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What if Goliath Killed David? The Coalition to Counter ISIS and the Status and Responsibility of ISIS' Child Soldiers

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

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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.¹ 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.² 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

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).

2. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 43(2), June 8, 1977, 1125 U.N.T.S. 23 [hereinafter *Protocol I*]; Convention Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter *Hague IV*]; Convention Respecting the Laws and Customs of War on Land art. 3, July 29, 1899, 32 Stat. 1803, T.S. No. 403 [hereinafter *Hague II*]; HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 11 (explaining that “all members of the armed forces of a party to the conflict are combatants, except medical and religious personnel”).

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"³ fought against the Philistine warrior Goliath, and won.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."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.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.⁷

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

[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.⁸

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

3. 1 *Samuel* 17:33 (King James).

4. *Id.* at 17:4, 51.

5. *Id.* at 17:45.

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).

7. COALITION TO STOP CHILD SOLDIERS, CHILD SOLDIERS: GLOBAL REPORT 2008 3 (2008).

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).

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

9. See Protocol I, *supra* note 2, 1125 U.N.T.S. at 39; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3)(c), June 8, 1977 [hereinafter Protocol II].

10. U.N. Secretary-General, *Report on the Establishment of a Special Court for Sierra Leone*, ¶ 14, U.N. Doc. S/2000/915 (Oct. 4, 2000).

11. Document IV: Memorandum of Understanding on the Procedures for the Application of the Applicable Rules of International Humanitarian Law by the Republic of Croatia, the Republic of Serbia and the Armed Forces of the FSR of Yugoslavia para. 4, Nov. 27, 1991, in *CRIMES WITHOUT PUNISHMENT HUMANITARIAN ACTION IN FORMER YUGOSLAVIA* 195, 196 (Michèle Mercier ed., 1995).

12. Document VI: Agreement on Respect for the Rules of International Humanitarian Law by the Plenipotentiaries Representing the Parties to the Conflict in Bosnia-Herzegovina para. 2.3, May 22, 1992, in *CRIMES WITHOUT PUNISHMENT HUMANITARIAN ACTION IN FORMER YUGOSLAVIA* 203, 205 (Michèle Mercier ed., 1995).

13. Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Integration of the Armed Forces of the Two Parties art. 73, Aug. 3, 1993.

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.¹⁴ Canada, France, the U.K., and the U.S. set a minimum voluntary enlistment age of fifteen years.¹⁵ The U.S. also stipulates that soldiers enlisted who are under eighteen years should not take direct part in hostilities.¹⁶

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.¹⁷ 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

14. DEPARTMENT OF DEFENCE, DEFENCE INSTRUCTIONS (GENERAL) MANAGEMENT AND ADMINISTRATION OF AUSTRALIAN DEFENCE FORCE MEMBERS UNDER 18 YEARS OF AGE para. 14 (2008) (Austl.); AIR CHIEF MARSHAL A.G. HOUSTON, LAW OF ARMED CONFLICT § 9.51 (Australian Defence Headquarters 2006) [hereinafter Australian Manual].

15. U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 4.20.5.1 (2015) [hereinafter U.S. MANUAL]; MINISTÈRE DE LA DÉFENSE, MANUEL DE DROIT DES CONFLITS ARMÉS [MANUAL OF THE LAW OF ARMED CONFLICT] 37, 49 (2012) (Fr.) [hereinafter French Manual]; MINISTRY OF DEFENCE, THE JOINT SERVICES MANUAL OF THE LAW OF ARMED CONFLICT § 9.9.1 (2004) (U.K.) [hereinafter U.K. Manual]; OFFICE OF THE JUDGE ADVOCATE GENERAL, THE LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS § 1714.1.c (2001) (Can.) [hereinafter Canadian Manual].

16. See U.S. MANUAL, *supra* note 15, § 4.20.5.2.

17. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 1, *opened for signature* June 17, 1999, 80 Stat. 271, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000); Convention on the Rights of the Child art. 38(3), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 56 (entered into force Sept. 2, 1990) [hereinafter UNCRC].

