

# Young terrorists or child soldiers? ISIS children, international law and victimhood

## Abstract

Since the Syrian conflict broke out, a number of Western citizens, including children, travelled to the warzone to join ISIS. However, since the defeat of ISIS Western countries are facing the conundrum on how to treat the former fighters and their children. The status of these children has been the source of debate. Among the Western countries, there does not seem to be a clear position or consistent approach on how such children should be treated. It would appear the approaches towards this dilemma have, predominantly, been dictated by the political whims of individual states without normative basis. The children have, predominantly, been regarded as young terrorists likely to pose danger to Western societies. The widely-reported case of British teenager Shamima Begum shone the spotlight on the predicaments of children formerly associated with ISIS. However, the perceptions and actions towards these minors depart from the normative approaches to children associated with armed conflict. This paper makes a case for the treatment of ISIS-associated children to be regarded as child soldiers. When analysed closely, these children deserve protections accorded to all children recruited for purposes of warfare. Recent case law implies that such protection does not cease even after the age of 18. The denial of repatriation is, thus, inimical to normative standards on children associated with armed conflict. Further, the approaches of the Western countries could be vulnerable to criticism of the violation of the rule of law. The arbitrary revocation of citizenship and barring of returns appear starkly conflict with norms of justice. With this in mind, this article asserts that a consistent approach would require the Western approaches to treat ISIS-associated children as victims first and accord them protections recognized in international law.

## Introduction

For scholars of International Humanitarian Law (IHL), the Syrian cataclysm presents an ideal window to understand contemporary complexities of war. One of the manifestations of modern armed conflict is the increased use of child soldiers. IHL now has to grapple with the scourge of children recruited by state and non-state groups perhaps at a scale, hitherto, unseen. As Fox notes, 'it is important to stress that the contemporary child soldiers phenomenon is very new indeed, for in the post-cold war era it has reached proportions -both in terms of scope and extremes - that stretch far beyond any previous occurrences in human history. It is simply unprecedented.'<sup>1</sup>

The Syrian conflict, the most cataclysmic in scope and duration in the 21<sup>st</sup> century, has drawn a milieu of parties, including the Al-Nusrah Front (ANF) and other or derivatives of Al-Qaida. Perhaps, the most infamous is Islamic State of Iraq and Syria (ISIS)<sup>2</sup>, which also emerged from the spasms of the war in Iraq, the Arab 'springs' and the civil war in Syria.<sup>3</sup> The ISIS 'project'

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<sup>1</sup> M Fox, 'Child soldiers and international law: Patchwork gains and conceptual debates' (2005) 7 *Human Rights Review* 1, 27-48, 28

<sup>2</sup> This paper will refer to the group as ISIS. It has also been known as The Islamic State of Iraq and the Levant (ISIL) or Daesh

<sup>3</sup> WT Oosterveld and W Bloem, 'The Rise and Fall of ISIS: From Evitability to Inevitability Volatility and Friction in the Age of Disintermediation' (2017) The Hague Centre for Strategic Studies (HCSS) StratMon Annual Report 2016/2017

aimed, essentially, to establish a ‘caliphate’. The group expanded into Syria, against the background of Bashar al-Assad’s lack of control over the whole of Syria, to establish its ‘capital’ as Raqqa.<sup>4</sup> There is evidence showing that the group has been engaged in the widespread recruitment of children. ISIS regarded minors as an important component of maintaining existence of the ‘caliphate’.<sup>5</sup> Its use of children was strategic; it aimed at achieving the organisation’s immediate and long-term transgenerational goals.<sup>6</sup> The project was designed to outlast its territorial defeat and ensure its continued survival.<sup>7</sup> Children were both a physical and ideological resource. They were taught as minors that anyone who disregarded the ‘correct’ interpretation of Islam was a ‘kafir’ (unbeliever) and had to be eliminated.<sup>8</sup> ISIS successfully turned the classrooms of its 1,350 primary and secondary schools into recruitment arenas for restricted ideological indoctrination to over 100,000 male and female students.<sup>9</sup> The recruitment and militarisation of minors was intended to both increase the population of its ‘state’ as well as replenish its army.

ISIS was adept at recruiting children,<sup>10</sup> often boasting of its successful recruitment and training of minors in videos. The use of children in large numbers not only allowed ISIS to reinforce its physical strength, it aimed at averting against potential leadership deficit.<sup>11</sup> The outfit would often refer to the children as ‘the cubs of the caliphate,’ ‘tomorrow’s mujahedeen,’ ‘the next generation,’ and ‘the future flag bearers’ to send a strong message to its adversaries that it was grooming future fighters and was well-equipped.<sup>12</sup> One its videos showed the minors chanting in French: ‘Beware, we have what we need to defend ourselves, well-armed soldiers are ready to kill you.’<sup>13</sup> Constructing itself as a victim of a hostile external world served to legitimise ISIS terrorist acts, especially in Europe.<sup>14</sup> The degree at which it recruited children was meant to engender an intergenerational culture of violence and religious extremism. Children were enticed through payment of salaries and appeal of the ideology and family as incentives for children to join the group.<sup>15</sup> As part of its process of territorial expansion, it also kidnapped thousands of children from orphanages, schools and family homes. For example, it is estimated that children under 14 accounted for over a third of the 6,800 Yazidis abducted in Sinjar in 2014, with a further 800–900 reported to have been kidnapped from Mosul.<sup>16</sup>

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<sup>4</sup> A Levallois and J Cousseran ‘The financing of the ‘Islamic State’ in Syria and Iraq (ISIS)’ (2017) European Parliament, Directorate-General For External Policies Policy Department

<sup>5</sup> See ‘The Children of ISIS The indoctrination of minors in ISIS-held territory’ (2017) A joint publication by the National Coordinator for Security and Counterterrorism (NCTV) and the General Intelligence and Security Service (AIVD)

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> G Vale, ‘Cubs in the Lions’ Den: Indoctrination and Recruitment of Children Within Islamic State Territory’ (2018) ICSR

<sup>10</sup> J Cook and G Vale, ‘From Daesh to ‘Diaspora’: Tracing the Women and Minors of Islamic State’ (2018) ICSR

<sup>11</sup> See ‘The Children in Daesh: ‘Future Flag Bearers’ of the ‘Caliphate’ (2017) The Carter Center

<sup>12</sup> Ibid

<sup>13</sup> See ‘ISIS Music Video in French Featuring Children: Your Roads Will Be Rigged by Mines, Our Swords Are Sharpened to Slice Necks’ Memri TV 29 April 2016 <https://www.memri.org/tv/isis-music-video-french-featuring-children-your-roads-will-be-rigged-mines-our-swords-are>

<sup>14</sup> See ‘The Children of ISIS The indoctrination of minors in ISIS-held territory’ A joint publication by the National Coordinator for Security and Counterterrorism (NCTV) and the General Intelligence and Security Service (AIVD)

<sup>15</sup> See, UN General Assembly - Children and armed conflict: Report of the Secretary-General, 24 August 2017 A/72/361-S/2017/821

<sup>16</sup> Vale, *supra* note 9

ISIS' widespread propaganda of brutality served to 'normalise' children's exposure to violence and death.<sup>17</sup> Children, as young as four and five years old, were forced to witness public executions and torture<sup>18</sup> with the objective of eroding from them of any natural feelings of disgust or fear. Such emotional 'reprogramming' resulted in children embracing violence as a 'natural' way of life, and enhanced the progression for children to perpetrate violence themselves as combatants, torturers and executioners.<sup>19</sup> Some of the boys in ISIS-held territory actively perpetrated violence from an increasingly young age.<sup>20</sup>

ISIS has also targeted young women and girls. Female recruits performed support roles for the organisation's security apparatus, and imposed strict dress codes on women that appeared in public. The group actively coerced girls into marrying ISIS fighters, often by threatening their families to give consent.<sup>21</sup> There were, however, also families that voluntarily consented to such marriages out of sympathies or a direct allegiance to ISIS. Teenage girls, in particular, were targeted by ISIS' local commanders.<sup>22</sup>

ISIS showed unprecedented success in attracting women from the West,<sup>23</sup> through radicalisation online. Radicalisation of new recruits and residents was the principal objective of ISIS propaganda.<sup>24</sup> Terrorist groups have been skilful in the use of the internet. The groups have shown an ability to design content that appeals to users' specific values and connecting them with like-minded individuals.<sup>25</sup> Both in the physical and virtual realm, such groups depend heavily on isolation of potential recruits from views and opinions that may sway them from the groups' prevailing ideologies. Terrorists aim to place targets into 'echo chambers' that amplify their narratives and overpower any contrary opinions.<sup>26</sup> Numerous social media platforms have been mobilised in the direct grooming and recruitment.<sup>27</sup> ISIS, in particular, was able to take advantage of impressionable young people who used social platforms.

