

THE CRIME OF TERRORISM: AN ANALYSIS OF CRIMINAL JUSTICE
PROCESSES AND ACCOUNTABILITY OF MINORS RECRUITED BY THE
ISLAMIC STATE OF IRAQ AND AL-SHAM

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ABSTRACT

This Article expounds the legal dilemma of minors involved in terrorist acts and related offenses in the Islamic State ranks. By acknowledging the international discourse on terrorism as encompassed by legal concerns on the legitimacy of unlawful killings, military tribunals and absence of due process,¹ the Article provides a detailed analysis of the consistency and inconsistency between the rule of law provisions related to minors in combat and counter-terrorism practices. Departing from a classification of the conflict in Syria and in consideration of its implications on the scope of application of international law to it, the Article examines the existing legislative gaps to the extent to what such fractures expose minors to a system of human rights abuses. The lack of monitor on counter-terrorism activities, in conjunction with an excessive deference to the executive in Syria and the United States, supports the emergence of a climate of impunity for actions committed by state officials in counter-terrorism operations. The security imperative to combat terrorism ultimately causes derogation from the very rule of law and influences the performance of the criminal justice system. The Article illustrates how the failure to address terrorism and terrorism-related offenses at the international level provides for nation-states to issue anti-terrorism treaties which disrupt principles of juvenile justice as they orient on the infliction of punishment and do not envisage rehabilitation and reintegration.

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¹ Martin Scheinin, *Terrorism*, in INTERNATIONAL HUMAN RIGHTS LAW 550, 566 (Oxford University Press 2014).

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INTRODUCTION

The rise of the self-proclaimed Islamic State of Iraq (IS) and al-Sham has marked the beginning of a new jihadist era.² Despite the 2006-2011 U.S. counter-terrorism campaign, the group took advantage of the instability of the region to proselyte and mobilize members, a process that increased with the outbreak of the Syrian Civil War. The Islamic State's long-term purpose of engineering a new society founded on the rhetoric ideology of the purification of faith³ adds a multigenerational dimension to the Syrian conflict complex legacy. The group systematic focus on child recruitment and re-education implies a shift in the rationale behind the child soldier phenomenon. The adoption of militant methods of indoctrination integrates into a hybrid system ideological components and exposure to atrocities⁴ and has both tactical and strategic value aimed to the institutionalization of the education system and youth groups.⁵ The prolonged exposure and participation in violent acts instills in children a deep ideological attachment to the creed of the Islamic State while desensitization to violence disseminates a nihilist disregard for human life and ensures the propagation of an utopian image of a sectarian Islam and its long-term survival. While the question of child soldiering remains one of the most pressing concerns in international law, this phenomenon disproportionately aggravates in circumstances where children engage in terrorism and related offenses.

International law does not establish a specific minimum age for minors to be held legally responsible for their actions.⁶ This is despite the provisions of international instruments endorsing the formulation of a minimum age of criminal responsibility bearing in mind the degree of child discernment as determined by facts of emotional, mental and intellectual maturity⁷ and the recommendations by relevant organs to set this age at eighteen. Since States

² Lina Khatib, *The Islamic State's Strategy: Lasting and Expanding*, Carnegie Middle East Center (Jun. 29, 2015), <http://carnegie-mec.org/2015/06/29/islamic-state-s-strategy-lasting-and-expanding-pub-60511>.

³ Bernard Haykel, *On the Nature of Salafi Thought and Action*, in *Global Salafism: Islam's New Religious Movement* 33, 147 (Roel Meijer ed., 2009). The term Salafī derives from al-salaf al-s. ālih., meaning "the venerable ancestors" of the first generations of Islam whom Salafis seek to emulate.

⁴ Adam Smith, *Children of the Caliphate: The Threat Posed by the Islamic State School System*, 7 (NELSON INST. UNDERGRADUATE CONF. ON GLOBAL AFF., 2014), <http://www.drake.edu/media/departments/offices/international/nelson/Children%20of%20the%20Caliphate.pdf>.

⁵ This is similar to the strategies and goals of the Hitler Jugend ("Hitler Youth") groups that indoctrinated children in the ideology of Nazism.

⁶ G.A. Res. 44/25 at rt. 40(3)(a), Convention on the Rights of the Child, (Nov. 20, 1989).

⁷ No Peace Without Just. & UNICEF Innocenti Res. Center, *International Criminal Justice and Children* (Sept. 2002).

retain discretion on this matter, the definition of a minimum age of criminal responsibility varies under domestic law from seven to eighteen years depending on the history, culture of the country and the nature of the crime.⁸ The decision to exclude persons under eighteen from the jurisdiction of the International Criminal Court stems the premise that judicial mechanisms are not well suited to prosecute children who have committed an offense under international law.⁹

The absence of clear minimum age and of precedents for children alleged perpetrators of crimes under international law assumes a larger significance when coupled with the lack of a universally agreed definition of terrorism as a criminal act and its consequent international criminalization. Such duality creates an environment where (i) the potential of the international framework to provide accountability options for minors is limited by the personal and subject-matter jurisdiction of the International Criminal Court; (ii) it creates an obstacle to the development of international criminal law; (iii) it creates an obstacle to the development of a legitimate counter-terrorism strategy based on the rule of law; (iv) and the protection of a child in conflict with the law in cases involving terrorism is subjected to the requirements of security imperatives as codified and implemented in domestic legal systems.

The discourse to address terrorism creates the conditions for governments to resort to law-making through the adoption of multilateral treaties enforced by national criminal justice systems where the enactment of domestic counter-terrorism legislation often serves as a legal ground to justify military and other practices amounting to violations of the rule of law or as a mean to pose disproportionate limitation to civil liberties and human rights. The rejection of legal constraints on the use of power is supported by existing relationships between the legislative, judiciary and executive branch. This Article drives analytical venues in three legal areas: international humanitarian law, human rights law and counter-terrorism security regulations. It aims to provide an in-depth analysis of the impact of counter-terrorism on children rights, juvenile justice standards and purposes, and traditional criminal justice processes. It presents issues of accountability related to minors alleged perpetrators of terrorism while emphasizing the disproportionate deference to the executive in cases involving terrorism as in the administration of governance; it causes impairment in the functioning of the justice system and lies as the primary cause of institutional impunity. The Article assumes the challenge to identify viable judicial and non-judicial mechanisms for the accountability of minors involved in terrorism and

⁸ No Peace Without Just. et al., *supra* note 6 at 38.

⁹ Rome Statute of the International Criminal Court art. 26, Jul. 17, 1998, 2187 U.N.T.S. 90.

related offenses. It contends that national criminal justice systems, as influenced by the counter-terrorism *rationale*, not only fail to protect and promote the rule of law and fundamental values but are also ineffective as a tool to deter terrorism and ultimately serve international security. It upholds the view that there is a need to scrutinize counter-terrorism national strategies and balance the relationship between the executive, legislative and judiciary to avoid accountability issues and pursue the application of just legal frameworks as implemented in traditional criminal justice approaches. In this consideration, the Article develops as a comparative criminal law exercise between Syria' and United States' domestic systems of criminal accountability for minors engaging in terrorism and related acts, including *de facto* judicial systems emerged from the geopolitical fragmentation of the Syrian territory and thus advances a proposal of the structure of a new international mechanism. The partition of the Syrian territory caused traditional administrative institutions to be replaced, including the justice system. In areas under the control of organized armed groups in fact, an established net of exceptional courts without defined procedural standards, exercises jurisdictional authority on minors captured in the battlefield. Parallel to the regular court system, *de facto* courts fail to conform to international standards of independence and impartiality and to positively respond to the requirements of Common Article 3 of the Geneva Conventions. The Article also illustrates the structure of *de facto* courts and its impact on criminal justice processes. It evaluates the application of Shari'ah Law in such neo-established legal systems and analyzes the relation between Islamic doctrine and terrorism and the influential character of religious beliefs on prosecution, conviction rate and punishment of minors' alleged perpetrators. The breakdown of governmental control resulted in discrepancies in the execution of justice and in the treatment of the child in criminal justice. The attribution of responsibility to minors for crimes committed in the course of the armed conflict in Syria takes place in a politically-charged environment where there is no recognition of the exploitation of children in war effort as a war crime. The role of children in transition and post-conflict reconstruction is impaired by an exercise of justice as a punitive and criminalizing reaction which does not consider the requirements of international children rights and juvenile justice standards to provide alternatives to judicial proceedings.

The Article is divided into eight substantive components. Chapter I illustrates the evolution of children's participation in terrorism and, through statistical data analysis, the nature of children exploitation in the Islamic State. It theorizes that the systematic rate of child recruitment by the group and re-education is a paradigm shift in the child-soldier phenomenon and subsequent impact. Chapter II evaluates the scope of application of international humanitarian and human rights law to children engaging with

the Islamic State in the context of the armed conflict in Syria. This chapter develops an analysis of the legal classification of the Syrian armed conflict. It overviews the possibility for the conflict, determined as non-international in character, to internationalize under the fulfillment of specific circumstances prescribed by law and trigger the full applicability of the Geneva Conventions with related protections for children in combat. In this context, Syria's non-ratification of Additional Protocol II to the Geneva Conventions is discussed as it conducts to the dependence on the provisions of Common Article 3. The chapter also examines human rights law in its application to the armed conflict paradigm, taking into analysis Common Article 3 and fair trial rights as overlooked in counterterrorism legislation as applied to armed conflict. Chapter III investigates the degree of implementation of international human rights standards in Syria's counterterrorism strategy. According to general human rights principles, if criminal proceedings are initiated against a child, whether by a domestic or an international court, certain basic rules apply. The proceedings must fulfill the requirements for a fair trial as defined by human rights law. The chapter discusses human rights challenges involving minors facing prosecution in Syria's national criminal justice system and the duty of the Syrian government to investigate violations and provide a remedy. Chapter IV exposes the challenges determined by the lack of consensus over the definition of terrorism with respect to the development of international criminal justice, international jurisprudence and accountability. It evaluates the capacity of the International Criminal Court to address crimes committed in the context of the Syrian armed conflict and presents a proposal to establish a new international or internationally-assisted mechanism for accountability. Chapter V problematizes the enactment of counter-terrorism legislations on pre-existing criminal procedure, juvenile justice processes and related guarantees of protection provided by Syria's domestic law. Chapter VI expounds the United States extra-territorial exercise of jurisdiction over acts of terror and associated offenses in conjunction with an analysis on the legitimacy, appropriateness and implications of the prosecution of juveniles before military commission in view of the conformity of these courts with United States' military and legal doctrine. Chapter VII considers the correlation between the concept of Jihad in Islamic theory and acts of terrorism with an aim to estimate its significance and degree of influence on criminal justice processes as operated by Shari'ah courts. Chapter VIII evaluates the impact of the exercise of justice as influenced by counter-terrorism enactments on the pursuit of accountability through non-judicial measures, de-radicalization, rehabilitation and reintegration of children alleged perpetrators and their participation on potential transitional justice processes.

I. THE FUTURE GENERATION OF TERRORISTS

The development of terrorism throughout the 20th and 21st centuries has been characterized by the increasing involvement of children.¹⁰ This is explained by the fact that terrorism evolves with consideration of the counter-measures applied against it.¹¹ To direct qualified human capital in the battlefield, children have been identified as expendable resources, thereby commonly participating in suicide operations or typically performing minor auxiliary roles.¹² However, children involvement in suicide bombings has increasingly emerged as a phenomenon in modern terrorism and is by no means an atrocity unique to Syria and Iraq. In the aftermath of the 11th September 2001 (9/11), oppressive counter-terrorism measures lowered the probability of terrorist acts operational success and to avoid detection, terrorist groups became less hierarchical and more decentralized. The involvement of children in terrorism is a strategic changing of tactics and reflects the necessity to ensure an organization's survival. In fact, equally to women,¹³ children are associated with innocence and presumed to be inherently non-violent. As one Taliban fighter stated during their rise in the Afghan Civil War, "Children are innocent, so they are the best tools against dark forces."¹⁴ The malleability of children to indoctrination makes them particularly vulnerable targets who can be either coerced or induced by other means to involve in terrorist operations when the recruitment of adults does not seem to provide any comparative advantage and/or is simply lacking.

A. *The Islamic State Strategy*

The formalization of the Islamic State of Iraq and al-Sham (IS)¹⁵ as the renascent caliphate, realized in conjunction with an appeal to "all Sunnis, and to the young men of Jihadi-Salafism (*al-Salafiyya al-Jihadiyya*) across the entire world"¹⁶ to pledge an oath of fealty (*Bay'a*) to the leader Baghdadi.

The IS aptitude toward severe and arbitrary violence and the excesses in

¹⁰ Kara Anderson, *Cubs of the Caliphate: The Systematic Recruitment, Training, and Use of Children in the Islamic State 1* (Int'l Inst. for Counter-Terrorism 2016).

¹¹ *Id.* at 14.

¹² For example, they often serve as cooks, work as cleaners, man checkpoints, and transfer information and military supplies.

¹³ Counter-terrorist measures have adjusted to this trend, and women can no longer evade suspicion as effectively.

¹⁴ P. W. Singer, *Children at War* 26 (2006).

¹⁵ Islamic State of Iraq and Al-Sham (Daesh).

¹⁶ Cole Bunzel, *From a Paper State to Caliphate: The Ideology of the Islamic State*, 19 *Brookings Inst.* 7 (2015).

the practice of *takfir*¹⁷ is the rationale behind the segmentation of the Jihadi movement in the Middle East.¹⁸ The al-Qaeda leadership and affiliated scholars, in particular, by dismissing any association with the group and its methods, defined it as “deviating from the path of Divine Truth, being unjust to the mujahidin, following the road of extremism (. . .) refusing arbitration, declining reform, [and] disobeying the commands of its senior leaders and shaykhs.”¹⁹

An analysis of intra-jihadi historic, religious-ideological fragmentation is not the object of this study. However, IS’s unremarkable practices may serve as a point of reflection on its imperious necessity to maintain supremacy as an organized and legitimate unit. The establishment of IS itself can be seen as a *manœuvre* against the absence of recognition by a number of Jihadi scholars and predominant figures and as an attempt to characterize its identity, through sovereignty, as a stronghold against the perceived decline of Islam as oppressed by Western imperialism.

The IS has begun to change the nature of child participation in terrorism.²⁰ Reportedly, boys under eighteen years of age have been executed—either beheaded or shot—for suspected affiliation with other armed groups and torture, mass forced enslavement and sexual violence have been practiced against girls as young as ten years old, mostly from the Yazidi religious minority in Iraq.²¹ However, children have not only been extensively targeted by the group but they also witnessed and perpetrated IS executions.²²

The tactical benefits in using children as an effective form of psychological warfare are combined with the group’s intention to prioritize children as a vehicle to propagate its dogma through future generations. In fact, the group’s ambition to create and impose a new socio-political order depends on the concretization of its perspectives of longevity.

In areas under its control, the IS systematically indoctrinates the young generation by administrating existing educational institutions and amending the school curriculum as to reflect ideological precepts and military training.²³ Children in the IS are indoctrinated to an acutely severe and

¹⁷ *Takfir* is the act of declaring other Muslims infidels.

¹⁸ *Supra*, note 12 at 13.

¹⁹ *Id.* at 30.

²⁰ *Id.* at 1.

²¹ U.N. Hum. Rts. Council, Rep. of the Indep. Int’l Commission of Inquiry on the Syrian Arab Republic, Rule of Terror: Living under ISIS in Syria, ¶58, U.N. Doc. A/HRC/27/CRP.3 (2014); Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. Times (Aug. 13, 2015), <https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html>.

²² *Id.* at 3.

²³ The Al-Bouhtri School in Al-Bab has been used as an IS recruitment and military

uncompromising adherence to Jihadi-Salafist theology which is founded on the premise that unbelievers should be persecuted. In a specific stipulation: (a) all Muslims must associate exclusively with fellow “authentic” Muslims and dissociate from anyone not fitting this constricted definition; (b) failure to rule in accordance with God’s law constitutes unbelief; opposing the Islamic State is equivalent to apostasy; (c) all Shi’a Muslims are apostates deserving death; (d) and the Muslim Brotherhood and Hamas are heretics against Islam.²⁴

1. The Child Soldier Phenomenon in the Islamic State

The transparency by which the IS displays children exploitation is uncharacteristic to other terrorist organizations. By exposing the mobilization of children, the group aims not only to achieve short-term propaganda benefits but also to satisfy its hunger for publicity. The majority of media broadcasts in fact feature the participation of children in multiple contexts, from overly publicized executions and military camps to “*Qur’an* memorization fairs and *dawa* caravans.”²⁵

2. Multiple Combat and Non-Combat Roles

Since the establishment of the caliphate, the IS have employed children as spies, checkpoint guards, frontline soldiers and executioners.²⁶ A study conducted by the Georgia State University²⁷ illustrates instances of children and minors eulogized as martyrs in IS propaganda.

