

Children associated with terrorist groups in the context of the legal framework for child soldiers

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1. Introduction

The high profile case of nineteen-year-old Shamima Begum, who ran away from her home in London when she was fifteen to join the Islamic State (IS) in Syria and was discovered, heavily pregnant, in a camp for internally displaced persons in early 2019, refocused attention on the issue of children who join terrorist organizations.¹ Upon her arrival in Syria in 2015, Begum quickly married a Dutch IS fighter and they had three children together, all of whom died in their infancy, the third succumbing in the squalor of the camp just as Begum was stripped of her British citizenship. Political and legal opinion are divided over whether Begum is a victim or a perpetrator, or in either instance a security risk, and if, where and how she should face justice.² There has been little serious consideration of whether Begum should be characterised as a former child soldier and whether such a characterisation carries special implications in the context of terrorism.

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¹ See eg M Townsend, 'UK under Pressure to Return Children of Isis Mothers' *The Observer* (7 April 2019) <www.theguardian.com/world/2019/apr/07/begum-lawyer-working-to-repatriate-british-children-of-isis-fighters>; O Bowcott, 'Surge in Prosecutions of British Jihadists "May Never Happen" – DPP' *The Guardian* (11 March 2019) <www.theguardian.com/law/2019/mar/11/surge-in-prosecutions-of-british-jihadists-may-never-happen-dpp>.

² See eg T Kington, '45,000 Children of Isis "Are Ticking Time Bomb"' *The Times* (8 May 2019); 'The Observer View on Shamima Begum' *The Observer* (editorial) (17 February 2019) <www.theguardian.com/commentisfree/2019/feb/17/the-observer-view-on-shamima-begum>; L Wallis, 'Shamima Begum Was the Victim of a Cult – She Needs Help' *The Guardian* (opinion) (11 March 2019) <www.theguardian.com/commentisfree/2019/mar/11/shamima-begum-cult-victim-isis>.



This article aims to provide a preliminary assessment of the extent to which the phenomenon of children who are recruited or born into terrorist groups fits within the legal and conceptual framework concerning the recruitment and use of child soldiers. As both ‘terrorism’ and ‘terrorist group’ lack universally accepted definitions, reliance is placed on United Nations, regional and national sanctions lists to identify relevant organisations. This article will focus on the activities of Islamic State (IS or ISIL) in Syria and Iraq, and Boko Haram in Nigeria to illustrate the factual context. Recruitment and exploitation of children by terrorist groups is not a new occurrence. Indeed, one of the first cases to be instituted before the International Criminal Court (ICC) concerned the activities in Uganda of Joseph Kony’s Lord’s Resistance Army (LRA) – a group included in the US State Department’s Terrorist Exclusion List and designated a terrorist group by the African Union in 2011.³ While Kony remains at large, the trial of the alleged former commander of LRA’s Sinia Brigade, Dominic Ongwen, once himself a child soldier, is ongoing before the ICC.⁴ The ICC does not distinguish between armed groups and terrorist groups so long as the elements for the crimes under the 1998 Rome Statute are met.⁵ The distinctions become more apparent when the issue of ‘foreign fighters’ and the possibility of domestic prosecutions under anti-terror legislation are considered. As the Begum case illustrates, there is an absence of international consensus on how to approach ‘former foreign child fighters’ and their children who are born into terrorist groups.

³ US State Department, Terrorist Exclusion List, Section 411 of the USA PATRIOT ACT of 2001 (8 USC § 1182) <www.state.gov/terrorist-exclusion-list/>. See also US Department of State Fact Sheet (archived) (23 March 2012) stating that the African Union formally designated the LRA as a terrorist group on 22 November 2011, and that in 2008, Joseph Kony was designated by the State Department as a ‘Specially Designated Global Terrorist’ under Executive Order 13324 <<https://2009-2017.state.gov/r/pa/prs/ps/2012/03/186734.htm>>.

⁴ *Prosecutor v Dominic Ongwen*, Situation in Uganda, ‘Decision on the confirmation of charges against Dominic Ongwen’, ICC-02/04-01/15-422-Red (23 March 2016).

⁵ Rome Statute of the International Criminal Court, Doc A/CONF.183/9 (17 July 1998) in force 1 July 2002.



2. *The Role and Circumstances of Children in Terrorist Groups*

Like all child soldiers involved with armed groups, children who are recruited into terrorist organisations are exposed to extreme forms of violence. They may bear arms and participate directly in hostilities, act as porters or spies, and be subjected to forms of sexual and gender-based violence such as sexual slavery and forced marriages. In addition, they may be involved in activities more typically associated with terrorism such as suicide bombings and the execution of hostages. Consequently, they become normalised to violence and for children born into terrorist groups, this upside-down world is the only one they know.

