

COMMENTS

THE MILITARY USE OF CHILDREN BY THE SYRIAN-IRAQI SALAFI-JIHADIST GROUP

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Non-state armed groups are the main threats to states' national security in the 21st century, to defend against which, states require useful methods. Recently, use of children by these groups, especially in the Middle East, has turned into one of the most important discussable issues that need to be evaluated in the context of the law of armed conflict. This study aims to discuss legal regime of the military use of children in armed conflict. The main purpose of the study is to analyze the use of child soldiers by the Syrian-Iraqi Salafi-Jihadist Group in its combat operations. In this respect, initially, the legal definition of child soldiers and the role of them in armed conflicts will be discussed. Based on this, different forms of the child soldiers' involvement in armed conflicts and the international criminal responsibility for their war crimes will be examined as an applicable law in the context of international criminal law.

Keywords: non-state armed groups; the law of armed conflict; child soldiers; military use of children; war crimes.

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Introduction

The recruitment of children into armed groups or forces is an indication of negative developments of armed conflicts in different species across the world. As well as African countries where armed some conflicts have ended and a few are continuing, recruitment of children into armed groups is now escalating in other regions of the world, particularly in the Middle East. The “ethnic” or “ideological” factors are the main reasons of the emergence of many of these armed conflicts in the Middle East. As Edwards and Hinchcliffe argue, “conflicting ideologies, ethnic and religious differences, superpower rivalry and the development of state nationalism are all factors that have been cited to one degree or another in explanation of conflict in the region.”¹ One of the most important examples of Ethnicity-based conflicts is the conflict between Kurdistan Workers’ Party (PKK) and Turkish Armed Forces. In the late 1990s, the PKK recruited children from schools in Sweden to serve in PKK forces in southeast Turkey.² In other terms, these conflicts revolve around the ethnic Kurd minority in Turkey which sought independence from Turkey.

Furthermore, many of the newly emerged armed groups in the Middle East are fighting for the sake of their ideologies. The most important instance for ideological conflicts which have recently been triggered in the Middle East is the growing armed activities of the Syrian-Iraqi Salafi-Jihadist Group (hereafter Jihadist Group). The social and political conditions in the region have led to the emergence of the most extremist non-state armed group known as the Jihadist Group inside the borders of Iraq and Syria.³ The group is an obvious example of extremist groups and one of the most powerful jihadist movements whose main objective is establishing an “Islamic caliphate”. Studies and reports clearly show that the abductions and forced recruitments have been conducted by the Jihadist Group throughout Iraq and Syria. In line with their extremist ideologies and advancing movement, military leaders of the Jihadist Group are recruiting child soldiers and transforming them into militants. Actually, unproportional threats of the Jihadist Group are the main important consequences of the use of child soldiers in its combat operations. The issues of the prohibition of recruitment of children into armed groups and international criminal

¹ *Conflicts in the Middle East Since 1945* (B. Milton-Edwards & P. Hinchcliffe, eds., London and New York: Routledge, 2008).

² Tom Malinowski, *In Support of the “The Child Soldiers Accountability Act of 2007”*; *Hearing in the US House Judiciary Subcommittee*, Human Rights Watch (2008) (Feb. 20, 2017), available at <https://www.hrw.org/news/2008/04/07/support-child-soldiers-accountability-act-2007-hearing-us-house-judiciary>.

³ Vincent Durac, *The Role of Non-State Actors in Arab Countries after the Arab Uprisings*, IEMed Mediterranean Yearbook (2015), at 37–38 (Feb. 20, 2017), available at http://www.iemed.org/observatori/arees-danalisi/arxius-adjunts/anuari/med.2015/IEMed%20Yearbook%202015_NonStateActorsArabUprisings_VincentDurac.pdf.

responsibility for violations of the law of armed conflict by child soldiers are still among the highly argued subjects of international law.

Non-state armed groups threaten international peace and security partly because the use of force by these groups takes many different forms, including warlords, drug traffickers, youth gangs, terrorists, militias, insurgents and transnational terrorist organizations. Recruitment and use of children as soldiers is one of the most effective used tactics by these groups in order to achieve their objectives.⁴ Around 70 percent of child soldiers worldwide are estimated to be found in the ranks of non-state armed groups.⁵ In legal studies, several categories of child soldiers recruited by the Jihadist Group – such as abandoned children, children forced to enroll, and voluntary recruits – have frequently been discussed. However, in this study, we will evaluate the forced recruited children by the group.