Of the reported cases:

thirty-nine percent died upon detonating a vehicle-borne improvised explosive device (VBIED);

thirty-three percent were killed as foot soldiers in unspecified battlefield operations;

six percent died while embedded in propagandist units, and four percent committed suicide in mass casualty attacks against civilians; and²⁸

training facility for boys under the age of 18 while the Sharea youth camp near Tabqa (Ar-Raqqa) reportedly trains over 350 boys between the ages of 5 and 16 years for combat roles.

²⁴ Yaron Friedman, *The Nuṣayrī - 'Alawīs: An Introduction to the Religion, History and Identity of the Leading Minority in Syria* 295 (2009).

²⁵ Mia Bloom, John Horgan & Charlie Winter, *Depictions of Children and Youth in the Islamic State’s Martyrdom Propaganda*, 9 *Combating Terrorism Ctr.*, Feb. 2016, at 29.

²⁶ Sebastian Gorka, Katharine Gorka & Claire Herzog, *Rising Threat: The Islamic State’s Militarization of Children*, TKG, 5 (2016).

²⁷ *Id.* at 20.

²⁸ 28 U.S.C. § 530C(b)(1)(M)(ii)(I) (2012). Here, ‘mass casualty attacks against civilians’ refers to an operation where three or more killings take place in a single accident, as per the Federal Bureau of Investigation (FBI) definition.

eighteen percent died during attacks on an enemy position using light automatic weapons before killing themselves by detonating suicide belts (*inghimasis*).²⁹

The traditional assumption regards the use of children as a replacement of “battlefield losses”³⁰ or as a strategy of last resort typical of the child soldier norm,³¹ is not mirrored in IS strategy. The employment of children in a multitude of combat and non-combat roles demonstrated by the data, leads to the assumption that their pattern of involvement in military operations does not present significant gaps respect to adults.³²

II. THE NATURE OF THE LAWS OF WAR, TERRORISM, AND COUNTER-TERRORISM

The term “war on terror” is *per se* non-legal, untechnical and rhetorical. The invocation of a global state of war contrasts with the existent legal framework to signify that to resort to a legitimate exercise of self-defense,³³ it is not necessary to analyze singular terrorist attacks since such dynamics are part of a continuing war. If such vision is admissible, the applicable regime is the law of war (*jus in bello*) which regulates the types of weapons used, lawful targets and the protection afforded by civilians and non-combatants.³⁴ However, powerful States demonstrated reticence in accepting pre-existing legal norms or denied their applicability.

A. *The Scope of Application of the Law Governing Armed Conflict*

The 1949 Geneva Conventions (GC)³⁵ contain several provisions

²⁹ This act is known as *inghimasis*, meaning “to plunge.”

³⁰ No Peace Without Just., *supra* note 6, at 98; MICHAEL WESSELS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 71 (2007).

³¹ *See generally*, GRAÇA MACHEL, IMPACT OF ARMED CONFLICT ON CHILDREN, Rep. of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to G.A. Res. 48/157, ¶44, U.N. Doc. A/51/306, (Aug. 18, 1996); UN Security Council Votes to Name and Shame Governments, Groups Who Abduct Children, Deutsche Welle, <http://www.dw.com/en/un-security-council-votes-to-name-and-shame-governments-groups-who-abduct-children/a-18526206> (last visited Oct. 23, 2016).

³² *Id.* at 20.

³³ The United States informed the UN Security Council in September 2014 that it relied on Article 51 of the UN Charter as the legal basis for conducting airstrikes against ISIS in Syria in support of Iraq.

³⁴ Yoram Dinstein, The Conduct of Hostilities under International Law of Armed Conflict 61 (2004).

³⁵ The conventions are: The Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 (GCI); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949 (GCII); Convention (III) relative to the

applicable to armed conflicts regardless by their formal designation as international or non-international in character. The principle of equality of rights and obligations enshrined in Common Article 1 urges the parties to “respect and ensure respect for the present Convention in all circumstances.”³⁶

B. Legal Classification of the Armed Conflict in Syria

1. Non-international Armed Conflict

The armed conflict between the Syrian government and its associated militias, and the main opposition groups whether secular or Islamist in nature, constitute a non-international armed conflict for the satisfaction of the requirements of Common Article 3 to the GC.³⁷ In addition, Article 1(1) Additional Protocol II to the GC (APII)³⁸ provides that APII shall apply to those armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.” Despite the degree of organization and territorial control exercised by opposition armed groups (OAGs), Syria’s non-ratification of APII hinders the applicability of the provisions contained therein.

2. International Armed Conflict

The Syrian conflict is formed by a multitude of overlapping non-international armed conflicts (NIACs). The fulfillment of specific preconditions however, creates the possibility to diversify such classification by converting the conflict, which is hitherto non-international in character,

Treatment of Prisoners of War. Geneva, 12 August 1949 (GCIII); Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 (GCIV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (APII), 8 June 1977.

³⁶ The Geneva Conventions of Aug. 12, 1949, Common Art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

³⁷ See, The Geneva Conventions of Aug. 12, 1949, Common Art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Conventions Common Article 3].

³⁸ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter 1949 Geneva Conventions Protocol II].

to an international one. If an OAG acts under the control of an outside state, or an outside state military intervenes in support of an insurgent or rebel armed group against the armed forces of the State,³⁹ the threshold necessary to internationalize the conflict may be crossed by involving the GC provisions related to international armed conflict (IAC). To satisfy the standard of “overall control” established by the ICTY Appeals Chamber in Tadić final judgment,⁴⁰ an outside state must have a role in “organizing, coordinating or planning the military actions” of the OAG. OAGs in Syria are enjoying various degrees of lethal and non-lethal support⁴¹ from a number of foreign States. However, as the internationalization of a *prima facie* NIAC depends on the nature of the relationship between the intervening state and the non-state actor, in the view of this author, the lack of open intervention, territorial occupation, incorporation of one or more non-state armed groups in the official armed forces of the intervening States, or of the official recognition of an opposition government, constitute insufficient parameters for the purposes of an internationalization of the conflict.

3. Consent of the Territorial State as an Element in the Legal Classification of the Syrian Conflict

A pertinent question in the context of the Syrian conflict as well as legal theory concerns the implications of the lack of consent by a territorial State to a military intervention by a foreign state directed against an OAG operating on or from its territory.⁴² In the Commentary on the 1949 GC,⁴³ the International Committee of the Red Cross (ICRC) asserts that “an international armed conflict arises between the territorial State and the intervening State when force is used on the former’s territory without its consent.” To date, the Syrian government has not consented to the United States-led anti-IS Combined Joint Task Force (CJTF-OIR)⁴⁴ to direct aerial operations against its territory and has identified them as an unlawful

³⁹ Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT’L L. STUD., 353, 356 (2016).

⁴⁰ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶137 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁴¹ Non-lethal support includes funding, technical assistance, provision of weaponry, and train-and-equip aid.

⁴² *Id.*, *supra* note 43, at 366.

⁴³ INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION, Art. 262 (2017).

⁴⁴ The Combined Joint Task Force Operation Inherent Resolve is formed by a group of ten Western and regional States, namely: Australia, Bahrain, France, Jordan, the Netherlands, Saudi Arabia, Turkey, United Arab Emirates, United Kingdom and United States.

violation of its sovereignty. An attack against a State's armed forces or national resources (i.e. State organs, population centers, industrial, communication infrastructure and transportation) as well as the already indicated partial or total occupation of its territory would uncontestedly constitute an IAC.⁴⁵ The situation is less clear when the attack is solely directed against the OAG located in the territorial State. The matter is not definitely settled under international law. Valid arguments exist either in support of the theory that non-consensus alone would represent a sufficient ground to claim the illegitimacy of foreign intervention or, on the other hand, that intervention which does not target national assets is not directed against the State for the characterization of an IAC under Common Article 2 GC.⁴⁶ CJTF-OIR actions are directed almost exclusively against IS which occupies a substantial portion of Syria's territory, population and infrastructure, rather than against Syria government-held territory, population and infrastructure.⁴⁷ To the present time, no adversarial action occurred between Syrian armed forces and CJTF that would trigger the application of the IAC regime. Additionally, CJTF-OIR operations have not resulted in overall or effective control of an OAG against the territorial state that would create a mechanism of attribution as a matter of the secondary rules of state responsibility.

C. Counter-Terrorism and the Rule of Law Framework

The 9/11 events accelerated the expansion of coercive responses to terrorism in the form of executive-led security/military approaches that challenge international legal paradigms.⁴⁸ In the words of Jeremy Waldron: "The lead idea of the Rule of Law is that somehow respect for law can take the edge off human political power, making it less objectionable, less dangerous, more benign and more respectful."⁴⁹ Terrorism is recognized as aiming to destroy fundamental human rights and freedoms; however, the security imperative to combat against it with difficulties mesh with international legal rules and standards.

The international law framework establishes robust *de jure* and *de facto*

⁴⁵ *Id.* at 366.

⁴⁶ The Geneva Conventions of 1949, Common Art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

⁴⁷ Chatham House Principles No. 4, www.chathamhouse.org.uk; (accessed 22 November 2016).

⁴⁸ NIGEL D. WHITE, THE UNITED NATIONS AND COUNTER-TERRORISM: MULTILATERAL AND EXECUTIVE LAW-MAKING, IN COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 54 (Ana Maria Salinas De Frias, et al. eds., 2012).

⁴⁹ Jeremy Waldron, Is the Rule of Law an Essentially Contested Concept?, 21 LAW AND PHILOSOPHY, 137, 159 (2002).

provisions for the protection of children⁵⁰ in times of armed conflict as particularly vulnerable and unarmed individuals⁵¹ “who by definition take no part in the hostilities and whose weakness makes them incapable of contributing to the war potential of their country.”⁵²

While the changes on the legal and military environments expose the unsustainability of the hypothesis of children as incapable to contribute to war efforts,⁵³ the systematic deployment of children in multiple direct combat roles not only lead to a loss of civilian status⁵⁴ and related guarantees,⁵⁵ but also increases children’s exposure to counter-terrorism (CT) military practices which primarily focus on intelligence and kinetic means of warfare—that is, the use of conventional force.⁵⁶

1. Use of Lethal Force against Suspected Terrorists

By definition, a targeted killing is the “intentional, premeditated and deliberate use of lethal force, by States or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”⁵⁷ In recent years, states increasingly adopted policies to legitimize targeted killings as a necessary response to terrorist threats and to the challenges of asymmetric warfare. Targeted killings occur in a variety of contexts and may be

⁵⁰ See generally, Ilene Cerne, *The Convention on the Rights of the Child: What it Means for Children in War*, 3 INT’L J. REFUGEE L., 100 (1991); Jenny Kuper, *International Law Concerning Child Civilians In Armed Conflicts* 223 (1997); JAAP DOEK, PAUL VLAADRINGBROEK & HANS VAN LOON, *CHILDREN ON THE MOVE: HOW TO IMPLEMENT THEIR RIGHT TO FAMILY LIFE* 64 (1996); EVERETT M., RESSLER, NEIL BOOTHBY & DANIEL STEINBOCK, *UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS AND REFUGEE MOVEMENTS* 234 (1988).

⁵¹ FRANÇOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 42 (2007).

⁵² *Id.* at 126.

⁵³ *Id.* at 35.

⁵⁴ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, Protocol I Relating to the Protection of Victims of Non-International Armed Conflict art. 51, ¶ 3, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter 1949 Geneva Conventions Protocol I]; Geneva Conventions Protocol II, *supra* note 38, at art. 13, ¶ 3.

⁵⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 89, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention IV]; 1949 Geneva Conventions Protocol I, *supra* note 54.

⁵⁶ THOMAS R. MOCKAITIS ET AL. Thomas R. Mockaitis et al., *The Military and the Role of Law in Countering Terrorism*, in *COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE*, *supra* note 48, at 388.

⁵⁷ Philip Alston (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Study on Targeted Killings*, ¶ 1, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) [hereinafter Alston, *Targeted Killings*].

conducted through a variety of means and methods.⁵⁸ The common element is that the use of lethal force is deliberate, intentional, and includes a degree of pre-meditation.⁵⁹

Under the international humanitarian law (IHL) regime, targeted killings are only lawful when the target is a combatant or a fighter⁶⁰ and the attack fulfills the conditions of military necessity and proportionality.⁶¹ As a matter of international law, the estimated 1,500 child soldiers deployed in IS ranks, respond to the qualification of what constitutes a legitimate target. While over-reliance on military force against the IS invariably exacerbates the contingency for these children to die in combat, it is unclear whether military actions are supported by any procedural safeguard for children, or if any accountability mechanism exists in cases of misconduct.

2. Classification, Administration, and Treatment of Battlefield Detainees

The determination of the legal status and classification of captured persons, including children, is fundamental to ascertain the rights to which they are entitled, to formulate charges with respect to any alleged criminal conduct, and to determine the appropriate forum for proceedings.

In CT operations there is a tendency to focus on the classification of captured persons as “unlawful enemy combatants” and to incarcerate such persons, absent a presumption of any entitlement to legal protection beyond general assurance of “humane treatment.”⁶² Such approach appears to be inconsistent not only with the constitution and military law of the States that endorse it but also with IHL. The removal of legal doctrine from military practices, as codified through the statement on the inapplicability of the GC to alleged detained terrorists,⁶³ implies a lack of reference to the rule of law

⁵⁸ *Id.* ¶ 8 (explaining that targeted killings rely on diverse military means, including: sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison).

⁵⁹ *Id.* ¶ 9a.

⁶⁰ 1949 Geneva Conventions Protocol I, *supra* note 54, at arts. 51, ¶ 2-52, ¶ 2; 1949 Geneva Conventions Protocol II, *supra* note 38, at Art. 13, ¶ 2.

⁶¹ 1949 Geneva Conventions Protocol I, *supra* note 54, at arts. 51, ¶ 5(b)-57, ¶ 2(a)(iii).

⁶² U.S. Administration, Guantánamo Bay. The approach to the legal classification, administration and treatment of detainees captured in military counter-terrorism operations proved to be inconsistent, not only with U.S. constitutional and military doctrine but also with international law.

⁶³ President George Bush effectively removed the foundational doctrine of the Geneva Conventions from military practices by claiming the inapplicability of the instrument to alleged detained terrorists (*See*, Memorandum from President George Bush to Vice President Richard B. Cheney, Sec’y of State Colin L. Powell, Sec’y of Defense Donald H. Rumsfeld, Attorney Gen. John D. Ashcroft, Chief of Staff to the President Andrew Card, Dir. of Cent.

as a standard of conduct for captured persons in CT and provides for the adoption of *ad hoc* measures which do not respond to the generally applicable norms.

Beside this consideration, the dichotomy of formal combatant status and the one of prisoner of war (POW) does not exist in NIACs. It follows that children involved in the conflict in Syria may be considered internees or detainees.⁶⁴ Children classified as security internees may be detained in accordance with the law of the host state or under the authority of a Security Council resolution, whereas the power to apprehend criminal detainees must be taken from the national law of the host state, and it is to that state authorities that detainees have to be surrendered at the earliest opportunity.⁶⁵

Determining the legal status of detained persons is connected to administrative and detention conditions challenges. In IAC captured children, should any doubt arise regarding the classification of their status, may afford the system of protection prescribed by the GC until such determination is carried out by a competent tribunal.⁶⁶ The application of this provision extends, among other categories, to “persons who accompany the armed forces and have lost their identity card.”⁶⁷

The classification of children involved with the IS could prove to be particularly problematic in light of specific practices of recruitment that aim to disrupt family boundaries and deprive children of their identity. For children to mature a sense of attachment to the group, recruitment takes place without parental support and/or participation, parents and relatives of children are often killed and children’s documents are substituted with IS-issued identity cards.⁶⁸

Children recruited by IS are neither able to afford the protection of

Intelligence George Tenet, Assistant to the President on Nat’l Sec. Affairs Condoleezza Rice, and Chairman for the Joint Chiefs of Staffs Richard B. Myer, on the Humane Treatment of al Qaeda and Taliban Detainees (7 Feb. 2002) <https://www.fidh.org/IMG/pdf/memo11.pdf>.

⁶⁴ JEAN PICTET, INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1386 (Yves Sandoz et al. eds., 1987) (commenting on Art. 5 of Protocol II, para. 113).

⁶⁵ This classification would apply uniquely to children captured by Iraqi armed forces on Iraqi territory, as Iraq ratified Protocol II of the Additional Protocol to the Geneva Convention of Aug. 12, 1949..

⁶⁶ Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention of 1949].

⁶⁷ *Id.* Art. 4; see also Jean de Preux, Int’l Comm. of the Red Cross, Commentary on the Third Geneva Convention Relative to the Treatment of Prisoners at War 64 (Jean Pictet, ed. 1960).