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.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.²⁰ Similarly, recruitment of children under fifteen as soldiers was also a war crime under the Statute of the Special Court for Sierra Leone.²¹

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.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.”²³ News organizations have reported on parents in ISIS-controlled territories

note 1, art. 2, 3.

19. *Id.* art. 4.

20. Rome Statute of the International Criminal Court 97, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

21. Statute of the Special Court for Sierra Leone art. 4, Mar. 8, 2002, 2178 U.N.T.S. 145.

22. See Mia Bloom, John Horgan & Charlie Winter, *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.”).

23. Mia Bloom, *Cubs of the Caliphate: The Children of ISIS*, FOREIGN AFFAIRS (July 21, 2015) <https://www.foreignaffairs.com/articles/2015-07-21/cubs-caliphate>.

being forced to surrender their children to ISIS, under the threat of death, for soldier training.²⁴ In some situations, children in ISIS-controlled territories may choose to join, perceiving that enlisting will provide them with better opportunities.²⁵ 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.²⁶ 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."²⁷ 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.²⁸

Child soldiers have also been recruited through ISIS' de-facto control of school systems in occupied areas.²⁹ 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

24. Joshua Berlinger, *ISIS' Child Soldiers: What Will Happen to the 'Cubs of the Caliphate'?*, CNN (May 28, 2015), <http://edition.cnn.com/2015/05/20/middleeast/isis-child-soldiers>.

25. *Id.*

26. HUMAN RIGHTS WATCH, *MAYBE WE LIVE AND MAYBE WE DIE: RECRUITMENT AND USE OF CHILDREN BY ARMED GROUPS IN SYRIA* 13 (2014).

27. Erin McLaughlin, *How ISIS Recruits Children, Then Kills Them*, CNN (Feb. 22, 2016), <http://edition.cnn.com/2016/02/19/middleeast/isis-child-soldiers/>.

28. See *Camp Jihad: Slushies, Fairground Rides, and Shari'a Law*, RADIO FREE EUR. RADIO LIBERTY (Apr. 20, 2015, 5:01 PM), <https://www.rferl.org/a/camp-jihad-slushies-fairground-rides-sharia-law/26968413.html>; see also John Horgan & Mia Bloom, *This Is How the Islamic State Manufactures Child Militants*, VICE NEWS (July 8, 2015, 9:23 AM), <https://news.vice.com/article/this-is-how-the-islamic-state-manufactures-child-militants>; HUMAN RIGHTS WATCH, *supra* note 26, at 21.

29. See Katarina Montgomery, *ISIS Sets a 'New Paradigm' for Child Soldiers: Ideology, Combat and Forced Marriage*, NEWS DEEPLY (Nov. 27, 2014), <https://www.newsdeeply.com/syria/articles/2014/11/27/isis-sets-a-new-paradigm-for-child-soldiers-ideology-combat-and-forced-marriage> (asserting that ISIS militants have changed the school curricula in local communities so that it coincides with the ISIS ideologies).

Arabic language, “along with fitness classes which start with vigorous exercises and then trainings on different types of weapons.”³⁰ 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.”³¹ All scientific subjects were banned, though children were reportedly taught how to make bombs.³² Due to forced conscription of children via the school system, many families took the risk of fleeing occupied areas.³³ There are furthermore reports of child soldier “cubs” training camps in both Syria³⁴ and Central Asia.³⁵ To accommodate and train the children of foreign fighters, ISIS also reportedly established two military schools for English speaking children.³⁶

Mia Bloom and John Horgan describe programs of systematic

30. See Abu Mohammed, *ISIS Curriculum and Educational System*, RAQQA IS BEING SLAUGHTERED SILENTLY (Sept. 18, 2016), <http://www.raqqasl.com/en/?p=1959>.

31. Samuel Osborne, *ISIS is Using Schools in Raqqa to ‘Brainwash Children and Train Them With Weapons’*, INDEP. (Sept. 18, 2016, 1:25 PM), <http://www.independent.co.uk/news/world/middle-east/isis-islamic-state-daesh-schools-raqqa-brainwash-children-a7315071.html>.