According to United Nations estimates, at least 8,000 children have been recruited into Boko Haram since 2009, including children as young as four.⁶ Poverty, illiteracy, unemployment, peer and family pressure, combined with social injustice, have been cited as factors facilitating recruitment, although abduction is a widely used method to expand membership of the group.⁷ The activities carried out by children in Boko Haram from around 2013 to 2016 were reported by the UN Secretary-General as follows:

Children were used in direct hostilities, for planting improvised explosive devices and burning schools and houses and in support roles such as cooks, messengers and lookouts. Children were also reportedly used as human shields to protect Boko Haram elements during military operations. Many children were also subjected to forceful religious conversions and forced marriage and used for sexual purposes. Predominately from mid-2014 to the end of the reporting period, children, including girls as young as 10, were used by Boko Haram in suicide bombings.⁸

Some of the most notorious acts have involved the targeting of schoolgirls. On 14 April 2014, Boko Haram abducted at least 276 girls from a government secondary school in Chibok, Nigeria. More than one hundred of those girls remain missing.⁹ In February 2018, 113 girls

⁶ 'Report of the Secretary-General on children and armed conflict in Nigeria' UN Doc S/2017/304 (10 April 2017) paras 29-30.

⁷ *ibid* paras 30-31.

⁸ *ibid* para 32.

⁹ F Mbah, 'Nigeria's Chibok Schoolgirls: Five Years On, 112 Still Missing' *Al Jazeera* (14 April 2019) <www.aljazeera.com/news/2019/04/nigeria-chibok-school-girls-years-112-missing-190413192517739.html>; D Searcey, 'Why the Chibok Girls Returned by



were abducted from the Government Girls' Science Technical College in Dapchi, Yobe State. Although 107 of those girls were later released, five died during the incident and one was apparently kept captive.¹⁰ Boko Haram has repeatedly forced children to carry out suicide attacks.¹¹ It was reported that in May 2015, a girl of around twelve detonated a bomb at a bus station in Damaturu, Yobe State resulting in the deaths of seven people.¹²

The UN estimates that at least 7,000 girls and women have been victims of sexual violence at the hands of Boko Haram since 2009, often in connection with abductions and forced marriage.¹³ Scores of girls between the ages of nine and eighteen are believed to have been raped and forced into marriages with Boko Haram members and many of them have become pregnant and given birth.¹⁴ A study found that girls and women formerly associated with Boko Haram face stigma and are unable to reintegrate into their families and communities.¹⁵ Many children have become orphans, or do not know the whereabouts of their parents.¹⁶ The number of verified cases of child recruitment and use in hostilities is believed to be decreasing.¹⁷ However, the use especially of girls 'as carriers of person-borne improvised explosive devices' continues to be identified as a 'worrying trend'.¹⁸

As it concerns IS/ISIL, the recruitment and training of children has been a notable aspect of its modus operandi and video evidence has

Boko Haram Are Still Not Entirely Free' *The Independent* (1 May 2018) <www.independent.co.uk/news/long_reads/boko-haram-girls-kidnapped-freed-return-nigeria-campus-children-babies-a8307866.html>.

¹⁰ ICC Office of the Prosecutor, Report on Preliminary Examination Activities 2018, para 228.

¹¹ 'Report of the Secretary-General, Children and Armed Conflict' UN Doc A/72/865-S/2018/465 (16 May 2018) para 7.

¹² 'Report of the United Nations High Commissioner for Human Rights on violations and abuses committed by Boko Haram and the impact on human rights in the affected countries' UN Doc A/HRC/30/67 (29 September 2015) para 44.

¹³ 'Report of the Secretary-General on children and armed conflict in Nigeria' UN Doc S/2017/304 (10 April 2017) para 54.

¹⁴ *ibid* paras 55-56.

¹⁵ *ibid* para 57, referring to a 2016 study by UNICEF and International Alert.

¹⁶ 'Report of the United Nations High Commissioner for Human Rights on violations and abuses committed by Boko Haram' (n 12) para 46.

¹⁷ 'Report of the Secretary-General, Children and Armed Conflict' (n 11) para 223.

¹⁸ *ibid* para 226.



emerged of children serving as executioners. UN reports indicate that 284 verified cases of the recruitment and use of children were attributed to ISIL in 2017, marking a notable increase.¹⁹ According to the most recent report of the Secretary-General on children and armed conflict in the Syrian Arab Republic:

‘The youngest recruit was four years of age. The boy, of foreign origin, was dressed in military fatigue, made to carry a weapon and featured in ISIL propaganda videos as a so-called “Cub of the Caliphate”. Of the boys recruited by ISIL (982), 92 per cent were used in combat roles, such as guarding checkpoints, participating in patrols and front-line operations and conducting suicide attacks; while the remaining 8 per cent were used in support roles, such as aides-de-camp, messengers, spies or prison guards. Children were also used to commit a broad range of atrocities, including executions. Sixty-eight girls as young as eight years of age were also associated with ISIL through their forced marriage with, most often, foreign combatants [...].’²⁰

The report elaborates on the forms of sexual violence inflicted on children, explaining that from early 2014, the forced marriage of girls to ISIL fighters became commonplace, usually accompanied by rape and often leading to multiple forced marriages following the redeployment or death of the fighters. In some instances, parents would be coerced into agreeing to the arrangement while in others, delegations of ISIL women would be sent to visit homes and recruit brides.²¹

The foreign terrorist fighter phenomenon became prominent with the emergence of IS and its transnational recruitment strategy. Some children have travelled to join IS of their own accord, as was the case for Begum and her school friends, some have travelled with their parents or relatives, and some have been abducted or born into the terrorist group. Foreign terrorist fighters (FTFs) have been defined by the UN Security Council 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

¹⁹ *ibid* paras 184-185.