⁶⁸ Nadim Houry, *Children of the Caliphate: What to Do About Kids Born Under ISIS*, FOREIGN AFFAIRS, Nov. 23, 2016; Ben Ariel, *ISIS Issuing Photo ID Cards in Syria’s Raqqa*, Arutz Sheva (Apr. 18, 2015, <http://www.israelnationalnews.com/News/News.aspx/194219>).

Article 5 of the Geneva Convention III (GCIII),⁶⁹ nor to rely on nationality, whether foreign fighters, as a criterion for the determination of the affordability of the status of “protected persons” because these provisions are inapplicable to NIACs. A child combatant captured in the context of a NIAC is nevertheless still protected by Common Article 3 and relevant provisions of Additional Protocol I to the GC (API)⁷⁰ as a matter of treaty and/or customary law. The ICRC lays primary emphasis on the interest of detained child soldiers in internal armed conflicts and endeavors to secure their release wherever guarantees that they will not return to the battlefield can be given.⁷¹ In addition, the ICRC requires the Parties to consider the limited capacity of discernment of children under fifteen years and ensure that captured children receive special treatment as appropriate to their age.⁷²

3. Detention as a Function of Criminal Justice Processes

a. *Pre-Trial Arrest Phase*

The “passing of sentences and the carrying out of executions, without previous judgment pronounced by a regularly constituted court”⁷³ is indicated among the acts “prohibited at any time and in any place whatsoever.”⁷⁴ In addition, Article 75 API establishes the obligation to “afford the accused before and during his trial all necessary rights and means of defense”⁷⁵ but it does not explicitly contain the right to be brought before a judicial authority and the right to counsel. IHL leaves an important gap in respect to detention effected as capture. The possibility to protract the period of detention, prior to the preferment of criminal charges may in fact, leave children and minors in the custody of investigating authorities for periods that would be inconsistent with the prohibition of arbitrary detention or the necessary conditions for a fair trial.⁷⁶ In IHL there does not exist a provision equivalent to Article 9 of the International Covenant on Civil and Political Rights (ICCPR)⁷⁷ concerning trial within a reasonable time or release. The

⁶⁹ Third Geneva Convention of 1949, *supra* note 66, art. 5.

⁷⁰ 1949 Geneva Conventions Protocol I, *supra* note 54.

⁷¹ Maria T. Dutli, *Captured Child Combatants*, 72 INT’L REV. OF THE RED CROSS ARCHIVE 456 (1990).

⁷² *Id.*

⁷³ Third Geneva Convention of 1949, *supra* note 66, art. 3(1)(d).

⁷⁴ 1949 Geneva Conventions Common Article 3, *supra* note 37.

⁷⁵ 1949 Geneva Conventions Protocol I, *supra* note 54, art. 75(4)(a).

⁷⁶ Nigel S. Rodley, *Detention as a Response to Terrorism*, in COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE, *supra* note 48, at 457.

⁷⁷ International Covenant on Civil and Political Rights, art. 9, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR];

only provision regarding trial is found in Article 71 GCIV⁷⁸ which does not extend to NIACs. Due to Syria's non-ratification of APII, children captured by Syrian armed forces could rely exclusively on trial with all "judicial guarantees which are recognized as indispensable by civilized nations."⁷⁹ However, children of Iraqi nationality, captured on Iraqi territory, may be afforded the rights concerning penal prosecution contained in Article 6 APII.⁸⁰

b. Secret and Incommunicado Detention

The term secret detention refers to the detention of an individual in circumstances that do not permit any contact with the outside world following the detaining authorities' refusal to confirm or deny, or actively conceal, the fact of the detention or the fate or location of the detainee.⁸¹ Instances of secret detention amount to "enforced disappearance"⁸² and constitute a form of incommunicado detention.⁸³ The Special Procedures of the Human Rights Council reported the use of secret and incommunicado detention in the fight against terrorism.⁸⁴ The GC does not provide any specific provision concerning secret detention.⁸⁵ It may be noted however, that secret detention practices involve international criminal responsibility, not only pursuant to war crimes⁸⁶ but also to crimes against humanity. The

G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

⁷⁸ 1949 Geneva Convention IV, *supra* note 55, art. 71.

⁷⁹ 1949 Geneva Conventions Common Article 3, *supra* note 37.

⁸⁰ 1949 Geneva Conventions Additional Protocol II, *supra* note 38, art. 6.

⁸¹ Human Rights Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, ¶ 8, U.N. Doc. A/HRC/13/42, (May 20, 2010) [hereinafter *Joint Study on Secret Detention and Counter-Terrorism*].

⁸² Rome Statute of the International Criminal Court art. 7(2)(i), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *The Rome Statute*]; G.A. Res. 61/177, art 2, International Convention for the Protections of All Persons from Enforced Disappearance (Jan. 12, 2007).

⁸³ *Joint Study on Secret Detention and Counter-Terrorism*, *supra* note 81, ¶ 31.

⁸⁴ *Joint Study on Secret Detention and Counter-Terrorism*, *supra* note 81, ¶¶ 98-102; Martin Scheinin (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 62, U.N. Doc. A/HRC/10/3/Add.2, addendum 2 (Dec. 16, 2008); Ben Emmerson (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism), *Framework principles for securing the accountability of public officials for gross or systematic human rights violations committed in the course of States-sponsored counter-terrorism initiatives*, ¶ 50, U.N. Doc A/HRC/22/52 (Apr. 17, 2013).

⁸⁵ *Id.* 64, at 134.

⁸⁶ These war crimes include breaches of the Geneva Conventions. See Third Geneva Convention of 1949, *supra* note 66, art. 70; 1949 Geneva Convention IV, *supra* note 55, art. 106.

Rome Statute of the International Criminal Court (ICC Statute)⁸⁷ establishes that “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”⁸⁸ amounts to crimes against humanity.

c. Torture, Interrogation and the Rule of Law

Since the prohibition against torture is absolute,⁸⁹ the standard for interrogation is that coercion is not allowed in foreign battlefields or in domestic civilian holding facilities, regardless the status of the suspect. After 9/11, governments around the world denied the extra applicability of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁹⁰ or the ICCPR, to shield the engagement of their officials⁹¹ in this practice and various forms of political partisanship used notions such as “enhanced interrogation techniques” or “moderate physical pressure” to circumvent existing rules.

The GC prohibits “violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment” and provides for official guarantees in the event of legal proceedings.⁹² IS’ captured children, due to their membership and involvement with the crimes perpetrated by the terrorist group, incur the risk of torture and inhuman or degrading treatment. Despite the attempts to claim that the provisions contained in Common Article 3 does not apply to terrorist suspects,⁹³ following investigations on interrogation practices,⁹⁴ corrective responsive actions⁹⁵ have been undertaken to restore the validity of GC

⁸⁷ The Rome Statute, *supra* note 82.

⁸⁸ *Id.* art. 7.1(e).

⁸⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1, 2.2, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT]; ICCPR, *supra* note 77, arts. 4.2, 7.

⁹⁰ CAT, *supra* note 89.

⁹¹ See generally S. COMM. ON ARMED SERVICES, 110 CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Comm. Print 2008).

⁹² 1949 Geneva Conventions Common Article 3, *supra* note 37, art. 3(1).

⁹³ Memorandum from Assistant Attorney Gen. Jay S. Bybee to Counsel to the President Alberto R. Gonzales and General Counsel of the Department of Defense William J. Haynes II, on Application of Treaties and Laws to al Qaeda and Taliban Detainees, at 21-22, 9 (22 Jan. 2002).

⁹⁴ These interrogations practices mainly concerned military and CIA interrogations.

⁹⁵ Corrective actions included the withdrawal of erroneous legal opinions, the publication of military interrogation rules, and the U.S. Supreme Court declaration of the applicability of the Geneva Convention to terrorist groups. See also *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

standards in CT.⁹⁶

III. HUMAN RIGHTS CHALLENGES IN THE CONTEXT OF COUNTER TERRORISM

The claim that the applicability of International Human Rights Law (IHRL) is excluded from situations of armed conflict has a degree of conceptual plausibility. Despite the challenges posed on the extra-territorial applicability of the ICCPR, the two law paradigms coexist in a “complementary, not mutually exclusive”⁹⁷ manner. The fundamental general principles of IHL invariably affect and supply the interpretation of relevant IHRL rules, but this regime may be subject to derogation in times of public emergency.⁹⁸ Most human rights instruments stipulate several non-derogable rights, namely: the right to life, freedom from torture and cruel, inhuman and degrading punishment, *ex post facto* criminal liability and punishment.

A. National Implementation of Human Rights in Syria

The State of Emergency Act,⁹⁹ promulgated by the Baath party as a permanent nation-wide state of emergency was lifted by virtue of Decree 161, after four decades, following popular demand for comprehensive reforms.¹⁰⁰ The State of Emergency act imposed severe restrictions on the rights and freedom of Syrian citizens by enacting exceptional legislations which allocated extensive power to the executive system and replaced the ordinary judiciary. The Counter-Terrorism Law No. 19 (CTL)¹⁰¹ replicated many of these measures years later. Syria is party to several universal and regional human rights treaties, including the ICCPR, CAT, the Convention on the Rights of the Child (CRC),¹⁰² and the Arab Charter on Human Rights

⁹⁶ The US Department of Defense Law of War Program directed that the U.S. forces comply with the law of war during all armed conflicts, regardless of their international or non-international nature and maintain the spirit of the law of war during all other operations. *See* Department of Defense, Law of War Manual 1051, 1070 (Office of General Counsel Department of Defense, 2015).

⁹⁷ Human Rights Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 11 (May 26, 2004).

⁹⁸ ICCPR, *supra* note 77, art. 4.

⁹⁹ State of Emergency Act, Legislative Decree (No. 51/1962) (Syria).

¹⁰⁰ *See generally* Counter-Terrorism Law, Legislative Decree (No. 161/2011) (Syria).

¹⁰¹ *See generally* Counter-Terrorism Law, Legislative Decree (No. 19/2012) (Syria).

¹⁰² United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1999).

(ACHR).¹⁰³

B. Human Rights Law Norms

1. Right to Life of Suspected Terrorists

The general norms of international law constraining the use of lethal force by state authorities are those of IHRL. The right to life¹⁰⁴ in times of armed conflict becomes the *lex specialis* that determines whether the taking of a person's life will be deemed arbitrary or not.¹⁰⁵ Article 6 ICCPR provides that: "No one shall be arbitrarily deprived of his life."¹⁰⁶ The element of arbitrariness is relevant to distinguish extrajudicial executions from killings which are not forbidden under international law standards such as, killings in armed conflict that are regulated by the rules concerning the conduct of hostilities. Differently from other circumstances of CT where "extrajudicial executions" need to be legitimized under a law enforcement rationale,¹⁰⁷ in the context of armed conflict, a targeted killing does not *per se* involve a violation of the right to life. As the situation in Syria occurs within the framework of the law of armed conflict, the lawfulness of a targeted killing involving children, among other categories, is to be assessed under the parameters of this sphere of law and it may not amount to a violation of the right to life¹⁰⁸ if it took place in conformity with IHL rules. The right to life is not reflected as such in the Syrian Constitution.¹⁰⁹ However, the government of Syria has the obligation to respect, protect, and minimize to the greater extent possible any risk to life. The 2012 annual report of the UN Secretary-General (SG) on Children and Armed Conflict reported that Syrian government armed forces and their allied *Shabiha* militia violate international standards on children and armed conflict.¹¹⁰ An

¹⁰³ League of Arab States [LAS], Revised Arab Charter on Human Rights, (May 22, 2004) [hereinafter ACHR].

¹⁰⁴ ICCPR, *supra* note 77, art. 6; ACHR, *supra* note 102, art. 5; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, art. 2, Nov. 5, 1950, E.T.S. 5, 213 U.N.T.S. 221; Org. of African Unity [OAU], African (Banjul) Charter on Human and Peoples' Rights, art. 4, OAU Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 217 (June 27, 1981).

¹⁰⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 at 240 (July 8).

¹⁰⁶ ICCPR, *supra* note 77, art. 6.

¹⁰⁷ For example, operations against a suspected suicide bomber would be such a circumstance.

¹⁰⁸ NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW 468 (Oxford U. Press 2008).

¹⁰⁹ دساتير الجمهورية العربية السورية لعام 2012 [Constitution] Feb. 26, 2012 (Syria)[hereinafter Syrian Constitution of 2012].

¹¹⁰ U.N. Secretary-General, *Children and armed conflict*, ¶ 2, A/66/782-S/2012/261 (Apr.

estimated 10,000 children recruited by OAGs have been killed during military operations by government forces since the outset of the conflict.

2. Right to Fair Trial

The right to fair trial¹¹¹ is not listed as a non-derogable right under Article 4(2) of the ICCPR. Even in situations when derogation is permissible the principle of legality and the rule of law compel respect for the fundamental requirements of a fair trial. Fair trial guarantees are enshrined in the Syrian Constitution and include: presumption of innocence,¹¹² information on the nature and cause of the accusation,¹¹³ necessary rights and means of defense¹¹⁴ and no retroactivity of the law.¹¹⁵ In Syria, the affordability of the right to fair trial is severely challenged by CTL and related measures. In many instances, the right to *habeas corpus* is denied to those in custody; criminal provisions are too broadly defined, death penalties are issued by not “regularly constituted” courts which do not satisfy the requirement of impartiality, the judiciary fails to monitor the national justice system and it provides no effective remedy for victims of violations.¹¹⁶

3. Pre-Charge Arrest Phase

The re-charge arrest phase makes detainees extremely vulnerable to torture or other ill-treatment. International law permits pre-charge detention provided assurance of the safeguards contained in Article 9 of the ICCPR and Article 37 of the CRC. These include the right of any detained child to be promptly brought before a judge or any other officer exercising judicial power and the entitlement to trial within a reasonable time or to release. The custodial detention of persons awaiting trial shall not be practiced as a general rule.¹¹⁷ However, the promulgation of Decree No. 55,¹¹⁸ circumvented this standard by adding a clause to Article 17 of the Syrian

26, 2012).

¹¹¹ ICCPR, *supra* note 77, art. 14.

¹¹² دستور الجمهورية العربية السورية لعام 2012 [Constitution] Feb. 24, 2012, art. 51(2) (Syria).

¹¹³ *Id.*, art. 53(3).

¹¹⁴ *Id.*, art. 51(3).

¹¹⁵ *Id.*, art. 52.

¹¹⁶ U.N. Human Rights Council, Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, ¶ 16, U.N.Doc. A/HRC/31/CRP.1 (Feb. 3, 2016).

¹¹⁷ CAROLYN HAMILTON, ET AL., ADMINISTRATIVE DETENTION OF CHILDREN: A GLOBAL REPORT 244 (UNICEF 2011).

¹¹⁸ Legislative Decree (No. 55/1959) (Syria).

Code of Criminal Procedure¹¹⁹ authorizing “judicial police or whom it commissions” (e.g., the security apparatuses), to detain a suspect for up to 60 days.¹²⁰ During this time, the detainee remains isolated and as a result, his or her basic rights are subjected to violation. To date, 1,433 children have been detained, including some as young as 8 years old, for alleged conflict-related offenses, including terrorist activity. Many of them died in custody.¹²¹

4. Instances of Secret and Incommunicado Detention in Syria

In its jurisprudence, the Human Rights Committee (HRC) has found that incommunicado detention prevents prompt presentation of a detained person before a judge and “inherently violates” article 9(3) of the ICCPR, in addition to a possible violation of articles 7, 9(4), and 10(1) of the ICCPR. As recognized by the Special Rapporteur on Torture, torture is “most frequently practiced during incommunicado detention” implying that incommunicado detention should be illegal. The Criminal Code of the Syrian Arab Republic (Syrian Criminal Code)¹²² does not criminalize enforced disappearances as an autonomous crime. In Syria, enforced disappearance is used as a war tactic to intimidate and punish families by causing a state of uncertainty and mental distress. The documented 10% of cases of enforced disappearance involve children.¹²³

5. Opposition Armed Forces Detention Areas

OAGs established detention and prison areas in Syria. Detention and prison facilities, including those managed by the Free Syrian Army (FSA), are unknown and need to be geographically located, inspected and monitored to ensure rightful detention and humane holding conditions. This is particularly critical due to the link of detained persons to armed conflict-related crimes and raises numerous concerns with respect to the detention of

¹¹⁹ Code of Criminal Procedure, Legislative Decree (No. 112/1950) (Syria).

¹²⁰ Nael Georges, *The Syrian Regime Legal “Reforms” (II) “State of Emergency as the Trojan Horse of Counter-Terrorism*, THE LEGAL AGENDA (Dec. 12, 2016), <http://legal-agenda.com/en/article.php?id=2957>.

