

# Prosecute or Protect? International Criminal Responsibility and the Recruitment of Isis Brides

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## Introduction

In February 2018, seventeen-year-old Linda Wenzel narrowly escaped the death penalty in Iraq.<sup>1</sup> Linda had travelled to Iraq in 2016 to join Islamic State (Isis). After Isis militants on social media convinced her to join the self-proclaimed “caliphate,” Linda—then a child of fifteen—left her home in Germany, where she lived with her parents to travel to the Middle East, marry a stranger, and engage in violence.<sup>2</sup>

Linda is one of many girls from the Global North who joined Isis in the mid-2010s. These girls, typically aged between fifteen and twenty at the time of travel, moved to Syria following wide-ranging online recruitment campaigns by individuals affiliated with Isis. They hailed from a variety of countries, mostly in Europe. The girls commonly entered into arranged marriages upon their arrival in Syria, and their roles in the Isis regime involved producing children, supporting their husbands in the preparation and execution of violence, and enforcing Isis’s rules among the civilian population.<sup>3</sup> This group of foreign fighters is commonly known in the media as “Isis brides.”<sup>4</sup>

Isis brides played an integral role in the Isis regime. As such, some domestic courts have begun prosecuting girls, like Linda Wenzel, who travelled to Syria to join Isis.<sup>5</sup> These prosecutions raise the questions: Did girls like Linda travel to Syria of their own volition? Are the girls perpetrators or victims of violence? And who should bear responsibility for their harmful presence in Syria? I will address these questions of criminal responsibility through a legal framework that should guide domestic and international courts when responding to the issue of Isis brides: the international criminal law framework on child soldier recruitment.

The present Note proposes that the recruitment of Isis brides is a form of child soldier recruitment and, thus, should be prosecuted as a war crime under the Rome Statute. The Rome Statute forbids individuals from conscripting, enlisting, and using persons under fifteen in armed conflict (referred to throughout this Note as “child soldier recruitment”).<sup>6</sup> International criminal law concerns itself with the root cause of child soldiering:

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1. *Iraq: German Islamic State Bride Sentenced to Six Years in Prison*, DEUTSCHE WELLE (Feb. 18, 2018), <https://www.dw.com/en/iraq-german-islamic-state-bride-sentenced-to-6-years-in-prison/a-42636025> [https://perma.cc/A7UT-E42U].

2. *Id.*

3. See *infra* Section I.

4. The girls are also sometimes called “jihadi brides” in the mainstream media. While I recognise that the term “Isis bride” is pejorative in that it defines the girls by their marital status, I have adopted it throughout this essay for ease of reference. Moreover, as will be detailed in Section I, the girls defined their own roles by their marital status.

5. See Edwin Bakker & Seran de Leede, *European Female Jihadists in Syria: Exploring an Under-Researched Topic*, INT’L CTR. FOR COUNTER-TERRORISM—THE HAGUE 1, 5 (2015).

6. Article 8(2)(b)(xxvi) criminalises the conscription, enlistment, and use in hostilities of persons under fifteen in international armed conflicts and Article 8(2)(e)(vii) criminalises the same actions in non-international armed conflicts. For ease of reference, the crime as contained in the Rome Statute Article 8(2)(b)(xxvi) and 8(2)(e)(vii)

the recruiters—those who, through a variety of methods, cause children to be involved in armed conflict. This is precisely the prism through which courts should approach the issue of Isis brides.

I will briefly address two preliminary issues in this introduction. First, the recruitment of Isis brides is an issue of international concern. The international community writ large was, and is, affected by Isis's actions in Syria. The Syrian conflict saw countries around the world—Russia, France, the United States, and Jordan, for example—taking military action in Syria and, in 2017, the International Committee of the Red Cross classified the conflict as an international armed conflict.<sup>7</sup> The international community is also affected by returning foreign fighters, Isis brides included. Not only were these girls involved in acts so grave that they should alarm the international community as a whole,<sup>8</sup> but the girls were recruited from, and are returning to, a range of different, mostly European, countries. Though domestic systems can choose to criminalize Isis's recruitment of girls independently from this act under international law, this does not, and should not, affect the need for an international response to the issue.