The main idea of this study is to show that the non-state armed groups which force children to commit war crimes should be kept criminally responsible. Executing prisoners, beheading or setting them on fire, compilations of roadside bombs by a large number of child soldiers recruited by the Jihadist Group as a result of incitements or threats by the Jihadist Group's military leaders are serious violations of the law of armed conflict – which is mainly regulated by the Geneva Conventions of August 12, 1949. However, assigning criminal responsibility to those child soldiers of the Jihadist Group that were forcibly recruited and forced to commit such crimes is consistently violating the law of armed conflict. The protection of the rights of children affected by armed conflicts is one of the law of armed conflict's customary rules. As stated by Rule 135 of Customary International Humanitarian Law Study, "Children affected by armed conflict are entitled to special respect and protection."⁶ As well, "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts."⁷

Actually, the quest for a respond to the question whether the child soldiers committing war crimes as members of a murderous armed group of the Jihadist Group victims or perpetrator requires a legal assessment of the issue under the law of armed conflict. In this regard, first legal definition of child soldiers and their relations with armed groups or forces, and then the role of child soldiers in armed conflicts should be examined.

⁴ Durac, *supra* note 3, at 38–39.

⁵ See Philippe Gazagne, *Engaging Armed Non-State Actors on the Issue of Child Recruitment and Use in Seen, but not Heard: Placing Children and Youth on the Security Governance Agenda* 248 (D. Nosworthy, ed., Zürich: LIT Publishing, 2009).

⁶ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. I: Rules* 479 (Cambridge: Cambridge University Press, 2005).

⁷ *Id.*

1. Armed Conflicts and Child Soldiers

1.1. The Legal Definition of Child Soldiers and Children's Role in Armed Conflicts

Generally, the term "child soldiers" is used in order to refer to any of boys and girls conscripted by armed groups or forces. They are commonly used in different positions such as cooks, porters, messengers, spies and also to do any orders of their commanders. Actually, the term "child soldiers" has been defined in many different ways. The most important of these definitions is noted by the Cape Town Principles that the UNICEF is using from 1997. According to the Cape Town Principles, "[A] 'Child soldier' in this document is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members."⁸

However, as an internationally agreed legal definition of the child soldiers it can be referred to *the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (Paris Principles), which has defined it as follows:

A child associated with an armed force or armed group refers to any person below eighteen years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes.⁹

In any case, using a child for military aims is a serious violation of human rights. Therefore, it is not important what the reasons for taking part of the children in training and combat operations of the armed groups are or how they are recruited by the armed groups. The important issue is that all of the child soldiers are generally victims because many of them are subject to inhuman treatments of military leaders of the armed groups. Most of them are forced to perpetrate serious violations of the law of armed conflict, who in the result of these actions suffer serious long-term and grave psychological impacts. The reintegration of these children into civilian life is a complex process. Therefore, evolving comprehensive and helpful policies on recovery and reintegration of child soldiers used by armed groups in their operations will be the most beneficial step in this process.

⁸ UNICEF, Cape Town Principles and Best Practices, Cape Town, South Africa, April 27–30, 1997 (Feb. 20, 2017), available at [https://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](https://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf).

U.S. Department of State, The Child Soldiers Prevention Act of 2008, December 23, 2008 (Feb. 20, 2017), available at <http://www.state.gov/j/tip/rls/tiprpt/2015/245236.htm?goMobile=0>.

⁹ The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (February 2007), at 7, para 2(1) (Feb. 20, 2017), available at <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>.

As mentioned before, child soldiers play many different roles in armed conflicts. Generally, they participate in conflicts as spies, bomb carriers, sentries, and human shields. They “are also often used to lay and clear landmines. As they grow older and stronger, children who were recruited into armed groups may be ‘promoted’ from lower servant roles to active combat roles.”¹⁰ In fact, children are recruited into armed groups as small adults capable of performing very strict duties. Children’s role in armed conflicts “was generally supportive to the war effort; for example, children assumed roles as charioteers, armor bearers for adult soldiers, buglers, aides or squires, and porters, drummers, cooks,”¹¹ sent to clear minefields, serve as cleaners or simply servants that have multiple tasks.¹² However, the roles of children recruited by non-state armed groups in armed conflict are very critical. A large number of legal scholars and human rights practitioners have commonly accepted that “children are ‘recruited’ by a non-state armed group committing mass atrocities and/or genocide largely because of the role they are expected to play in perpetrating atrocity.”¹³ Generally they “are subjected to extreme brutality, they are beaten, starved, drugged and in some cases as initiation they are forced to kill their relatives as a way of parting with their ‘previous lives.’”¹⁴ It should be noted that “small arms”¹⁵ are the most important prerequisites of the child soldiers’ serious and critical roles in armed conflicts. In other terms, there is a crucial link between small arms and use of child soldiers in armed conflicts. Actually, as children can be easily trained to handle these arms, states have generally preferred to use children as their combatants in wars. They are firstly used in simpler positions such as cooks or wood gatherers. After a while “these children [were] given guns to fight. Children are trained to use small arms properly in order to become effective combatants.

¹⁰ Mark Lorey, *Child Soldiers: Care & Protection of Children in Emergencies: A Field Guide 3* (London: Save the Children Federation, 2001).

¹¹ Roméo Dallaire, *They Fight Like Soldiers, They Die Like Children* 105 (Toronto: Random House Publishing, 2010). See also Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict* 30–53 (Oxford: Oxford University Press, 1994).