¹²¹ *Extreme Measures: Abuses against Children Detained as National Security Threats*, HUMAN RIGHTS WATCH (July 28, 2016), <https://www.hrw.org/report/2016/07/28/extreme-measures/abuses-against-children-detained-national-security-threats>.

¹²² Criminal Code, Legislative Decree (No. 148/1949) (Syria).

¹²³ Syria Observatory for Human Rights, *Toll of Detainees Still under Arrest or Enforced Disappearance from March 2011 to May 2016* (2016). https://sn4hr.org/wpcontent/pdf/english/23863_Children_Killed_In_Syria_Since_March_2011_en.pdf (accessed 2 February 2017).

minors.¹²⁴

6. Freedom from Torture and Cruel, Inhuman or Degrading Treatment

The absolute prohibition against torture is a principle of *jus cogens* enshrined in the Universal Declaration of Human Rights (UDHR).¹²⁵ The CAT establishes an absolute bar to torture without exception or derogation.¹²⁶ Syria is party to international conventions that protect the lives of detainees and prohibit killings and summary executions, enforced disappearances, torture and other forms of ill-treatment. The obligation pending on the Syrian government requires it provide an effective remedy to victims of violations, including reparations, and to undertake prompt and impartial investigations of alleged violations. Security Council Resolution 2191 demanded all parties to the Syrian armed conflict to end practices resulting in “extrajudicial killings and executions, torture, enforced disappearance, and other violations of international law.”¹²⁷ No party to the conflict has, yet, taken measures to implement the resolution either by amending their policing, interrogation and detention practices, ensuring the due process of law or preventing summary execution or arbitrary arrest. As such, the resolution remained wholly unimplemented and ineffective.

7. Circumstances Amounting to Torture, Inhuman or Degrading Treatment in Syria

The Syrian Constitution and Criminal Code proscribe torture.¹²⁸ However, the United Nations Committee against Torture (UNCAT) expressed concern regarding the effectiveness of the provisions in ensuring appropriate penalties applicable to such acts. The Committee noted that the definition of ill-treatment in the domestic relevant instruments does not conform to the CAT. In addition, Article 16 of Decree 14¹²⁹ established a

¹²⁴ A military commander of the FSA confirmed to Human Rights Watch to have captured children between ages 13 and 15 who had fought with IS and attempted to deradicalize and rehabilitate them by isolating them in a remote rural location and bringing religious leaders for deradicalization.

¹²⁵ G.A. Res. 217 (III) A, art. 5, Universal Declaration of Human Rights (Dec. 10, 1948); *see also* CAT, *supra* note 89, art. 1; ICCPR, *supra* note 77, art. 7.

¹²⁶ CAT, *supra* note 89, art. 2.

¹²⁷ S.C. Res. 2191 (Dec. 17, 2014).

¹²⁸ .tra (airyS) 2102 ,62 .beF [noitutitsnoC] 2102 ية ال سوربة ل عام 2102 د سد تور ال جمهورية ال عرب ية ال سوربة ل عام 2102 53; Criminal Code, Legislative Decree (No. 148/1949) (Syria).

¹²⁹ Immunity from prosecution has also been enshrined in the applicable law for specific categories of Government officials, including the President. Legislative Decrees No. 14, Legislative Decree (No. 14/1969) (Syria), and No. 69, Legislative Decree (No. 69/2008) (Syria), grant immunity to members of the security forces and police for crimes committed in

principle of immunity for state officials¹³⁰ for crimes committed during the performance of their duties “given the seriousness of the tasks of the officers (. . .) in facing the violence by (. . .) terrorists and outlaws.”¹³¹ Torture and ill-treatment of detainees, including children, who were raped or experienced other forms of sexual violence or mutilation while detained,¹³² have been widely documented in State-controlled facilities.

8. Positive Obligation for the State Authorities to Carry out an Immediate, Effective, and Independent Investigation

International jurisprudence establishes that States own the primary burden to prove that the death of a person in its custody did not result from acts or omissions attributable to it. The level of control exercised by State authorities over the custodial environment applies to deaths occurring in civilian prisons as well as in detention facilities under the control of the military or security apparatus. Failure to conduct such an investigation may incur the responsibility of the State for the death of the victim.¹³³ The government of Syria has consistently denied UNCAT and other international human rights monitoring organizations unfettered access to its territory. This has effectively prevented any internationally mandated organization, including the United Nations,¹³⁴ from documenting the total number of persons killed during the conflict, as well as the number of individuals subjected to enforced disappearance or held by the government or by armed groups and terrorist organizations.¹³⁵

violation of international legal obligations to investigate and prosecute extrajudicial killings, torture, and other violations. Under the Syrian Constitution, the President is granted full personal immunity, الجمهورية العربية السورية لعام 2102 [noitutitsnoC] 2102, 62. beF روتسد (Syria) art. 117.

¹³⁰ Specifically, these officials are the members of the General Intelligence Directorate (or GID), Legislative Decree (No. 14/1969) (Syria) art. 16.

¹³¹ Legislative Decree (No. 4509/1969) (Syria) art. 4.

¹³² U.N. Committee Against Torture, *Consideration by the Committee against Torture of the implementation of the Convention in the Syrian Arab Republic in the absence of a special report requested pursuant to article 19, paragraph 1, in fine: Concluding observations of the Committee against Torture, Syrian Arab Republic*, at § A(2)(a), U.N. Doc. CAT/C/SYR/CO/1/Add.2 (June 29, 2012).

¹³³ *Id.*, at 106, § 8.

¹³⁴ United Nations Supervision Mission in Syria, *Implementation of Point Four of the Envoy Six-Point Proposal on Arbitrary Detention*, UNSMIS, 1 (2012).

¹³⁵ *Id.*, at 127.

IV. TERRORISM AS A LEGAL CONCEPT IN INTERNATIONAL LAW AND THE ACCOUNTABILITY OF MINORS

The present international framework provides to be comprehensive for most aspects of counter-terrorism in form either of hard¹³⁶ or soft law.¹³⁷ A normative lacunae persists in the inability of the international community to reach consensus on a universal definition of terrorism.¹³⁸ The Secretary General's High-Level Panel on Threats Challenges and Change (HLP) defines terrorism as "any action (. . .) that is intended to cause death or serious bodily harm to civilians or noncombatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."¹³⁹ The existent national-regional definitions and related interpretations shape the norms on terrorism and their application.

A. Criminal Liability of the Child at the International Level

With respect to terrorist acts, the body of international law makes no distinction between adult perpetrators and children. Since children are not excluded by the commission of terrorist acts by virtue of childhood and international law does not prohibit their prosecution, they can be deemed violators of international rights and provisions governing acts of terrorism.¹⁴⁰ The international system of criminal accountability lacks a mechanism of prosecution for children perpetrators of terrorist acts. The absence of an international juvenile court implies that children would face prosecution before the International Criminal Court (ICC) as a matter of

¹³⁶ See, e.g., G.A. Res. 1021 A (III), Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948); S.C. Res. 827 (May 25, 1993) (ICTY Statute); The Rome Statute, *supra* note 82; ICCPR, *supra* note 77; UDHR, *supra* note 123; see also customary criminal law governing crimes against the humanity, customary law and treaty provisions of the Geneva Conventions and their Additional Protocol.

¹³⁷ See, e.g., G.A. Res. 65/221, at 2, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Apr. 5, 2011); G.A. Res. 65/34, at 2, Measures to Eliminate International Terrorism (Jan. 10, 2011).

¹³⁸ BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 144 (Oxford U. Press 2006); Jörg Friedrichs, *Defining the International Public Enemy: The political struggle behind the legal debate on international terrorism*, 19 LEIDEN J. INT'L L. 69 (2006).

¹³⁹ U.N. Secretary-General's High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*, at 52, U.N. Doc. A/59/565, Sales No. E.05.I.5 (2004). See also, 1949 Geneva Conventions Protocol I, *supra* note 54, art. 51(2); 1949 Geneva Conventions Protocol II, *supra* note 38, art. 13; S.C. Res. 1566, § 3 (Oct. 8 2004).

¹⁴⁰ Ine van Giessen, *Child Terrorists and Child Foreign Fighters in Europe*, CULTURE AND HUMAN RIGHTS BLOG (Oct. 3, 2016, 9:55 AM), <http://culture-human-rights.blogspot.de/2016/10/child-terrorists-and-child-foreign.html>.

individual criminal responsibility for war crimes¹⁴¹ and crimes against the humanity¹⁴² as terrorism is not included as an independent crime under the court jurisdiction. However, there exists no *de facto* possibility to prosecute children before such organ due to the exclusion from the ICC jurisdiction of individuals below eighteen years of age.¹⁴³ In addition, the Syrian government neither ratified the ICC Statute nor accepted the court jurisdiction through a declaration¹⁴⁴ pursuant to Article 12.3.¹⁴⁵

B. Alternative Options for Accountability of the Child at the International Level

The criminal liability of children at the international level is connected to diverse challenges in relation to their psychological development, which leads to a difficulty in establishing when the required element of *mens rea* is acquired, and to the absence of a minimum age of criminal accountability.¹⁴⁶ For the purposes of international criminal law, an individual may be found liable for an offense only when the *actus reus* is committed with intent.¹⁴⁷ The prohibition of a child's participation in an armed conflict at a specific age reflects the belief that as a child, an individual does not bear the required mental, physical or moral development to make a conscious decision with respect to his or her participation.¹⁴⁸

C. The Establishment of an International or Internationally-assisted Tribunal

The Security Council has access to the exercise of its power under Chapter VII of the United Nations Charter (UN Charter) to create, as subsidiary organs, international criminal tribunals to address the accountability deficit in specific contexts. The creation of a new mechanism for accountability in Syria should provide a different approach from the ICC selectivity in the application of principles of criminal law. The consideration

¹⁴¹ The Rome Statute, *supra* note 82, art. 8.

¹⁴² *Id.*, art. 7.

¹⁴³ *Id.*, art. 26.

¹⁴⁴ *Syria and the International Criminal Court: Questions and Answers*, HUMAN RIGHTS WATCH (Sept. 17, 2013), https://www.hrw.org/sites/default/files/related_material/Q%26A_Syria_ICC_Sept2013_en_0.pdf.

¹⁴⁵ The Rome Statute, *supra* note 82, art. 12(3).

¹⁴⁶ Erin Lafayette, *The Prosecution of Child Soldiers: Balancing Accountability with Justice*, 63 SYRACUSE L. REV. 297, 303 (2013).

¹⁴⁷ The Rome Statute, *supra* note 82, art. 30.

¹⁴⁸ See Lafayette, *supra* note 144, at 304.

of Islamic Law (*Shari'ah*) as a static, non-progressive legal system¹⁴⁹ and the consequent exclusion of fundamental and eventually compatible principles from the ICC Statute created the reluctance of Islamic states in ratifying the document and it caused the current territorial jurisdictional deficiency of the court over crimes committed in Syria. The legal basis for the establishment of a new mechanism should combine elements and procedures of international criminal law with relevant substantive and procedural rules of Shari'ah law.

The concept of Islamic universalism is founded upon the absolute rejection of other legal systems.¹⁵⁰ However, there exists some degree of compatibility between the two spheres of law. Islamic states in fact, signed into treaties outlawing war crimes, crimes against the humanity and genocide.¹⁵¹ The recognition of the three types of crimes envisaged in international criminal law lead to the assumption that the concept of international crimes is not in contradiction with Islamic perspectives. In addition, individual criminal responsibility, together with the requirement of *mens rea* and *actus reus* and the possibility of reparation for victims,¹⁵² functions as a common denominator.

For the new tribunal to acquire credibility among Islamic communities, a balance should be established in the percentage of judges, prosecutor and defense lawyers of Shari'ah and practitioners from other legal traditions.¹⁵³ A particular consideration regard to the creation of a mechanism for accountability should be given to its subject-matter jurisdiction, personal jurisdiction, temporal jurisdiction and territorial jurisdiction.

1. Subject-matter Jurisdiction

The categories of offenses perpetrated by children engaged in IS military operations may constitute war crimes, crimes against the humanity and other violations of the law of war. It appears appropriate to assume that such crimes should be included in the accountability mechanism's subject matter jurisdiction. Suicide bombing and VBIED causing mass civilian

¹⁴⁹ Mohamed E. Badar, *Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court*, 24:2 LEIDEN J. INT'L. 411, 412 (2011).

¹⁵⁰ Marcus Beham, *Islamic Law and International Criminal Law*, in 7 ISLAM AND INTERNATIONAL LAW: ENGAGING SELF-CENTRISM FROM A PLURALITY OF PERSPECTIVES 349, 356 (Marie-Luisa Frick & Andreas Th. Müller eds., Koninklijke Brill NV 2013).

¹⁵¹ Michael Kelly, *Islam & International Criminal Law: A Brief (In) Compatibility Study*, PACE INT'L L. REV., Mar. 2010 1, 27.

¹⁵² The Rome Statute, *supra* note 82, art. 75 (prescribing compensation for victims is mirrored in Islamic Law by the concept of *diyha*).

¹⁵³ Sergei Syapin, *A "Hybrid" Tribunal for Daesh?*, EJIL: TALK! (May 4, 2016), available at <http://www.ejiltalk.org/a-hybrid-tribunal-for-daesh/>.

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casualties can be deemed as acts of terrorism. The aptness for inclusion of the crime of terrorism is it however connected to future legal and political developments at the international level.

2. Personal Jurisdiction

The experience with the Special Court of Sierra Leone (SCSL) demonstrates that the decision to prosecute child soldiers is not free from criticism. The establishment of a new mechanism for the criminal accountability of a child would not disengage from the dilemma of child soldiers but it would provide an opportunity for prosecution that ensure procedural safeguard of judicial guarantees and fundamental rights and orients on rehabilitation instead of punishment for children below the age of eighteen. In consideration of the resources necessary to establish a new tribunal and to the severity of the crimes committed in Syria, it seems appropriate to extend personal jurisdiction to adult perpetrators and create a uniform mechanism of accountability.

3. Temporal Jurisdiction

The start of temporal jurisdiction commonly runs from a specific event of violence leading to a period of conflict. The commencement date naturally implies that previous criminal acts fall outside the new mechanism jurisdiction. With respect to Syria it is likely appropriate to establish the starting date as to March 2011 and to leave an open-ended temporal jurisdiction due to the ongoing violence.

4. Territorial Jurisdiction

In previous institutions, the territorial jurisdiction has generally been limited to the territory of the State concerned. In the context of Syria, the assessment of territorial jurisdiction should take in consideration the degree of trans-boundary movement of perpetrators.

V. JUVENILE JUSTICE, COUNTER-TERRORISM AND LEGAL PROCEDURES OF SYRIAN CRIMINAL LAW

The obligation to prosecute international crimes at the national level is a well-established principle of international law¹⁵⁴ which takes in account the interest of singular states to sovereignty. The prosecution of child terrorists and child foreign fighters is therefore left to the discretion of domestic and municipal courts which clash with different legal standards and results.

¹⁵⁴ The Rome Statute, *supra* note 82, art. 17.

Since juvenile justice is a modern legal construct, systems of Islamic juvenile justice have little recourse on orthodox Islamic jurisprudence and related legal texts and it rather include legislative and other processes that integrate Islamic Laws with customary and international law norms.¹⁵⁵ Contrary to the premodern world Islamic tradition that connoted corporal punishment as normative, in the modern era the criminal liability of an individual is addressed through terms of imprisonment.

A. *Minimum Age of Criminal Responsibility*

Article 2 of the Juvenile Delinquents Act No. 18 (JDA)¹⁵⁶ stipulates that: “No juvenile shall be liable to criminal prosecution for an offence that he committed when he was under seven years of age.” Syrian national law embodies the categorization of juveniles provided by conventional Islamic jurisprudence and indicates three distinct phases of maturity for legal and criminal responsibility: incompetent,¹⁵⁷ semi-competent,¹⁵⁸ fully competent.¹⁵⁹

Children who have not attained the age of seven years are considered incapable of discernment and are entirely absolved of responsibility for any form of contravention, misdemeanor or felony which they commit. At this stage, children cannot be tried, prosecuted, arrested or interrogated, nor can general proceedings be initiated against them;¹⁶⁰

Adolescents from seven to fifteen years of age cannot be sentenced to penalties for acts or offences committed but may be subject to special reform measures with the purpose to provide for the welfare and reform of the child and ensure that he/she is safely reintegrated into society upon release;¹⁶¹

Adolescents who are between fifteen and eighteen years old are subjected to the application of penalties only when the act perpetrated amounts to a legally designated criminal offence. The penalties applied to such category are more restricted than those imposed on adults who commit

¹⁵⁵ LENA SALAYMEH, *JUVENILE JUSTICE IN GLOBAL PERSPECTIVE* 249-250 (New York University Press 2015).

¹⁵⁶ Juvenile Delinquents Act, Law (No. 18/1974) (Syria).

¹⁵⁷ This phase runs to 7 years of age when the child is instructed to pray.