Second, Isis's recruitment of girls necessitates a gender-specific approach. Both the recruitment and the roles of girls in Isis were vastly different from those of men or boys. The literature on child soldiering notes that when girls are used in armed conflict, they tend to have gender-specific roles.<sup>9</sup> The situation under Isis is no exception. Recruiters targeted the girls because of their gender and, once in Syria, the girls were largely defined by their reproductive functions; their roles as wives, mothers, and supporters of their husbands' jihad formed the basis of their existence.<sup>10</sup> This is not to say that boys and men were not victims of recruitment. Rather, the distinct gender dimensions informing the recruitment of Isis brides merit distinct analysis.

This Note opens by detailing the typical profile of Isis brides, their roles in the Isis regime, and how they came to be in Syria. Section II then lays out the international legal framework for the crime of child soldier recruitment, and Section III applies this framework to the situation of Isis brides to show that their cases should come within existing provisions on child soldier recruitment. Section IV foreshadows a number of critiques of

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will be referred to as "child soldier recruitment." Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute].

7. See *International Armed Conflicts in Syria*, RULE OF LAW IN ARMED CONFLICTS: GENEVA ACADEMY (updated May 17, 2021), <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria#collapse3accord> [<https://perma.cc/DN7G-8NM6>]; Stephanie Nebehay, *Exclusive: Situation in Syria Constitutes International Armed Conflict—Red Cross*, REUTERS (Apr. 7, 2017), <https://www.reuters.com/article/us-mideast-crisis-syria-redcross-idUSKBN17924T> [<https://perma.cc/7VQJ-3JBS>].

8. See *infra* Section I.

9. See, e.g., Karen Roberts, *The Plight of Girl Soldiers*, 105 AM. J. NURSING 102, 103 (2005); see generally SUSAN MCKAY & DYAN MAZURANA, *WHERE ARE THE GIRLS? GIRLS IN FIGHTING FORCES IN NORTHERN UGANDA, SIERRA LEONE AND MOZAMBIQUE: THEIR LIVES DURING AND AFTER WAR* (2004).

10. See *infra* Section I.

this approach whilst showing that these critiques do not diminish the Note's overall thesis. Section V analyzes the possible forums for prosecuting those responsible for the girls' recruitment, exploring both international and domestic courts. Finally, Section VI turns to the role of international human rights law in the recruitment of Isis brides, focusing on the girls as victims of abuse.

With the collapse of Isis and its global prominence dwindling, the international community is beginning to address questions of criminal responsibility for the actions of Isis militants. Many states currently view Isis brides as perpetrators, and not as victims of an international crime themselves. As will be shown, these girls are victims as well as perpetrators of violence, and should not be the focus of international prosecutions. Rather, the international community should understand the girls' narratives as instances of child soldier recruitment and should focus their efforts on the actions of Isis recruiters. Until the framing of these girls' situation shifts from prosecution to protection, children like Linda Wenzel will continue to suffer extreme consequences for actions that their recruiters induced them to commit.

## I. The Girls: Who are "Isis Brides"?

Between 2012 and 2016, approximately 440 young women left Europe to travel to Syria.<sup>11</sup> They joined the self-proclaimed caliphate of the Islamic State (Isis). This section details the girls' profiles, their roles in the Isis regime, and the methods used to recruit them to Isis's cause.

### A. Profiles

The story of each girl who travelled to Syria is different. There are, however, some common themes across their stories that have enabled European intelligence agencies to build a profile of the Isis brides.

A salient feature of these girls' profiles is their youth.<sup>12</sup> The girls who left Europe to join Isis were mostly between the ages of fifteen and twenty at their time of departure.<sup>13</sup> The girls also all developed a deep religious conviction by their time of travel.<sup>14</sup> Many converted to Islam at a later age, often from Christianity, but others came from moderate Muslim families.<sup>15</sup> Intelligence reports, as well as press articles, indicate that many of the girls demonstrated a rapid change in their appearance and demeanor in the

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11. See Bibi Van Ginkel et al., *The Foreign Fighters Phenomenon in the European Union: Profiles, Threats, and Policies*, INT'L CTR. FOR COUNTER-TERRORISM—THE HAGUE 1, 3 (2016) (profiling the number of female foreign fighters from EU countries).