32. See *id.*

33. See Omar Abdallah, *In Raqqa’s Training Camps, ISIS Teaches Children How to Behead*, NEWS DEEPLY (Sept. 2, 2014), <https://www.newsdeeply.com/syria/articles/2014/09/02/in-raqqas-training-camps-isis-teaches-children-how-to-behead>.

34. See Tim Arango, *A Boy in ISIS. A Suicide Vest. A Hope to Live.*, N.Y. TIMES (Dec. 26, 2014), <https://www.nytimes.com/2014/12/27/world/middleeast/syria-isis-recruits-teenagers-as-suicide-bombers.html> (asserting that at one of these “cubs” camps, children are trained to fight “hate-filled Shiites”); see also Lizzie Dearden, *Isis Is Using Far More Child Soldiers Than the World Realised*, INDEP. (Feb. 19, 2016, 10:01 AM), <http://www.independent.co.uk/news/world/middle-east/isis-using-more-child-fighters-than-feared-as-suicide-bombers-and-soldiers-after-brainwashing-at-a6883626.html> (surmising that children in these camps are sent home with dolls dressed in orange clothing and instructed to behead them as homework).

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).

36. See Horgan & Bloom, *supra* note 28.

indoctrination and desensitization to extreme violence used by ISIS against its child soldiers.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.”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 training³⁹ with those who refused to participate being subjected to beatings.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.⁴¹ Children are trained to “take captives, serve as snipers, and ambush moving vehicles.”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.’”⁴³

ISIS is unusual in that it uses its child soldiers in a similar manner to its use of adult soldiers.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.”⁴⁵ Children wear the same uniform as adult

37. *See id.*

38. *See id.*

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).

40. *See id.* (describing a boy whose leg was broken in three places for disobedience).

41. *See* Joanna Paraszczuk, ‘*Next Generation*’ Stars in IS Terror-Training Video of ‘*Caliphate Cub*’, RADIO FREE EUR. RADIO LIBERTY (Oct. 18, 2015), <https://www.rferl.org/a/islamic-state-children-terror-training-video/27312748.html>.

42. *See* Horgan & Bloom, *supra* note 28.

43. *Dearden, supra* note 34; *see* Abdallah, *supra* note 33.

44. *See* Bloom, Horgan & Winter, *supra* note 22, at 31 (asserting that children are fighting right alongside adult males).

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-peek" 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).

49. See Joanna Paraszczuk, *Islamic State's Teenage 'Caliphate Cubs' Appear in New Killing Video*, RADIO FREE EUR. RADIO LIBERTY (Mar. 30, 2015, 1:21 PM), <https://www.rferl.org/a/islamic-state-beheading-video-killing-video-alawites/26928149.html>.

50. See Charlie Winter, *Shocked By the 'Cubs of the Caliphate'? Of Course You Are—That's ISIS's Plan*, GUARDIAN (Jan. 5, 2016, 8:17 AM), <https://www.theguardian.com/commentisfree/2016/jan/05/cubs-of-caliphate-isis-children-videos-propaganda>.

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.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."⁵⁴

IV. THE COALITION TO COUNTER ISIS

There are sixty-seven state participants in the US-led Coalition to Counter ISIS.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.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.⁵⁷

53. See McLaughlin, *supra* note 27.

54. *Id.*; see also Bloom, Horgan & Winter, *supra* note 22, at 32 (asserting that today's child militants are tomorrow's adult terrorists); Winter, *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).

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, Iceland, Ireland, 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).

56. KATHLEEN J. MCINNIS, CONG. RESEARCH SERV., R44135, COALITION CONTRIBUTIONS TO COUNTERING THE ISLAMIC STATE 8 (2016).

57. *Id.*

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.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.⁵⁹
5. U.K.: 400 personnel engaged in a training and advisory capacity, and undertook airstrikes.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.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.”⁶² Saudi Arabia conducted airstrike operations in Syria with an unspecified number of aircraft.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.”⁶⁴ Airstrikes aim at “destroying their infrastructure, reducing their ability to generate financial support and impeding their command and control.”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.⁶⁶ Coalition

58. *Id.*

59. *Id.* at 11.