Through social media, ISIS extended its appeal beyond Arab countries, attracting fighters from the West. ISIS projected an image of success; that it was the triumphant side and could offer a better life. Portraying a glamorised image, ISIS fighters acted as the new 'rock stars' of global cyber jihad.<sup>28</sup> The group idealised the caliphate as the place for Muslims to enjoy status and a sense of belonging; that it was the duty of Muslim men and women in the West to travel there, particularly if they were Sunni Muslims.<sup>29</sup> The propaganda reaped some success: ISIS managed to

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<sup>17</sup> See 'Establishment of the Limit Upon the Corrupt in the Land,' (2015) Al Halab Media Center, cited in 'The Children in Daesh: 'Future Flag Bearers' of the 'Caliphate' (2017) The Carter Center

<sup>18</sup> Ibid

<sup>19</sup> Vale, *supra*, note 9, 3

<sup>20</sup> A Almohammad, 'ISIS Child Soldiers in Syria: The Structural and Predatory Recruitment, Enlistment, Pre-Training Indoctrination, Training, and Deployment International Counter-terrorism', (2018) The Hague CCT Research paper DOI: 10.19165/2018.1.14 ISSN: 2468-0656

<sup>21</sup> H Asaad, 'Syrian girls forced to marry ISIS fighters', Al-Monitor, May 12, 2014

<http://www.al-monitor.com/pulse/originals/2014/05/syria-girls-marriage-isis-raqqa.html>

<sup>22</sup> S Qassim, 'Syrian teenage girls forced to marry ISIS jihadis in Deir ez-Zor', AraNews, 9 January 2016,

<http://aranews.net/2016/01/syrian-teenage-girls-forced-to-marry-isis-jihadis-in-deir-ez-zor/>

<sup>23</sup> A Peresin, 'Why Women from the West are Joining ISIS' (2018) 56 *International Annals of Criminology* Special Issue 1-2 (Special Issue on Female Migration to ISIS), 32-42

<sup>24</sup> Vale, *supra* note 9

<sup>25</sup> A Meleagrou-Hitchens and N Kaderbhai, 'Research Perspectives on Online Radicalisation: A Literature Review, 2006–2016' International Centre for the Study of Radicalisation (ICSR), King's College London

<sup>26</sup> Ibid

<sup>27</sup> M Ranstorp et al, 'The Role of Gender in Violent Extremism' 2015 RAN Issue Paper

<sup>28</sup> I Awan, 'Cyber-Extremism: Isis and the Power of Social Media' (2017) 54, *Society*, 2, 138–149

<sup>29</sup> See 'How social media is used to encourage travel to Syria and Iraq' Briefing note for schools, Home Office UK

attract foreign recruits, among them young men, women and children from Western countries and the US. For young girls, martyrdom was the ultimate incentive; marrying a *mujahid* provided eternal rewards in the afterlife.<sup>30</sup> It is reported that 15-year-old British girl Shamima Begum and her two colleagues, whose departure to join the terrorist group attracted media attention, had been radicalised by ISIS' online campaigns. Shamima Begum intimated that her 'family wouldn't help me get married in the UK.'<sup>31</sup>

At its strongest, ISIS was in control of territory straddling two countries, Syria and Iraq.<sup>32</sup> The group built on the jihadist movement embodied by al-Qaeda. The only difference is that it acquired territory,<sup>33</sup> ascribing itself with 'statehood.' In March 2019, under heavy onslaught from coalition forces, ISIS lost the final territorial remnant of its caliphate in Baghouz. Yet its collapse bequeathed a plethora of complex and difficult challenges. One such difficulty was dealing with minors recruited or taken by, or born into the group. The status of these children has been the source of debate, particularly those seeking to return to their previous Western domiciles. Among the Western countries, there does not seem to be a clear position on how such children should be treated. The reactions of Western government have been inconsistent, some punitive. It would appear the approaches towards this dilemma have been dictated by the political whims of individual states without normative basis. The widely-reported case of British teenager Shamima Begum shone the spotlight on the predicaments of children formerly associated with ISIS.

The children have, predominantly, been regarded as young terrorists likely to pose danger to Western societies. However, these perceptions and actions depart from the normative approaches to children associated with armed conflict. This paper makes a case for the treatment of ISIS-associated children – those under 18 - to be regarded as child soldiers. When analysed closely, these children deserve protections accorded to all children recruited for purposes of warfare. Recent case law implies that such protection does not cease even after the age of 18. The denial of repatriation is, thus, inimical to normative approaches to child victims of armed conflict. The approaches of the Western countries could be vulnerable to criticism of the violation of the rule of law. The revocation of citizenship and barring returns conflict with norms of justice. With this in mind, this article asserts that a consistent approach would require the Western approaches to treat ISIS-associated children as victims first.

The paper is organised as follows. The first part discusses the dilemmas faced by Western countries with regards to children who travelled to the warzone to join ISIS. The second part makes a case for the children to be regarded as child soldiers. Reference to international human rights and in particular, International Criminal Law, are made. The case of Thomas Lubanga at the ICC made some interesting conclusions on children associated with armed conflict and the effects of war. The third section discusses decisions to strip Western citizens who travelled to join ISIS of citizenship, within the context of international law. The fourth part examines the notion of 'victimhood' against the background of age thresholds for victims of child soldiering. The case of Dominic Ongwen, abducted as child and prosecuted as an adult, triggered debate on whether an adult former child soldier could still be regarded as a victim. The case brings some conflicting insights into the discourse of child soldier victimhood. Ultimately, this paper adopts

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<sup>30</sup> Ranstorp et al, supra note 27

<sup>31</sup> Q Sommerville 'Shamima Begum: What was life like for the IS couple in Syria?' BBC 3 March 2009 <https://www.bbc.co.uk/news/world-middle-east-47435039>

<sup>32</sup> Levallois and Cousseran, supra note 4

<sup>33</sup> Ibid

the position in Lubanga that child soldier victimhood is continuous for the time the victim is under the custody of his or her abductors. This is essential in interpreting the cases of ISIS-associated children now over 18. The fifth part argues for a consistent approach to ISIS-associated children based on their continuous victimhood.

## 1. Dilemmas of Western children

Research findings demonstrate that about 41,490 foreign citizens across 80 countries became affiliated with ISIS.<sup>34</sup> Some 13 per cent of them were women while 12 per cent were minors, meaning that 1 in 4 ISIS fighters were women and minors. This is, however, believed to be a gross underestimation: only 26 countries publicly provided reliable figures on both women and minors.<sup>35</sup> There is, thus, still a lack of a full understanding of the scale and scope of the problem.<sup>36</sup> In total, 1,460-1,525 minors have now returned to their country of departure, representing up to 20 percent of total returnees.<sup>37</sup> However, the approaches to repatriation of children formerly attached to ISIS have been inconsistent. The issue is politically charged across Europe. US president Donald Trump told the European Union (EU) to take back its 800 ISIS fighters captured in Syria by US-backed forces and put them on trial.<sup>38</sup> It is not clear how many of these are children. Similarly, the UN has enjoined governments to take responsibility for their citizens who joined ISIS, and repatriate family members not being held for the purposes of prosecution.<sup>39</sup> Children of ISIS fighters, in particular, had ‘suffered grievous violations of their rights.’<sup>40</sup> France, Germany, Norway and Denmark have all repatriated a small number, most of them orphans whose parents were killed during the caliphate’s final months.<sup>41</sup> Eight Australian children were rescued from a refugee camp in Syria and taken into the care of the Australian government.<sup>42</sup> Six Belgian children of ISIS members were taken to Belgium from camps in Syria.<sup>43</sup>

However, there is general resistance. The Court of Appeal in Brussels overturned an earlier court decision which ordered the government to accept the return of the widows and children of two

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<sup>34</sup> See ‘ISIL Now A Covert Global Network’ Despite Significant Losses, United Nations Counter-Terrorism Head Tells Security Council SC/13463 UN Security Council 23 August 2018 <https://www.un.org/press/en/2018/sc13463.doc.htm>

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Cook and Vale, *supra* note 10

<sup>38</sup> P Wintour, ‘Trump: EU must take back 800 Isis fighters captured in Syria’ *The Guardian* 17 February 2019 <https://www.theguardian.com/world/2019/feb/17/islamic-state-isis-baghu-z-trump-calls-on-european-allies-to-take-800-fighters-captured-in-syria>