12. There have been instances of older women joining Isis—indeed, a 50-year-old German woman was sentenced to death by an Iraqi court for her involvement in Isis in 2018—but their situation is distinct from the phenomenon of school-aged girls targeted by social media recruitment. This Note focuses on young girls.

13. See Bakker & de Leede, *supra* note 5, at 9.

14. See *id.*

15. See *id.* at 4.

months preceding their departure.<sup>16</sup> Linda Wenzel's family, for example, reported that in the year before she left, she converted from Christianity to Islam, began to wear headscarves, and fasted for Ramadan.<sup>17</sup> Another girl who travelled to Syria from the Netherlands "changed rapidly from a girl wearing short skirts to one wearing the . . . niqab," according to her neighbors.<sup>18</sup>

Dutch researchers have noted that the girls who travelled to Syria "seem[ed] vulnerable and impressionable."<sup>19</sup> This is readily noted in the profile of Moezdalifa el A, a Dutch girl who was recruited when she was a high school pupil at a school for children with learning difficulties.<sup>20</sup> Shamima Begum, a British schoolgirl who travelled to Syria, aged fifteen, also displayed impressionability, declaring that she was inspired to join Isis because she saw it as "the good life"<sup>21</sup> and was "unfazed" by beheadings.<sup>22</sup> Many of the girls also had difficult social backgrounds. Researchers have described that some had "trouble at home and (other) personal problems,"<sup>23</sup> others had "difficulty fitting in and finding [their] place in society,"<sup>24</sup> and others still had "difficulties in school."<sup>25</sup>

## B. The Girls' Roles

The rigid structure of the Isis regime maintained that all individuals had specific roles to play within the organization.<sup>26</sup> Girls' roles were largely gender-specific. Girls were recruited to marry male Isis fighters, to support them in jihad, and to give birth to as many children as possible. Fifteen-year-old Shamima Begum married an Isis fighter ten days after arriving in Isis territory and quickly had three children.<sup>27</sup> Indeed, many girls who travelled to Iraq and Syria became pregnant soon after arriving<sup>28</sup>

16. *Id.*

17. Philip Oltermann & Fazel Hawramy, *Suspected Isis Fighter Seized in Mosul May Be Missing German Girl*, 16, *GUARDIAN* (Jul. 19, 2017), <https://www.theguardian.com/world/2017/jul/19/isis-mosul-missing-german-girl-linda-wenzel> [<https://perma.cc/8S4T-4QJV>].

18. Bakker & de Leede, *supra* note 5, at 4.

19. *Id.*

20. *See id.*

21. *Shamima Begum: 'I Didn't Want to Be IS Poster Girl'*, *BBC NEWS* (Feb. 18, 2019), <https://www.bbc.com/news/uk-47276572> [<https://perma.cc/P826-9XM2>].

22. Anthony Loyd, *Shamima Begum: Bring Me Home, Says Bethnal Green Girl Who Left to Join Isis*, *TIMES* (Feb. 13, 2019), <https://www.thetimes.co.uk/article/shamima-begum-bring-me-home-says-bethnal-green-girl-who-fled-to-join-isis-hgvqw765d> [<https://perma.cc/R46L-KRYU>].

23. Bakker & de Leede, *supra* note 5, at 9.

24. *Id.* at 9 n.39.

25. *Id.* at 4.

26. GEN. INTEL. & SEC. SERV., *NETH. MINISTRY INTERIOR & KINGDOM RELATIONS, LIFE WITH ISIS: THE MYTH UNRAVELLED* 3 (Jan. 2016).

27. Owen Bowcott, *Shamima Begum Loses First Stage of Appeal Against Citizenship Removal*, *GUARDIAN* (Feb. 7, 2020), <https://www.theguardian.com/uk-news/2020/feb/07/shamima-begum-loses-appeal-against-removal-of-citizenship> [<https://perma.cc/8LBY-UNW2>].