²⁰ ‘Report of the Secretary-General, Children and Armed Conflict in the Syrian Arab Republic’ UN Doc S/2018/969 (30 October 2018) para 17.

²¹ *ibid* para 31.

conflict'.²² Their arrival helped to exacerbate conflict in the Middle East and it has been noted that 'most, if not all, FTFs will have been exposed to violence – including acts of extreme violence, such as beheadings and suicide bombings – and many will have gained combat experience and varying degrees of weapons and explosives training.'²³ Women and girls may not have participated in combat and instead provided support for the group through domestic roles.²⁴ However, there is no automatic or necessary exclusion of women from roles involving violence.

In 2018, the UN Secretary-General reported that both IS and Boko Haram continued to recruit and use child soldiers and that these activities had a cross-border dimension.²⁵ Reference was made to the complex task of 'prevention, tracing and reintegration' and the need for a coordinated international response under international law.²⁶ The Office of the UN High Commissioner for Human Rights has called for prompt, thorough and independent investigations of crimes against humanity and war crimes attributed to Boko Haram as well as the invocation of special measures to protect child victims.²⁷ Similar calls for accountability have echoed throughout the eight year conflict in Syria.

3. *The recruitment and use of child soldiers under International Law*²⁸

The Rome Statute of the ICC includes in its Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) the enlistment, conscription or use in hostilities of children under the age of fifteen years as war crimes entailing individual criminal

²² UN Doc S/RES/2178 (2014) (24 September 2014) para 6.

²³ 'The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives, UNSC Counter-Terrorism Committee Executive Directorate (CTED), CTED Trends Report' (March 2018) 6 <www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf>.

²⁴ *ibid.*

²⁵ 'Report of the Secretary-General, Children and Armed Conflict' (n 11) para 16.

²⁶ *ibid.*

²⁷ 'Report of the United Nations High Commissioner for Human Rights on violations and abuses committed by Boko Haram' (n 12) para 78.

²⁸ This section draws on material from: NHB Jørgensen, 'Child Soldiers and the Parameters of International Criminal Law' (2012) 11 *Chinese J Intl L* 657-688.



responsibility.²⁹ Previously, children associated with armed conflict were the subject of limited humanitarian law provisions contained in the 1977 Protocols I and II Additional to the Geneva Conventions. Article 77(2) of Additional Protocol I requires parties to international armed conflicts to ‘take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities’ and to refrain from recruiting children under the age of fifteen into their armed forces, in any case giving priority to the oldest children of those within the fifteen to eighteen age bracket.³⁰ Article 4(3)(c) of Additional Protocol II applicable in non-international armed conflicts provides that: ‘children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.’³¹ According to the International Committee of the Red Cross (ICRC), the rule that ‘children must not be recruited into armed forces or armed groups’ is recognised under customary international law irrespective of the nature of the armed conflict.³²

In the human rights sphere, Article 38(2) of the 1989 Convention on the Rights of the Child provides that ‘States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities’ and Article 38(3) calls on States to refrain from recruiting children under the age of fifteen into their armed forces (while again giving priority to those who are oldest within the fifteen to eighteen age bracket).³³ The Optional Protocol to the Convention on the Rights of the Child adopted in 2000 supplements the international law framework by raising the age concerning participation in hostilities to eighteen (Article 1), prohibiting the compulsory

²⁹ *Prosecutor v Thomas Lubanga Dyilo*, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06, Judgment pursuant to Art 74 of the Statute (14 March 2012) (*Lubanga* Trial Judgment) para 569.

³⁰ Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, art 77(2).

³¹ Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, art 4(3)(c).

³² ICRC, Customary International Humanitarian Law (online IHL database), Rule 136. Recruitment of Child Soldiers <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule136>

³³ Convention on the Rights of the Child, UN Doc A/RES/44/25 (20 November 1989) in force 2 September 1990.

recruitment of children under the age of eighteen into the armed forces of States parties (Article 2), requiring States parties to raise the minimum age for voluntary recruitment from fifteen (Article 3), and prohibiting the recruitment or use in hostilities of persons under the age of eighteen by armed groups (Article 4).³⁴ Despite this significant development, the ICRC acknowledges that it is not yet clearly established in State practice that the minimum age for recruitment is eighteen as opposed to fifteen.³⁵