60. *Id.*

61. *Id.*

62. MCINNIS, *supra* note 56, at 11.

63. *Id.* at 10.

64. *Fact Sheet: The Global Coalition to Counter Daesh*, U.S. DEP’T OF ST. (July 21, 2016), <https://2009-2017.state.gov/s/seci/261626.htm>.

65. *Id.*

66. *See Coalition Airstrikes Target ISIL Terrorists in Iraq, Syria*, U.S. DEP’T OF DEF. (Oct. 14, 2015), <https://www.defense.gov/News/Article/Article/622993/>

forces have also targeted a health clinic that ISIS forces were positioned inside and, allegedly, a mosque; both strikes resulted in civilian casualties.⁶⁷ Multiple news sources describe ISIS' child soldiers being killed as a result of coalition airstrikes.⁶⁸ A French airstrike against an ISIS camp in Eastern Syria in September 2015 was reported to have killed twelve child soldiers.⁶⁹

coalition-airstrikes-target-isil-terrorists-in-iraq-syria (noting destruction of homemade explosives cache, tactical units, buildings, and fighting positions); *Coalition Airstrikes Continue Against ISIL Targets in Syria, Iraq*, U.S. DEP'T OF DEF. (Oct. 5, 2015), <https://www.defense.gov/News/Article/Article/621806/coalition-airstrikes-continue-against-isil-targets-in-syria-iraq> (listing strikes on ISIS tactical units, vehicles, buildings, fighting position, rocket rails, and weapon storage facility); *Coalition Continues Airstrikes Against ISIL Targets in Syria, Iraq*, U.S. DEP'T OF DEF. (Mar. 15, 2015), <https://www.defense.gov/News/Article/Article/604281> (listing destruction of ISIS tactical unit, excavators, vehicles, and staging area); see also *Iraq: Anti-ISIS Strike Harms 12 Civilians*, HUM. RTS. WATCH (Jan. 26, 2017), <https://www.hrw.org/news/2017/01/26/iraq-anti-isis-strike-harms-12-civilians> (asserting that an anti-ISIS airstrike carried out on a vehicle by either the United States-led coalition or Iraqi government forces killed one civilian and injured 11 others); Lizzie Dearden, *Official Total of Civilians Killed by US-Led Coalition Air Strikes Against Isis in Syria and Iraq rises to 188*, INDEP. (Jan. 3, 2017), <http://www.independent.co.uk/news/world/middle-east/isis-air-strikes-syria-iraq-civilian-casualties-killed-us-led-coalition-america-britain-france-total-a7508031.html> (highlighting that the official total of civilians killed by the United States-led coalition's anti-ISIS airstrikes is 188).

67. *Iraq: Airstrike Hits Clinic, 8 Civilians Died*, HUM. RTS. WATCH (Nov. 29, 2016), <https://www.hrw.org/news/2016/11/29/iraq-airstrike-hits-clinic-8-civilians-died>; *Iraq: Investigate Mosque Strike that Killed Civilians*, HUM. RTS. WATCH (Oct. 24, 2016), <https://www.hrw.org/news/2016/10/24/iraq-investigate-mosque-strike-killed-civilians>.

68. See *More Than 50 Daesh Child Soldiers Killed in 2015: Monitor*, SYRIAN OBSERVATORY FOR HUM. RTS. (July 16, 2015), <http://www.syriaahr.com/en/?p=25055> (noting that at least 52 child soldiers under the age of sixteen were killed in the first part of 2015); *Scores of ISIL Child Soldiers 'Killed' in Syria in 2015*, AL JAZEERA (July 15, 2015), <http://www.aljazeera.com/news/2015/07/scores-isil-child-soldiers-killed-syria-2015-150715132745980.html> (claiming that as many as thirty-one child soldiers were killed in July 2015 in explosions, clashes, and airstrikes by the US-led coalition and Syria's regime).