28. Bibi Van Ginkel & Simon Minks, *Addressing the Challenge of Returnees: Threat Perceptions, Policies, and Practices in the Netherlands*, in *RETURNEES: WHO ARE THEY, WHY*

and were supposed to be “strong, modest, and honorable wives and mothers.”<sup>29</sup>

In addition to their childbearing and marital roles, girls were critical in supporting the violence of the regime. The Ministry of the Interior of the Netherlands has noted that “violence is intrinsic to ISIS. It is preached, glorified and used on a daily basis.”<sup>30</sup> New recruits to Isis understood that “in swearing allegiance to ISIS, they [were] signing up for a life dominated by excessive violence and an all encompassing ideology . . . in which everyone not part of the group is . . . a legitimate target for its deadly wrath.”<sup>31</sup> As part of the group’s violence, girls have allegedly sewn fighters into suicide vests<sup>32</sup> and taken up positions as snipers.<sup>33</sup>

Women and girls’ roles also extended to upholding Isis’s strict moral and religious rules regarding dress and women’s behavior. As part of this enforcement, “Western women are known to have flogged [civilian] women found guilty of breaching the strict ISIS moral code.”<sup>34</sup>

### C. Recruitment Efforts

The girls almost uniformly travelled to Syria after prolonged online contact with Isis agents. The efforts by these agents to bring girls from the Global North, mostly Europe, to Syria was an integral part of Isis’s operations in Syria; recruitment ensured a constant supply of fresh fighters to the Syrian conflict. Isis’s recruitment methods involved both broad online propaganda and targeted, individual contact with potential recruits through social media.

After the proclamation of the “caliphate” in June 2014, there was a wave “of propaganda in which Isis called upon all the world’s Muslims to swear allegiance to the self-styled ‘caliph’, Abu Bakr al-Baghdadi, and to settle in the territory under its control.”<sup>35</sup> The regime framed the need to come to Syria as a religious duty.<sup>36</sup> Isis developed a number of sophisticated media and propaganda wings to disseminate the regime’s recruitment message,<sup>37</sup> ensuring its spread to the Global North through active

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ARE THEY (NOT) COMING BACK AND HOW SHOULD WE DEAL WITH THEM? at 55, 59 (Egmont Inst., 2018).

29. Bakker & de Leede, *supra* note 5, at 6.

30. GEN. INTEL. & SEC. SERV., *supra* note 26, at 3.

31. *Id.*

32. See Richard Hall & Lizzie Dearden, *Shamima Begum ‘Was Member of Feared Morality Police’ in Syria*, INDEPENDENT (Apr. 14, 2019), <https://www.independent.co.uk/news/world/middle-east/shamima-begum-isis-syria-morality-police-suicide-belts-a8869016.html> [<https://perma.cc/ZT74-29KX>].

33. See Josie Ensor, *Isil For First Time Urging Women to Join Battle to Combat Dwindling Manpower*, TELEGRAPH (Sept. 4, 2017), <https://www.telegraph.co.uk/news/2017/09/04/isil-first-time-urging-women-join-battle-combat-dwindling-manpower/> [<https://perma.cc/PR6Y-RGBW>].

34. GEN. INTEL. & SEC. SERV., *supra* note 26, at 9.

35. *Id.* at 3.

36. *Id.*

37. See *ISIS’s Media Network: Developments in 2018 and Future Courses of Action*, MEIR AMIT INTEL. & TERRORISM INFO. CTR. (Feb. 21, 2019), <https://www.terrorism->

online networks of Isis supporters.<sup>38</sup>

These supporters largely used social media to spread the regime's message and views. One of Isis's earliest recruitment videos targeting the Global North was uploaded to YouTube and shared widely online. In this video, an Isis militant presented the regime as a place of "safety" for "Muslims from all walks of life" after executing the American journalist James Foley on camera.<sup>39</sup> Twitter was another popular platform on which Isis gathered support.<sup>40</sup> Isis supporters regularly shared videos juxtaposing gruesome content with exposés in English of the regime's benefits and successes.<sup>41</sup> These videos made use of English and featured jihadists of European descent, thus targeting sympathizers in the English-speaking Global North, sending a message to countries in the Global North, and encouraging Muslims from across the Global North to see themselves in Syria, just like the proponents in the videos.<sup>42</sup>

