies the principle of distinction.\textsuperscript{121}

If a party to a conflict does not distinguish between civilian and military objects, they are in clear violation of IHL. Rule 11 of Customary IHL provides that attacks that do not discriminate between civilian and military objects are prohibited.\textsuperscript{122} This is codified by Article 51(4) of Additional Protocol I which holds that "indiscriminate attacks are prohibited," and Article 85(3)(b) which provides that it is a grave breach of the protocol for a party to a conflict to launch "an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects."\textsuperscript{123} The military manuals of coalition member states all affirm the prohibition on indiscriminate attacks.\textsuperscript{124}

\textsuperscript{117} Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 4000 Grammes Weight, Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297.


\textsuperscript{120} Hague II, supra note 2, at 257; Hague IV, supra note 2, at 648.

\textsuperscript{121} Protocol I, supra note 2, 1125 U.N.T.S. at 25 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.").

\textsuperscript{122} Henckaerts & Doswald-Beck, supra note 1, at 37.

\textsuperscript{123} Protocol I, supra note 1, 1125 U.N.T.S. at 26, 41.

Rule 15 of Customary IHL places a significant burden on armed forces to ensure that civilians are not being targeted, providing that “constant care must be taken to spare the civilian population, civilians and civilian objects” and that “all feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.”

This rule has its basis in Article 2(3) of the 1907 Hague Convention IX, and is codified in Article 57(1) of Additional Protocol I, which also imbues a burden of “constant care” onto parties to a conflict. The military manuals of coalition member states also echo these provisions. For example, both Australia’s 1994 Defense Force Manual and its 2006 Laws of Armed Conflict (LOAC) Manual mirror the burden of “constant care.” Canada’s 2001 LOAC Manual also provides the standard that “care should always be taken to spare civilians and civilian objects.” France’s LOAC Manual and the United States’ 1976 Air Force manual additionally establish an onus of “constant care” to spare civilians from attack.

However, are ISIS’ child soldiers civilians for the purposes of the principle of distinction? Provisions indicate that when a child becomes a combatant they lose the protections of being children and civilians. Civilians are defined in Customary IHL by Rule 5 as “persons who are not members of the armed forces,” a definition that is codified in Article 50 of Additional Protocol I. The military manuals of coalition member states also echo these provisions. For example, both Australia’s 1994 Defense Force Manual and its 2006 Laws of Armed Conflict (LOAC) Manual mirror the burden of “constant care.” Canada’s 2001 LOAC Manual also provides the standard that “care should always be taken to spare civilians and civilian objects.” France’s LOAC Manual and the United States’ 1976 Air Force manual additionally establish an onus of “constant care” to spare civilians from attack.

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manuals of coalition members also follow this definition. Australia’s 2006 LOAC Manual defines a civilian as “any person not belonging to the armed forces,”133 and Canada’s LOAC Manual defines a civilian as “any person who is not a combatant.”134

In practice, military uniform and the carrying of weapons have been found to be the principle markers distinguishing combatants from civilians. For instance, the International Criminal Tribunal for the Former Yugoslavia, in its 2007 Trial Chamber Judgement in Prosecutor v. Dragomir Milošević,135 noted “[t]he generally accepted practice is that combatants distinguish themselves by wearing uniforms or, at the least, a distinctive sign, and by carrying their weapons openly.”136 In 2006, the War Crimes division of the Appellate Panel of the Court of Bosnia and Herzegovina additionally held that the absence of a uniform and arms should “indisputably indicate” that persons are civilians.137

Notably, ISIS’ child soldiers are depicted in ISIS propaganda as wearing similar uniforms to adult soldiers,138 and a video uploaded by the organization to social media in September 2016 depicts child soldiers as carrying and firing large firearms.139 Additionally, reports indicate that ISIS deploys its child combatants much in the same way as it does adult combatants.140 For these reasons, the principle of distinction does little to protect ISIS’ child soldiers from the acts of

136. Id. (adding that, in case of doubt, the person is assumed to be a civilian).
137. Prosecutor v. Maktouf, Case No. KPŽ 32/05, Ct. of Bosn. & Herz. 359, 362 (Apr. 4, 2006) (articulating factors that indicate a civilian: location, dress, and whether they are armed).
138. E.g., Bloom, supra note 23 (decrying the use of child soldiers).
140. See Bloom, Horgan & Winter, supra note 22, at 31 (examining the similar patterns of target types and patterns of involvement between adult and child combatants).
coalition forces as they are unlikely to be distinguished as civilians under IHL given their wearing of uniforms, bearing arms, and engagement as combatants.