69. *French Strike in Syria Kills 30 Jihadists, Says Monitor Group*, TIMES OF ISR. (Sept. 30, 2015, 12:58 PM), <http://www.timesofisrael.com/french-strike-in-syria-kills-30-jihadists-says-monitor-group> (reporting that France's first airstrike in Syria as part of the US-led coalition killed at least thirty ISIS fighters including twelve child soldiers); *French Syria Raid 'Killed 12 Child Soldiers'*, RADIO FREE EUR. RADIO LIBERTY (Sept. 30, 2015), <http://www.rferl.org/a/syria-french-air-strike-kills-12-child-soldiers/27279701.html>; *IS Conflict: French Raid in Syria 'Kills 12 Child Soldiers'*, BBC (Sept. 30, 2015), <http://www.bbc.com/news/world->

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.⁷⁰ 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.⁷¹ Child soldiers formed the majority of ISIS combatants killed, with 180 adult fighters also being killed.⁷²

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.⁷³ 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,⁷⁴ 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.⁷⁵ 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.”⁷⁶

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

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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).

71. Matt Payton, *More Than 300 ISIS Child Soldiers Have Been Killed in Mosul*, *Human Rights Watchdog Reports*, INDEP. (Oct. 30, 2016), <http://www.independent.co.uk/news/world/middle-east/isis-child-soldiers-mosul-syria-300-hundred-a7388166.html>.

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;⁷⁷ and,

2. Coalition partner Iraq, in conducting ground combat operations, will encounter ISIS child soldier adversaries.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)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.⁸⁰ The Human Rights Committee has been firm in its

77. See *French Strike in Syria Kills 30 Jihadists, Says Monitor Group*, *supra* note 69 (citing French President Francois 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 'Kills 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).

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).

79. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

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.⁸¹

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).⁸² Australia, Belgium, Canada, France, Iraq, Syria, Turkey, and the U.K. are all parties to the *Convention on the Rights of the Child* (CROC).⁸³ 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 1995.⁸⁴

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."⁸⁵ The CROC also applies to each child within state parties' "jurisdiction."⁸⁶ "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

81. See Human Rights Comm., General Comment No.31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.1326 (Mar. 29, 2004) (stating that the Covenant applies in "situations of armed conflict" and that Covenant rights and rules of international humanitarian law are "complementary, not mutually exclusive"); see also Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Australia, ¶ 11, U.N. Doc. CCPR/C/AUS/CO/5 (May 7, 2009) [hereinafter *Concluding Observations*] (emphasizing the Committee's concern that several provisions of the Australian Anti-Terrorism Act are incompatible with the Covenant).

82. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S 171 [hereinafter ICCPR].

83. UNCRC, *supra* note 17.

84. Office for the High Comm'r for Human Rights, *Status of Ratification Interactive Dashboard: Convention on the Rights of the Child*, UNITED NATIONS (Feb. 19, 2018), <http://indicators.ohchr.org/>.

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

86. UNCRC, *supra* note 17, at 46.

situated within the territory of the State Party.”⁸⁷ 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.”⁸⁸ 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.”⁸⁹

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.⁹⁰ Because Iraq is a signatory to the above treaties, all of its actions are subject to their jurisdiction.⁹¹ 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 Party⁹²—by providing training and equipment.⁹³ 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*, FOREIGN POL’Y (Feb. 5, 2016, 3:21 PM), <http://foreignpolicy.com/2016/02/05/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: Where the US Went Wrong*, BBC (Oct. 10, 2015), <http://www.bbc.com/news/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,”⁹⁴ meaning that the group “will also be held responsible, as a state, for their unlawful acts committed while they were a non-state actor.”⁹⁵