The Special Court for Sierra Leone (SCSL) was the first international court to apply equivalent provisions to those contained in the ICC Statute as ‘serious violations of international humanitarian law’ set out in Article 4(c) of the SCSL Statute as follows: ‘Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.’³⁶ The jurisprudence of the SCSL indicates that the child soldier-related offences are open to a relatively broad interpretation and that their evolution has been closely tied to the facts presented in different cases.³⁷ Recruitment into the Civil Defence Forces (CDF), which fought on behalf of the Sierra Leone government, was often ‘voluntary’ in the sense that parents might offer up and pay for the initiation of their children, persuaded by traditional beliefs that the initiation process would confer on children mystical powers and render them impervious to bullets.³⁸ Children also joined the CDF out of ‘patriotism to support the democratically-elected Sierra Leonean government’ or to ‘protect their families and communities, or punish the rebels.’³⁹ By contrast, the rebel groups known as the Revolutionary United Front (RUF)

³⁴ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, UN Doc A/RES/54/263 (25 May 2000).

³⁵ See (n 32) above.

³⁶ Statute of the Special Court for Sierra Leone (16 January 2002).

³⁷ *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T, Judgment, Trial Chamber (20 June 2007) (AFRC Trial Judgment); *Prosecutor v Fofana, Kondewa*, SCSL-04-14-T, Judgment, Trial Chamber (2 August 2007) (CDF Trial Judgment); *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgment, Trial Chamber (2 March 2009) (RUF Trial Judgment); *Prosecutor v Taylor*, SCSL-03-01-T, Judgment, Trial Chamber (18 May 2012) (Taylor Trial Judgment).

³⁸ WA Schabas, ‘The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases’, in K Arts, V Popovski, *International Criminal Accountability and the Rights of Children* (Hague Academic Press 2006) 19-35, 30.

³⁹ MA Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP 2012) 64.



and Armed Forces Revolutionary Council (AFRC) tended to resort to abduction.⁴⁰

A key contextual requirement that must be satisfied in any prosecutions for war crimes is that ‘the conduct took place in the context of and was associated with an armed conflict’.⁴¹ In this respect, international criminal law does not distinguish between terrorist groups and any other armed groups, the core question being simply whether the group is a party to an armed conflict of an international or non-international character. The ICC has so far regarded enlistment, conscription and use in hostilities as three separate crimes, which contain some common elements, such as knowledge that the person was under the age of fifteen.⁴²

Enlistment entails the acceptance and enrolment of individuals who volunteer to join an armed force or group.⁴³ The ICC Trial Chamber recognised in the *Lubanga* case that enlistment is a form of voluntary incorporation into an armed group and referred to the ordinary meaning of ‘enlisting’ as being ‘to enrol on the list of a military body’.⁴⁴ The SCSL Appeals Chamber, in addressing a defence argument that the Trial Chamber had erroneously conflated ‘initiation’ as fighters and enlistment, noted the paucity of jurisprudence on the question of how direct an act must be to constitute enlistment as well as the possible modes of enlistment.⁴⁵ Finding that there must be a nexus between the act of the accused and the child joining the armed force or group, the Appeals Chamber decided that a formal process is not envisaged especially where the armed group is not a conventional military organisation.⁴⁶ Thus, enlistment could include ‘any conduct accepting the child as a part of the militia’, which encompasses making the child participate in military

⁴⁰ *ibid.*

⁴¹ ICC Elements of Crimes, art 8 (2)(b)(xxvi) element 4 (international armed conflicts); art 8 (2)(e)(vii) element 4 (non-international armed conflicts).

⁴² *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06A5, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (1 December 2014) (*Lubanga Appeal Judgment*) paras 37-38; ICC Elements of Crimes, art 8(2)(e)(vii), War crime of using, conscripting and enlisting children.

⁴³ *Prosecutor v Fofana, Kondewa*, SCSL-04-14-A-829, Judgment, Appeals Chamber (28 May 2008) (*CDF Appeal Judgment*) para 140.

⁴⁴ *Lubanga Trial Judgment* (n 29) para 608, referring to the Oxford Dictionary.

⁴⁵ *CDF Appeal Judgment* (n 43) para 141.

⁴⁶ *ibid* para 144.

operations.⁴⁷ The principle that enlistment may be informal and constituted by ‘use’ in hostilities has subsequently been affirmed.⁴⁸ According to SCSL Justice Winter, ‘the key test to determine whether an act in question constitutes enlistment is whether the act substantially furthers the process of a child’s enrolment and acceptance into an armed force or group’.⁴⁹ Therefore initiation, on the particular facts of the case, was a ‘stepping stone to recruitment as a soldier’,⁵⁰ indeed the condition *sine qua non*.⁵¹