Similarly, ISIS’ child soldiers are not protected as civilians under IHL as they are actively engaged in hostilities, by being deployed as if adults.\textsuperscript{141} Under Rule 6 of Customary IHL, civilians lose protection from attack under IHL when they voluntarily take a direct part in hostilities.\textsuperscript{142} The rule is codified in article 51(3) of Additional Protocol I.\textsuperscript{143} The military manuals of coalition members also affirm this rule. The Australian LOAC Manual of 2006 provides that “civilians are only protected as long as they refrain from taking a direct part in hostilities.”\textsuperscript{144} Canada’s 2001 LOAC manual asserts, “civilians who take a direct part in hostilities . . . are unlawful combatants. They lose their protection as civilians and become legitimate targets for such a time as they take a direct part in hostilities.”\textsuperscript{145} At the International Criminal Tribunal for the Former Yugoslavia, in the case of\textit{Prosecutor v. Kupreskić},\textsuperscript{146} the Trial Chamber held that “if a group of civilians takes up arms in an occupied territory and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent . . . .”\textsuperscript{147}

Indeed, whilst IHL is clear that child soldiers should not be permitted to participate in hostilities—under Rule 137 of Customary IHL and Article 77(2) of Additional Protocol I\textsuperscript{148}—IHL does not

\textsuperscript{141} See Bloom, \textit{supra} note 23 (detailing how children learn sophisticated military techniques, such as sniper training).

\textsuperscript{142} HENCKAERTS & DOSWALD-BECK, \textit{supra} note 1, at 20 (advancing the importance of Article 51 over any reservations).

\textsuperscript{143} Protocol I, \textit{supra} note 2, 1125 U.N.T.S. at 37 (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”).

\textsuperscript{144} Australian Manual, \textit{supra} note 14, § 5.36.

\textsuperscript{145} Canadian Manual, \textit{supra} note 15, § 318.1.


\textsuperscript{147} Id.

\textsuperscript{148} See Protocol I, \textit{supra} note 2, 1125 U.N.T.S. at 39 (asserting signatory parties’ duties to limit child recruitment); Protocol II, \textit{supra} note 9, at 612; Agreement Bosnia and Herzegovina, \textit{supra} note 115, para. 2.3 (accordig civilians of Bosnia and Herzegovina protections from hostilities); Memorandum Croatia and
address the status of child soldiers when they are actively engaged in hostilities. Some theorists argue the effect of this silence is that child soldiers, once engaged in hostilities, enjoy only the same rights as adult combatants. For instance, Matthew Happold stated, “[W]hen participating in hostilities children are no more privileged than any other combatant. There are no additional rules restricting what the forces of an adverse power may do to them. They may be shot, shelled, bombed or bayoneted just as may any other combatant.”

Joanna Nicholson similarly states that “[a]lthough children, including child soldiers, are entitled to special protection under IHL, no treaty provision addresses the specific issue of targeting and child soldiers, leading to the presumption that child soldiers may be targeted in the same way as their adult counterparts under IHL.” According to Alex Sinha, “As combatants . . . [child soldiers] may very well pose a threat, and giving armed forces the power to neutralise that threat is (as a general matter) compatible with the Geneva Conventions.”

The United States’ Law of War Manual provides a window into state practice regarding the status of engaged child soldiers, addressing how child soldiers should be considered by opposing forces head-on. According the Manual, “[c]ertain provisions of treaties and U.S. law seek to restrict the use or recruitment of children in armed conflict. If children are nonetheless employed in armed conflict, they generally are treated on the same basis as adults, although children may be subject to special treatment in detention because of their age.”

The practical effect of the above is that coalition forces, under IHL, may lawfully complete airstrikes and ground strikes against locations where they have knowledge of child soldiers being present,

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Yugoslavia, *supra* note 115, para. 4 (extending protections to civilians in the power of the adverse party); HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 485 (“children must not be allowed to participate in hostilities”).

149. *See* MATTHEW HAPPOLD, CHILD SOLDIERS IN INTERNATIONAL LAW 101 (2005).


and knowledge that attacking those locations may result in the death and injury of those child soldiers.

VII. THE NTAGANGA PRE-TRIAL DECISION ON THE CONFIRMATION OF CHARGES AND THE STATUS OF CHILD SOLDERS UNDER INTERNATIONAL CRIMINAL LAW

A clear gap between IHRL and IHL in regards to the protections afforded to child soldiers actively engaged in hostilities is evident. IHRL acknowledges the special status and right to life of children and imbues state parties to human rights treaties with a responsibility to step in and protect vulnerable children. IHL, on the other hand, does little to protect child soldiers once they are actively engaged—where a child performs the adult functions of a combatant, IHL treats them as such.