The UDHR, ICCPR, and CROC all affirm a right to life.⁹⁶ The ICCPR provides that “no one shall be arbitrarily deprived of his life,”⁹⁷ and in signing the CROC, state parties “recognize that every child has the inherent right to life.”⁹⁸ The CROC also obliges state parties to “ensure to the maximum extent possible the survival and development of the child.”⁹⁹ 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.¹⁰⁰ 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.”¹⁰¹ Article 37 prohibits “cruel, inhuman or degrading treatment or punishment,” capital punishment of children, and arbitrary deprivation of liberty.¹⁰² The CROC also obliges state parties to provide “special protection” to children who are

AMNESTY INT’L (July 5, 2016), <https://www.amnesty.org/en/latest/news/2016/07/syria-abductions-torture-and-summary-killings-at-the-hands-of-armed-groups/>.

94. G.A. Res. 56/83, art. 10(1) (Jan. 28, 2002).

95. Andrew Clapham, *Human rights obligations of non-state actors in conflict situations*, 88 INT’L REV. RED CROSS 491, 508 (2006).

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,”¹⁰³ to provide children with access to health care services,¹⁰⁴ 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.”¹⁰⁵

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.¹⁰⁶ As an international armed conflict, coalition members to the conflict are subject to the provisions of the four Geneva Conventions, and Additional Protocol I.¹⁰⁷ Much of IHL forms customary international law, which binds state and non-state parties to the conflict equally.¹⁰⁸ Customary IHL is collated by the International Committee of the Red Cross.¹⁰⁹

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.”).

107. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field art. 2, Aug. 22, 1864, T.S. No. 337; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 75 U.N.T.S. 87 (“The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties. . . .”); Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 136; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Protocol I, *supra* note 2, 1125 U.N.T.S. at 222 (“This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.”).

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.”¹¹⁰ 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,¹¹¹ 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.”¹¹² Article 70(1) of Additional Protocol I provides that “in the distribution of relief consignments” priority should be given to children¹¹³ and 77(1) provides that “children shall be the object of special respect.”¹¹⁴ 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.¹¹⁵

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.¹¹⁶ 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).

115. Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the Socialist Federal Republic of Yugoslavia para. 4, Croat.-Yugoslavia, Nov. 27, 1991 [hereinafter Memorandum Croatia and Yugoslavia] (“All civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I.”); Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina para. 2.3, May 22, 1992 [hereinafter Agreement Bosnia and Herzegovina].

116. HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 3.

of the enemy.”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,”¹¹⁸ and article 1 of the 1880 Oxford Manual provides that “acts of violence” are only permitted “between the armed forces of belligerent states.”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].”¹²⁰ Article 48 of Additional Protocol I of 1977 codifies the principle of distinction.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.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.”¹²³ The military manuals of coalition member states all affirm the prohibition on indiscriminate attacks.¹²⁴

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.

118. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 22 (New York: D. Van Nostrand 1863), http://avalon.law.yale.edu/19th_century/lieber.asp.

119. THE LAWS OF WAR ON LAND, OXFORD: INSTITUTE OF INTERNATIONAL LAW art 1 (1880), <https://ihl-databases.icrc.org/ihl/INTRO/140?OpenDocument>.

120. Hague II, *supra* note 2, at 257; Hague IV, *supra* note 2, at 648.

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.”).

122. HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 37.

123. Protocol I, *supra* note 1, 1125 U.N.T.S. at 26, 41.

124. Australian Manual, *supra* note 14, §§ 5.21, 6.26, 9.22; J. MAES, DROIT PÉNAL ET DISCIPLINAIRE MILITAIRE ET DROIT DE LA GUERRE [CRIMINAL LAW AND MILITARY DISCIPLINE AND LAW OF WAR] 27 (Ecole Royale Militaire 1983)

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.”¹²⁵ This rule has its basis in Article 2(3) of the 1907 Hague Convention IX,¹²⁶ and is codified in Article 57(1) of Additional Protocol I, which also imbues a burden of “constant care” onto parties to a conflict.¹²⁷ 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.”¹²⁸ Canada’s 2001 LOAC Manual also provides the standard that “care should always be taken to spare civilians and civilian objects.”¹²⁹ France’s LOAC Manual and the United States’ 1976 Air Force manual additionally establish an onus of “constant care” to spare civilians from attack.¹³⁰