¹² Darija Marković, *Child Soldiers: Victims or War Criminals?: Criminal Responsibility and Prosecution of Child Soldiers under International Criminal Law*, Regional Academy on the United Nations (2015), at 4 (Feb. 20, 2017), available at http://www.ra-un.org/uploads/4/7/5/4/47544571/child_soldiers_-_victims_or_war_criminals.pdf.

¹³ Sonja C. Grover, *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-Related International Crimes* 50 (Berlin: Springer, 2012).

¹⁴ Marković, *supra* note 12.

¹⁵ According to definition of the Small Arms Working Group (SAWG), “Small arms are weapons that can be carried and used by one or two people, including handguns, assault rifles, machine guns, grenade launchers, anti-tank or anti-aircraft guns and light mortars. Light weapons, ammunition, grenades, landmines, and explosives are also part of this category.” See Small Arms Working Group, *Small Arms and Children* (2003) (Feb. 20, 2017), available at http://fas.org/asmp/campaigns/smallarms/sawg/2003factsheets/small_arms_and_children.pdf.

Without small arms, children are generally less useful to armed groups".¹⁶ However, regardless of children's age, gender, and their role differences in armed conflicts in which they have participated (either directly or indirectly), they are under threat in any case. Notwithstanding they are committing many different types of violations, they are the main victims of armed conflicts; this aspect needs to be speculated more in the next section.

1.2. Prohibition of the Use of Children in Armed Conflicts under the Law of Armed Conflict

According to Rule 136 of Customary International Humanitarian Law Study, "children must not be recruited into armed forces or armed groups."¹⁷ Practically, this principle is applicable in both international and non-international armed conflicts. Likewise, the recruitment of children as soldiers has repeatedly been condemned by the United Nations Security Council.¹⁸ In accordance with resolutions adopted by the 26th International Conferences of the Red Cross Red Crescent¹⁹ in 1995, recruitment of children has been prohibited. The Conference also adopted the Declaration and Plan of Action for the years 2000–2003 in its 27th meeting, which requires all parties to an armed conflict to ensure that all measures, including penal measures, be taken to stop the recruitment of children into armed forces or armed groups.²⁰

Besides all these prohibitions, recruitment of children as soldiers raises many other questions. The criminal responsibility of child soldiers for their war crimes as a result of a violation of the law of armed conflict is the most important of these questions, which needs to be evaluated.

Art. 1 of the United Nations Convention on the Rights of the Child²¹ defines a child as follow:

¹⁶ Rachel Stohl, *Targeting Children: Small Arms and Children in Conflict*, 9(1) *Brown Journal of World Affairs* 281, 287 (2002).

¹⁷ See Henckaerts & Doswald-Beck 2005, at 482.

¹⁸ See U.N. Security Council, Resolution 1314, U.N. Doc. S/RES/1314, August 11, 2000; U.N. Security Council, Resolution 1261, U.N. Doc. S/RES/1261, August 25, 1999; U.N. Security Council, Resolution 1296, U.N. Doc. S/RES/1296, April 19, 2000; U.N. Security Council, Resolution 1306, U.N. Doc. S/RES/1306, July 5, 2000 (Feb. 20, 2017), available at <http://www.un.org/en/sc/documents/resolutions/>.

¹⁹ 26th International Conference of the International Red Cross and Red Crescent Movement, Resolution II (Geneva, December 3–7, 1995) (Feb. 20, 2017), available at <https://www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-2-1995.htm>.

²⁰ 27th International Conference of the International Red Cross and Red Crescent Movement, Resolution I (Geneva, October 31 – November 6, 1999) (Feb. 20, 2017), available at <https://www.icrc.org/eng/resources/documents/resolution/27-international-conference-resolution-1-1999.htm>.

²¹ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly of the United Nations Resolution 44/25 of November 20, 1989, entry into force September 2, 1990, New York, 1577 UNTS 3, Art 2, at 3 (Feb. 20, 2017), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf>.

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Accordingly, a child participant in combat operations of armed groups refers to any person below eighteen years of old who is recruited or used as a fighter, cook, porter or spy or for sexual purposes. In practice, other than the governments' armed forces, children are recruited largely by non-state armed groups such as rebel forces, guerrillas, revolutionaries, insurgents, terrorist groups, paramilitaries, global terrorist networks and ethnic or religious militants. As a non-state armed group, the Jihadist Group currently uses children as soldiers, executioners, suicide bombers, human shields, spies, messengers, and guards, with the increasing use of small arms facilitating their active participation in its combat operations. Regardless of their young age, the international criminal responsibility of these children is a significant issue worth more discussion.