Conscription involves compulsion or coercion.⁵² The ICC Trial Chamber in the *Lubanga* case noted that the ordinary meaning of the word was ‘to enlist compulsorily’.⁵³ While traditionally associated with military service in a State’s armed forces, the jurisprudence has established that conscription encompasses acts of coercion, such as abductions and forced recruitment of children by an armed group with the purpose of using them to participate actively in hostilities.⁵⁴ The SCSL Trial Chamber used the term conscription interchangeably with ‘forced recruitment’ which often involves abduction followed by military training.⁵⁵ The ICC Appeals Chamber has clarified that ‘the element of compulsion necessary for the crime of conscription can be established by demonstrating that an individual under the age of fifteen years joined the armed force or group due to, inter alia, a legal obligation, brute force, threat of force, or psychological pressure amounting to coercion’.⁵⁶

The precise scope of the category of use in hostilities remains unsettled. The ICC has confirmed that the use of the expression ‘to participate actively in hostilities’, as opposed to the expression ‘direct participation’ (as found in Additional Protocol I to the Geneva Conventions) was intended to import a wide interpretation to the activities and roles that are

⁴⁷ *ibid.*

⁴⁸ *Taylor* Trial Judgment (n 37) para 442.

⁴⁹ *CDF* Appeal Judgment (n 43) Partially Dissenting Opinion of Honourable Justice Renate Winter, para. 11.

⁵⁰ *ibid* para 15, referring to the testimony of an expert witness.

⁵¹ *ibid* para 18.

⁵² *AFRC* Trial Judgment (n 37) para 734; *Taylor* Trial Judgment (n 37) para 442; *Lubanga* Trial Judgment (n 29) para 607.

⁵³ *Lubanga* Trial Judgment (n 29) para. 607.

⁵⁴ *AFRC* Trial Judgment (n 37) para 734; *Taylor* Trial Judgment (n 37) para 441.

⁵⁵ *RUF* Trial Judgment (n 37) para. 186.

⁵⁶ *Lubanga* Appeal Judgment (n 42) para. 278.



covered by the offence.⁵⁷ Both the ICC and SCSL Trial Chambers have indicated that the decision as to whether a particular activity counts as active participation will be made on a case-by-case basis.⁵⁸ The SCSL's Trial Chamber II found that using children to participate actively in hostilities 'encompasses putting their lives directly at risk in combat' although it is not so limited.⁵⁹ The ICC Appeals Chamber rejected the ICC Trial Chamber's conclusion that '[t]he decisive factor [...] is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target'.⁶⁰ According to the ICC Appeals Chamber it is simply necessary to demonstrate the existence of a sufficient link between the activity and the hostilities.⁶¹ The Chamber declined to give a list of examples of activities that might constitute active participation in hostilities, noting 'the complex and unforeseeable scenarios presented by the rapidly changing face of warfare in the modern world'.⁶² The types of activity that have so far been found to qualify include: scouting, spying or sabotage; acting as decoys, couriers, at military checkpoints or as bearers to take supplies to the front line; involvement at the front line itself; carrying loads for the fighting faction; finding and/or acquiring ammunition and equipment; making trails or finding routes; manning checkpoints; acting as human shields; and acting as bodyguards or guards at strategic sites in terms of the particular war effort. Activities which most likely do not qualify are conducting food deliveries and unarmed food-finding missions, and serving as domestic staff.⁶³

Several aspects of the conduct of both IS and Boko Haram outlined above fit within the categories of enlistment, conscription and use to participate actively in hostilities. The definition of enlistment extends to 'foreign fighters' under the age of fifteen, whether they join a terrorist organisation independently or at the instigation of parents or relatives. Further, enlistment could encompass indoctrination as conduct accepting the child into the organisation. Where the association with the terrorist

⁵⁷ *Lubanga* Trial Judgment (n 29) para 627; *Lubanga* Appeal Judgment (n 42) para 328.

⁵⁸ *Lubanga* Trial Judgment (n 29) para 628; *Taylor* Trial Judgment (n 37) para 444.

⁵⁹ *Taylor* Trial Judgment (n 37) para 444; *AFRC* Trial Judgment (n 37) para 736.

⁶⁰ *Lubanga* Trial Judgment (n 29) para 628.

⁶¹ *Lubanga* Appeal Judgment (n 42) para 333.

⁶² *ibid* para 335.

⁶³ Jørgensen, 'Child Soldiers' (n 28) 671.

group has no element of voluntariness, conscription may be the appropriate category and the ICC's jurisprudence recognises that psychological pressure may be sufficient to meet the element of coercion. Using children to carry out suicide bombings has not been a feature of the jurisprudence to date, but this conduct would undoubtedly be included as a form of participation in hostilities. As it concerns rape, sexual slavery and forced marriage, the question of law identified in the *Lubanga* judgment as to whether these offences may properly be included within the scope of using children under the age of 15 to participate actively in hostilities remains open to debate.⁶⁴ The emphasis on sexual and gender-based violence in the context of acts attributed to Boko Haram and IS suggests that future cases at the international level are unlikely to follow the restricted charging practice adopted in *Lubanga*, which limited the case to the child soldier-related offences, and will invoke the full range of available legal characterisations. Notably, the ICC Appeals Chamber appears to have suggested that rape could constitute the force needed for conscription,⁶⁵ and has furthermore decided that it is legitimate to charge a member of an armed group with forms of sexual violence as war crimes carried out against children recruited into the same armed group.⁶⁶