Against this background, Isis supporters targeted individuals for recruitment on a one-to-one level. Dutch intelligence agencies have found that girls who travelled or attempted to travel to Syria in the mid-2010s were contacted individually by persons affiliated with Isis, encouraging them to go to Syria.<sup>43</sup> Aqsa Mahmood, a teenager from the UK, joined Isis in 2013 after prolonged social media contact with Isis members.<sup>44</sup> Fifteen-year-old Nora el-Bathly left France to join Isis in 2014, after people describing themselves as her "sisters" connected with her through Facebook.<sup>45</sup> Linda Wenzel left Germany to join Isis in 2016 after she began chatting

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info.org/il/en/isiss-media-network-developments-2018-future-courses-action/ [https://perma.cc/CW5M-WVR7].

38. Van Ginkel & Minks, *supra* note 28, at 58.

39. @Mujahid4life, *A Message to America*, YouTube (uploaded Aug. 19, 2014, hyperlink not available; this video has been removed from YouTube). For a transcript of the video, see Bryce Rudow, *Breaking: Isis Releases YouTube Showing Execution of Missing American Journalist James Foley*, DAILY BANTER (Feb. 17, 2016), <https://thedailybanter.com/2014/08/breaking-isis-releases-youtube-video-executing-missing-american-journalist-james-foley/> [https://perma.cc/HBJ8-KF4X].

40. ELIZABETH BODINE-BARON, TODD C. HELMUS, MADELINE MAGNUSON, & ZEV WINKELMAN, RAND CORP., EXAMINING ISIS SUPPORT AND OPPOSITION NETWORKS ON TWITTER xi-xii, 1-4 (2016), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1300/RR1328/RAND\\_RR1328.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1300/RR1328/RAND_RR1328.pdf) [https://perma.cc/AP88-P4QG].

41. See, e.g., *A Message Signed with Blood to the Nation of the Cross*, TWITTER (uploaded Feb. 15, 2015, hyperlink not available; this tweet has been removed from Twitter); *Healing the Believers' Chests*, TWITTER (uploaded Feb. 3, 2015, hyperlink not available; this tweet has been removed from Twitter). Excerpts available at *ISIS Video Purports to Show Jordanian Burned Alive*, CBS NEWS, (Feb. 3, 2015), <https://www.cbsnews.com/news/isis-hostage-jordanian-pilot-muath-al-kaseasbeh-purportedly-burned-alive-in-video/> [https://perma.cc/887M-B3XB].

42. Indeed, the title of the first recruitment video was even "A Message to America," in which British fighter Mohammed Emwazi spoke in a direct-to-camera appeal of the need for all Muslims to come to Isis territories in Iraq and Syria. See Rudow, *supra* note 39.

43. See GEN. INTEL. & SEC. SERV., *supra* note 26, at 5.

44. Bakker & de Leede, *supra* note 5, at 7.

45. *Id.* at 9.

with a Jordanian Isis member on jihadist chat forums.<sup>46</sup> Individualized recruitment was so important to Isis that the organization implemented a sponsorship structure: From 2016 onwards, Isis required new recruits to have a contact in Isis-controlled territory who could vouch for the recruit when she first came out.<sup>47</sup>

Recruiters made many promises to the girls about life under Isis so as to tempt them to go to Syria. A number of girls were told that they would have higher quality education in Syria, others were promised free health care, and all were promised roles as devout Muslim wives who could support their fighter husbands in jihad.<sup>48</sup> Fifteen-year-old Moezdaifa el A left the Netherlands to join Isis after two Isis supporters assured her that “in Syria, she could have a perfect life and get married.”<sup>49</sup> Many of the girls with whom intelligence agencies were able to speak told of the importance of this targeted, personal, online contact with recruiters in their decision to join Isis.<sup>50</sup>

The girls usually travelled to Isis-controlled territories without their parents’ knowledge, in spite of their young age and the fact that they almost universally lived with their parents before travelling to Syria.<sup>51</sup> These school-aged girls left their parental homes to join a regime characterized by violence, based on promises of marriage and piety transmitted to them through social media. These vulnerable girls were the victims of targeted recruitment campaigns.