<sup>39</sup> J Smyth and A England, ‘UN urges repatriation of Isis family members’ *The Financial Times* 24 June 2019 <https://www.ft.com/content/33b71286-9637-11e9-8cfb-30c211dcd229>

<sup>40</sup> Jamie Smyth and Andrew England UN urges repatriation of Isis family members *The Financial Times* 24 June 2019 <https://www.ft.com/content/33b71286-9637-11e9-8cfb-30c211dcd229>

<sup>41</sup> R Hall ‘Children of British Isis members will not be allowed to return to UK, government rules’ *The Independent* 13 August 2019 <https://www.independent.co.uk/news/uk/home-news/isis-children-syria-shamima-begum-al-hol-terrorism-immigration-a9054306.html>

<sup>42</sup> J Hollingsworth, ‘Australian children of ISIS fighters rescued from Syria’ *CNN* 3 July 2019 <https://edition.cnn.com/2019/06/24/australia/syria-isis-australia-intl-hnk/index.html>

<sup>43</sup> See ‘Belgium takes back six children of Isis fighters from Syrian camps’ *Reuters* 15 June 2019 <https://www.theguardian.com/world/2019/jun/15/belgium-takes-back-six-children-of-isis-fighters-from-syrian-camps>

men who left Belgium with their families to go and fight in Syria.<sup>44</sup> Sajid Javid, the former home secretary, concluded that it would be too risky to send officials to retrieve the children of ISIS fighters from Syria.<sup>45</sup> However, these camps were frequently visited by British aid workers and journalists.

Attitudes are much more hardened against the parents or fighters. As regards the children, the fear is that minors recruited into groups like ISIS may perpetrate criminal acts and violence.<sup>46</sup> The fear comes against the use of children by armed groups generally,<sup>47</sup> and ISIS' use of young boys in combat roles. Images that appeared to show children being used in the perpetration of violence have added to the fears.<sup>48</sup> As noted by Charles Lister, director of the Countering Terrorism and Extremism Program at the Middle East Institute in Washington, many Europeans were resisting repatriation because they perceived, even the children, as potential dangers.<sup>49</sup> The young recruits have been described as having been 'groomed', 'lured' and 'seduced' to join ISIS without the consent or knowledge of their parents.<sup>50</sup> The now common examples include 15-year-olds Sharmeena Begum, Shamima Begum (no relation), Amira Abase and Kadiza Sultana (16), who flew from London in 2014 and 2015<sup>51</sup>, the 16-year-old twins Salma and Zahra Halane, who left Manchester in June 2014,<sup>52</sup> and two Austrian friends, Samra Kesinovic (17) and Sabina Selimovic (16) who left Vienna to join ISIS in April 2014.<sup>53</sup> German Linda Wenzel was 15 when she left home after telling her mother she was going to spend the weekend with a friend but instead made her way to Syria after striking up a relationship online with a jihadist.<sup>54</sup>

The well-publicised case of Shamima Begum, in particular, brought the dilemma of Western children formerly associated with ISIS into sharp focus. Shamima, who was pregnant, had sought to return to the UK after she was discovered in a Kurdish refugee camp in Syria. She had been married to ISIS fighter Yago Riedijk, 27, from Holland and had had two other children who later died. Shamima, 19 at the time of her appeal to return, claimed she had been 'brainwashed' by

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<sup>44</sup> A Hope, 'No automatic right of return for widows and orphans of dead Syria fighters, rules court of appeal' *The Brussels Times* 28 February 2019 <https://www.brusselstimes.com/all-news/belgium-all-news/54061/no-automatic-right-of-return-for-widows-and-orphans-of-dead-syria-fighters-rules-court-of-appeal/>

<sup>45</sup> R Hall, 'Children of British Isis members will not be allowed to return to UK, government rules' *The Independent* 13 August 2019 <https://www.independent.co.uk/news/uk/home-news/isis-children-syria-shamima-begum-al-hol-terrorism-immigration-a9054306.html>

<sup>46</sup> See e.g. UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, UN Vienna (2017) [Hereinafter "UNODC, 2017"]

<sup>47</sup> *Ibid*

<sup>48</sup> In January 2016, for example, a four-year-old British boy featured in an ISIS video apparently detonating a bomb that killed prisoners. See J Davenport and A Hall, 'Top Counter Terror Officer Warns Of Threat Posed By Jihadi Children Returning To UK', *The Evening Standard*, 1 February 2018

<sup>49</sup> Hope, *supra* note 44

<sup>50</sup> L Dearden, 'How Isis Attracts Women and Girls from Europe with False Offer of 'Empowerment'', *The Independent*, 5 August 2017, <https://www.independent.co.uk/news/world/europe/isis-jihadi-brides-islamicstate-women-girls-europe-british-radicalisation-recruitment-report-a7878681.html>

<sup>51</sup> M Evans, 'Three Missing London Schoolgirls 'Travelling to Syria to Join Isis'' *The Telegraph* (2015).

<sup>52</sup> I Calderwood, 'Teenage 'Terror Twins' who Fled Britain to Join ISIS Tried to Recruit Their Whole Family Telling Brothers: 'We Might Seem Evil to You, but we will all be Happy in the Afterlife'', *Mail Online*, 4 October 2015, <http://www.dailymail.co.uk/news/article-3259363/Teenage-terror-twins-fled-Britain-join-ISIS-tried-recruit-family-telling-brothers-evil-happy-afterlife.html>

<sup>53</sup> D Killalea, 'Samra Kesinovic, Sabina Selimovic: How Islamic State Recruits Teenagers', *News.com.au*, 28 November 2015, <https://www.news.com.au/world/middle-east/samra-kesinovic-sabina-selimovic-howislamic-state-recruits-teenagers/news-story/9a0ab035c6352e2eb93c93b1733bd76e>

<sup>54</sup> D Charter, 'Linda Wenzel, German teen who joined Isis, is jailed for six years in Iraq' *The Sunday Times* 18 February 2018 <https://www.thetimes.co.uk/article/linda-wenzel-german-teen-who-joined-isis-is-jailed-for-six-years-in-iraq-r07k8lg76>

ISIS and now ‘regrets everything.’<sup>55</sup> However, she also intimated she did not regret travelling to Syria but did not agree with everything the ISIS group had done. On 19 February 2019, the British Home Office revoked her British citizenship. Soon afterwards, she gave birth to a boy, who later died of pneumonia in March at less than three weeks of age.

A United Nations Security Council Resolution in 2014 introduced what formally became known as the ‘foreign [terrorist] fighter’ threat on the international security agenda.<sup>56</sup> Foreign terrorist fighters (FTFs) are defined as ‘individuals who travel to a State other than their State of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with *armed conflict*’.<sup>57</sup> They increase the intensity, duration, and complexity of conflicts and may constitute a serious danger to their States of origin, transit, destination, as well as neighbouring zones of armed conflict in which they are active. After the terrorist attacks in Paris in November 2015, fears heightened that ‘battle-hardened, ideologically fervent combatants would return to Europe *en masse*— with destructive intentions and capabilities— now characterise common perceptions of this threat’.<sup>58</sup> The subsequent attacks in Brussels, Paris, Nice, Berlin, Manchester and London were ‘viewed through the lens of the foreign fighter phenomenon.’<sup>59</sup>

## 2. Law of armed conflict and children

In essence, young persons like Shamima have been regarded as FTFs. With regards to girls and women, the popularised and sensationalised epithet ‘ISIS or jihadi brides’ inextricably ‘marries’ them to the devious agenda of the group. The FTFs definition is unhelpful for its sweeping classification of transnational participants as ‘terrorist fighters.’ While it recognises ‘armed conflict’, it fails to pay cognizance to child soldiers. In this paper, I make a case for ISIS-associated children to be considered as child soldiers and, therefore, principally victims, unless clear evidence is available that they were terrorists. The blanket denial of repatriation would appear against the law of armed conflict (and international human rights law). The approaches of the Western countries could be vulnerable to criticism of the violation of the rule of law. The revocation of citizenship and barring returns conflict with norms of justice.