¹⁵⁸ This phase runs from 7 to 15 years of age when the child is considered capable of recognizing immoral acts; puberty is assumed to have occurred.

¹⁵⁹ This phase runs from 15 to 18 when the offense committed may entail disciplinary punishment.

¹⁶⁰ U.N. Comm. On the Right of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention, Syrian Arab Republic*, ¶ 200(a), U.N. Doc. CRC/C/93/Add.2 (Oct. 18, 2002) [hereinafter UNCRC Report Syria 2002]; Juvenile Delinquents Act, Law (No. 18/1974), art. 2 (Syria).

¹⁶¹ UNCRC Report Syria 2002, *supra* note 158, ¶ 200(b).

the same offence.¹⁶²

B. The Crime of Terrorism in Syrian Criminal Law

Article 304 of the Syrian Criminal Code defines acts of terrorism as “all actions that seek to create a state of panic and are committed using such means as explosive devices (and weapons of war), flammable substances, toxic or incendiary products and pathogenic or germ agents that may create a public danger.”¹⁶³ Any act of terrorism is punishable by 15 to 20 years of hard labor,¹⁶⁴ while capital punishment may be imposed for any act which results in the “partial destruction to a public building, an industrial establishment, a ship or another installation, in disruption of the means of transport or communication person or in the death of a person.”¹⁶⁵

For the purposes of Syrian criminal law, the form of punishment reserved to adult perpetrators of criminal acts is more severe respect to the one reserved to juveniles. Accordingly, an act of terrorism punishable with long term imprisonment and compulsory labor would be reduced to one to five years. In addition, because juveniles are exempted from the death penalty, any felony punishable with capital punishment would be reduced to a term from six to twelve years.¹⁶⁶ In any circumstance, a juvenile may be punished with a sentence exceeding twelve years of imprisonment.

The issuance of CTL expanded the penalties applicable to terrorist acts. Article 3 CTL provides that “anyone who joins a terrorist organization” shall be punished with a sentence not inferior to seven years of hard labor. The use of the term ‘anyone’ lead to the assumption that Article 3, and other provisions formulated with an equally broad terminology, would apply to any individual without prejudice of the age of assumption of criminal responsibility as disposed by other national instruments.

CTL provisions also outline the participation to a training in a terrorist organization,¹⁶⁷ the smuggle, manufacture, possession or stealing of arms, munitions and explosives¹⁶⁸ and the distribution of publications¹⁶⁹ with a view to promote terrorist activities and establishes a range of sentences running from ten years of hard labor to the imposition of capital punishment. The document covers every degree of involvement in terrorist organizations and it spells out harsh sentences even for auxiliary roles. This is particularly

¹⁶² *Id.*, ¶ 200(c).

¹⁶³ Syrian Criminal Code, Legislative Decree (No. 148/1949), art. 304 (Syria).

¹⁶⁴ *Id.*, art. 305(2).

¹⁶⁵ *Id.*, art. 305(3).

¹⁶⁶ Juvenile Delinquents Act, Law (No. 18/1974), art. 29 (Syria).

¹⁶⁷ Counter-Terrorism Law, Legislative Decree (No. 19/2012), art. 4 (Syria).

¹⁶⁸ *Id.*, art. 5.

¹⁶⁹ *Id.*, art. 8.

detrimental for children who can face criminal liability under CTL because the decree not only fails to establish any guarantee of protection for a child in view of its status, but also fails to prescribe any alternative to criminal prosecution.

C. The Prosecution of Juvenile Offenders in Juvenile Courts

In 1953, Syria established juvenile courts (*Mahakim Al-Ahdath*) to address the problem of juvenile delinquency through prosecution and measures for punishment and reform of young offenders.¹⁷⁰ Article 31 JDA stipulates that “juveniles shall be prosecuted before special courts, known as juvenile courts” that retain absolute jurisdiction for any act or offense committed by a juvenile.¹⁷¹

D. The Establishment of the Counter-Terrorism Court

Decree 22 of July 2012 created a Counter-Terrorism Court (CTC)¹⁷² located in Damascus to address crimes of terrorism and crimes referred to it by the Court’ prosecution department¹⁷³ or transferred to it by other tribunals.¹⁷⁴ Article 3(b) stops the CTC from granting any right to compensation or redress which may be afforded as result of damage caused by the crimes under its consideration. The CTC establishment expanded the categories of persons considered as a threat to national security and restricted the right to legal assistance and due process.¹⁷⁵ The court has jurisdiction over all individuals, regardless their military affiliation or civilian status.¹⁷⁶ To date, the number of cases referred to the CTC exceeds 32.000. Among this, the one percent is comprised of children between fifteen and eighteen years of age while five percent correspond to women and girls.¹⁷⁷ The rules and procedures of referral of detainees to the CTC appear to be non-existent or arbitrary.

¹⁷⁰ UNICEF, *Juvenile Justice Information Portfolio*, Committee on the Rights of the Child, *State Party Reports, Syria Arab Republic*, https://www.unicef-irc.org/portfolios/documents/444_syrian-rep.htm (accessed 14 February 2017).

¹⁷¹ Id. 163.

¹⁷² Legislative Decree No. 22 (2012) (CTC Decree).

¹⁷³ Art. 3 CTC Decree.

¹⁷⁴ Art. 8 CTC Decree.

¹⁷⁵ Violation Documentation Center in Syria, *Counter-Terrorism Court: A Tool for War Crimes: Special Report on Counter-Terrorism Law N.19 and the Counter-Terrorism Court in Syria*, 10 (2015).

¹⁷⁶ Art. 4 CTC Decree.

¹⁷⁷ Id. 154, at 20.

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1. Counter-Terrorism Court Structure

The Counter-Terrorism Court is composed as follows:

Public prosecution: It consists of eight judges inclusive of the Attorney-general and a military judge.¹⁷⁸

Investigating magistrates: It consists of seven judges appointed to chair different investigation chambers based on the type of crimes under consideration.¹⁷⁹

Article 32 JDA states that juvenile shall be prosecuted by a court constituted by a presiding judge, two members holding the higher diploma selected by the Minister of Justice and two alternate civil servants nominated by the Ministry of Higher Education.¹⁸⁰ In addition, the judges appointed shall be selected in view of their “experience in juvenile affairs rather than their rank or grade in the judicial hierarchy.”¹⁸¹ In CTC judges are not appointed on the basis of their knowledge in dealing with juvenile offenders and are not trained to determine a form of treatment to reform rather than punish.

2. Counter-Terrorism Court Proceedings

a. *Public Prosecution*

The CTC prosecution is headed by Judge Ammar Bilal and includes other eight judges.¹⁸² The dossier of the detainee is submitted to the prosecutor by security branches officials, who under Syrian criminal procedure, does not retain the authority to perform this function, and formal accusations converts in the seizure of the detainee’ properties and possessions or in the issue of a travel ban prior to the conduction of an investigation by concerned magistrates.

b. *Forced Confessions*

Article 15 of CAT prohibits invoking forced confessions as evidence and stipulates that “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.” The Syrian Court of Cassation (SCC) established that pressure or coercion to release a statement of confession

¹⁷⁸ Id. 168.

¹⁷⁹ *Id.*

¹⁸⁰ Art. 32 JDA.

¹⁸¹ Art. 34 JDA.

¹⁸² Id. 154, at 14.

undermines the validity of the presented evidence.¹⁸³ This principle is further emphasized as follows: “If there is pressure or coercion, the information may not be invoked as evidence whether the statement has fulfilled all formalities or not. It may not be considered as ordinary information either; it must be removed and excluded completely from evidence, including circumstantial evidence. The evidence in the case must be considered without it.”¹⁸⁴ As a matter of legal proceedings, the defendant statements relating to a confession extracted through forcible means are not considered by CTC judges.¹⁸⁵

c. Fair Trial and Due Process

Pursuant to the Syrian Constitution, a juvenile is considered innocent until proven guilty.¹⁸⁶ In addition, in legal proceedings against accused minors over fifteen years, the minor’s statements must be heard in the presence of a lawyer charged with defending his/her interests. However, Article 5 of Decree 22 expressly exonerates the CTC from respecting fair trial principles as established by the Syrian Criminal Code and the Syrian Constitution,¹⁸⁷ with an identical provision to the one contained in Article 7(a) of the statute of the Supreme State Security Court (SSSC),¹⁸⁸ abolished in view of the unconstitutionality of its procedures.¹⁸⁹ Article 7 of Decree 22 stipulates that: “While retaining the right of defense, the court shall not comply with the procedures set out in the applicable legislations in all stages and procedures of prosecution and trial.” As reported in numerous instances, fair trial rights appear to be ostensibly denied in CTC, including the right to be presumed innocent¹⁹⁰ or the right to accessing legal aid,¹⁹¹ and the right to trial without delay.¹⁹²

d. Public Trial and Open Investigation

Article 49 of the JDA provides that with an aim to protect the secrecy of a child’s identity and to prevent any possible exposure to jeopardy, juveniles

¹⁸³ Syria Court of Cassation, 510 (1983).

¹⁸⁴ Syria Court of Cassation, 389 (1999).

¹⁸⁵ Id. 154, at 15.

¹⁸⁶ Art. 28 Syrian Constitution.

¹⁸⁷ Art. 51.3 Syrian Constitution.

¹⁸⁸ Legislative Decree 47 (1968).

¹⁸⁹ Legislative Decree 53 (2011); Legislative Decree 161 (2011); Legislative Decree 53 (2011); Legislative Decree 54 (2011).

¹⁹⁰ Art. 51.2 Syrian Constitution.

¹⁹¹ Art. 51.3 Syrian Constitution.

¹⁹² The overwhelming number of cases referred to CTC produce an extension in the length of proceedings.

must be tried in camera. This degree of confidentiality in dealing with juvenile offenders must also be applied in previous stages of their criminal prosecution including the time of arrest and investigation.¹⁹³ In CTC, secrecy is misapplied and exacerbates to the point that attendance to trial is forbidden for any family member, relative or legal representative¹⁹⁴ and amounts to a violation of Article 44 of JDA which requires the presence of a guardian or tutor, person holding custody of the juvenile or representative of the Social Service Office, in the release of statements by the juvenile.

e. Counter-Terrorism Court Sentences

For children between the second and third stage of maturity¹⁹⁵ the JDA postulates liability as a mean of reformation and corrective measures which may not include imprisonment. The judge holds extensive discretionary power in determining the measures applicable to the child.¹⁹⁶ These measures include parental or legal guardian custodial, custodial to an approved juvenile institution, the placement in a remand center or in a juvenile reform institution or release on probation.¹⁹⁷ The juvenile placement in a reform institution is a custodial measure that has the purpose to reform the juvenile through vocational training, counselling and assistance. By late 2014, the CTC issued more than 120 sentences ranging from three years of imprisonment and hard labor to capital punishment. The present number of sentenced juveniles by CTC is unknown.

3. Judicial Systems in Opposition-Controlled Areas

The geopolitical fragmentation of the Syrian territory advanced the establishment of *de facto* court systems in opposition-controlled areas. There are three main legal codes employed by courts in opposition-controlled areas: Shari'ah law, the Arab Unified Code (*Quda al-Arabi al-Muwahhad*)¹⁹⁸ and Syria's secular pre-war civil code, which is a synthesis of Ottoman, French and Shari'ah law. The predominance of Islamic legal codes derives from the will to construct an independent judicial apparatus that dissociates from secular legal precepts perceived as a reflection of the Syrian

¹⁹³ Art. 39 JDA.

¹⁹⁴ This procedure is also imposed in trials where the defendant is an adult.

¹⁹⁵ From seven to eighteen years of age.

¹⁹⁶ Id. 150, at 4.

¹⁹⁷ The list is not exhaustive and includes other measures, namely: preventive detention in a juvenile home; release on probation; restricted residence; prohibition of frequentation of places of ill-repute; prohibition of engagement in specific types of work; care.

¹⁹⁸ The Arab Unified Code was a sharia-inspired legal instrument agreed upon by the Arab League Ministers of Justice in 1996, but never implemented.

government administration. The commitment to Shari'ah or Sharia-inspired law is understood as necessary to the construction and preservation of the integrity of OAGs identity.¹⁹⁹

The *Hay'at al-Sharia* (HS) courts are the judicial organs of OAGs. The dominant factions not only implement HS rulings by carrying out arrests, managing detention facilities and enforcing punishments but also retain the authority to appoint judges or to intervene in judicial decision-making. Judges in HS courts are almost exclusively religious Sheikhs, Imams or students from Shari'ah colleges or institutes.²⁰⁰ Islamist-oriented groups, such as Ahrar al-Sham or Islam Army, have tended to pioneer the initiative in establishing HS courts and have used them as means to project power and dominate, often at the expenses of groups who neglected judicial affairs within their military domains.²⁰¹

The substantial adequacy of Shari'ah law and the Civil Code is a contentious issue. In opposition-controlled areas, the present disputes over the sources of law generate parallel and yet illegitimate, judicial mechanisms. Captured persons, including children and juveniles, are subjected to the territorial jurisdiction of the concerned Islamic court and are prosecuted under a framework that operates outside of the prescribed standards of the rule of law and human rights.

VI. TITLE 18 U.S. CODE AND THE AUTHORITY OF MILITARY COMMISSIONS

The crime of terrorism is codified under the United States (U.S.) criminal code (U.S. Code)²⁰² as a conduct transcending national boundaries where the perpetrator engages in the following circumstances:

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assault with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

¹⁹⁹ Maxwell Martin, *Lawyers, Guns, and Mujahideen: Inside Syria's sharia court system*, FP (Oct. 30, 2014) <http://foreignpolicy.com/2014/10/30/lawyers-guns-and-mujahideen/> (accessed 23 February 2017).

²⁰⁰ ILAC, *ILAC Rule of Law Assessment Report: Syria 2017*, 37.

²⁰¹ FSA-Banner groups.

²⁰² 18 U.S.C. § 1 (1948).

A. U.S. Jurisdiction over the Crime of Terrorism

The U.S. is one of the most preeminent actors in the counter-terrorism discourse. Comparatively to many other nation-states, the U.S. claims the authority to safeguard its criminal law beyond territorial borders.²⁰³ Acts of terrorism are the most tangible crimes to which the U.S. asserts extraterritorial jurisdiction. The definition of the crime of terrorism as provided in Title 18 U.S. Code makes clear that jurisdiction is owned on one or more of the prescribed offenses occurring outside of the U.S. in addition to the conduct occurring within the U.S.²⁰⁴ The jurisdiction over the crime of terrorism forms part of a more general evolutionary pattern in criminal law which disrupted the territorial paradigm, understood as the authority of the State to apply its laws to certain persons or things²⁰⁵ located within its territory. The form of extra-territorial prescriptive jurisdiction²⁰⁶ exercised by the U.S. includes offenses that while occurring beyond national boundaries, may have their effects within and *vice versa*.²⁰⁷ The extra-territorial application of U.S. laws extends not only on the crime of terrorism as a prohibited act per se, but also encompass elements of personality of the perpetrator such as his/her citizenship. International legal principles establish that nation-states may assert jurisdiction over their national citizens abroad²⁰⁸ which in the case of Syria, would include approximate 150 foreign fighters of American citizenship.²⁰⁹ While the number of minors among them remains unknown, reportedly seven juveniles between fifteen and eighteen years of age have joined or were prevented from joining the IS from December 2011 and May 2015.²¹⁰

B. U.S. Civilian Courts

Despite the historical experience of U.S. Civilian Courts in dealing with terrorists,²¹¹ some uncertainty arose with respect to the appropriateness of

²⁰³ Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, HARV. INT'L J., Vol. 48 No. 1, 121 (2007).

²⁰⁴ 18 U.S.C. § 2332(b), 2(g)(1) (1948).

²⁰⁵ Restat. 3d of the Foreign Relations Law of the U.S. § 401(a) (1987).

²⁰⁶ Id. 175, at 127.

²⁰⁷ Principles of subjective territoriality and objective territoriality.

²⁰⁸ *Skiriotos v. Florida*, 313 U.S. 69 (1941); Id. 192, § 402(2).

²⁰⁹ The Soufan Group, *Foreign Fighters: An Update Assessment of the Flow of Foreign Fighters into Syria and Iraq*, TSG (2015).

²¹⁰ Erik R., Smith, *American Foreign Fighters: Implications for Homeland Security*, HIS, 47-57 (2015).