Firstly, it should be noted that, regardless of what is the main reason of participation of children in training and combat operations of the armed groups, they are constant victims of armed conflicts because of being subject to their commanders' inhumane treatment. In other terms, "child soldiers as a part of armed groups which committing systematic atrocities and genocide are situated as victims of genocidal forcible transfer to such armed groups by committing these international crimes."²² Undoubtedly, forcing the child soldiers, as the next generation of jihadists, to execute and behead prisoners by the Jihadist Group is a war crime.²³ In other words, all of the child soldiers of the Jihadist Group carry out war crimes by committing these acts of violence. Nonetheless, there is no international consensus on the minimum age of criminal responsibility between the states and it has not been addressed in international criminal law. Even, the statutes of the ad hoc tribunals do not include any provisions related to the minimum age of criminal responsibility. Although the Rome Statute of the International Criminal Court (ICC) reads in Art. 26 that "The court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the offense", it is a jurisdictional provision and practically defers the issue to national law.²⁴

Even, the law of armed conflict has not provided a minimum age of criminal responsibility for international crimes of child soldiers. Insofar as this fact, Protocol

²² Grover 2012, at viii.

²³ See Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, Thirty-First Session, A/HRC/31/CRP.1, February 3, 2016, para. 103 (Feb. 20, 2017), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A-HRC-31-CRP1_en.pdf.

²⁴ Penal Reform International, *The Minimum Age of Criminal Responsibility*, 4 Justice for Children Briefing (2013), at 2 (Feb. 20, 2017), available at https://www.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf.

Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)²⁵ in its Art. 77 reads:

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavor to give priority to those who are oldest.

From this point of view, it can be concluded that if it is accepted that children under fifteen are too young to fight, it should also be accepted that these children must also be considered too young to be held criminally responsible for their wrongful acts and serious violations of the law of armed conflict while participating in armed operations of the Jihadist Group. That is to say, if it is accepted that the age of criminal responsibility is fifteen, the armed groups will be more inclined to use children under fifteen in armed conflicts. Accordingly, in this situation, discussing the criminal responsibility of children as young as fifteen as fighters and kids as young as fourteen in support roles, targeted aggressively by the Jihadist Group recruitment and use in its operations, including suicide bombing missions, will be unfeasible. Actually, judicial norms and standards have been established in order to protect child soldiers as victims of armed conflicts and limit their participation in combat operations of armed groups such as the Jihadist Group.

Generally, it is accepted that prosecution of any person who committed war crimes, as long as any trial takes place with all the appropriate fair trial standards in place, is possible.²⁶ From this point of view, at first sight, it could be said that holding child soldiers – especially children under eighteen – responsible for their war crimes and prosecuting them is possible in the context of appropriate fair trial standards, but it should be noted that determining criminal responsibility of child soldiers is not a solution. On the other hand, investing more efforts by the governments and international organizations such as the United Nations on the extermination of

²⁵ International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3 (Feb. 20, 2017), available at <http://www.refworld.org/docid/3ae6b36b4.html>.

²⁶ *Id.* at 209–210.

the “child soldiers” phenomenon could be the primary and most important step in this process. In other terms, the most significant issue is that governments have a responsibility to protect the lives and liberties of their citizens, especially their youth. Therefore, it is the governments’ commitment to prevent joining of their youths to armed groups and to detain the participation of children in training and combat operations of these groups. In this regard, governments’ authorities can initiate appropriate legal actions against their citizens who have joined to armed groups or have considered doing it.

According to Principle II of *the Principles of the Nuremberg Tribunal*, “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”²⁷ It could adventurously be said that the provision provided by this principle also includes child soldiers. However, the case of the Jihadist Group has very different features. There are robust evidence that a large number of child soldiers in the Jihadist Group were forcibly recruited and forced to commit war crimes such executing and beheading prisoners. Many of them are children of orphanages controlled by the Jihadist Group children abducted by the group. Generally, they are forced to commit war crimes under threat of death. In order to survive, parents of child soldiers recruited by the Jihadist Group allows access of the Jihadist Group militants to their children; also, because they have no other choice. Therefore, it cannot be said that these families support violations of this extremist group.

As Robert Young, ICRC’s legal adviser, said: “coercion and duress may provide exceptions... and one can quickly imagine how this principle might mitigate the responsibility of a child soldier who was forcibly recruited and forced, under threat of harm, to commit war crimes.”²⁸ In this context, there are many international conventions which have prohibited any forced recruitment of children under eighteen into the armed groups. For instance, according to Art. 2 of the Optional Protocol to the Convention on the Rights of the Child²⁹, “States Parties shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces.” Alongside of the mentioned Protocol, the African Charter on the

²⁷ International Committee of the Red Cross, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950 (Feb. 20, 2017), available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/3a0ef64882993569c125641e004ab014?OpenDocument>.

²⁸ *See Should Child Soldiers be Prosecuted for Their Crimes?*, The Inside Story on Emergencies (2011) (Feb. 20, 2017), available at <http://www.irinnews.org/analysis/2011/10/06/should-child-soldiers-be-prosecuted-their-crimes>.

²⁹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, UN Doc. A/RES/54/263 (Feb. 20, 2017), available at <http://www.ohchr.org/Documents/ProfessionalInterest/crc-conflict.pdf>.