The case of Prosecutor v. Bosco Ntaganda is currently in the trial stage at the International Criminal Court. Ntaganda is charged with 13 counts of war crimes and five counts of crimes against humanity. Counts 6 and 7 are for the rape and sexual slavery of child soldiers as war crimes pursuant to Article 8(2)(e)(vi) of the Rome Statute. Counts 14, 15, and 16 are for the war crime of the conscription and enlistment of child soldiers under fifteen-years-old, and using these child soldiers to participate actively in hostilities.

In the Decision on the Confirmation of Charges in June 2014, the

153. E.g., UNCRC, supra note 17, art. 3(2), 6(1), 38, 39 (including, inter alia, the duty of State Parties to maximize the development of children and minimize any physical or psychological damage caused by armed conflict).
154. E.g., HENCKAERTS & DOSWALD-BECK, supra note 1, at 20.
156. See id. (justifying its jurisdiction from the Democratic Republic of Congo’s ratification of the Rome Statute on April 11, 2002).
157. Id.
158. See Prosecutor v. Ntaganda, ICC-01/04-02/06, Trial Decision, 28-30, (June 9, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF (recognizing that the Chamber must determine whether the Court has jurisdiction over these charges).
159. See id. at 30-35 (providing the evidence to justify the charges, including evidence of the recruitment campaign).
Pre-Trial Chamber II, in relation to Counts 6 and 7, addressed the issue of child soldiers under fifteen-years losing their protection under IHL. The Chamber held:

[T]he mere membership of children under the age of fifteen years in an armed group cannot be considered as determinative proof of direct/active participation in hostilities, considering that their presence in the armed group is specifically proscribed under international law in the first place. Indeed, to hold that children under the age of fifteen years lose the protection afforded to them by IHL merely by joining an armed group, whether as a result of coercion or other circumstances, would contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities.  

The Chamber went on to clarify the exact circumstances in which child soldiers lose protection afforded by IHL:

[C]hildren under the age of fifteen years lose the protection afforded by IHL only during their direct/active participation in hostilities . . . those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of a sexual nature, including rape . . . The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically precludes active participation in hostilities at the same time.

The Chamber’s finding that child soldiers lose their IHL protections only during “direct/active participation in hostilities” has real implications for the coalition against ISIS, as does the finding that IHL protections are engaged when “elements of force/coercion or the exercise of rights of ownership” are implemented over children. Reports indicate that, in many cases, ISIS’ child soldiers participate against their will, as a consequence of ISIS’ occupation of their area, and that children participate in training under threat of

160. Id. at 28, ¶ 78.
161. Id. at 29, ¶ 79.
162. Id. at 28-29, ¶¶ 78-79 (limiting the scope of the IHL).
163. See generally Abdallah, supra note 33 (following thirteen-year-old Mohamed’s experience as an involuntary soldier); Berlinger, supra note 24 (claiming a generation of children are lost due to their conscription as soldiers); Bloom, supra note 23 (categorizing the children soldiers as follows: those born to foreign fighters, those born to local fighters, those who were abandoned, those
physical violence.\textsuperscript{164}

The implications of this decision may be that coalition forces are prohibited from attacking ISIS child soldier training facilities, where children are being trained in physically violent situations and often against their will.\textsuperscript{165} Additionally, when coalition forces have knowledge of ISIS’ child soldiers being present at a potential airstrike target, they will need to make an evaluation of the nature of the children’s engagement at that location including whether at the time of the airstrike the children could be considered to be actively participating in hostilities.

\textbf{VIII. DO THE ACTS OF CHILD SOLDIERS INCUR CRIMINAL RESPONSIBILITY?}

In December 2016, the United Nations General Assembly voted to establish the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic ("the Mechanism"), with a temporal jurisdiction of those crimes committed since March 2011.\textsuperscript{166} The Mechanism will operate under the auspices of the United Nations, and work in conjunction with the Independent International Commission of Inquiry on the Syrian Arab Republic, which was established by the Human Rights Council in 2011.\textsuperscript{167} The Mechanism’s mandate is to collect and preserve evidence relating to

\begin{quote}
\textsuperscript{164} See Nima Elbagir & Peter Wilkinson, ‘Like Coming Back to Life’ says Child Soldier who Escaped ISIS, CNN (Jan. 12, 2016, 5:05 PM), http://www.cnn.com/2016/01/12/middleeast/isis-child-soldiers/index.html (detailing the child’s physical punishment, such as broken legs and starvation).
\textsuperscript{165} See Abdallah, \textit{supra} note 33 (detailing how ISIS threatened to kill the father of a thirteen-year-old boy who was being forced to attend a children’s training camp); \textit{see also} Berlinger \textit{supra} note 24; Bloom, \textit{supra} note 23 (revealing that ISIS forces the children to participate in acts so horrendous that their family members will not allow them to return home).
\textsuperscript{167} \textit{Id}.
\end{quote}
“violations of international humanitarian law and human rights violations and abuses” which will support future proceedings “in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”\textsuperscript{168}