## II. The Legal Framework: The Recruitment of Child Soldiers

The recruitment of teenage girls to Isis should be considered a war crime under existing provisions on child soldier recruitment.<sup>52</sup> This section examines the development of the war crime of child soldier recruitment, the requisite elements of the crime, and the policies driving the inclusion of child soldier recruitment as an international crime.

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46. Rachel Roberts, *German Teenage ‘Isis bride’ Who Faces Death Penalty in Iraq ‘Was Groomed’*, INDEPENDENT (Oct. 5, 2017) <https://www.independent.co.uk/news/world/german-isis-bride-death-penalty-hanging-iraq-groomed-teenager-linda-wenzel-a7984171.html> [https://perma.cc/2RFK-DNTZ].

47. See GEN. INTEL. & SEC. SERV., *supra* note 26, at 5.

48. *Id.*

49. See Seran de Leede, *Western Women Supporting IS/Daesh in Syria and Iraq - An Exploration of their Motivations*, 56 INT’L ANNALS OF CRIMINOLOGY 43, 49 (2018).

50. Bakker & de Leede, *supra* note 5, at 4. Interestingly, the girls’ motivations for joining Isis differ substantially from the typical reasons that girl soldiers give for “volunteering” in armed conflict. Rachel Brett, surveying the involvement of girl soldiers in conflicts in Colombia, Sri Lanka, and the Philippines, notes that many girl soldiers see the armed forces as a viable alternative to physical or sexual abuse, domestic exploitation, and inequality. These motivations are absent here, signalling the altogether different nature of the girls’ roles in the Isis regime. See Rachel Brett, *Girl Soldiers: Denial of Rights and Responsibilities*, 23 REFUGEE SURVEY QUART. 30, 32–33 (2004).

51. GEN. INTEL. & SEC. SERV., *supra* note 26, at 5.

52. There are many related issues of international and domestic courts’ jurisdiction over children, but this Note does not discuss whether courts should, and do, have jurisdiction to prosecute the girls themselves.



### A. The Development of Child Soldier Recruitment as a War Crime

Children have participated in armed conflict for much of human history.<sup>53</sup> Every year, tens of thousands of children are recruited and used in armed conflicts around the world.<sup>54</sup> In 2019 alone, the United Nations verified over 25,000 “grave violations” against children worldwide, defining a grave violation as one which includes the use, maiming, sexual assault, or abduction of children.<sup>55</sup> The United Nations specifically noted that state and non-state actors recruited and used children as young as six in armed conflict.<sup>56</sup> The scale of child soldier recruitment and use has long demanded an international response.

Child soldiering became a concern of international law in 1977. In response to societal calls for greater protection of children in armed conflict, the two Additional Protocols to the Geneva Conventions became the first instruments directly prohibiting child soldiering.<sup>57</sup> As the issue of child protection gained traction among the international community, other areas of law responded to the problem of child soldiering. There are now eight binding international instruments prohibiting the recruitment of child soldiers.<sup>58</sup> Regarding international human rights law, the Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict requires States Parties to “take all feasible measures” to ensure that persons under the age of eighteen years “do not take a direct part in hostilities.”<sup>59</sup> The Optional Protocol also prohibits States Parties from recruiting persons under eighteen into the armed forces.<sup>60</sup> Notably,

53. GUS WASCHFORT, *INTERNATIONAL LAW AND CHILD SOLDIERS* 1 (2015).

54. U.N. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Child Recruitment and Use*, <https://childrenandarmedconflict.un.org/six-grave-violations/child-soldiers/> (last visited Nov. 7, 2021) [<https://perma.cc/5MCH-J93U>].

55. U.N. Security Council, *Children and Armed Conflict*, ¶¶ 5, n.4, 6, U.N. Doc. A/74/845-S/2020/525 (June 9, 2020).

56. *Id.*

57. Article 77(2), Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 17512, provides that, in international armed conflicts, “children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, [States] shall refrain from recruiting them into their armed forces.” Regarding Non-International Armed Conflicts, Article 4(3)(c) of Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, similarly 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.”