By all accounts, ISIS, while also correctly described as a terrorist group, would, under IHL conform with the legal identity of non-state armed group. A ‘non-state armed groups’ must be a collective entity with a command structure that distinguishes the group from its individual members.<sup>60</sup> Second, the group must have sufficient manpower, logistics, including weapons, and coordination to engage in intense and sustained violence.<sup>61</sup> Once an armed group is party to an armed conflict, its members are liable for war crimes.<sup>62</sup> One such war crime is the recruitment of

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<sup>55</sup> A Lloyd ‘Shamima Begum: I was brainwashed. I knew nothing: The Isis bride is facing up to a life outside the UK’ The Times UK, 1 April 2019 <https://www.thetimes.co.uk/article/isis-bride-shamima-begum-i-regret-everything-please-let-me-start-my-life-again-in-britain-9g0tn08vn>

<sup>56</sup> See UN Security Council Resolution Counter-terrorism Committee S/RES/2178 (2014) – Addressing the growing issue of foreign terrorist fighters

<sup>57</sup> See ‘Foreign terrorist fighters’ UN Security Council Counterterrorism Committee (emphasis added) 10 June 2019 <https://www.un.org/sc/ctc/focus-areas/foreign-terrorist-fighters/>

<sup>58</sup> A Scherrer et al ‘The return of foreign fighters: an ex-post evaluation’ (2018) European Parliamentary Research Service, European Parliament, 26

<sup>59</sup> E. Bakker and J. de Roy van Zuijdewijn, ‘Jihadist Foreign Fighter Phenomenon in Western Europe: A Low-Probability, High-Impact Threat,’ (2015). International Centre for Counter-Terrorism( ICCT), Research Paper, The Hague

<sup>60</sup> T Rodenhäuser, ‘What does it take to be a non-state armed group?’ (2018) OUPblog Oxford University Press

<sup>61</sup> Ibid

<sup>62</sup> Ibid

child soldiers. As discussed earlier, ISIS has been involved in the widespread recruitment of children, among them, of very young ages. Soft law and hard law have since established the definition of a child soldier. The Paris Principles defined a child soldier as:

Any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies, or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.<sup>63</sup>

Under Article 4 (1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.<sup>64</sup> The liability does not lie with the recruitee but the recruiter.

### ***3.1 International Criminal Law***

International jurisprudence has affirmed the criminality of engaging children and outlined the methods of recruitment. In *Prosecutor v. Hinga Norman*, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) held that the recruitment of child soldiers, namely the conscription, enlistment and use to participate actively in hostilities of children under fifteen, was a crime under customary law international law attracting individual criminal responsibility since at least November 1996.<sup>65</sup> The SCSL cases represented a seminal moment when the crime of child recruitment had, for the first time, been charged before an international court or tribunal. The ICC followed the path paved by the SCSL and developed its own jurisprudence directly addressing the elements of this specific crime.<sup>66</sup>

The ICC and SCSL chimed on the forms of recruitment. The Appeals Chamber of the SCSL noted that ‘enlistment’ in the broad sense included any conduct of accepting the child as a part of the militia. Such conduct would include making him participate in military operations.<sup>67</sup> The case of Lubanga at the ICC affirmed that ‘conscripting’ and ‘enlisting’ were two forms of recruitment, ‘conscripting’ being forcible recruitment, while ‘enlisting’ pertains more to voluntary recruitment.<sup>68</sup> The activities of ISIS conform to these legal precepts. The group accepted children who willingly joined it, some who voluntarily travelled from the West, into its ranks while also kidnapping others.

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<sup>63</sup> See *The Children of ISIS: The Indoctrination of Minors in ISIS-Held Territory*, (The Hague: Dutch Ministry of the Interior and Kingdom Relations, (2017), 5.

<https://english.aivd.nl/publications/publications/2017/04/26/thechildren-of-isis-the-indoctrination-of-minors-in-isis-held-territory> UNICEF, *The Paris Principles: Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, [http://www.un.org/children/conflict/\\_documents/parisprinciples/ParisPrinciples\\_EN.pdf](http://www.un.org/children/conflict/_documents/parisprinciples/ParisPrinciples_EN.pdf). Accessed 31 August 2019.

<sup>64</sup> See *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*; Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002.

<sup>65</sup> *Prosecutor v. Hinga Norman* [Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment (SCSL-2004-14-AR72(E))), 31 May 2004]

<sup>66</sup> M Cottier, ‘Article 8’ in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft,1999)

<sup>67</sup> SCSL, *Fofana and Kondewa Appeals Chamber* 28 May 2008, para. 144.

<sup>68</sup> *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, 29 January 2007, para. 246.



However, jurisprudence has, albeit controversially, established that consent of the child is not a valid defence to any of the three child soldiering war crimes. In *Lubanga*, the court concurred with the Special Representative of the Secretary-General for Children and Armed Conflict that '[t]he line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict.<sup>69</sup> Child soldiers, it has been concluded, are, thus, regarded as faultless passive victims<sup>70</sup> of adult malevolence.

As noted earlier, the term 'child soldier' captures an array of activities: boys, and girls used as fighters, cooks, porters, messengers, spies, or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.<sup>71</sup> IHL uses the terms participating 'directly' in armed conflict while the Rome Statute uses the terms 'using' and 'participating actively' in hostilities. 'The words 'using' and 'participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat [...] use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included in the terminology.'<sup>72</sup>

In *Lubanga*, the ICC introduced the test of 'potential target' to define the scope of active participation in hostilities.<sup>73</sup> 'The decisive factor... in deciding if an 'indirect' role, it stated, is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a 'potential target.'<sup>74</sup> 'The child's support and the level of consequential risk means that, irrespective of the child's absence from the immediate scene of the hostilities, he or she was nonetheless actively involved in them.'<sup>75</sup> 'The decisive factor, therefore, in deciding if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.'<sup>76</sup> Broadening the definition of what constitutes 'active participation' might have the unintended consequence that civilians, including civilian children, would lose their status of protected persons under IHL.

The judicial indiscretion aside, in essence, ISIS-associated children, were recruited through both voluntary means and by force. Whether at the battlefield or not, they could be potential targets. Several children, including Shamima Begum's colleagues were killed. With ISIS increasingly losing fighters and territory, the group increasingly sent children to the frontlines.<sup>77</sup> Research on 89 young people featured in official ISIS from January 1, 2015, to January 31, 2016 showed them praised as martyrs in ISIS propaganda. Fifty-one percent were alleged to have died in Iraq, while 36 percent died in Syria.<sup>78</sup> Thirty-one percent of those killed were Syrian, 25 percent

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<sup>69</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch. I, 14 March 2012 (hereinafter 'Lubanga Judgment') para 612

<sup>70</sup> MA Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012) 142–3., 22

<sup>71</sup> See UNICEF, *The Paris Principles: Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*,

[http://www.un.org/children/conflict/\\_documents/parisprinciples/ParisPrinciples\\_EN.pdf](http://www.un.org/children/conflict/_documents/parisprinciples/ParisPrinciples_EN.pdf). Accessed 31 May 2010.

<sup>72</sup> See 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', A/CONE 183/2/Add.1 (14 April 1998), 21

<sup>73</sup> Lubanga Judgment

<sup>74</sup> Lubanga Judgment, para. 628

<sup>75</sup> Ibid

<sup>76</sup> Ibid

<sup>77</sup> See de Bont et al, 'Life at ISIS: The Roles of Western Men, Women and Children' (2017) Security and Global Affairs, Leiden University

<sup>78</sup> M Bloom, J Horgan and C Winter, 'Depictions of Children and Youth in the Islamic State's Martyrdom Propaganda, 2015-2016,' (2016) *CTC Sentinel* 9, 2

Syrian/Iraqi, and 11 percent Iraqi. The remaining 33 percent were from Yemen, Saudi Arabia, Tunisia, Libya, the United Kingdom, France, Australia, and Nigeria.<sup>79</sup>

Girl child soldiers, referred to as 'bush wives' have often been used as rewards for or have been abused by commanders and ordinary group members. ISIS exploited the 'bush wives' who bore children at young ages. Research in Mosul under ISIS showed that by June 2014, there were 819 household members reportedly married.<sup>80</sup> The age of marriage was 15 or less for 89 (12.9%) and 18 and less for 253 (49.7%).<sup>81</sup> Battlefield deaths left the women widowed but remarried soon after, with some reportedly married and divorced up to six times.<sup>82</sup> This was designed to 'populate the project.'