Any future tribunal or court addressing the crimes committed by ISIS in both Syria and Iraq will be faced with the question of whether or not ISIS’ former child combatants can and should be held criminally responsible for their actions.

IHRL does not deal directly with the potential criminal responsibility of child soldiers, but it does deal with the criminal responsibility of children in general. Principle 4 of the 1985 “Beijing Rules” imbues states with an onus not to charge children with crimes they lack the “moral and psychological components” to commit.\textsuperscript{169} The 1990 Convention on the Rights of the Child, in Article 40(3)(a), calls for the establishment of a minimum age of criminal responsibility by state parties, but does not set an age.\textsuperscript{170} In 2007, the Committee on the Rights of the Child, relying on the principles outlined in the “Beijing Rules,” recommended an absolute minimum age of criminal responsibility of twelve years of age.\textsuperscript{171} The Committee also added that a minimum age of criminal responsibility of between fourteen and sixteen years of age was ideal and would ensure that “the child’s human rights and legal safeguards are fully respected.”\textsuperscript{172} Thus, IHRL is not inconsistent with ISIS’ child soldiers and former child soldiers being charged with crimes they committed when they were between twelve and eighteen years of age.

IHL does guarantee some protections and fair trial rights for children who are detained and charged for reasons relating to the conflict, which indicates an assumption that child combatants can be

\textsuperscript{168} Id.
\textsuperscript{170} See UNCRC, supra note 17, at 57.
\textsuperscript{172} See id. ¶ 33.
detained for and charged with violations of IHL. Article 76 of Geneva Convention IV provides that “proper regard shall be paid to the special treatment due to minors” in regards to the treatment of protected persons who are accused of some offence. Article 89 of Geneva Convention IV provides that “children under fifteen years of age [who are interned] shall be given additional food, in proportion to their physiological needs.” Article 77(4) of Additional Protocol I also provides that children “shall be held in quarters separate from the quarters of adults.” Article 68 of Geneva Convention IV and article 77(5) of the Additional Protocol I also provide that the death penalty shall not be imposed on persons who were under eighteen years of age at the time of the commission of their offence.

ICL, however, has consistently refused to attach criminal responsibility to the acts of child soldiers. At the Special Court for Sierra Leone, the Office of the Prosecutor was provided with the jurisdiction to potentially indict persons who had been between fifteen and eighteen years of age at the time of the commission of their crimes. However, the Office of the Prosecutor “decided early in developing a prosecutorial plan that no child between fifteen and eighteen had the sufficiently blameworthy state of mind to commit war crimes in a conflict setting.” David Crane, the former Chief Prosecutor, wrote of the court’s June 2007 Trial Judgement against the leadership of the Armed Forces Revolutionary Council:

This marked the first time in history where commanders and political leaders were held liable for this recently defined crime against humanity. The Trial Chamber sent a clear message to the world that a person who recruits child soldiers into a conflict is a war criminal, but the children recruited and forced to commit unspeakable acts are not.

173. See Fourth Geneva Convention, supra note 107, 75 U.N.T.S. at 194.
174. See id. at 198.
177. See U.N. Secretary-General, supra note 10, ¶ 17.
179. See id. at 13.
Reflecting this approach, the International Criminal Court (ICC) does not have jurisdiction over child soldiers. Pursuant to article 26 of the Rome Statute, which created the ICC, the court has no jurisdiction over persons who were younger than eighteen years old at the time of the commission of the alleged crime.\textsuperscript{180} ICC jurisprudence has drawn a line, however, regarding the immunity of child soldiers. Being a child soldier at one point does not shield a person from prosecution for crimes committed once they are older than eighteen.\textsuperscript{181} In the case of \textit{Prosecutor v. Dominic Ongwen},\textsuperscript{182} the defense argued that because Ongwen had been forcibly recruited as a child soldier he should be immune from prosecution for crimes committed as an adult.\textsuperscript{183} The Pre–Trial Chamber, in the March 2016 Decision on the Confirmation of Charges, strongly rejected this argument as being without legal basis.\textsuperscript{184}