58. In addition to Additional Protocols I and II, the Convention on the Rights of the Child (CRC), the CRC’s Optional Protocol on Children in Armed Conflict, the Rome Statute, the ILO Forced Labour Convention, the ILO Minimum Age Convention, and the ILO Worst Forms of Child Labour Convention all prohibit child soldier recruitment. See Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Optional Protocol on the Involvement of Children in Armed Conflict*, <https://childrenandarmedconflict.un.org/tools-for-action/opac/> (last visited Nov. 7, 2021) [<https://perma.cc/UZQ2-9NL6>].

59. G.A. Res. A/RES/54/263, *Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict* art. 1, 2 (Feb. 12, 2002).

60. *Id.* art. 2.

the Convention on the Rights of the Child has been ratified by every state in the world with the exception of the United States, making the norms there-enshrined norms of customary international law.<sup>61</sup>

The incorporation of child soldiering in international criminal law followed from developments in international humanitarian and human rights law. The Rome Statute prohibits the conscription, enlistment, and use in hostilities of children and was the first instrument to codify these acts as a war crime.<sup>62</sup> The jurisprudence of the International Criminal Court (ICC) has been groundbreaking in understanding this crime.<sup>63</sup> The first person to be prosecuted by the ICC, Thomas Lubanga Dyilo, was charged and convicted only with child soldier enlistment, conscription, and use.<sup>64</sup> As such, this case established how many elements of the crime should be interpreted. The jurisprudence of the Special Court for Sierra Leone (SCSL) has also contributed significantly to the development of international criminal law regarding child soldiering. Indeed, every case that has been finalized before the SCSL resulted in at least one conviction on child soldiering, including its most high-profile case, that of *Prosecutor v. Charles Taylor*.<sup>65</sup> The contributions of the ICC and the SCSL have established the recruitment of child soldiers as a war crime.

## B. Elements of the Crime

Article 8 of the Rome Statute defines war crimes over which the ICC has jurisdiction. In international armed conflicts, such as the war in Syria,<sup>66</sup> Article 8(2)(b)(xxvi) of the Rome Statute proscribes “[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”

Additionally, child soldier recruitment, as a war crime, must be committed in the context of an armed conflict, and there must be a nexus between the offence and the armed conflict.<sup>67</sup> The ICC’s Pre-Trial Chamber, in *Prosecutor v. Lubanga* (hereinafter *Lubanga*), determined that nexus

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61. Interestingly, the United States has ratified the CRC’s Optional Protocol on Children in Armed Conflict, signalling its agreement with the rest of the world that children should not directly participate in hostilities. See G.A. Res. A/RES/54/263, *supra* note 59

62. See JULIE MCBRIDE, *THE WAR CRIME OF CHILD SOLDIER RECRUITMENT* 47 (2014).

63. Though the jurisprudence of the ICC applies only where the ICC has jurisdiction, it provides a helpful metric for understanding this international crime and for understanding how the international community treats the crime. Moreover, the prohibition of child soldier recruitment and use is arguably a norm of customary international law now, given widespread state practice, tribunal jurisprudence, and the near-universal ratification of the CRC. The core open question with respect to defining the crime remains the age under which child recruitment should be prosecuted, which is discussed *infra*, Section IV.

64. See *Prosecutor v. Lubanga*, ICC-01/04-01/06, Trial Chamber I, Judgment Pursuant to Article 74 of the Statute, ¶ 1 (Mar. 14, 2012) [hereinafter *Lubanga Trial Judgment*].

65. WASCHFORTH, *supra* note 53, at 105.

66. See *RULE OF LAW IN ARMED CONFLICTS*, *supra* note 7.

67. WASCHFORTH, *supra* note 53, at 119.

is met when “the conduct [is] closely related to the hostilities.”<sup>68</sup>

### 1. *Actus reus*

The Rome Statute presents three ways in which the child soldier crime is committed: *conscripting* or *enlisting* children into national armed forces, or *using* children to actively participate in hostilities. As a preliminary matter, it is important to note that the drafters of the Rome Statute deliberately chose the language “national armed forces” during their deliberations for crimes committed in the context of an international armed conflict.<sup>69</sup> The ICC has, however, clarified that the armed forces in question need not be a state or government army. In *Lubanga*, the Pre-Trial Chamber determined that “the term ‘the national armed forces’ is not limited to the armed forces of a state.”<sup>70</sup> The Trial Chamber neither confirmed nor rejected the Pre-Trial Chamber’s interpretation of “national armed forces,” the majority holding instead that the conflict at issue was non-international.<sup>71</sup> However, in her dissenting opinion to the Trial Chamber’s decision, Judge Odio Benito argued that the interpretation of “national armed forces” was at issue and concluded that “it would be contrary to the ‘object and purpose’ of the Rome Statute . . . to exclude from the prohibition of child recruitment, an armed group, solely for the nature of its organization (State or non-state armed group).”<sup>72</sup> Until the ICC pronounces otherwise, the child soldier crime does not appear to require that children are recruited into the state’s armed forces.