Rights and Welfare of the Child³⁰ in its Art. 22(2) reads: “State Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.” Therefore, debate on the criminal responsibility of such soldiers is not sensible; however, according to the legal doctrine of “command responsibility,” the commanders who controlled the child soldiers which have committed war crimes should be responsible for their violations and “children who were threatened would be able to argue that they acted under duress, either as a defense or in mitigation of punishment.”³¹

According to the Rome Statute, “Conscripting or enlisting children under the age of fifteen years into armed forces or using them to participate actively in hostilities”³² – both international and non-international armed conflicts – is a war crime. Criminalizing recruiting children under fifteen (whether this is forced or voluntary) into armed groups means that the prohibition applies both to governments’ armed forces and non-state armed groups’ or oppositions’. In accordance with this doctrine, commanders are criminally responsible for the actions of their subordinates, where they gave a command to commit violations of the law of armed conflict.³³ Therefore, in cases where “the commander was aware that their subordinates were committing war crimes or crimes against humanity (or were about to commit them) but failed to take reasonable and necessary action to stop them or to have them prosecuted, such a commander will also be responsible to be prosecuted for the action of the subordinates.”³⁴ From this point of view, military commanders of the Jihadist Group must be held responsible for the serious violations of the law of armed conflict and cruelties committed by their subordinates, especially the child soldiers under their control.³⁵

³⁰ The African Charter on the Rights and Welfare of the Child, adopted by the Twenty-Sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU, Addis Ababa, July 1990 (Feb. 20, 2017), available at <http://www.acerwc.org/download/african-charter-on-the-rights-and-welfare-of-the-child/?wpdmdl=9406>.

³¹ *Child Soldiers: Criminals or Victims?*, Amnesty International (December 2002), at 2 (Feb. 20, 2017), available at <https://www.amnesty.org/download/Documents/140000/ior500022000en.pdf>.

³² Rome Statute of the International Criminal Court, Rome, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 UNTS I-38544, Art. 8(2)(b)(xxvi), at 90 (Feb. 20, 2017), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf>.

³³ Amnesty International, *supra* note 31, at 6.

³⁴ *Id.*

³⁵ For more details on the criminal responsibility of commanders and other superiors for war crimes committed by their subordinates, see Jamie A. Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, 90(870) International Review of the Red Cross 303–317 (2008). See also Henckaerts & Doswald-Beck 2005, at 558.

2. The Legal Framework of the Use of Children in Combat Operations of the Syrian-Iraqi Salafi-Jihadist Group

2.1. The Status of the Syrian-Iraqi Salafi-Jihadist Group

The Jihadist Group's leaders call their extremist group a "state," however, it should be examined whether the conditions required for the formation of a sovereign state as the most important group in international law exist for this group.

There are some different views about the characteristics of the creation of a state. However, there is no certain definition of "state" in international law. Nonetheless, the essential requirements of statehood under international law, which has been commonly accepted by the international community, are provided by *Montevideo Convention on the Rights and Duties of States* (1933).³⁶ As stated by Art. 1 of the Convention, the state as a person of international law should possess "a permanent population"; "a defined territory"; "government"; and "capacity to enter into relations with other states." Alongside the conditions mentioned by the Montevideo Convention, there is also another view raised customarily by the international community, particularly by some legal scholars, is that the "independence" and "legitimacy" are also required conditions for the creation of a state. In this view, only states can have sovereignty over territory and become members of the United Nations and other international organizations.³⁷

At first sight, it could probably be claimed that the Jihadist Group has a permanent population, because many of the Sunni tribes pledged allegiance with Abu Bakr al-Baghdadi, the leader of the Jihadist Group in western Iraq, Syria, Libya and Afghanistan, at the beginning of their movement. The group entered the armed conflicts in neighboring Syria under the leadership of Abu-Bakr al-Baghdadi. It became the Jihadist Group in Iraq and Syria in April of 2013. After having extended its control over a substantial area straddling Syria and Iraq, the Jihadist Group declared a global Islamic caliphate and renamed itself [the Syrian-Iraqi Salafi-Jihadist Group].³⁸ Conversely, the Jihadist Group does not have a defined territory. In other terms, although the Jihadist Group has controlled certain parts of the territory of Syria and Iraq, its control over these regions is not legal or legitimate, because its control over these regions has been achieved through the use of force and occupation. Additionally, it should be noted that the territory makes no sense for the Jihadist Group because its goal is to reign over the entire Muslim world. On the other side,

³⁶ Convention on Rights and Duties of States, December 26, 1933, CLXV LNTS 3801-3824, at 19 (Feb. 20, 2017), available at <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20165/v165.pdf>.

³⁷ Robert Beckman & Dagmar Butte, *Introduction to International Law*, International Law Students Association (Feb. 20, 2017), available at <https://www.ilsa.org/jessup/intlawintro.pdf>. For more details see, James R. Crawford, *The Creation of States in International Law* 37–96 (Oxford: Oxford University Press, 2006).

³⁸ Durac, *supra* note 3, at 39.

although the Jihadist Group has a government, it is not an effective government because an effective government should adhere to its international obligations in order to enter into the international community. In the Jihadist Group case, it can definitely be said that it does not fulfill any international obligations.