ISIS is also reported to have raped children as young as 12.<sup>83</sup> The prospects of religiously permitted sexual relation served as a recruitment tool for men from conservative societies where sex before marriage is proscribed.<sup>84</sup> An 11-year-old Yazidi girl was forced to marry an Azerbaijani foreign fighter who was 19.<sup>85</sup> Shamima Begum's colleague, Sultana, reportedly married an American ISIS fighter with Somali heritage, who was killed a short time later in a Russian airstrike. Amira Abase married an 18-year-old Australian ISIS fighter, Abdullah Elmir, in July 2016.<sup>86</sup> It has not been suggested that the three girls were enlisted for sexual purposes. However, it has been noted that Shamima Begum's marriage to Dutch Riedijk was 'arranged' shortly after she arrived in Raqqa.<sup>87</sup> She had two children and a third at a refugee camp where she was discovered. While there is no explicit evidence of them being 'sex slaves', they were performing support roles which exposed them to danger. Coalition airstrikes killed civilians, including children.<sup>88</sup>

While girls were frequently abducted to serve as 'bush wives', they performed other military and domestic tasks.<sup>89</sup> Shamima Begum reportedly served in ISIS' 'morality police' and also tried to recruit other young women. It has been claimed she carried a rifle and earned a reputation as a strict 'enforcer' of ISIS' laws, such as dress codes for women.<sup>90</sup> A nine-year-old boy from London, forced to travel to Syria by his parents, was also feared to be the youngest British child

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<sup>79</sup> Ibid

<sup>80</sup> Lafta et al. 'Living in Mosul during the time of ISIS and the military liberation: results from a 40-cluster household survey' (2018) *Conflict and Health* 12:31

<sup>81</sup> Ibid

<sup>82</sup> P Walsh, 'ISIS Brides Flee Caliphate as Noose Tightens on Terror Group' CNN, 17 July 2017

<https://edition.cnn.com/2017/07/17/middleeast/raqqa-isis-brides/index.html>

<sup>83</sup> See 'ISIS Fighters Pray Before Raping Girls' The Daily Beast, 14 April 2017

<https://www.thedailybeast.com/cheats/2015/08/13/isis-fighters-pray-before-raping-girls-or-isis-uses-faith-to-justify-child-rape>

<sup>84</sup> R Callimachi 'ISIS Enshrines a Theology of Rape' The New York Times 13 August 2015

<sup>85</sup> C Hughes 'Teen was forced to become ISIS fighter's child bride aged just 11' The Mirror 19 June 2019

<https://www.mirror.co.uk/news/world-news/teen-forced-become-isis-fighters-16544042>

<sup>86</sup> F. Perraudin 'Shamima Begum tells of fate since joining Isis during half-term' The Guardian 14 February 2019

<https://www.theguardian.com/world/2019/feb/14/shamima-begum-friends-kadiza-sultana-amira-abase-joined-isis-syria>

<sup>87</sup> Sommerville, supra note 31

<sup>88</sup> See Human Rights Watch 'Syria: US Coalition Should Address Civilian Harm' 9 July 2019

<https://www.hrw.org/news/2019/07/09/syria-us-coalition-should-address-civilian-harm>

<sup>89</sup> DE Mazurana, SA McKay, KC Carlson, et al. 'Girls in Fighting Forces and Groups: Their Recruitment, Participation, Demobilization, and Reintegration' (2002) *Peace and Conflict: Journal of Peace Psychology* 8(2):97-123

<sup>90</sup> J Ensor and R Mendick, 'Shamima Begum was cruel enforcer in Isis's morality police, say Syrian witnesses' The Telegraph <https://www.telegraph.co.uk/news/2019/04/13/shamima-begum-cruel-enforcer-isis-morality-police-say-syrian/> The Telegraph 3 April 2019

to be killed with ISIS.<sup>91</sup> Shamima Begum's colleagues were also killed by coalition airstrikes.<sup>92</sup> It can be concluded that the two girls, married to ISIS fighters, were 'potential targets'.

The purpose of the foregoing accounts is to juxtapose them with extant precepts of child soldiering. It is clear that ISIS-associated children under the age of 18 were enlisted, forcibly recruited, used as sex slaves and performed ancillary activities as well as active combat, thus fulfilling the definitional precepts of child soldiering. The children performed various activities, as well as combat, which would constitute 'participating actively' and left them as 'potential targets' in hostilities. However, under International Criminal Law the definition of a child soldier assumes a different and lower age threshold. Under Article 8 of the Statute, war crimes against child soldiers include conscripting or enlisting children under the age of 15 years, or using them to participate actively in hostilities. Conscripting, enlistment and using children to participate actively in hostilities are separate crimes.<sup>93</sup> Therefore, International Criminal Law exclusively targets adult recruiters and users of child soldiers while child soldiers are exempted for crimes they commit. For instance, the Rome Statute disallows prosecution of anyone under the age of 18, in the process creating a three-year accountability and victimhood gap. Here is the dilemma arising: Soldiers older than 15 are not considered 'child' soldiers in terms of the crimes of conscription, enlistment, and use in hostilities. They are denied the possibility of being recognised as child soldier victims. At the same time, they are, under the Statute, not regarded as perpetrators either. Shamima Begum and colleagues were 15 or older when she joined ISIS. So, between the age of 15 through 17 they did not have status either as child soldier victims or as potential perpetrators, nor could they be regarded the subject of child soldier crimes.

While the SCSL Statute provided no jurisdiction over any person who was under the age of 15, it provide that should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she would be treated 'with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.'<sup>94</sup> Unlike the Rome Statute, in essence, the SCSL Statute permitted prosecution of those aged between 15 and 18. The founding prosecutor, David Crane, however, declined, arguing:

'The Prosecution decided early in developing a prosecutorial plan that no child between 15 and 18 had the sufficiently blameworthy state of mind to commit war crimes in a conflict setting. Aware of the clear legal standard highlighted in international humanitarian law, the intent in choosing not to prosecute was to rehabilitate and reintegrate this lost generation back into society. It would have been impractical to prosecute even particularly violent children because there were so many.'<sup>95</sup>

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<sup>91</sup> D Gadher, 'Isaac, 9, feared to be the youngest British child killed with Isis in Syria' *The Times* 14 April 2019 <https://www.thetimes.co.uk/article/isaac-9-feared-to-be-the-youngest-british-child-killed-with-isis-in-syria-n8xq2j03t>

<sup>92</sup> F. Perraudin, 'Shamima Begum tells of fate since joining Isis during half-term' *The Guardian* 14 February 2019 <https://www.theguardian.com/world/2019/feb/14/shamima-begum-friends-kadiza-sultana-amira-abase-joined-isis-syria>

<sup>93</sup> Lubanga was sentenced for each of the three crimes.

<sup>94</sup> See Rome Statute Article 7

<sup>95</sup> D. Crane, 'Prosecuting Children in Times of Conflict: The West African Experience' (2008) *Human Rights Brief* 11, 15

### 3. ISIS children: Citizenship and statelessness

Because of the charged nature of terrorism and violent extremism, Western approaches to returning and reintegrating children of foreign fighters have been varied. As noted earlier, while some Western countries had repatriated children, there was a general fear of exposing populations to potential terror risks. France, Germany and the United Kingdom have been reluctant, and sometimes downright unwilling, to take back ISIS suspects and their families.<sup>96</sup> Some of the reactions have been punitive. For instance, some of the responses have been that children of ISIS fighters would not be allowed back while also revoking citizenship of their parents. More than 120 dual nationals have been stripped of their British citizenship, including Shamima Begum,<sup>97</sup> since 2016. Under the 1981 British Nationality Act, a person can be deprived of their citizenship if the Home Secretary is satisfied it would be 'conducive to the public good'. Javid, then home secretary, stripped Shamima Begum of her citizenship in February 2019. However, Section 40 (4) states that the Secretary of State cannot make an order if he is satisfied that the order would make a person stateless, except where the Secretary of State certifies that he has taken the decision wholly or partly in reliance on information which should not be made public in the interests of national security ... or otherwise in the public interest. Under international law, it is illegal to deprive nationals of citizenship if such decision would leave them stateless. The prohibition of adopting measures that result in statelessness is, principally, regulated under the 1961 Convention on the Reduction of Statelessness.<sup>98</sup> The Convention envisages only few narrowly defined cases in which a person can be made stateless. However, state parties that express their intention to maintain a right to deprive persons of citizenship in accordance with national laws, are allowed to do so if these are applicable at the moment of accessing the Convention (Art.(8).(3)).