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,”¹³¹ a definition that is codified in Article 50 of Additional Protocol I.¹³² The military

(Belg.); Canadian Manual, *supra* note 15, § 416(1); French Manual, *supra* note 15, at 85; U.K. Manual, *supra* note 15, § 12.26; GEORGE N. WALNE, AFP 110-31: INTERNATIONAL LAW-THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS AND THE LINEBACKER BOMBING CAMPAIGNS OF THE VIETNAM WAR 5 (Center for Naval Analyses) (1987) (prohibiting attacks against civilian populations).

125. HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 51.

126. Convention Concerning Bombardment by Naval Forces in Time of War art. 2, Oct. 18, 1907, 36 Stat. 2351 (stating that commanders shall take all necessary measures to ensure that undefended towns suffer as little damage as possible when time is a factor).

127. Protocol I, *supra* note 2, 1125 U.N.T.S. at 29.

128. ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS § 8.14 (2004) (Austl.); Australian Manual, *supra* note 14, § 5.61.

129. Canadian Manual, *supra* note 15, § 411.

130. French Manual, *supra* note 15, at 31; WALNE, *supra* note 124, at 5.

131. HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 17.

132. Protocol I, *supra* note 2, 1125 U.N.T.S. at 26; INT’L COMM. OF THE RED CROSS, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE

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

CIVILIAN POPULATION IN TIME OF WAR 8 (1956); Draft Convention for the Protection of Civilian Populations Against New Engines of War art. 1, 1938, Int'l Law. Assoc. 19498, <http://www.legal-tools.org/doc/4fbdf/>.

133. Australian Manual, *supra* note 14, § 9.14.

134. Canadian Manual, *supra* note 15, § 424.

135. *Prosecutor v. Milošević*, IT-98-29/1-T, Judgement, ¶ 946 (Dec. 12, 2007).

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).

139. See Chris Hughes & Sam Webb, *Vile footage shows heavily armed ISIS child soldiers on the battlefield in Syria*, MIRROR (Sept. 7, 2016, 6:18 PM), <https://www.mirror.co.uk/news/world-news/innocence-lost-vile-footage-shows-8787758>.

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.¹⁴¹ Under Rule 6 of Customary IHL, civilians lose protection from attack under IHL when they voluntarily take a direct part in hostilities.¹⁴² The rule is codified in article 51(3) of Additional Protocol I.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."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."¹⁴⁵ At the International Criminal Tribunal for the Former Yugoslavia, in the case of *Prosecutor v. Kupreskić*,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. . . ." 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 I¹⁴⁸—IHL does not

141. See Bloom, *supra* note 23 (detailing how children learn sophisticated military techniques, such as sniper training).

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

143. Protocol I, *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.").

144. Australian Manual, *supra* note 14, § 5.36.

145. Canadian Manual, *supra* note 15, § 318.1.

146. IT-95-16-T, Judgement, ¶ 523 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

147. *Id.*

148. See Protocol I, *supra* note 2, 1125 U.N.T.S. at 39 (asserting signatory parties' duties to limit child recruitment); Protocol II, *supra* note 9, at 612; Agreement Bosnia and Herzegovina, *supra* note 115, para. 2.3 (accordng 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.”¹⁴⁹ 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.”¹⁵⁰ 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.”¹⁵¹

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.”¹⁵²

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,

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).

150. See Joanna Nicholson, *Is Targeting Naked Child Soldiers a War Crime?* 16 INT’L CRIM. L. REV. 134, 144 (2016).

151. See Alex Sinha, *Child Soldiers as Super-privileged Combatants*, 17 INT’L J. HUM. RTS. 584, 590 (2013), <http://www.tandfonline.com/doi/pdf/10.1080/13642987.2013.800310?needAccess=true>.