As stated in the United Nations Security Council's resolutions 2161,³⁹ 2170,⁴⁰ 2178,⁴¹ and 2199⁴² concerning "Threats to International Peace and Security Caused by Terrorist Acts," occupation of territory in parts of Iraq and Syria by the Jihadist Group, and committing grave violations of the law of armed conflicts and human rights law, particularly fomenting sectarian tensions in the region have led to the displacement of millions of people.⁴³ The Council once again has reaffirmed independence, sovereignty, unity and territorial integrity of the Republic of Iraq and the Syrian Arab Republic, by emphasizing the purposes and principles of the Charter of the United Nations.⁴⁴ Additionally, Security Council's emphasis on sovereignty, unity and territorial integrity of the Republic of Iraq and the Syrian Arab Republic in the preamble of its resolution 2199 confirms the lack of an independent legal existence of the Jihadist Group.⁴⁵

As a result, an extremist group such as the Jihadist Group, that does not have any effective government, will practically be incapable of having relations with other states. Considering the existing situation of the Jihadist Group and its serious violations of the law of armed conflicts, it could be definitely said that the caliphate established by the Jihadist Group does not include the conditions required for the creation of a sovereign state. Actually, after committing the grave violations of human rights and the law of armed conflict, debate on the legitimacy of the Jihadist Group is beyond possible. In this situation, recognition of this group as an entity of international law by the international community will not happen under any circumstances.

³⁹ U.N. Security Council, Resolution 1261, adopted by the Security Council at its 4037th meeting, on August 25, 1999, U.N. Doc. S/RES/1261 (Feb. 20, 2017), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20SRES%201261.pdf>.

⁴⁰ U.N. Security Council, Resolution 2170, adopted by the Security Council at its 7242nd meeting, on August 15, 2014, U.N. Doc. S/RES/2170 (Feb. 20, 2017), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170(2014)).

⁴¹ U.N. Security Council, Resolution 2178, adopted by the Security Council at its 7272nd meeting, on September 24, 2014, U.N. Doc. S/RES/2178 (Feb. 20, 2017), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20(2014)).

⁴² U.N. Security Council, Resolution 2199, adopted by the Security Council at its 7379th meeting, on February 12, 2015, U.N. Doc. S/RES/2199 (Feb. 20, 2017), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20(2015)).

⁴³ U.N. Security Council, *supra* note 40, Preamble.

⁴⁴ *Id.*

⁴⁵ For more information see Christian Chinkin, *The Security Council and Statehood in Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* 155–172 (C. Chinkin & F. Baetens, eds., Cambridge: Cambridge University Press, 2015).

Furthermore, it could not be claimed that the Jihadist Group is a terrorist group. In other terms, any of terrorist organizations have dozens or hundreds of members, attack civilians, do not hold territory, and cannot confront armed forces.⁴⁶ Conversely, as mentioned above, the Jihadist Group has territory and some 30,000 fighters and holds territory in Iraq and Syria. At this stage, it can be said that the Jihadist Group is only a non-state armed group that is involved in armed conflicts in order to achieve its political and ideological objectives, thereby lacking legal capacity to become a party to relevant international treaties. However, terrorist actions may be committed by the non-state armed groups and which it does not change these groups' status according to the law of armed conflict. In this respect, it should be noted that although the non-state armed groups are not signatories to the Geneva Conventions and their Additional Protocols which form the core of the law of armed conflict, the majority view among the legal scholars is that, "national jurisdiction is paramount and that [non-state armed groups] are bound by the rules of the states on whose territories they operate. To the extent that these states are High Contracting Parties to the Geneva Conventions and Additional Protocols, the activities of [non-state armed groups] operating within these sovereign territories are similarly regulated by the laws of war."⁴⁷ In this case, military actions of the Jihadist Group are taking place inside borders of Iraq and Syria, which are contracting parties to the Geneva Conventions. Therefore, the commitment of the states of Iraq and Syria to the law of armed conflict binds the Jihadist Group too.

Actually, the Jihadist Group is a group that presents a unique model that combines conquering territory and attempting to establish a state; and managing a civil government in the Middle East.⁴⁸ However, the Jihadist Group conducts the above-mentioned acts by committing terrorist actions, thereof violating international law and the law of armed conflict. However, some of the key international treaties such as Rome Statute impose obligations upon armed groups, requiring that they forgo the recruitment and use of child soldiers. Accordingly, these armed groups are bound by the law of armed conflict as embodied by the Statute. In short, "the international community imposes obligations upon armed groups without offering such groups any recognized rights or even token of legitimacy. At the same time, it is difficult to enforce international law against armed groups already regarded as illegitimate and criminal."⁴⁹

⁴⁶ Audrey K. Cronin, *ISIS is Not a Terrorist Group*, Foreign Affairs (March/April 2015) (Feb. 20, 2017), available at <https://www.foreignaffairs.com/articles/middle-east/isis-not-terrorist-group>.