In Germany, a court ruled that a German wife and three children of an ISIS fighter must be returned. The family had sued Germany's foreign ministry after diplomats declined a request to help the mother return with her three children from northern Syria.<sup>99</sup> Eventually, Germany permitted children of German ISIS fighters to be repatriated in response to mounting pressure to take back families stranded in Syrian prison camps.<sup>100</sup>

Other countries have adopted a different approach by accepting former fighters for trial.<sup>101</sup> A group of American women and children captured with ISIS in Syria were returned to the US. The group consisted of two women and six children. They were returned at the request of the US government and based on their own desire to return 'without any pressure or coercion.'<sup>102</sup> In one case of American-born Hoda Muthana, the State Department argued that she was not a

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<sup>96</sup> S Quillen, 'Europe grapples with ISIS returnees and their families' *The Arab Weekly* 24 August 2019 <https://thearabweekly.com/europe-grapples-isis-returnees-and-their-families>

<sup>97</sup> See 'Jihadi Jack: Isis fighter stripped of British citizenship by Home Office' *The Telegraph* 18 August 2019 <https://www.telegraph.co.uk/news/2019/08/17/jihadi-jack-isis-fighter-stripped-british-citizenship-home-office/>

<sup>98</sup> See The Convention on the Reduction of Stateless ness was adopted on 30 August 1961 and entered into force on 13 December 1975

<sup>99</sup> See 'German court rules on repatriation of Syria ISIL fighter's family' *Aljazeera* 11 June 2019 <https://www.aljazeera.com/news/2019/07/german-court-rules-repatriation-syria-isil-fighter-family-190711164005146.html>

<sup>100</sup> D Crossland, 'Germany takes back four children of Isis fighters' *The Times UK* 21 August 2019 <https://www.thetimes.co.uk/article/germany-takes-back-four-children-of-isis-fighters-0zfxcd26#>

<sup>101</sup> W Strobel and G Lubold, 'US Is Bringing Home Citizen Suspected of Fighting for ISIS' *Wall Street Journal* 18 June 2019

<sup>102</sup> C Finnegan and E Mclaughlin, 'American women, children who lived under ISIS transferred to US from Syria' *ABC News* 5 June 2019 <https://abcnews.go.com/Politics/american-women-children-lived-isis-transferred-us-syria/story?id=63505693>

citizen because of her father's diplomatic status at the time of her birth.<sup>103</sup> Russia had the most active programme to return detainees from Iraq and Syria, notably children.<sup>104</sup>

#### 4. Do former child soldiers lose victimhood?

In the foregoing sections, I have attempted to make a case for ISIS-associated children to be treated as child soldiers and thus victims in accordance to international law. The approaches to ISIS-associated children are merely informed by whims of individual countries who perceived them as young terrorists. Child soldiers have been known to perform violent and ghastly acts, although as noted earlier, humanitarian discourse exempts them of liability. According to Drumbl, the 'international legal imagination' has become saturated by the 'faultless passive victim' image of the child soldier. This, he argues, image is a legal fiction.<sup>105</sup> The image fails to recognise volunteerism; children are capable of understanding, especially when adolescents, more than the international law wishes to acknowledge. He argues that the rationale for excluding children from the criminal process overshoots its mark by offering too much protection.<sup>106</sup> Although there have been no public reports found of foreign minors under 15 years old travelling unaccompanied to ISIS territory, evidence has shown that ISIS-trained children as young as five years old have participated in violent acts.<sup>107</sup> These perceptions have influenced Western countries approaches to children formerly associated with ISIS. The situation becomes more complex when those concerned are no longer children, as the international legal protections cease to apply when the age of 18 is reached.<sup>108</sup> Therefore, Shamima Begum and others who spent the majority of their time with ISIS as children, but are now over 18, now fall outside the legal regimes protecting children. Shamima Begum and colleagues were 15 or older when she joined ISIS.<sup>109</sup>

The question becomes: do former child soldiers really lose victim status? Recent case law on child soldiering suggests otherwise. In the Conviction Decision in *Lubanga*, the Trial Chamber found that the offences of conscripting and enlisting 'are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group' and that they 'are continuous in nature.'<sup>110</sup> The case of the 'victimhood' of child soldiers arose in the case of Dominic Ongwen, a former commander in Uganda's rebel group, the Lord's Resistance Army (LRA). Ongwen was forcibly conscripted by the LRA as a young boy.<sup>111</sup> He rose through the

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<sup>103</sup> While children born in America are granted citizenship under the 14th Amendment, children of foreign diplomats are not because they are not under the "jurisdiction of" the U.S., according to the U.S. Citizenship and Immigration Services.

<sup>104</sup> T Lokshina, 'Will Russia Bring Home Children Who Lived Under ISIS/the Islamic State?' Human Rights Watch <https://www.hrw.org/news/2018/08/14/will-russia-bring-home-children-who-lived-under-isis/islamic-state>

<sup>105</sup> MA Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012) 142–3., 22

<sup>106</sup> Ibid

<sup>107</sup> Mia Bloom, 'ISIS Terrorism Targets Children in Unthinkable Ways', Newsweek, 25 May 2017, <http://www.newsweek.com/islamic-states-terrorism-targets-children-unthinkable-ways-614573> 63 Martin Chulov, "Scorned and Stateless: Children of Isis Fighters Face an Uncertain Future", The Guardian, 7 October 2017, <https://www.theguardian.com/world/2017/oct/07/children-isis-fighters-syria-raqqa-orphanuncertain-future>

<sup>108</sup> A Bisset, 'What rights do the children of Islamic State have under international law?' The Conversation, 28 February, 2019

<sup>109</sup> Ibid

<sup>110</sup> Lubanga Conviction Decision, paragraph 618.

<sup>111</sup> The age at which he was abducted has been reported variously. His defence team claimed he was 9. See Krispus Ayena Odongo, one of Dominic Ongwen's lawyers, in the Defence's opening statement on 18 September 2018. Edited slightly for flow. ICC, Ongwen Transcript (18 September 2018): 5. The prosecution mentioned the age of 14. See Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen 6 December 2016 <https://www.icc-cpi.int/Pages/item.aspx?name=2016-12-06-otp-stat-ongwen>

ranks of the LRA, led by Joseph Kony, to become one of its commanders. In July 2005, the ICC issued warrants of arrest against the leader of the LRA, Joseph Kony, and four of his commanders, including Ongwen, for numerous counts of crimes against humanity and war crimes.<sup>112</sup> Almost ten years after the ICC indicted him, Ongwen was arrested and made his first appearance before the Court in The Hague on 26 January 2015.<sup>113</sup> He faced 70 charges of crimes against humanity and war crimes, including recruiting children for purposes of armed conflict - crimes which took place once he was an adult and met the over-eighteen requirement outlined in Article 26 of the Rome Statute.

Ongwen's case was remarkable in that it was the first trial to pursue an indictment against an individual who was both a victim and perpetrator of child soldiering. His case fulfills the element of 'conscripted' and the vast majority of his life and development were at the hands of his abductors. Ongwen's defence posed some poignant questions on: whether his victimhood ceased at any time during his captivity under the LRA. Did he, having been a victim kept under the keen watch of Kony and his spy network and scared of spiritualism, transcend into a perpetrator?<sup>114</sup> Put differently, did Ongwen cease to be a victim? This question is central to understanding the status of children formerly associated with ISIS who are deemed to have fallen out of the threshold for protection (over 18).

ICC Prosecutor Fatou Bensouda acknowledged that, not only was Ongwen alleged to be the perpetrator of these crimes, he was also a victim.<sup>115</sup> He was abducted from his home by LRA rebels, when he was fourteen. Bensouda conceded Ongwen must have gone through the trauma of separation from his family, brutalisation by his captors and initiation into the violence of the LRA way of life.<sup>116</sup> He had thus been cast as a victim, rather than a perpetrator. However, contrary to the conclusions in *Lubanga* on 'continuous' victimhood, Bensouda argued that Ongwen was a murderer and a rapist.<sup>117</sup> He had commanded attacks which destroyed innocent civilians' livelihood. She argued that his abduction and conscription into the LRA may 'perhaps' amount to some mitigation of sentence not a defence or a reason not to prosecute him for the choice that he made; the choice to embrace the murderous violence used by the LRA and to make it the hallmark of operations carried out by his soldiers.<sup>118</sup>

The defence, however, argued that Ongwen lived his life like many child soldiers who were fighting on frontlines in prohibition of IHL. In light of the many child soldiers around the globe, the defence appealed to the court to take this into account. The fact that he was forcibly conscripted as a child soldier and lived in an environment of 'ruthlessness and duress throughout

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<sup>112</sup> ICC Press Release, 'Warrant of Arrest unsealed against five LRA Commanders', ICC-CPI-20051014-110, 14 October 2005.

<sup>113</sup> Ibid

<sup>114</sup> Krispus Ayena Odongo, one of Dominic Ongwen's lawyers, in the Defence's opening statement on 18 September 2018. Edited slightly for flow. ICC, Ongwen Transcript (18 September 2018): 5.

<sup>115</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen December 2016 <https://www.icc-cpi.int/Pages/item.aspx?name=2016-12-06-otp-stat-ongwen>

<sup>116</sup> Ibid

<sup>117</sup> Ibid

<sup>118</sup> Ibid

his life' could not merely be regarded as a matter to be resolved during the sentencing phase at trial when addressing mitigation.<sup>119</sup>

Ongwen's case differs significantly from the cases of child soldiers who joined ISIS. He was conscripted and not enlisted and was in the ranks of the LRA for a long time. The ISIS child recruits enlisted, over 15 and were not thought to have been a high-ranking members of the group. However, the two cases converge on the issue of 'victimhood'. Did Ongwen's victim status cease after 18? Shamima Begum for instance is now over 18.