²¹¹ U.S. Civilian Courts experience in dealing with cases involving terrorism date back to the prosecution of the anarchist assassinator of President McKinley.

such trials in view of the related consequences. First, the issue of security and more specifically the eventuality of retaliation by members of Al-Qaeda or other terrorist groups implies an expenditure of resources to equip courthouses and to protect the identity of jurors.²¹² Furthermore, defendants for criminal offences before U.S. civilian courts may examine the evidence of the prosecutor to find information that can exculpate them.²¹³ Such defendant constitutional right however, creates concerns on the confidentiality of sensitive information.²¹⁴ The so-called ‘graymail’²¹⁵ is a situation where the defense seeks to introduce evidences that the government wish to maintain secret in order to force the prosecution to dismiss charges or negotiate a relatively favorable disposition. This tension lead to the enactment of the Classified Information Procedures Act (CIPA)²¹⁶ which “provides pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court.”²¹⁷ The issue of confidentiality remains however unsolved.²¹⁸ In addition, an interpretation of the United States Constitution (USC)²¹⁹ provides for the accused to have a judicial hearing within 48 hours of arrest²²⁰ while federal law requests for indictment within thirty days.²²¹ As demonstrated by case law,²²² delay in judicial hearing is tolerated in special circumstance where the accused was captured in a foreign country and in combat conditions. Controversy also exists in respect to statements made by the defendant following coercive interrogation. A statement released under physical or psychological pressure would in fact be deemed inadmissible before the court and in contravention with the *Miranda* Rules.²²³ Ultimately, concerns arise with respect to the ability of U.S. civilian courts to act expeditiously in view of the considerable

²¹² Detlev F. Vagts, *Which Court Should Try Persons Accused of Terrorism*, Vol. 14 No.2, EJIL, 314 (2003).

²¹³ *Id.* at 315.

²¹⁴ Ruth Wedgwood, *Al-Qaeda, Terrorism and Military Commissions*, AJIL, Vol. 96 No.2, 328-337, 330 (2002).

²¹⁵ Edward C. Liu & Todd Garvey, *Protecting Classified Information and the Rights of Criminal Defendants: The Classified Information Procedures Act*, CRS (Apr. 2, 2012).

²¹⁶ 18 U.S.C § 3 (1948); *United States v. Poindexter*, 725 F. Supp. 13 (DDC 1989); *United States v. Baptista Rodriguez*, 17 F. 3d 1354 (11th Cir. 1994).

²¹⁷ *United States v. Smith*, 750 F.2d 1215, 1217 § 3 (4th Cir. 1984).

²¹⁸ If a judge discovers evidence which may be relevant to the defense of the accused, the issue of confidentiality cannot be solved by paraphrasing the information.

²¹⁹ U.S. CONST. (hereinafter “USC”).

²²⁰ *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

²²¹ 18 U.S.C § 3161-3174 (1948).

²²² *Gillars v. United States*, 182 F. 2d 962 (DC Cir. 1950).

²²³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

time of pre-trial maneuvering, as expected in complex cases, where the imposition of capital punishment may be involved.²²⁴

C. U.S. Military Commissions

On 13 November 2001, the Bush Administration issued a military order (the Order)²²⁵ providing for the prosecution of non-US citizens before military commissions of persons who “engaged in, aided or abetted, or conspired to commit, acts of international terrorism”²²⁶ including, but not limited to Al-Qaeda members. Pursuant to the military order, the commissions, located in Afghanistan,²²⁷ Iraq²²⁸ and temporary U.S. military operating bases were authorized to detain, prosecute and punish individuals found guilty in accordance with the penalties provided under the applicable law, including life imprisonment and capital punishment.²²⁹ The Order de facto nullified U.S. federal courts jurisdictional powers.²³⁰ President Bush claimed the validity of such act in view of the legal precedent created in the *Ex parte Quirin*²³¹ where the prosecution before military commissions of non-U.S. citizens who planned and/or committed mass murder as unlawful combatants, was legitimate in the pursuit and the promotion of “national security interest.”²³²

1. The Authority of Military Commissions

The authority of military commissions is derived from Article 1 and Article 2 of USC which grants the Congress the power “[t]o (. . .) provide for the common defense”²³³ and confers the President “executive power” as “Commander in Chief of the Army and the Navy.”²³⁴ In U.S. military legal

²²⁴ Id. 186, at 316.

²²⁵ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (16 Nov. 2001).

²²⁶ *Id.*

²²⁷ Bagram and Kandahar.

²²⁸ Abu Ghraib, Camp Cropper and Camp Bucca.

²²⁹ Ramatullah Khan, *The U.S. Military Tribunals to Try Terrorists*, 296 (2002).

²³⁰ Art. 11 USC; S.J. Res. 23, 107th Cong. (2001); [U.S. Dep’t of Def.], [DoD MCO No. 1], [Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism] 1-2, 13-14 (21 Mar. 2002).

²³¹ See *Ex Parte Quirin*, 317 U.S. 1 (1942).

²³² Dana Milbank, *In War, It’s Power to the President*, WASHINGTON POST, Nov. 21 2001, https://www.washingtonpost.com/archive/politics/2001/11/20/in-war-its-power-to-the-president/66c27298-c38a-46f3-8fad_b5bd35d184ed/?utm_term=.4562453e6833 (accessed 28 February 2017).

²³³ Art. 8.1 USC.

²³⁴ Art. 2 USC.

doctrine, the trial and punishment for violations of the law of war does not only forms part of the conduct of war operating as a preventive measure against such violations, but is also an exercise of authority by the Congress to administer the system of military justice.²³⁵

2. The Jurisdiction of Military Commissions

The Uniform Code of Military Justice (UCMJ)²³⁶ affirms the jurisdiction of military tribunals over offenses of the law of war.²³⁷ Typically, trials before military commissions concerned acts occurred following a declaration of war by the Congress that identified another state and its nationals as enemy.²³⁸ Article 21 UCMJ establishes that the exercise of jurisdiction by a military commission may arise under no other statute and concerns violations of the laws of war.²³⁹ While doubts arise about the legal justification at the basis of the establishment of military commissions after 9/11 with respect to the existence of a precedent state of war and eventually which provisions of the law of war were violated,²⁴⁰ the legitimacy and pertinence of such mechanisms is more clear in the context of Syria since the situation relates to the armed conflict paradigm.

3. Judicial Review

In accordance with the Order, the individual concerned “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding brought on the individuals behalf, in any court of the United States, or any State thereof, any court of any foreign nation, or any international tribunal.”²⁴¹ Beside the terminology of this section, the U.S. Supreme Court has conducted reviews

²³⁵ Madsen v. Kinsella 343 U.S. 341 (1952).

²³⁶ 10 U.S.C. Ch. 47 (2006) (UCMJ).

²³⁷ Art. 15, 21 UCMJ.

²³⁸ American Bar Association, *Report and Recommendations on Military Commissions* (2002) <http://www.americanbar.org/content/dam/aba/migrated/leadership/military.authcheckdam.pdf> (accessed 1 March 2017).

²³⁹ Or circumstances of military occupation.

²⁴⁰ In support of the consideration that September 11th attacks were an act of war is the recognition of the events as triggering Article 5 of the Treaty (NATO) and the Security Council confirmation that the attacks justified the resort to the right to self-defense. It appears clear that perpetrators could be held responsible for a violation of the law of war. The Military Order issued by the Bush Administration however, included offenses that are not limited to the September 11th attacks and it is not clear if membership alone to a terrorist organization, or the harboring of terrorist would constitute a violation of the law of war.

²⁴¹ *Id.* 212, at 57831-57836.

in the past application for writ of *habeas corpus* for individuals in trial before military commissions.²⁴² If the defendant seeks review, it can be therefore assumed that the validity of the Order and the jurisdiction of the commission will be reviewed in federal courts, at least with respect to any persons or trials within the U.S.²⁴³

4. Legal Procedures in Military Commissions

The Order provides for a full and fair trial, in a manner consistent with the requirement of protecting classified information; and admits such evidence, as would have probative value to a reasonable person.²⁴⁴ It also maintains for the right to legal counsel.²⁴⁵ In addition, the U.S. is party to the ICCPR that under Article 14 defines standards and procedures that shall be applied during proceedings. While it is not clear whether the ICCPR provisions would apply to military commissions, the basic rights set forth in the Convention have been respected and implemented in prosecutions for war crimes by the United Nations special tribunals.²⁴⁶ Military commissions, however, may not afford the same guarantees of U.S. civilian courts. The U.S. rejected the use of military commission to try its own citizens in third countries.²⁴⁷

5. Imposition of Death Penalty

Article 6(2) ICCPR provides that “sentence to death may be imposed only for the most serious crimes.” The use of death penalty in counter-terrorism causes disquietude due to the absence of a systematic standard on the elements and threshold of “most serious crimes.” Title 18 U.S. Code imposes capital punishment if the offense resulted in the death of another individual and prescribes any period of imprisonment, including life imprisonment.²⁴⁸ The imposition of death penalty in the U.S. does not exempt juveniles. By formulating a reservation on Article 6(5) ICCPR, the U.S. recognizes itself the legitimacy to impose capital punishment also in

²⁴² Id. 222, at 219; Application of Yamashita, 327 U.S. 1 (1946).

²⁴³ Id. 213, at 11.

²⁴⁴ Id. 232, at 297.

²⁴⁵ Id. 213, at 4.5(c).

²⁴⁶ Id. 89, at 13. In General Comment Number 13, the Human Rights Committee, noted the existence, in many countries, of military or special courts which try civilians, and that “[w]hile the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees of Article 14.”

²⁴⁷ Id. 213, at 14.

²⁴⁸ 18 U.S.C., § 1 (1948).

cases where the perpetrator of the offence is a minor below eighteen years of age. This, in combination with the provisions on the crime of terrorism, demonstrates that children involved in acts of terror and related offences, may face capital punishment in the U.S.²⁴⁹ Since the prohibition on the execution of juvenile offenders is internationally agreed upon, European countries oppose extradition of detainees to the U.S. However, a complete bar on extradition is not in place and suspected are often transferred if the U.S. Attorney General provides a formal declaration stating that the Justice Department does not expect prosecutors to seek the death penalty.²⁵⁰

6. Extraordinary Rendition and the Rule of Law

The term “extraordinary rendition” refers to the act of abducting a person in one state, regardless of the cooperation of the government of that state, and extrajudicially transferring the concerned individual for detention and interrogation outside of legal system parameters.²⁵¹ Since 9/11, U.S. officials acknowledged that the U.S. Central Intelligence Agency (CIA) held a hundred individuals in its extraordinary rendition program (ERP) and reports indicate that thousand were transferred to third world countries for “intelligence gathering” purposes.²⁵² The ERP targeted “high value” individuals to be subdued to “enhanced interrogation techniques”²⁵³ in specific locations including Guantánamo Bay. Syria is also known for having received prisoners from the U.S. as a form of collaboration to ERP.²⁵⁴ Individuals under the ERP are in most of the cases held incommunicado and suffer forms of ill-treatment as various combinations of solitary confinement, beating, waterboarding, prolonged stress positions, sleep deprivation and threats.²⁵⁵ The relevant provisions of IHL²⁵⁶ regarding

²⁴⁹ Leyla-Denisa Obreja, *The Use of Child Soldiers by Terrorist Organizations* (2014) <http://jushumanis.org/the-use-of-child-soldiers-by-terrorist-organizations/> (accessed 2 January 2017).

²⁵⁰ *Id.* 204, at 299.

²⁵¹ HELEN DUFFY & STEPHEN A. KOSTAS, *EXTRAORDINARY RENDITION: A CHALLENGE FOR THE RULE OF LAW*, In *Counter-Terrorism: International Law and Practice*, 540 (Oxford University Press 2006).

²⁵² Margaret Satterthwaite & Angelina Fischer, *Beyond Guantánamo: Transfer to Torture One Year After Rasul v. Bush*, *CHRGJ*, New York: NYU School of Law, 3 (2005); A/61267, 2 (2005); The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations [U.S. Dep't of Justice] to [William J. Haynes II] (13 Mar. 2002).

²⁵³ *Id.* at 83.

²⁵⁴ The list of additional states collaborating to ERP include also Morocco, Jordan and Egypt; *Arar v. Ashcroft*, 60 18 CA No. 04-CV-249-DGT-VVP, 39-40 (2004).

²⁵⁵ *Id.* 213, at 545.

²⁵⁶ Art. 12 GCIII, Art. 49 GCIV, Common Article 1, API.

ERP-related practices as violations have limited scope of application in the context of the Syrian conflict due to its non-international character. The ERP is however, self-evidently in contrast with a number of IHRL norms. The U.S. government asserted that its obligations under this body of law do not arise in respect to ERP due to its “extra-territorial” nature.²⁵⁷

D. Juveniles Detained by the Military Commission of Guantánamo

Detainees in Guantánamo have been denied of basic rights including POW, access to court and attorneys and contact with their families.²⁵⁸ The U.S. government indicates detainees in Guantánamo as “extremely dangerous”²⁵⁹ and allegedly in possession of vital information on the “War on Terror.”²⁶⁰ The detainment of juveniles in Guantánamo Bay is a recognized fact. The U.S. authorities admitted having held at least twelve juveniles since the inception period of the structure.²⁶¹ In April 2003, U.S. authorities confirmed that they were holding “enemy juvenile combatants” between ten and thirteen years of age.²⁶² In accordance to Maj. Gen. Geoffrey Miller, Commander of the Joint Task Force at Guantánamo:

“I would say despite their age, these are very, very dangerous people (. . .) Some have killed, some have stated they’re going to kill again. So, they may be juveniles, but they’re not on a little league team anywhere. They’re on a major league team and it’s a terrorist team. And they’re in Guantánamo for very good reason; for our safety, for your safety.”²⁶³ Under international and U.S. internal law, juveniles require different treatment on the ground of the lowered capacity of discernment determined by their youth.²⁶⁴ However,

²⁵⁷ Id. 245, at 548.

²⁵⁸ Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantánamo Bay: The Special Concerns of the Children*, Vol. 9:1, 9 U.C. DAVIS J. JUV. L. & POL’Y 127, 130 (2005).

²⁵⁹ Detainees at Guantánamo Treated Humanely, DoD News Briefing (2002) <http://usinfo.state.gov/topical/pol/terror/02012207.htm> (accessed 10 March 2017).

²⁶⁰ Katie Daigle, *U.S. Offers Incentives to Detainees in Guantanamo*, DN (2002) <http://www.deseretnews.com/article/952511/US-offers-incentives-to-detainees-at-Guantanamo.html> (accessed 10 March 2017).

²⁶¹ Mike Melia, *U.S. acknowledges it held 12 juveniles at Guantánamo*, (2008) http://gtmodocuments.blogspot.de/2008_11_01_archive.html (accessed 13 March 2017).

²⁶² Kathleen T. Rhem, *Tariq Aziz Brings Total of ‘Top 55’ in Custody to 12*, AFPS (Apr. 25, 2003) <http://archive.defense.gov/news/newsarticle.aspx?id=29056> (accessed 5 March 2017).

²⁶³ CNN Live Event (Apr. 25, 2003, 12:42 p.m.) <http://transcripts.cnn.com/TRANSCRIPTS/0304/25/se.02.html> (accessed 7 March 2017).

²⁶⁴ Article 37 CRC; In the case of *Roper v. Simmons*, 543 U.S. 551, 112 S.W. 3d 397 (2005), the Missouri Supreme Court ruled that the use of the death penalty could no longer be used on juveniles.

only three of the juvenile detainees held in Guantánamo received appropriate treatment.²⁶⁵

1. Abusive Treatment and Detention Conditions

The detention facility of Guantánamo was designed on the U.S. model of a ‘supremax’ prison.²⁶⁶ In this kind of structures detention conditions are severe. Solitary confinement is imposed twenty-three hours pro day in cells measuring six feet; detainees are exposed to constant illumination and allowed to twenty minutes of exercise weekly.²⁶⁷ The provision of food is used as an incentive for information gathering. The U.S. claims that the allegation of mistreatment of Guantánamo detainees are misplaced and that several steps have been undertaken to ameliorate detention conditions, for instance through the establishment of a more permanent structure known as ‘Camp Delta’.²⁶⁸ The improvement of detention conditions however, does not provide adequate and fair treatment.

2. Interrogation Standards and Torture

The Federal Bureau of Investigation (FBI) memorandum on interrogation techniques at Guantánamo set three main methods for interrogation, such as: yelling and deception; the use of stress positions, isolation, forced grooming and exploiting phobias such as using dogs; and mild non-injurious physical contact; making a detainee believe death or serious injury was imminent for the detainee or his family; exposure to cold weather or water; and waterboarding.²⁶⁹ The requirement of approval for the use of interrogation techniques in the third category by the Commander General at Guantánamo Bay²⁷⁰ has been defined as a malicious use of “serious legal scholarship to create an aura of legitimacy for near-death interrogation tactics and unrestrained executive power.”²⁷¹ Torture and cruel or inhuman or degrading treatment has been largely reported in the frame of the ‘war on terror’. The U.S. government dismissed the allegation sustaining

²⁶⁵ Id. 233, at 138.

²⁶⁶ Id. at 134.

²⁶⁷ Id. at 8; *see also* Camp Iguana.