⁴⁷ *Empowered Groups, Tested Laws, and Policy Options: The Challenges of Transnational and Non-State Armed Groups*, Program on Humanitarian Policy and Conflict Research Harvard University (Geneva: Graduate Institute of International Studies, 2007), at 32 (Feb. 20, 2017), available at http://www.hpcrresearch.org/sites/default/files/publications/Report_Empowered_Groups_Nov2007.pdf.

⁴⁸ Carmit Valensi, *Non-State Actors: A Theoretical Limitation in a Changing Middle East*, 7(1) *Military and Strategic Affairs* 72–73 (2015).

⁴⁹ David M. Rosen, *Child Soldiers in the Western Imagination: From Patriots to Victims* 139 (New Jersey: Rutgers University Press, 2015).

In accordance with Art. 8(2)(f) of the Rome Statute which has defined war crimes, "Paragraph 2(e) ... applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." As stated in Art. 8(2)(e) of the Statute, all of the "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; pillaging a town or place, even when taken by assault; committing rape, sexual slavery, enforced prostitution, forced pregnancy; and especially conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities"⁵⁰ are war crimes that the Jihadist Group is committing in many different regions of the Middle East such as Iraq, Syria, and Libya.

From this point of view, it can be said that the Jihadist Group by committing many different types of war crimes provided in Art. 8(2)(e) of the Rome Statute during its continuing conflicts is included within the scope of this Article as a non-state armed group.

2.2. Using Children in Combat Operations by the Syrian-Iraqi Salafi-Jihadist Group: A New Phase of Child Soldiers?

The child soldier is not a new phenomenon. However, by recruiting different age groups of children and training them in order to be used in combat operations, the Jihadist Group has created a new and different type of child soldiers' phenomenon. Actually, the extremist Jihadist Group aims to train a new generation of jihadists by recruiting children and using them for grave violence based on their ideological beliefs.

The Jihadist Group enlists children inside borders of Iraq and Syria in order to use them as child soldiers in its different combat operations. Actually, the group uses child soldiers for various purposes as follows: using children directly in combats operations; in combats operations as porters, spies, messengers, lookouts, suicide

⁵⁰ The International Criminal Court has issued enlisting and conscripting child soldiers under the age of fifteen years and using them to participate actively in hostilities as war crimes, against members of armed groups in the Democratic Republic of the Congo (DRC) and Uganda. See The International Criminal Court, *Investigation in the Democratic Republic of the Congo or the Situation in the Democratic Republic of the Congo* (June 2004) (Feb. 20, 2017), available at <https://www.icc-cpi.int/drc>; The International Criminal Court, *Investigation in Uganda or the Situation in Uganda* (July 2004) (Feb. 20, 2017), available at <https://www.icc-cpi.int/uganda>.

bombers; and in combats operations as human shields and propaganda.⁵¹ "In Iraq and Syria, the advances by [the Jihadist Group] and the proliferation of armed groups have made children even more vulnerable to recruitment. Children as young as twelve are undergoing military training and have been used as informants, to patrol, to man checkpoints and to guard strategic locations. In some cases, they have been used as suicide bombers and to carry out executions."⁵²

According to the reports of the United Nations Human Rights Council (UNHRC), the Jihadist Group has established many types of training camps to recruit children into armed roles under the guise of education. The group recruited children from the age of fourteen or fifteen to undergo the same training as adults, offering them financial rewards. The child soldiers recruited by the Jihadist Group received weapons training and religious education. They also were deployed in active combat during military operations, including suicide-bombing missions. For instance, in Al-Raqqa, children are recruited and trained at the Jihadist Group's camps from the age of ten. Actually, by recruiting and using children younger than eighteen, the Jihadist Group has violated the law of armed conflict and human rights law. On the other side, by using children below the age of fifteen, it is committing a war crime.⁵³

Currently "over five million children have been impacted by the Syrian conflict, finding themselves extremely vulnerable and susceptible to exploitation by all parties in Syria's conflict. They have been used as soldiers, human shields, messengers, spies, and guards, with the increasing use of 'small arms' facilitating their active participation in the war effort."⁵⁴

The terrible violations committed by the Jihadist Group against abducted children and those recruited by force, including their injuring, killing, their use in combat operations, rape, and other forms of sexual violence, may be accepted as war crimes and crimes against humanity under the law of armed conflict and customary international law.

⁵¹ See for more details, U.N. Security Council, Report of the Secretary-General on Children and Armed Conflict in the Syrian Arab Republic, January 27, 2014, S/2014/31 (Feb. 20, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/31.

⁵² UNICEF, *More Brutal and Intense Conflicts Leave Children Increasingly at Risk of Recruitment*, February 12, 2015 (Feb. 20, 2017), available at http://www.unicef.org/media/media_79775.html.

⁵³ See U.N. General Assembly, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, August 13, 2014, U.N. Doc. A/HRC/27/60, para. 95 (Feb. 20, 2017), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A.HRC.27.60_Eng.pdf.