David Crane envisaged a situation where the criminal responsibility of child soldiers in future conflicts might be raised. He observed that,

\begin{quote}
[j]ust as we could not hold these Sierra Leonean children responsible for the horrific violence they were forced to carry out, we also cannot hold similar children involved in other conflicts accountable for their acts, no matter our level of interest in the region or that our forces were the targets of the violence.\textsuperscript{185}
\end{quote}

Fanny Leveau also points to the significance of taking into account relevant neuro scientific research when considering whether child combatants have the necessary mens rea to commit crimes, asserting that “studies demonstrate that, up to a certain age, a child is not fully able to understand his or her acts, nor the consequences attached to

\textsuperscript{180} Rome Statute, \textit{supra} note 20, at 106.
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{See} Crane, \textit{supra} note 178, at 15.
The ICL approach tacitly acknowledges that, rather than prosecuting child soldiers, efforts should be put into Disarmament, Demobilization and Reintegration efforts to enable former child soldiers to rejoin civilian society. David Crane notes that, in regards to the Special Court for Sierra Leone’s Office of the Prosecutor’s decision not to prosecute former child soldiers, prosecutors were “aware of the clear legal standard highlighted in international humanitarian law” and that “the intent in choosing not to prosecute was to rehabilitate and reintegrate this lost generation back into society.”

Reintegrating former child soldiers is a complex process that necessitates addressing the psychological harm former child soldiers have endured, providing education and skills training, and conducting mediation with communities or families that may be reluctant to welcome home former child soldiers. For ISIS’ child soldiers, the inclusion of de-radicalization programs will also be imperative.

IX. CONCLUSION

Member states of the Coalition to Counter ISIS should be cautious in both their airstrike and ground operations in regards to targeting ISIS’ child combatants. Whilst it may superficially seem to be permissible under IHL to afford child combatants only the same protections as are afforded to adult combatants, the ICC’s Pre-Trial Chamber in Prosecutor v. Bosco Ntaganda opened the doors for an interpretation of IHL that potentially disrupts this paradigm.

187. See Crane, supra note 178, at 15.
188. John Williamson, The disarmament, demobilization and reintegration of child soldiers: social and psychological transformation in Sierra Leone, 4 INTERVENTION 185, 189-90 (2006); Mark Iacono, The Child Soldiers of Sierra Leone: Are they Accountable for their Actions in War?, 25 SUFFOLK TRANSACTIONAL L. REV. 445, 449-50 (2003) (“The people of Sierra Leone disagree on how to treat these child soldiers because their memories of recent brutality create a strong desire for justice and accountability, regardless of the soldiers’ young age.”).
According to the Decision on the Confirmation of Charges in Ntaganda, child soldiers only lose the special protections civilian children ordinarily receive under IHL in the situation where they are actively or directly engaged in the hostilities. Additionally, in situations where child soldiers are subject to powers of control and ownership, such as those potentially exercised by ISIS’ violent commanders and recruiters, child soldiers retain their protections as child civilians under IHL. Noting this development in IHL jurisprudence, coalition members would be wise to evaluate the available intelligence regarding the activities of child soldiers at potential target locations, and the extent to which these child soldiers may be actively engaged in hostilities, prior to launching military attacks that would put these child soldiers at risk. In this way, coalition forces would be acting in a manner that is both consistent with IHL and conscious of the requirements of IHRL.

In the future post-conflict transitional justice mechanisms of Iraq and Syria, the criminal responsibility of former child soldiers will inevitably be addressed; however, it is important that this occurs within the context of an underlying acknowledgement of ISIS’ child soldiers being, first and foremost, victims of a serious international crime themselves. At a minimum, these measures should be performed in a manner consistent with both IHRL, by not attaching criminal responsibility to the acts of persons who were under IHRL’s recommended age of fourteen at the time of their commission, and IHL, by respecting IHL protections on conditions of detention. Transitional justice mechanisms may also strengthen their mandate by adhering to the approaches of the ICC and the Special Court of Sierra Leone. For instance, jurisdiction over crimes committed by persons younger than eighteen years at the time of commission may be precluded, and criminal responsibility may be assertively attached to ISIS’ child soldiers’ recruiters and commanders, and not to child soldiers themselves. Following the lead of the Special Court for Sierra Leone, efforts should instead go into disarmament, demobilization, de-radicalization and reintegration programs to combat the complex process of equipping former child soldiers to rejoin and fully participate in civilian life.