Mark Drumbl's observations on the contradictions in recent jurisprudence on this matter warrant considerable rehearsal.<sup>120</sup> This is also central to how we might perceive children formerly associated with ISIS who are now over 18. The conflicting conclusions on this matter have also been noted by other scholars.<sup>121</sup> Drumbl asserts that, irrespective of his ascension, Ongwen's 'point of entry remained fixed as a young, kidnapped, orphaned, and abused child'.<sup>122</sup> The Lubanga case had established a link between a child soldier's past experiences and the present, as linear. The experiences of a child soldier 'was constructed as ongoing and assured: it rendered the children as victims damaged for life, with their reality today as derivative of their previous suffering. Once a child soldier in fact, always a child soldier in mind, body, and soul'.<sup>123</sup> In other words, *Lubanga* focused on the long-lasting effects of trauma.<sup>124</sup> This would seem to conform with a corpus of studies on militarised children. However, *Ongwen*, seems to depart from the previously established by rupturing the linkage between his past, as a child soldier, and his present as a former child soldier as discontinuous.<sup>125</sup>

To be sure, Drumbl does not necessarily argue that child soldiers should be treated as passive, faultless victims but that International Criminal Law should be consistent and predictable.<sup>126</sup> The Pre-Trial Chamber in Ongwen's case contradicted the findings in the Lubanga Trial and Appeals Chambers. Drumbl points out:

PTC II thereby shied away from the Lubanga narrative of the pernicious, ongoing effect of being compelled as a child into a violent armed group and socialized therein. Whereas the defense sought to link Ongwen's conduct as an adult to his horrid experiences as a child, PTC II only examined his agency as an adult – as if he had never been a child, let alone a child in the LRA. In rejecting the duress submissions in Ongwen, PTC II elides Ongwen's status as a former child soldier. It's as if he lost that status, or ceded it. Hence, there is a proper way to be a victim. Victimhood is contingent, so to speak, even aleatory.<sup>127</sup>

Ongwen's case proceeded to trial. Drumbl cautions that the 'push to confirm charges against Ongwen invoked language that should perturb child rights activists.'<sup>128</sup> This is because post-

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<sup>119</sup> *The Prosecutor v. Dominic Ongwen* Pre-Trial Chamber II ICC-02/04-01/15 Defence for Dominic Ongwen Third Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", filed on 18 January 2016 as ICC-02/04-01/15-404-Conf25 May 2016 para 36

<sup>120</sup> M Drumbl 'Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering' (2016) Justice in Conflict <https://justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of-child-soldiering/>

<sup>121</sup> See e.g Y McDermott 'Child victim or brutal warlord? ICC weighs the fate of Dominic Ongwen' (2017) *The Conversation*

<sup>122</sup> Drumbl, supra note 119

<sup>123</sup> *ibid*

<sup>124</sup> McDermott, supra note 120

<sup>125</sup> Drumbl, supra note 119

<sup>126</sup> *Ibid*

<sup>127</sup> *Ibid*

<sup>128</sup> *Ibid*

conflict rehabilitation and reintegration approach all persons (regardless of age) who had become associated with armed groups and armed forces while under the age of 18 as former child soldiers and accords them entitlements linked to that status. Drumbl further states:

The contrast between Ongwen and Lubanga vivifies how narratives of agency, choice, and constraint may become instrumentalized by judges to suit the prosecutorial impulse. This contrast additionally reflects the clumsiness of the criminal law in conceptualizing child soldiering specifically and, in Ongwen's case, victim-perpetrator circularity generally.<sup>129</sup>

The judgment in *Ongwen* on this element would be interesting given *Lubanga*. In fact, evidence presented by an expert witness in *Lubanga* supported continuity of victimhood. Dr. Elisabeth Schauer pointed out that children of war and child soldiers often suffered from devastating long-term consequences of experienced or witnessed acts of violence. A significant number of the children who were interviewed had developed the debilitating post-traumatic stress disorder.<sup>130</sup> According to Schauer, 'the post-traumatic stress tends to persist, possibly for the remainder of the individual's life.'<sup>131</sup> Similarly, another research concluded that growing up in an armed group was related to higher levels of trauma-related disorders and aggressive behavior.<sup>132</sup> This may explain the challenge of reintegrating former child soldiers.<sup>133</sup> In other words, there is continuity of victimhood. However, joining young and perpetrating violence on a regular basis seems to intensify the appetite for aggression.<sup>134</sup> Research on the conflict in Sierra Leone showed that killing or injuring others was strongly associated with more severe depression, anxiety and hostility symptoms, while being a victim of rape or sexual abuse was predictive of anxiety and hostility, but not depression.<sup>135</sup> These conclusions are consistent with general findings on the effects of trauma. Research in psychiatry indicates progressive escalation of symptoms with the passage of time leading to delayed onset post-traumatic stress disorder.<sup>136</sup> 'The development of traumatic memories at the time of stress exposure represents a major vulnerability through repeated environmental triggering of the increasing dysregulation of an individual's neurobiology.'<sup>137</sup>

## 5. Towards a consistent approach

These findings are crucial to how children associated with ISIS could be viewed. Some of these former child soldiers are now beyond the age of 18. The literature on child soldiers and indeed radicalisation places victimhood at the very centre of the discourses.<sup>138</sup> It could be argued that former ISIS-associated children remain victims when over 18. We have already established that they are conscripted, enlisted to participate actively in various activities and are potential targets. Drawing on *Lubanga* and evidence on the enduring effects of trauma, I argue that the fact that child soldiers are no longer under the custody of the perpetrator should not relieve them of the

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<sup>129</sup> Ibid

<sup>130</sup> Lubanga sentencing judgment Para 40

<sup>131</sup> Para 40

<sup>132</sup> K Hermenau et al, 'Growing up in armed groups: trauma and aggression among child soldiers in DR Congo' (2013) 4 *European Journal of Psychotraumatology* 1-9

<sup>133</sup> ibid

<sup>134</sup> T Hecker et al, 'Appetitive aggression in former combatants--derived from the ongoing conflict in DR Congo' (2012) 35 *Int J Law Psychiatry* 3, 244-9.

<sup>135</sup> T Bentancout et al, 'Sierra Leone's Child Soldiers: War Exposures and Mental Health Problems by Gender' (2011) 49 *Journal of Adolescent Health* 1, 21-28.

<sup>136</sup> A McFarlane, 'The long-term costs of traumatic stress: intertwined physical and psychological consequences' (2010) 9 *World Psychiatry* 1, 3-10.

<sup>137</sup> Ibid

<sup>138</sup> UNODC, 2017



victim status. Further, the fact that a former child soldier has surpassed the age of traditional protection does not necessarily strip them of victimhood. With this in mind, it is proposed that Western countries adopt consistent approach towards persons conscripted or enlisted by ISIS while under the age of 18. They remain victims.

Although the ISIS-associated teenagers' individual commitment cannot be ignored, the role of manipulation, grooming or coercion should also be taken into account in their affiliation to ISIS. Infants, in particular did not choose to be born into ISIS. Unless evidence is available of terrorist acts against civilians, former ISIS child soldiers should be treated, first, as victims. The victim-first approach has been widely recognised. The United Nations Office on Drugs and Crime<sup>139</sup> points to several widely ratified conventions and treaties that support the victim-first status of children recruited into groups like ISIS.<sup>140</sup> Article 6 (3) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict states that parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.<sup>141</sup>

Article 39 of the United Nations Convention on the Rights of the Child (UNCRC) enjoins states to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.<sup>142</sup> In the past twenty years, tens of thousands of former child soldiers have benefited from rehabilitation programmes designed to help them rejoin society.<sup>143</sup> These programmes recognize that recruiting children for armed conflict is a violation of international law and that the primary violators of the law are the adult recruiters, not the children.

### 5.1 *The rule of law*

The rule of law requires that people be governed by accepted rules, rather than by the arbitrary decisions of rulers. Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. Due process rights, through the *audi alteram partem* rule, dictate a person must be heard in their defence as a matter of natural justice.<sup>144</sup>

Although there is no universal age threshold for criminal responsibility, the UN Committee on the Rights of the Child has recommended that this age not be less than 12 years old.<sup>145</sup> In all the cases involving children associated with ISIS, no 'battlefield evidence' of violation of law, except 'association', has been proffered, either because it is non-existent or legally unusable. Shiraz

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<sup>139</sup> UNODC, 2017

<sup>140</sup> These include the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), the 2007 ['Paris'] Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, UN Security Council Resolution 1314 (2000).