In 2010, the ICC opened a preliminary examination into the situation in Nigeria (a State party to the Rome Statute since 2001), currently focusing on three factions under the umbrella of Boko Haram, namely a faction led by Abubakar Shekau, the Ansaru splinter group, and the Islamic State West Africa led by Abu Musab Al-Barnawi.⁶⁷ In order to determine whether Boko Haram constituted an armed group engaged in a non-international armed conflict so as to meet the contextual requirement for war crimes, the ICC Office of the Prosecutor considered the organisational structure of Boko Haram and the intensity of its armed confrontations with government forces.⁶⁸ The ICC concluded that 'the required

⁶⁴ *Lubanga* Trial Judgment (n 29) para 630; Jørgensen, 'Child Soldiers' (n 28) 679-685.

⁶⁵ *Lubanga* Appeal Judgment (n 42) paras 281-282.

⁶⁶ *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06OA5, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (15 June 2017).

⁶⁷ ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities 2018' para 218.

⁶⁸ ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities 2013' para 214.



level of intensity and the level of organization of parties to the conflict necessary for the violence to be qualified as an armed conflict of non-international character' had been met'.⁶⁹ Consequently, allegations of war crimes within the scope of articles 8(2)(c) and 8(2)(e) of the ICC Statute occurring since May 2013 could potentially be adjudicated before the ICC.⁷⁰

In its 2018 Report on Preliminary Examination Activities, the ICC Office of the Prosecutor found a reasonable basis to believe that Boko Haram had committed 'rape, sexual slavery and sexual violence pursuant to article 8(2)(e)(vi); conscripting and enlisting children under the age of fifteen years into armed groups and using them to participate actively in hostilities pursuant to article 8(2)(e)(vii) of the Statute' in addition to other war crimes and crimes against humanity.⁷¹ The Office referred to its own analysis from 2016 addressing gender-based violence which found that children, women and girls were subjected to abductions, forced marriages, rapes, sexual slavery and sexual violence, and use for operational tasks such as suicide attacks.⁷² Some of these acts were also brought under the heading of persecution on gender grounds as a crime against humanity and special attention was paid to crimes against children.⁷³

At this stage, the ICC is still engaged in an admissibility assessment and has noted the steps taken by the Nigerian authorities to institute proceedings against Boko Haram and other parties to the conflict. As it concerns Syria, which is not a party to the ICC, documentation efforts by, for example, the recently established 'International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011' continue. An 'Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant' has commenced operations and has reported that during ISIL's control of large amounts of territory in Iraq between 2014 and 2017, war crimes, crimes against humanity and

⁶⁹ *ibid* para 218.

⁷⁰ *ibid* paras 214-218.

⁷¹ ICC, 'Report on Preliminary Examination Activities 2018' para 222.

⁷² *ibid* para 225.

⁷³ *ibid* para 226.

genocide may have been committed.⁷⁴ The Investigative Team has indicated, following international practice, that it will focus on ‘those most responsible for the atrocities committed by ISIL’, including the senior ISIL leadership, as well as regional or mid-level commanders.⁷⁵ The likelihood of any prosecutions for IS or Boko Haram crimes at the international level appears slim for the foreseeable future, and these would in any case be limited to a pool of candidates of sufficient seniority. Thus, the torch is passed back to domestic systems which, partly due to the challenges of collecting evidence in conflict zones, have tended to focus their attention on terrorism offences.

4. *The status of children (formerly) associated with terrorist groups*

According to the international human rights framework, all children under the age of eighteen who become associated with parties to an armed conflict are to be regarded primarily as victims. The UN reports make this clear. For example, the Secretary-General ‘call[s] upon the Government of Nigeria to ensure that all children allegedly associated with armed groups are primarily treated as victims’.⁷⁶ Similarly, the Secretary-General has expressed deep concern about ‘the fate of children, including of foreign origin, affiliated or allegedly affiliated with parties to the conflict in the Syrian Arab Republic’ and calls upon ‘parties encountering and receiving these children to abide by international norms and standards and treat those children primarily as victims’.⁷⁷ Additionally, in the Syrian context, the Secretary-General has stated: ‘All children allegedly associated with opposing armed forces or armed groups and captured in the course of military operations should be treated primarily as victims of recruitment and use’.⁷⁸

⁷⁴ ‘Letter dated 15 November 2018 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council’ UN Doc S/2018/1031 (16 November 2018) para 8.

⁷⁵ *ibid*, para 26.

⁷⁶ ‘Report of the Secretary-General on children and armed conflict in Nigeria’ UN Doc S/2017/304 (10 April 2017).

⁷⁷ ‘Report of the Secretary-General, Children and Armed Conflict’ (n 11) para 198.

⁷⁸ ‘Report of the Secretary-General, Children and Armed Conflict in the Syrian Arab Republic’ (n 20) paras 62-63.