²⁶⁸ The Camp includes the basic facilities that were lacking in Camp X-Ray, including running water, indoor toilets, and adequate space for all of the detainees. More important, however, the Camp accommodates the religion and culture of the Middle Eastern detainees.

²⁶⁹ Standards of Conduct for Interrogation under 18 USC 2340-2340A [Dep’t of Justice] to [Alberto Gonzales] (1 August 2002).

²⁷⁰ Request for Approval of Counter-Resistance Strategies, [Dep’t of Def.] to [CMJTF-170, CMJTF-2] 2(c) (11 Oct. 2002).

²⁷¹ Stephen Gillers, *The Torture Memo*, TNN (Apr. 9, 2008) <https://www.thenation.com/article/torture-memo/> (accessed 13 March 2017).

that interrogation practices, even if abusive, were not sufficient to satisfy the definition of torture since no severe physical or mental pain was inflicted on detainees.²⁷²

3. Juveniles Prosecuted by the Military Commission of Guantánamo

a. *The Omar Khadr Case*

The case of Omar Khadr elucidates the substantive issues on the application of the rule of law in the Guantánamo commission. Omar Khadr is a Canadian citizen captured by the U.S. forces during a military operation in Afghanistan. At the date of his initial custody and detention, Omar Khadr virtually responded to every international or national definition of a child.²⁷³ After several months of detention at the Bagram Air Force Base in Iraq, Khadr was transferred to the detention center in Guantánamo and denied representation by counsel. Ultimately, Khadr was classified as an “alien unprivileged enemy belligerent” liable to charges of war crimes by military commission.²⁷⁴ The distinction between juveniles and adults is a principle articulated in numerous legal provisions including the law of war and U.S. domestic criminal law, recognizing the limited capacity and responsibility of juveniles.²⁷⁵ U.S. criminal law does not outlaw the detention of children, it however classifies them as individuals requiring special treatment in view of their status²⁷⁶ and provides them to be “detained, tried, and sentenced differently than adults.”²⁷⁷

b. *M.C.A. Attribution of Jurisdiction*

The case of Khadr however, demonstrates inconsistencies with respect to these provisions. The prosecution of Khadr before a military commission amounted to a violation of U.S. law as the Military Commission Act 2006 (M.C.A.)²⁷⁸ neither *expressly* attributes personal jurisdiction on juveniles nor establishes adequate procedures for its exercise.²⁷⁹ The assumption that the

²⁷² International Bar Association, *Detention and Trial at Guantánamo Bay and other US detention Centres*, IBA Human Rights Inst., 41 (2009).

²⁷³ Richard J. Wilson, *Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantánamo*, WCL Research Paper No. 2014-14, SANTA CLARA J. INT'L L., 32 (2014).

²⁷⁴ *Id.* at 33.

²⁷⁵ See Roper, *supra* note 266.

²⁷⁶ 18 U.S.C. § 5031 (1948).

²⁷⁷ *Id.*

²⁷⁸ Military Commission Act, 10 U.S.C. § 948(a) (2006).

²⁷⁹ O.K. v. United States of America and United States Court of Military Commission Review, No. 04-1136 (JDB), 2008; Memorandum of Points and Authority in Support of

Guantánamo military commission owned an implicit jurisdiction over juveniles would, in fact, contravene principles of U.S. military law stating that the military does not have jurisdictional power over children and minors who are too young to consent military status.²⁸⁰

c. Classification of Legal Status

Khadr was detained and treated accordingly to the classification of his status as “enemy combatant.” The Combatant Status Review Tribunal (CSRT)²⁸¹ disposed on Khadr on the ground of its membership and affiliation with al-Qaeda. The CSRT did not consider however, that the defendant was a juvenile, under the terms of the law,²⁸² at the time of his arrest and that as a juvenile, Khadr lacked the ability to consent to military status and could not be deemed as a valid or conscious member or affiliate of the OAG. Under international law, juveniles who commit an offense while they are associated with the armed forces or armed groups should be primarily considered as victims of offenses and not only as perpetrators.²⁸³ In declaring Khadr to be an unlawful combatant, the CSRT failed to recognize him as a child soldier and thus apply the appropriately designed procedures and international standards relating to such category in the framework of restorative justice and rehabilitation.

d. Khadr Detention Conditions

The Guantánamo military commission confirmed its positive “responsibility to ensure the physical and mental well-being of petitioner, in light of his status as a minor [and] serious physical injuries” and noticed that “conditions at Guantánamo are too harsh (and inappropriate for juveniles).”²⁸⁴ In Guantánamo, Khadr was subjected to harsh interrogation methods in violation of international law, including “shackling in painful stress positions for hours on end; beatings by guards; express threats of rendition to third countries for the purposes of torture; solitary confinement for lengthy periods; and confinement in extremely cold cells.”²⁸⁵ Even in

Petitioner’s Motion for Judgment on the Pleadings or, in the Alternative, Summary Judgment Based on Petitioner’s Juvenile Status (Khadr Motion for Habeas Corpus) 3-5; *Id.* 272, at 2603.

²⁸⁰ *Id.* at 6.

²⁸¹ Memorandum on the Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba, [U.S. Dep’t of Def.] to [Sec. Mil. Dep’t, CJCS & USDP] (29 July 2004).

²⁸² U.S. criminal law defines juveniles as individuals under eighteen years of age.

²⁸³ The Paris Principles, CRC.

²⁸⁴ *O.K. v. Bush*, 344 F. Supp. 2d 44, 60 (D.D.C. 2004).

²⁸⁵ The Case of Omar Khadr: Summary + Timeline, https://www.law.utoronto.ca/documents/Mackin/Khadr_summary-timeline.pdf (accessed 15

consideration of the determination of his status an “enemy combatant,” Khadr could not have been detained as an adult. Under international law, Khadr should have been “placed in a rehabilitation and reintegration program appropriate for former child soldiers.”²⁸⁶ Khadr detention was therefore inconsistent with fundamental requirements of international law and it exceeded authority.

4. The Scope of Application of International Law on Juveniles Detained by the U.S.

The international instruments pertaining to juvenile enemy combatants²⁸⁷ are those contained in the GC and their AP, the CRC and its Optional Protocol on the Involvement of Children in Armed Conflict (OP),²⁸⁸ and the ICCPR. The limited scope of application of the GC provisions²⁸⁹ to the Syrian conflict and, consequently to children and juveniles captured in this context, compel the reliance on human rights obligations undertaken by nation-states since human rights obligations do not cease to apply in circumstances of armed conflict²⁹⁰ and are superior to domestic law so that violation cannot be justified under its terms.²⁹¹

The CRC and its OP provide an opportunity to expand the guarantees of juvenile protection established by the GC.²⁹² The U.S. however, signed but not ratified these instruments on the basis of their perceived dissonances with USC and issues of federalism and sovereignty.²⁹³

March 2017).

²⁸⁶ Id. 249, at 54.

²⁸⁷ Id. 192, at 145.

²⁸⁸ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, July 5, 2000, arts. 1–4, 6, 7, GA Res. 263, UN GAOR, 54th Sess., Supp. 49, UN Doc. A/RES/54/263 (OP).

²⁸⁹ The non-international nature of the Syrian conflict does not allow for the affordability of guarantees of juvenile protection established in the Geneva Conventions. Specifically, in relation to the combatant status, separation from adults and protection from capital punishment, the right to culture, education and family unit for children below fifteen years of age.

²⁹⁰ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., § 31 (2002).

²⁹¹ Id. 291, § 42.

²⁹² Since participation to an armed conflict renders children unable to avail themselves of the protections devoted to civilians, the CRC and OP establish that due to their status as juveniles they still require special protection under international humanitarian law.

²⁹³ Jeremy Gunn, *The Religious Right and the Opposition to U.S. Ratification of the Convention on the Rights of the Child*, Vol. 20 No.1, EMORY INT’L L. REV, 117 (2006); Lainie Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, Vol.19, HARV HUM RIGHTS J, 26 (2006).

This circumstance imposes to rely on other sources for the protection of juveniles. Two non-binding instruments are especially relevant, namely: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules),²⁹⁴ and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.²⁹⁵ The most significant endeavor to elaborate on the special rights of children derives from the Inter-American Court of Human Rights (IACHR) in its advisory opinion²⁹⁶ on the *Legal Status and Human Rights of the Child*.²⁹⁷ In its opinion, the court provided several principles for considering the rights of children. First, States must seek to preserve the bond between children and their families, limiting separation to cases where it is absolutely necessary and only for the shortest time possible.²⁹⁸ Second, those making decisions must have personal and professional training and experience on how best to assess the particular interests of children.²⁹⁹ Third, states must adopt measures for educating and socializing detained children with an aim to reintegration.³⁰⁰ Finally, states must limit detention of children to exceptional circumstances.³⁰¹

VII. THE CONCEPT OF JIHAD IN ISLAMIC THEORY AND THE CRIME OF TERRORISM BEFORE SHAR'IA COURTS

The concept of Jihad emerged in a period of chaos in Islamic history where the survival and progress of religious, economic and social factors were threatened by tribalism supremacy.³⁰² The spirit of vengeance for the attempted annihilation of the religious precepts preached by the Prophet Muhammad propagated the idea that violence is necessary when Muslims are unjustly oppressed. In the Qur'an, however, Jihad is primarily described as a mean of liberation, part of an effort toward the diffusion of the ethics of the Islamic faith through education and not coercion.³⁰³ While Islam does

²⁹⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985).

²⁹⁵ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, U.N. GAOR, 45th Sess., Supp. No. 49A, at 205, U.N. Doc. A/45/49 (1990).

²⁹⁶ *Advisory Opinion* OC17/2002, § 18.

²⁹⁷ *Id.* § 103.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Abdul-Raheem Bashir, *The Concept of Jihad in Islamic Philosophy*, AIJSS, Vol. 4 No. 1, 142 (2015).

³⁰³ Ira Lapidus, *The Cambridge Illustrated History of the Islamic World*, 292 (Cambridge University Press 1996).

not advocate pacifism in an absolute manner, the resort to violence is conceived only as defense, when freedom of religion is threatened, the population is subjugated, or their land forcibly expropriated.³⁰⁴

In the modern era, there is a dualism on the spectrum of Islamic activism, which distinguishes Islamism from Islamic fundamentalism.³⁰⁵ The former is founded on the idea that political participation may play a role in the structure of Islamic states and therefore allows for the exercise of a political mechanism based on “dialogue, lobbying or the foundation of the parties.”³⁰⁶ On the contrary, Islamic fundamentalist identify such approach as “un-Islamic” since Shari’ah law is not fully implemented in their domestic legislation. The advancement of cultural and social pluralism is *jahiliyya*,³⁰⁷ a pre-Islamic profane status quo ruled by corruption and hatred. Salafism expands this sentiment by applying a doctrine that strongly rejects any concession to modern theory and secularism and discerns any semi-liberal way of life that does not recognize Shari’ah as the only authority as a menace. In Salafism, the Jihad is intended as the necessary and legitimate instrument against un-pure precepts.

In the cause of war, the military strategy envisioned by Prophet Muhammad is focused on instilling fears³⁰⁸ in the heart of opponents in order to undermine their confidence in succeeding in the fighting. On this basis, it would be incorrect to deny terrorism as a mean of Jihad. The concept of Jihad however, is articulated on three different dimensions³⁰⁹ and does not encompass terrorism as fundamental constitutive component. The long-history of Jihad-warfare is in fact, overturned in an unprecedented type of conflict which is neither a genuine crime nor a genuine war.³¹⁰

The Qur’an envisages terms of conduct which have to be respected by Muslims during combat and specifically “condemns and prohibits terrorism and suicide.”³¹¹ Since terrorism is exercised through the unlawful use of violence and intimidation, especially against civilians, it collocates itself in

³⁰⁴ Smock David & Mohamed Said, *Islamic Perspectives on Peace and Violence*, USIP (Jan.24, 2002) <https://www.usip.org/sites/default/files/sr82.pdf>.

³⁰⁵ *Id.* 282, at 55.

³⁰⁶ *Id.*

³⁰⁷ The Muslim Brother ideologue Sayyid Qutb (1906-1966) re-used the term *jahiliyya* (ignorance) to describe of the societal situation of Egypt in the 1950s.

³⁰⁸ Qur’an 003.151 (“Soon shall We cast terror into the hearts of the Unbelievers, for that they joined companions with Allah, for which He had sent no authority: their abode will be the Fire: And evil is the home of the wrong-doers!”).

³⁰⁹ Activist dimension; Discursive dimension; Military dimension. See Andreas Armbrost, *A Profile of Religious Fundamentalism and Terrorist Activism*, Vol. 2 No.1, DATR, 54 (2009).

³¹⁰ *Id.* at 52.

³¹¹ Shaykh-ul-Islam & Muhammad Tahir-ul-Qadri, *Fatwa on Terrorism and Suicide Bombings*, 28 (Minhaj Publication 2010).

strong contradiction with the Quranic limitation of the use of violence against individuals who did not demonstrate an intention to suppress religious practices or to unduly appropriate territories or goods.³¹² The Qur'an compares the killing of a "person not in retaliation for murder (. . .)" to a murder of the 'whole humankind.'³¹³

The rejection of terrorism shows a degree of correlation between the rules of warfare envisaged in the Qur'an and the GC. The principle of humanity affirmed by al-Shaybani and Imam al-Awza'i was pioneered in early Islamic rules, and now the modern law of armed conflict.³¹⁴ The restrictions imposed on Muslims as the legitimation of the use of force and the spare of civilians presented the Jihad in its principled ideology and aim toward the mitigation of human suffer.

A. *The Prosecution of Terrorism in Shari'ah Courts*

Despite diverse interpretations, there is widespread consensus that Shari'ah reflects "God's will for humankind" and it therefore must be pure and unchanged.³¹⁵ Shari'ah judicial proceedings vary significantly from other legal traditions. Trials in HS courts are conducted solely by the judge and since legal assistance is not prescribed, defendants are in charge of their own representation.³¹⁶ Pre-trial investigation and cross-examination of witnesses are also absent. Differently from common law, adjudication in HS courts does not establish binding precedents³¹⁷ and the law is applied on the basis of manuals and legal opinions (*hadith*) rather than on formally codified statutes.³¹⁸

³¹² Qur'an 2:193 ("Let there be no hostility except to those who practice oppression.").

³¹³ Qur'an 5:32.

³¹⁴ ICRC, *International Committee of the Red Cross, Debate on humanitarian law, policy and action: protection of victims of armed conflict under Islamic law and international humanitarian law*, available at <https://www.icrc.org/eng/resources/documents/feature/2006/islamic-law-ihl-feature-010606.htm> (accessed 28 March 2017).

³¹⁵ Qur'an 48:23 (You shall not find a change in Allah's course).

³¹⁶ Sharia, <https://www.saylor.org/site/wp-content/uploads/2011/08/HIST351-2.3.2-Sharia.pdf> (accessed 12 March 2017).

³¹⁷ Free Encyclopedia, Jurisprudence: The "sources" of the Law, available at <http://science.jrank.org/pages/7816/Law-Islamic.html> (accessed 27 March 2017); Hamez A. Nizar, *Qatar: The Duality of the Legal System*, Vol. 30 No.1, MIDDLE EAST STUDIES., 16 (1994).

³¹⁸ Fatany Samar, *Let Us Codify Shariah Laws*, ARAB N (Jan. 31, 2008) <http://archive.arabnews.com/?page=7§ion=0&article=106293&d=31&m=1&y=2008> (accessed 20 March 2017).

1. Categories of Crimes under Shari'ah Law

Shari'ah law separates crimes into three different categories: *qisas*, *hudud*, and *tazir*.³¹⁹ The first category relates to physical injury and extends to intentional murder, quasi-intentional murder, and non-intentional murder. In cases where the defendant is found guilty, the victim or relatives of the victim, determine the punishment, which can be either a form of retribution obtained through execution, imprisonment, amputation, compensatory damage or death. The judge may convict and punish an individual for *Qisas* crimes on his own authority.³²⁰

Terrorism is listed under *Hudud* crimes. *Hudud* crimes are considered "claims against God" and include also adultery, incest/pedophilia, rape, consuming intoxicants and apostasy and blasphemy.³²¹ The penalties for *Hudud* crimes are prescribed in the Qur'an. *Hudud* punishments comprise publicly stoning to death, amputation of hands and crucifixion. In order to impose physical punishment, the offense must be witnessed by two or four persons. This requirement to prove circumstantial evidence renders it almost impossible to enforce punishment. In fact, *Hudud* penalties are not imposed regularly as a mean of deterrence. In many cases, a *Hudud* offence is punished as a *Tazir*.

Tazir crimes relates to every offense not listed in the previous categories. The punishment imposed is proportionate to the criminal act itself and usually amounts to imprisonment but may also include forms of corporal punishment.