<sup>141</sup> See Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002

<sup>142</sup> Article 39 of the United Nations Convention on the Rights of the Child (UNCRC)

<sup>143</sup> J Becker, 'Some Child Soldiers Get Rehabilitation, Others Get Prison' Atlantic Council 4 March 2019

<sup>144</sup> See e.g. J Kelly 'Audi Alterant Partem' (1964) 9 *The American Journal of Jurisprudence* 1, 103–110,

<sup>145</sup> See General Comment No. 10 (2007) 'Children's rights in juvenile justice' CRC/C/GC/10 25 April 2007 Committee on the Rights of the Child, Forty-fourth session, Geneva, para 32

Maher, the director of the International Centre for the Study of Radicalisation, noted that: ‘For all kinds of legal reasons, much of what is called ‘battlefield evidence’... would not be admissible in court, either falling short on evidential grounds or because of the manner in which it was obtained.’<sup>146</sup> For instance, intercepted evidence is not admissible in UK courts. As a result, some repatriated British fighters could therefore walk free or convicted of lesser crimes.<sup>147</sup>

It is unhelpful, however, to pretend child soldiers do not commit atrocities, minors associated with ISIS included. Evidence has shown some children perpetrating horrific acts during armed conflicts. As noted earlier, some of the boys in ISIS-held territory actively perpetrated violence from an increasingly young age.<sup>148</sup> IHL and International Human Rights Law also set limits, in the event of prosecution of children associated with hostilities.<sup>149</sup> As Jo Becker of Human Rights Watch points out: ‘There’s no doubt that some children have committed terrible crimes during armed conflict. If so, they can be prosecuted under international law, taking their age into account and adhering to international standards. But prosecuting children for any affiliation with ISIS is not justice...’<sup>150</sup>

Moreover, the revocation of citizenship of former ISIS child soldiers eviscerates all the tenets of justice, particularly the of law. The withdrawal of nationality has been based solely on association with a ‘terrorist group’ and that such action taken against them by Western governments was ‘conducive to the public good.’ Putting aside the contestability of what constitutes ‘public good’, a key component of the rule of law is that governments must not impose penalties on people without due process.<sup>151</sup> Article 41 of European Charter of Fundamental Rights states that: ‘every person has the right to be heard, before any individual measure which would affect him or her adversely is taken.’<sup>152</sup> European Court of Justice (ECJ) has consistently supported the application of the right to be heard to the decisions with individual character in its case law.<sup>153</sup> Arbitrary withdrawal of citizenship is a penalty imposed without due process. Such action, especially when the victim is to be left stateless, seems to fall far short of the dictates of the rule of law. Procedural rights are only recognized after the decisions.

At the time of writing, Shamima Begum, then 20, had appealed to the Special Immigration Appeals Commission. Her lawyers contended that, now stateless, she was unable to mount a ‘fair and effective’ legal challenge and was at risk of ‘death, inhuman or degrading treatment’.<sup>154</sup> It had

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<sup>146</sup> S Maher, ‘The case of Shamima Begum shows there are no easy choices for the West as Isis collapses’ 14 February New Statesman <https://www.newstatesman.com/world/middle-east/2019/02/case-shamima-begum-shows-there-are-no-easy-choices-west-isis-collapses>

<sup>147</sup> Ibid

<sup>148</sup> A Almohammad, ‘ISIS Child Soldiers in Syria: The Structural and Predatory Recruitment, Enlistment, Pre-Training Indoctrination, Training, and Deployment International Counter-terrorism’, (2018) The Hague CCT Research paper DOI: 10.19165/2018.1.14 ISSN: 2468-0656

<sup>149</sup> N Quéniwet ‘Does and Should International Law Prohibit the Prosecution of Children for War Crimes?’ (2017) *The European Journal of International Law* 2, 433

<sup>150</sup> J Becker ‘Some child soldiers get rehabilitation, others get prison’ Atlantic Council 4 March 2019 <https://www.atlanticcouncil.org/blogs/new-atlanticist/some-child-soldiers-get-rehabilitation-others-get-prison/>

<sup>151</sup> J Waldron, ‘The Rule of International Law’, (2006) 30 *Harvard J Law & Public Policy* (2006) 15.

<sup>152</sup> EU Charter of Fundamental Rights Article 41 Right to good administration 2 (1) (a)

<sup>153</sup> See eg Case 85/76 (ECJ), *Hoffmann-La Roche v Commission*, (1979) Case 49/88 (ECJ), *Al-Jubail Fertilizer v Council*, (1991) Case 66/90 (ECJ), *Netherlands and Others v Commission* (1992) ; Case 48/90 Case 135/92 *Fiskano v Commission*, (1994), Case 450/93 (ECJ), *Lisrestal v Commission*, (1994)

<sup>154</sup> O Bowcott and D Sabbagh ‘Shamima Begum begins appeal against loss of UK citizenship’ The Guardian UK, 22 October 2019 <https://www.theguardian.com/uk-news/2019/oct/22/shamima-begum-begins-appeal-against-loss-of-uk-citizenship>

been noted that she was of Bangladeshi heritage. However, Bangladesh denied Begum had dual citizenship, and had never applied for Bangladeshi nationality.

The lawyers told the court: '[Begum] intended to return to the UK when the British government, after hearing of that intention, deprived her of her British citizenship with the purpose of preventing her from returning to the UK... Those actions were motivated, at least in part, by a desire to prevent the appellant exercising her [human rights] in the UK (such as by resisting deportation to Bangladesh).'<sup>155</sup>

In *A and others v Secretary of State for the Home Department UK*, commonly known as the 'Belmarsh case',<sup>156</sup> the House of Lords ruled against the excessive use of powers in matters relating to terrorism and national security. While the European Court of Human Rights (ECtHR) has ruled in favour of revocation of a UK's citizen's nationality for association with terrorism in one matter, the case involved a different set of circumstances.<sup>157</sup> This paper does not focus on individuals who travel outside their domiciles to merely associate with terrorist groups. Such persons may very well deserve revocation of nationality in the name of the so-called 'public good.' The interest of the paper is on children who associated with armed groups, who fit into the recognized definition of a 'child soldier.' Such children, whether boys or girls, would have 'participated actively' – in the broader sense established in jurisprudence – in hostilities, and has been affirmed, that does not necessarily mean involvement the fighting itself. In this paper, I have argued that children who travelled from the West to associate with ISIS seem to fulfil the accepted conceptualization of 'child soldier' and should thus benefit from the legal protections available for children associated with armed conflict.

## 6. Conclusion

The Syrian conflict has spawned a troubling dilemma of children formerly associated with terrorist groups wishing to return to Western countries. However, the approaches of the supposed recipient states have been inconsistent, ranging from outright barring of returns to revoking citizenship. It would appear the approaches to these children have been informed by political caprices of individual countries rather than any normative standards on child soldiering. The inclination of the Western states has been to regard the children as young terrorists or females, 'ISIS/jihadi brides'. In this paper, I have attempted to make a case for consistent approach towards children formerly associated with ISIS. The paper has argued that, rather than perceive these minors as 'young terrorists' and associated epithets, the children should, essentially, be seen as 'child soldiers.' Such an approach would allow the children to benefit from the legal protections available to children associated with armed conflict. The status and roles of the minors fit snugly into the definitions in the legal architecture and jurisprudence on child soldiering. While the Ongwen prosecution adopted a different position, extant case law has implied that even beyond the set age threshold, children formerly associated with ISIS could also be regarded as victims when under the continuous custody of an armed group. The great weight of evidence points to the continuity of the effects of trauma when released from the group. Protection would extend to those considered to have fallen out of the ambit of the child soldiering law. Where there is evidence against children who perpetrated crimes against civilians,

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<sup>155</sup> O Bowcott and D Sabbagh 'Shamima Begum begins appeal against loss of UK citizenship' The Guardian UK, 22 October 2019 <https://www.theguardian.com/uk-news/2019/oct/22/shamima-begum-begins-appeal-against-loss-of-uk-citizenship>

<sup>156</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56

<sup>157</sup> *K2 v the United Kingdom* (application no. 42387/13)

a victim-first approach, which promotes rehabilitation, is encouraged, especially in cases of radicalized minors. Therefore, the stripping of citizenship and barring returns, appears too draconian. Significantly, annulling citizenship, without due process rights, is inimical to the basic tenets of natural justice, principally, the rule of law.

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