It has additionally been observed that children who are recruited and used in hostilities are ‘often doubly victimized by subsequently being detained for their former association with armed forces or groups’.⁷⁹ An extreme example is provided by an incident in February 2016 in which three children between the ages of fifteen and seventeen were publicly beheaded by ISIL following their arrest and interrogation on allegations of spying against the group.⁸⁰ Children of foreign origin have also been detained by opposing forces on account of their suspected family ties with ISIL fighters.⁸¹ Some children are reported to have been ill-treated, tortured and/or raped during their detention.⁸² The perception that these children are victims is essential to ensure their release and reintegration into society and their eligibility for the support of child protection programmes.⁸³

The international criminal law framework suggests, however, that only children under the age of fifteen are technically victims of the child soldier-related crimes committed by the adults who recruit and abuse them. This means that there is a grey area of children between the ages of fifteen and eighteen who are not formally perceived as victims of the specific offences but are nonetheless victims of a practice that violates their human rights. Article 7 of the Statute of the SCSL in fact recognised the court’s jurisdiction in principle over children between the ages of fifteen and eighteen to be exercised in accordance with international human rights standards. Although no prosecutions were brought against children, the provision reflected the reality that some children had engaged in brutal acts of violence during the conflict in Sierra Leone and could not easily be characterised as victims. By contrast, Article 26 of the ICC Statute excludes jurisdiction over persons under the age of eighteen. The ICC, however, firmly rejected Ongwen’s argument that because he was abducted into the LRA as a young child soldier he should benefit from the legal protections afforded to child soldiers for the duration of his time with the LRA from 1987 to 2015, and be exempt from individual

⁷⁹ ‘Report of the Secretary-General, Children and Armed Conflict’ (n 11) para 6.

⁸⁰ ‘Report of the Secretary-General, Children and Armed Conflict in the Syrian Arab Republic’ (n 20) para 23.

⁸¹ *ibid* para 24.

⁸² ‘Report of the Secretary-General, Children and Armed Conflict’ (n 11) para 186.

⁸³ ‘Report of the Secretary-General, Children and Armed Conflict in the Syrian Arab Republic’ (n 20) paras 62-63.

criminal responsibility as an adult.⁸⁴ As the Ongwen case demonstrates, following disassociation from a terrorist or armed group, former child soldiers who commit crimes as adults may be prosecuted at the international level. While it is unlikely that international prosecutions will ever target children between the ages of fifteen and eighteen, children remain vulnerable to prosecution domestically for terrorism offences.

Pursuant to their obligations under international treaties and in response to emerging threats, most States have domestic laws that prohibit and punish financing, joining and supporting terrorist groups as well as acts of terrorism.⁸⁵ Notably, Nigeria has primarily invoked its Terrorism (Prevention) Act 2011 with respect to allegations against Boko Haram. This has meant that in domestic cases the charges include membership of a terrorist organization or the failure to report acts of terrorism to the authorities, rather than crimes under the ICC Statute such as the recruitment and use of child soldiers.⁸⁶ It is unclear whether charges have been brought against any children. Human Rights Watch has reported that there have been prosecutions in Iraq of foreign adults and children as young as nine for links to IS.⁸⁷ The minimum age of criminal responsibility varies between domestic systems, but it is often below fifteen. For example, in the UK the age is ten years. Although the figures are general, the UK reported ‘the highest proportion of under-18s arrested on suspicion of terrorism offences – 6%’ in 2018.⁸⁸ This suggests that some

⁸⁴ *Prosecutor v Dominic Ongwen*, Situation in Uganda, ‘Decision on the confirmation of charges against Dominic Ongwen’, ICC-02/04-01/15-422-Red (23 March 2016) para 150.

⁸⁵ See eg International Convention for the Suppression of the Financing of Terrorism UN Doc A/RES/54/109 (9 December 1999). In the United Kingdom, see Terrorism Acts 2000 and 2006, and Counter-Terrorism and Border Security Act 2019. See also United Nations Office on Drugs and Crime, ‘Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System’ (Vienna, 2017) 72-73.

⁸⁶ ICC Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2018’ paras 234-235.

⁸⁷ ‘Tunisia: Scant Help to Bring Home ISIS Members’ Children: 200 Held in Squalid Camps and Prisons in Libya, Syria, Iraq’ Human Rights Watch (12 February 2019) <www.hrw.org/news/2019/02/12/tunisia-scant-help-bring-home-isis-members-children>.