152. U.S. MANUAL, *supra* note 15, § 4.20.5.

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 SOLDIERS 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.¹⁵³ 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.¹⁵⁴

The case of *Prosecutor v. Bosco Ntaganda*¹⁵⁵ is currently in the trial stage at the International Criminal Court.¹⁵⁶ Ntaganda is charged with 13 counts of war crimes and five counts of crimes against humanity.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹

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.

155. *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Case Information Sheet, (Jan. 2017), <https://www.icc-cpi.int/drc/ntaganda/Documents/NtagandaEng.pdf>.

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.¹⁶⁰

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.¹⁶¹

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.¹⁶² Reports indicate that, in many cases, ISIS' child soldiers participate against their will, as a consequence of ISIS' occupation of their area,¹⁶³ 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.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.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.

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 2011.¹⁶⁶ 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 2011.¹⁶⁷ The Mechanism's mandate is to collect and preserve evidence relating to

taken against their will from their parents, and those who voluntarily joined).

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).

165. See Abdallah, *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); see also Berlinger *supra* note 24; Bloom, *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).

166. See U.N. General Assembly, 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 since March 2011, ¶ 4, U.N. Doc. A/71/L.48 (Dec. 19, 2016).

167. *Id.*

“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.”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.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.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.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.”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

168. *Id.*

169. G.A. Res. 40/33, annex, ¶ 4, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (Nov. 29, 1985).

170. *See* UNCRC, *supra* note 17, at 57.

171. *See* Comm. on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice on Its 44th Session, U.N. Doc CRC/C/GC/10, ¶ 32 (2007).

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.¹⁷³ 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.”¹⁷⁴ Article 77(4) of Additional Protocol I also provides that children “shall be held in quarters separate from the quarters of adults.”¹⁷⁵ 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.¹⁷⁶

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.¹⁷⁷ 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.”¹⁷⁸ 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.¹⁷⁹

173. See Fourth Geneva Convention, *supra* note 107, 75 U.N.T.S. at 194.

174. See *id.* at 198.

175. See Protocol I, *supra* note 2, 1125 U.N.T.S. at 39.

176. See Fourth Geneva Convention, *supra* note 107, 75 U.N.T.S. at 330; Protocol I, *supra* note 2, 1125 U.N.T.S. at 39.

177. See U.N. Secretary-General, *supra* note 10, ¶ 17.

178. David M. Crane, *Prosecuting Children in Times of Conflict: The West African Experience*, 15 HUM. RTS. BRIEF, Spring/Summer 2008, at 15.

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.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.¹⁸¹ In the case of *Prosecutor v. Dominic Ongwen*,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.¹⁸³ The Pre-Trial Chamber, in the March 2016 Decision on the Confirmation of Charges, strongly rejected this argument as being without legal basis.¹⁸⁴

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

[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.”¹⁸⁵

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

180. Rome Statute, *supra* note 20, at 106.

181. Darija Marković, *Child Soldiers: Victims or War Criminals?* 12-13 (Dec. 14, 2015) (unpublished student paper) (on file with Regional Academy on the United Nations), http://www.ra-un.org/uploads/4/7/5/4/47544571/child_soldiers_-_victims_or_war_criminals.pdf.

182. *Prosecutor v. Ongwen*, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges Against Dominic Ongwen, ¶¶ 150-51 (Mar. 23, 2016).

183. *Id.*

184. *Id.*

185. *See* Crane, *supra* note 178, at 15.

it. . . .”¹⁸⁶

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.”¹⁸⁷ 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.¹⁸⁸ For ISIS’ child soldiers, the inclusion of de-radicalization programs will also be imperative.¹⁸⁹

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.

186. Fanny Leveau, *Liability of Child Soldiers Under International Criminal Law*, 4 OSGOODE HALL REV. L. & POL’Y 36, 38 (2013).

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.”).

189. NOMAN BENOTMAN & NIKITA MALIK, *THE CHILDREN OF ISLAMIC STATE* 66 (2016).

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.