⁵⁴ Katarina Montgomery, *ISIS Sets a "New Paradigm" for Child Soldiers: Ideology, Combat and Forced Marriage*, Syria Deeply (2014) (Feb. 20, 2017), available at <https://www.newsdeeply.com/syria/articles/2014/11/27/isis-sets-a-new-paradigm-for-child-soldiers-ideology-combat-and-forced-marriage>.

Conclusion

In the recent years, with the increasing number of non-state armed groups in the Middle East, armed conflicts have also augmented in the region. Recruitment of children as child soldiers by these groups, training and using them in armed conflicts, and forcing them into grave violations of the law of armed conflict and human rights law has upset the international community. Actually, the growing number of child soldiers in the region in last decade has been one of the critical issues that have led to many different controversies between legal scholars. The Jihadist Group, having conquered territory in Iraq, Syria, and Libya, can be considered a significant example of these groups. The main objective of the group, which has drawn the attention of the international community in the last years, is establishing the caliphate and political and theological Sovereignty over the world's Muslims. In this respect, the easiest and most effective methods to achieve its objective are the recruitment of children into the armed group, training them as a new generation of jihadists and more lethal fighters in a variety of roles than themselves. In addition, converting children to radical ideologies and indoctrinating them into extreme values is the most effective method that the Jihadist Group is carrying out as an ideal way to use them in their combats. All these acts are the most avowed forms of child abuse. The children (generally under the age of fifteen) who have been recruited and used in armed conflicts by the Jihadist Group are not capable of comprehending their actions – including serious violations of the law of armed conflict and any form of war crimes – during armed conflicts.

In any circumstances, children have been protected under the law of armed conflict. Inasmuch that the use of children as soldiers in armed conflicts by states or non-state armed groups has commonly been condemned as an unacceptable act. There are different ranges of international provisions to protect children, especially from being recruited into and used in armed conflicts. For instance, the Geneva Conventions 1949 and their Additional Protocols 1977, which form the core of international law of armed conflict, regulates the conduct of armed conflict and seeks to limit its effects. According to these provisions, children who take a direct part in hostilities do not lose that special protection; while being aware that the children used in armed conflicts may commit very grave violations such as war crimes during the conflicts. On the other hand, criminal responsibility of children is also one of the most controversial issues in international criminal law, because there is no minimum age limit for criminal responsibility of child soldiers. However, the international community's focus with regard to child soldiers has tended to be on children forcibly recruited into armed groups. In the case of the Jihadist Group, abducted children or those coerced into armed conflicts commit many violations such as executing prisoners, beheading or setting them on fire, and compilations of roadside bombs. In other terms, the children recruited by the Jihadist Group are the first victims of this war. Therefore, debate on their criminal responsibility is almost

unreasonable. Additionally, international law protects children from individual criminal responsibility. As stated in Art. 26 of the Rome Statute, "The Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime." From this point of view, the forced recruited children of the Jihadist Group can not be tried; hence no criminal responsibility can be related to them. In addition, according to Rome Statute "a person shall not be criminally responsible if, at the time of that person's conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person."⁵⁵

In the light of the points made above, it can be stated that a large number of the child soldiers of the Jihadist Group – generally under fifteen – commit the serious violations of the law of armed conflict and fundamental principles of human rights law under force and without consent.

As evaluated above, child soldiers are victims of their commanders' inhumane treatment. Therefore, attributing criminal responsibility to such soldiers is not sensible; and the commanders who controlled the children and have committed serious graves and violations should be responsible for their acts because a large number of these violations have been committed under threats and duress of commanders.⁵⁶ In other terms, the various violations of the law of armed conflict and human rights law by the child soldiers are the atrocious consequences of child recruitment and use of them in armed conflicts by armed groups. Actually, recruitment and use of children by these groups in armed conflicts are the grave violations against children during armed conflict.⁵⁷ Undoubtedly, all of the committed violations and any strong negative psychological impacts of these acts on children lead to individual criminal responsibility. However, it is important to note that the recruitment of children is already a crime that has been accepted by the Rome Statute in 1998. Accordingly, children forcibly recruited into and used in armed conflicts should be considered primarily as victims, not as criminals.

⁵⁵ Rome Statute, *supra* note 32, Art. 31(d).

⁵⁶ This responsibility of non-state armed groups follows from the requirement in Art. 2 of the United Nations Convention on the Rights of the Child to "ensure" the relevant rights – so called positive obligations. According to para. 2 of Art. 2: "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." See Magne Frostad, *Child Soldiers: Recruitment, Use and Punishment*, 1.1 International Family Law, Policy and Practice 71–72 (2013).

⁵⁷ The other violations that have been considered as "grave violations against children during armed conflict" are "killing or maiming of children, sexual violence against children, attacks against schools or hospitals, abduction of children, and denial of humanitarian access." See Jonathan Kolieb, *The Six Grave Violations against Children during Armed Conflict: The Legal Foundation* 9 (New York: Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 2013).

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