⁸⁸ ‘Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to December 2018’ Statistical Bulletin 05/19 (7 March 2019) 14; J Grierson, ‘Number of People in Jail for Terrorism Offences Falls for First Time Since 2013’ *The Guardian* (7 March 2019).



children within the ten to eighteen age range may face prosecution although according to the international framework, rehabilitation and reintegration especially of younger children should be prioritised.⁸⁹

Returning to Begum's case at this juncture, it has not been established whether she only carried out domestic chores or whether she was at least complicit in acts of violence. In other words, it is not known whether she is or was a 'committed jihadi or grooming victim'.⁹⁰ Children in Begum's position could fall into either of these categories and a structured approach to justice and rehabilitation is required so that they are not left to re-radicalise or disintegrate psychologically in displaced persons camps, also taking account of the fact that they may be victims of sexual violence and forced marriage. This raises the 'ticking time bomb issue' which is exclusive to children associated with terrorist groups, in the sense that they may present an ongoing security risk in a manner that is not typical of children associated with other armed groups. The security concern should not influence the question of accountability for past acts of terrorism but presents a catalogue of challenges when it comes to reintegration or repatriation. In particular, in the context of terrorism there is a need to examine the process of radicalization and institute effective measures for deradicalization.

Despite 'ticking time bomb' fears, children should be entitled at least to a presumption of victim status up to the age of fifteen and assessed on a case-by-case basis between the ages of fifteen and eighteen in accordance with international criminal law and human rights law. Like Begum, many of those who went to Syria as children are now adults and should in principle face justice in respect of any continued association with a terrorist group as an adult. As it concerns prosecutions of children, the UN reiterated in its Global Counter-Terrorism Strategy Review of 2016 that 'given their potential status as victims of terrorism as well as of other violations of international law, every child alleged as, accused of or

⁸⁹ See C Paulussen, K Pitcher, 'Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges' International Centre for Counter-Terrorism – The Hague, Research Paper (January 2018) 24 <<https://icct.nl/wp-content/uploads/2018/01/ICCT-Paulussen-Pitcher-Prosecuting-Potential-Foreign-Fighters-Legislative-Practical-Challenges-Jan2018.pdf>>.

⁹⁰ L Khalil, 'Repatriating Female Foreign Fighters: Political not Personal' *The Interpreter* (19 February 2019) <www.lowyinstitute.org/the-interpreter/repatriating-female-foreign-fighters-political-personal>.



recognized as having infringed the law, particularly those who are deprived of their liberty, as well as child victims and witnesses of crimes, should be treated in a manner consistent with his or her rights, dignity and needs, in accordance with applicable international law'.⁹¹ The Review goes on to urge States to take measures to reintegrate children formerly associated with armed and terrorist groups. The preferred option for authorities in Syria and Iraq appears to be for foreign women and children who have been associated with terrorist groups to be repatriated. Belgium has instituted a policy according to which children under the age of ten have the right of immediate return while children between the ages of ten and eighteen are reviewed on a case-by-case basis.⁹² However, the Begum case demonstrates the absence of a clear policy on repatriation of former foreign child fighters and their children in some countries.⁹³

5. Conclusion

The question of what to do with children formerly associated with terrorist groups has become acute now that the threat to children posed by Boko Haram and IS has begun to diminish and these groups are slowly defeated. These children, some of whom are now adults like Begum, may be victims, perpetrators or ticking time bombs but leaving them to languish in displaced persons camps after their 'liberation' simply exacerbates the problem. If very young children born into terrorist groups are not shown a different type of existence before becoming too scarred, they may well themselves become the next generation of ticking time bombs, easily radicalised and recruited.

The international criminal law framework governing the recruitment and use of child soldiers provides a useful reference point for domestic authorities contemplating prosecutions under anti-terror legislation. It also helps to explain that Begum was not a 'child soldier' under this

⁹¹ 'The United Nations Global Counter-Terrorism Strategy Review' UN Doc A/RES/70/291 (19 July 2016) para 18.

⁹² R Kennedy, 'What is Europe's Approach to Repatriating ISIS Members?' Euronews answers, Euronews (7 March 2019) <www.euronews.com/2019/03/07/what-is-europe-s-approach-to-repatriating-isis-members-euronews-answers>.

⁹³ *ibid.*



framework as she enlisted in IS when she was fifteen, but that in the eyes of international human rights law she may still have been a victim of abuses by her recruiters. It is to be hoped that domestic prosecutions in this context will consider the concurrence of terrorism law and international criminal law not just in terms of the charge sheet but also in relation to the philosophical underpinnings of these categories.⁹⁴

Prosecutions are only an add-on to a package of measures that need to be taken to rehabilitate and reintegrate children formerly associated with terrorist groups. Further research is required to guide policy on such measures, recognising the victim, perpetrator or ticking time bomb conundrum and the stigma attached to each alternative.

⁹⁴ For example, Jennifer Wensch, a former member of the morality police in Fallujah and Mosul accused of the murder of a five-year-old Yazidi girl, has been charged concurrently with war crimes and membership of a terrorist organisation in Germany. 'Female Member of Isis 'Morality Police' Charged over Murder of Five-year-old Girl Kept as Slave in Iraq' *The Independent* (28 December 2018) <www.independent.co.uk/news/world/europe/isis-iraq-woman-charged-murder-germany-jennifer-w-iraq-morality-police-a8702076.html>; 'German IS Woman Accused of Letting Yazidi Girl Die of Thirst' RTE News (9 April 2019) <www.rte.ie/news/world/2019/0409/1041683-war-crime/>.