2. The Trial of Children Allegedly Suspected of Terrorism in Shari'ah Courts

In Syria, HS courts have been established in significant portions of the territory including Latakia, Idlib, Hama, Jisr al-Shoughour, Maarat al Noaman, Aleppo and its province. The number of children prosecuted by HS courts for acts of terror and related crimes in Syria is unknown. It is relevant to observe that the number of children and juveniles recruited by the IS since 2014 is superior to 850, as estimated.³²² As the group employs a systematic tactic of recruitment, As the group employs a systematic tactic of recruitment, every year approximately 400 children entered its ranks.³²³

³¹⁹ Id. 292.

³²⁰ Id.

³²¹ Id.

³²² Id. at 6.

³²³ Meg Wagner, *ISIS has recruited more children than adults this year*, NEW YORK DAILY NEWS (Mar. 24, 2015) <http://www.nydailynews.com/news/world/isis-recruits-children-adults-activists-article-1.2160690> (accessed 3 March 2017).

Following these statistics, it is possible to assume that the number of children susceptible to prosecution before HS courts increases at substantial pace.

Shari'ah law identifies children as a vulnerable category and urges their protection from any form of exploitation and armed conflict.³²⁴ Forms of psychological or physical damage as means of discipline or redress for a child act or offense are forbidden as their infliction would impair the development of their personality and well-being.³²⁵ Admonition and temporary isolation are the suggested methods for punishment. However, the application of Shari'ah law in HS courts is subordinated to the interpretation of the relevant texts by religious scholars and pluralist interpretations may result in a number of different legal opinions and results.

Children in IS are indoctrinated to believe that opposing regimes perceived as apostates is an individual religious duty to all Muslims.³²⁶ The confrontation they are inspired to pursue knows the "dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun."³²⁷ The obligation to respond to a challenge posed on faith exists on the entire Muslim community, including women and children, who are driven by the externally imposed exigency to commit and support the Jihad. The dismissal of the relationship between terrorism and Jihad by Islamic scholars suggests that Jihad may not be resorted to as a justification for criminal behavior. But the absence of any prescribed standard of application of Shari'ah law may amount to a punishment inflicted on various levels of severity. Shari'ah law does not designate a mechanism of accountability for acts or offences committed by juveniles or a system of legal procedures which take into consideration the status of children or their degree of discernment. At this regard, the discretionary power of the judge in HS courts is determinant on the exercise of the rule of Islamic precepts as a punitive reaction or as a chance for rehabilitation.

VIII. THE INFLUENCE OF DE-RADICALIZATION STRATEGIES ON JUVENILE RECIDIVISM AND TRANSITIONAL JUSTICE VIABILITY

Children and juveniles in the IS have participated in severely violent crimes due to their subjugation to indoctrination strategies and coercion. The analysis of terrorism or of the *rationale* behind the involvement in terrorism-related activities is complex and controversial due to the multiple variables

³²⁴ UNICEF, *Children in Islam, Their Care, Upbringing and Protection*, 56 (2005).

³²⁵ *Id.* at 45.

³²⁶ George Gawrych, *Jihad, War and Terrorism*, SMALL WARS J., 15 (2013).

³²⁷ Jerrold M. Post, *The Mind of the Terrorist: The Psychology of Terrorism from the Iraq to Al-Qaeda*, 201 (St. Martin's Press 2007).

at the basis of the behavior of actors. The internal hierarchical organization of terrorist groups in fact, attracts individual with different predispositions.³²⁸ Children play a role in terrorism due to profoundly different psychological factors and external influences and there exists no heterogeneity in their temperament or cognitive capacity.

Acts of violence or terror do not automatically mean that a child has been radicalized to religious extremism. Since de-radicalization involves addressing the psychological state of the persons concerned, the diversity of factors inducing terrorism challenges the prospects of successful rehabilitation programs.

Juvenile justice standards provide a foundational basis for the detention, rehabilitation and reintegration of juvenile violent extremists (JVE). In order to determine an appropriate level of custody, supervision and placement, qualified professionals in the correctional system should conduct an intake assessment of the JVE. At this purpose, violent extremism risk assessment tools such as the Extremism Risk Guidance 22+ (ERG 22+),³²⁹ the Multi-Level Guideline (MLG)³³⁰ and the Violent Extremism Risk Assessment Version 2 (VERA2),³³¹ primarily developed for adults, may offer some guidance. The categorization of children and juvenile offenders is particularly delicate due to the risk of stigmatization which may arise. In combination with inadequate resources, overcrowd, poor detention conditions, lack of trained correctional officials, stigma poses a risk to mistreatment. From a study conducted by the West German Ministry of the Interior, thirty-three percent of the interviewed left-wing terrorists and right-wing extremists had a history of juvenile court convictions.³³²

The impact of detention on juvenile recidivism worsens when the juvenile is involved in terrorism and related activities. Terrorism, in particular in its Salafist dimension, is primarily an anti-social behavior which aims to disrupt the foundation of society. The responsibility to create a juvenile justice system conducive to pro-social engagement and rehabilitation lies primarily with state authorities. A State's developmental

³²⁸ Jeff Victoroff, *The Mind of the Terrorist: A Review and Critique of Psychological Approaches*, J. CONFL. RESOLUT., Vol. 49 No. 1, 3-42, 3 (2005).

³²⁹ Chris Dean, *Intervening Effectively with Terrorist Offenders*, No. 203, PSJ, 31-36 (2012).

³³⁰ Alana N. Cook, Risk assessment and management of group-based violence, (unpublished Ph.D. dissertation, Simon Fraser University) 19 (2014) available at <https://alanancook.wordpress.com/curriculum-vitae/publications/> (accessed 27 October 2016).

³³¹ Elaine Pressman & John Flockton, *Calibrating Risk for Violent Extremists and Terrorists: The VERA 2 Structured Assessment*, Vol. 14 No.4, BRITISH J. OF FORENSIC PRACTICE, 240 (2012).

³³² Gerhard Schmidtchen & Lieselotte Süllwold, *Die Lebenslaufanalysen: Analysen zum Terrorismus*, 101-102 (Opladen 1981).

capacity, the strength of its political institutions and ability to build national consensus are necessary elements in de-radicalization efforts.³³³ The degree of state repression in Syria and the ongoing conflict invariably affects de-radicalization' and rehabilitation' chance of success.

Despite the existence of a rather advanced system of juvenile justice in Syria, the procedures to safeguard juveniles dissipate in non-transparent criminal justice processes. The geographical fragmentation of the territory moreover, creates unfixed and divergent punitive systems which affect rehabilitation outcomes.

The magnitude of the threat posed by children indoctrinated by the IS, can be understood in light of the fact that a relevant portion of society will be in a near future the by-product of violent extremist ideologies. The failure to address the roots of terrorism involving Syrian children imposes not only a major challenge on the positive outcome of counter-terrorism strategies but it also galvanizes their actual or future partaking in extremism. In order to avoid the inter-generational perpetration of IS dogma and barbarity, juvenile justice needs to be prioritized. The current disregard for strategic procedures of disengagement and juvenile justice standards prevents the reconstruction of the children's identity as nonideological.

A. *The Role of Children in Transitional Justice Processes*

Transitional justice is intended to be the "full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."³³⁴ At the time of this article, the pursuit of justice in Syria is taking place solely through the adoption of judicial measures. The criminalization of child conduct, in conjunction with the absence of effective mechanisms of rehabilitation, fails to address children as victims and prevent their possible inclusion and participation in future potential transitional justice processes outside of the legal standards operating procedures.

Legal obligation pending on states does not relate only to the extradition or prosecution³³⁵ of perpetrators of serious crimes but also impose to provide effective remedies, as reparation for victims of human rights violations, including children.³³⁶ In Syria however, individual criminal

³³³ MICHELLE FELDSTEIN, INTO THE FOLD: REEVALUATING DIFFERENT COUNTRIES PROGRAMS TO DE-RADICALIZE ISLAMIST EXTREMISTS AND ISLAM TERRORISTS, (Johns Hopkins University) 4 (2015).

³³⁴ United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, UN Doc S/2004/616, 4 (2004).

³³⁵ Aut dedere aut iudicare Principle.

³³⁶ United Nations General Assembly, *Basic Guidelines on the Right to a Remedy and*

responsibility does not contain a reparation system for children as victims. Child recruitment as a war crime appears to be neglected.

The fragmentation of the judicial system in Syria implies a lack of uniformity in the application of the rule of law. The difference in treatment which derives from diverse standards of prosecution under either the Syrian secular legal tradition or Shari'ah law impacts children psychology and compromise the perception of justice in a manner that could exacerbate future social divisions.

In view of the gravity of the child soldier phenomenon in Syria, it is fundamental to reform the justice system in a manner that transcends the objectification, marginalization and consequential creation of stereotypical images of children involved in terrorism. As the inherit generation of conflict and transition, and as family members, citizens, witnesses, victims and also perpetrators of serious human rights violations, children play an essential role in post-conflict reconstruction. It is therefore important to link rehabilitation, education, security system and justice reform to transitional justice in order to create a protective environment where children may become stakeholders of their own rights.³³⁷

The processes of transitional justice need to be adapted to particular contexts. Political actors own primary responsibility in negotiating the architecture of transitional justice mechanisms and in the implementation of their outcomes, including through legislative measures. The initiation of transitional justice processes may serve the cause of reconciliation but includes the removal of human rights violators from state institutions. With the ongoing conflict and the protraction of Bashar al-Assad presidency, it seems somewhat unrealistic to obtain social co-participation to reconstruction and to promote adequate pluralism and credibility in the short term.

IX. CONCLUSIONS

The recruitment of children by the Islamic State is unprecedented in scale and proportion to other terrorist organizations. The exploitation of children is in fact, not solely oriented to the satisfaction of military needs and purposes of territorial expansionism but it aims to create a perpetual status of brutality and conflict. The condition of children in the Islamic State is particularly grave in view of their direct exposure to counter-terrorism frameworks which are not designed to face, prosecute, rehabilitate and

Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 1 (2005).

³³⁷ Sharanjeet Parmar, Mindy J. Roseman, Saudamini Siegrist & Theo Sowa, *Children and Transitional Justice Truth-Telling, Accountability and Reconciliation*, UNICEF, 35 (2010).

promote children's reintegration into society.

The normative lacunae in addressing terrorism at the international level and the lack of judicial scrutiny and monitor on counter-terrorism activities affect rights, duties and criminal responsibility of non-state actors and create impunity and accountability gaps for state officials in their counter-terrorism responses.

The international legal vacuum in the prosecution of minors engaging in acts of terrorism invariably erases the comparative advantage of international tribunals with respect to the application of international standards in criminal justice processes. Further, it transfers the burden of children prosecution to domestic criminal mechanisms where arbitrary applications of the rule of law jeopardize human rights. By allowing States to exercise jurisdiction over children, the international framework aids the creation of disparities in the exercise of the rule of law as a child prosecuted for the alleged perpetration of acts of terrorism and related offenses in a country, may not be held liable in another. In addition, too broad and ambiguous definitions of terrorism may allow for the criminalization of membership to terrorist organizations, which bypass considerations of the actual degree of involvement of the minor concerned to criminal activities. These same terms may lead to an avoidance of established legal standards of due process in national courts.

Whether ordinary criminal justice systems are appropriate to try minors and juveniles, the assignment of individual criminal responsibility in the context of counter-terrorism amounts to rule of law violations and conflicts with scopes of rehabilitation and reintegration envisioned in juvenile justice systems. The legal classification of the Syrian armed conflict as non-international, together with the lack of ratification of international relevant instruments, lowers the protection provided by international law to children in combat and, in the exercise of criminal justice processes in the counter-terrorism sphere, such standards are further neglected or misapplied. The rule of law has historically been subjected to derogation. Counter-terrorism does not exclude from such processes as in the legitimate pursuit of justice, we note the persistence of an element of arbitrariness in the exercise of power and a tendency to inflict punishment without the fulfillment of the procedures established by law. In the prosecution of children for acts of terrorism and related offenses, the child figure, is obscured by the perception of the terrorist threat as absolute and totalitarian deprivation of judicial safeguards.

In Syria, the erosion of children rights occurs in a climate of impunity characterized by a disproportionate deference to the executive. In the administration of governance, the relationship between the executive, legislative and judiciary is the primary cause of institutional impunity.

With the enactment of Counter-Terrorism Law No. 19 in addition to the

severe restrictions on the access to due process rights, the Syrian government included a specific lifting function of state authorities' responsibility for acts committed during the performance of their duties in cases involving terrorism. The lack of accountability reflects a dysfunction in the justice system since the legislature does not enact provisions which prevent the executive from the commission of abuse, but it is rather instrumental to it.

The United States, the most prominent and influential actor in the counter-terrorism discourse asserting extra-territorial jurisdiction, shares a degree of compatibility with Syria's lack of judicial oversight amounting to impunity in counter-terrorism. The consistent stance of the Bush Administration in declaring the inapplicability of the rule of law on alleged detained terrorists propelled illegal and/or ultra vires practices in state-controlled facilities. Several such actions, in many cases, proved to be unjustified. Such actions have been documented in the final Report of the U.S. Senate's Select Committee³³⁸ and illustrated by the Omar Khadr case presented in this Article. Omar Khadr's denial of legal representation, detention conditions and trial before the military commission of Guantánamo demonstrates the neglect of the rule of law and juvenile justice standards in counter-terrorism.

In the compelling exigency to fight against terrorism, while it appears justifiable under specific circumstances to derogate from due process rights and related guarantees, it is necessary to ensure that such derogations are proper, necessary and proportional. The duty to provide scrutiny on derogations and remedies to victims of violation of constitutional and due process rights is embodied in the authority of courts. In Syria, the Counter-Terrorism Court exercises full jurisdiction over the crime of terrorism and related offenses and over any alleged perpetrator, regardless of his/her status. Interim, the court is dispensed from the fulfillment of its function as an organ granting compensation and remedies to victims of constitutional and due process rights violations and affords a level of authority which is not envisaged, for courts, under Syrian criminal procedures. The establishment of the Counter-Terrorism Court creates a scenario where the national legal system is not in the condition to perform its functions and therefore, to effectively monitor governmental policies as formulated, redress violations and designate certain rights as non-derogable, such as the prohibition against torture or the right to life. In addition, due to the geopolitical division of the Syrian territory, we assist to a replacement of traditional administrative institutions. The emergence of *de facto* court systems in opposition to armed groups in areas of control creates an overlap in the exercise of justice and

³³⁸ Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, S. Rep. 21, 94 Cong. (1976).

legal doctrine. In the application of Shari'ah law, religious beliefs appear to influence criminal justice processes to the extent of the conformation of the judge to religious texts and their interpretation. In prosecuting children captured in the battlefield before Shari'ah courts, no standard can be therefore assumed with regard to legal procedures and punishment. The rejection of terrorism by opposition armed groups fighting against the Islamic State, scholars and Islamic communities, lead to the assumption that Islamic doctrine is susceptible to exploitation. It is however unknown, how the acknowledgment of such exploitation may influence Shari'ah courts' criminal justice processes and the conviction rate.

From this Article, issues of accountability, either regarding minors alleged perpetrators or authorities, appear as developing in a coextensive manner. Whether internal processes of accountability are impaired by canons of national security, external accountability mechanisms become necessary to prevent abuses and secure fundamental rights. In the framework of the Syrian crisis, the International Criminal Court is at present, at a roadblock. Impairments however, may be addressed with a view to render the court more effective in the future through the expansion of its jurisdiction to include crimes of terrorism and afford power of judicial review on institutional practices. The establishment of international mechanisms under the auspices of the United Nations, despite the dilatory nature of these instruments in issuing verdicts and punishments and consequently impact societies afflicted by conflict, serves the development of international criminal justice and positively influences post-conflict reconstruction and peace-building by remodeling a culture of impunity. Ultimately, counter-terrorism regimes as characterized by the virtual extinction of due process rights, inadequate treatment and conditions in detention, together with the institutionalization of torture and the denial of agency and consideration of the sociopolitical context where children are formed, are likely to be counter-productive in the fight against international terrorism. Children are indoctrinated to believe the idea that fighting alongside the Islamic State is a fight against messianic and evil precepts of modern societies whose only aim is to subjugate the Muslim faith. This assumption not only creates a dualism in the figure of the child, but also impairs post-conflict reconstruction and transition. In view of the indefinite boundaries of children victimization and responsibility in Syria, scrutiny of counter-terrorism activities and legislation is necessary for the application of procedural correctness. Counter-terrorism, and particularly with respect to the Syrian conflict due to its pertinence to the armed conflict paradigm, is possible between the rule of law framework containing fundamental norms of human rights protection. The enhancement of comprehensive counter-terrorism strategies to include scopes of rehabilitation and reintegration envisioned in the juvenile justice system is likely to serve nation-state's

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interests and long-term security in a more effective and just manner.