Turning to the commission of the child soldier crime itself, enlistment entails “accepting and enrolling individuals when they volunteer to join an armed force or group.”<sup>73</sup> Indeed, enlistment includes any conduct that accepts a child as part of an armed force.<sup>74</sup>

The ICC has held that a perpetrator can commit the crime of child soldier enlistment even if the child does not participate in hostilities. In *Lubanga*, the ICC rejected the defense’s argument that “the act of enlistment consists in the integration of a person as a soldier, within the context of an armed conflict, *for the purposes of* participating actively in hostilities

68. Prosecutor v. Lubanga, ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ¶ 204 (Feb. 7, 2007) [hereinafter *Lubanga Confirmation of Charges*]. The ICC based its decision on the ICTY’s reasoning in *Prosecutor v. Tadic*. See *id.*

69. WASCHFORT, *supra* note 53, at 116.

70. Lubanga Confirmation of Charges, *supra* note 68, ¶¶ 268–85.

71. The Trial Chamber’s interpretation of the conflict as non-international was not challenged on appeal, so the issue did not come before the Appeals Chamber. See *id.* ¶ 231.

72. Lubanga Trial Judgment, *supra* note 64, Dissenting Opinion of Judge Odio Benito, ¶ 13.

73. Prosecutor v. Brima, Kamara, and Kanu, SCSL-04-16-T, Judgment, ¶ 733 (June 10, 2007) [hereinafter *AFRC Trial Judgment*]. This interpretation of “enlistment” was endorsed by the SCSL Appeals Chamber. See Prosecutor v. Fofana and Kondewa, SCSL-04-14-A, Judgment, ¶¶ 140–44 (May 28, 2008) [hereinafter *CDF Appeal Judgment*].

74. WASCHFORT, *supra* note 53, at 122, 125.

on behalf of the group.”<sup>75</sup> The prosecution must, nevertheless, demonstrate a nexus to the armed conflict.<sup>76</sup>

Enlistment also entails a “voluntary act.”<sup>77</sup> For an armed group to enlist a child within the meaning of the Rome Statute, the group must accept and enroll the child without force. However, the SCSL consistently argued that the ability of a child younger than fifteen to express volition in a conflict setting is a questionable endeavor.<sup>78</sup> The former Special Representative on Children in Armed conflict, Radhika Coomaraswamy, agrees: She has argued that children lack the ability to express free will in conflict, and “the line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial.”<sup>79</sup> Based on the SCSL and Special Representative Coomaraswamy’s views on voluntariness, the ICC in *Lubanga* found that consent cannot be a defense against a charge of child soldier enlistment.<sup>80</sup>

Using child soldiers is another incarnation of this crime. Unlike enlistment, “use” is predicated on a person under fifteen’s active participation in hostilities.<sup>81</sup> The scope of “participation in hostilities” is wide-ranging and covers activities beyond direct combat. In the *AFRC* case, the SCSL held that “the use of children to participate actively in hostilities is not limited to participation in combat. An armed force requires logistical support to maintain its operations. Any labor or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”<sup>82</sup>

The ICC adopted a similarly broad approach in *Lubanga*. The Pre-Trial Chamber held that “[a]ctive participation’ in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.”<sup>83</sup> This analysis requires the Court to conduct a case-by-case assessment of whether a child’s use meets the threshold for participating actively in hostilities.

## 2. *Mens rea*

Article 30 of the Rome Statute stipulates that, unless otherwise provided, perpetrators are liable for crimes within the jurisdiction of the ICC if they commit the material elements of the crime “with intent and knowledge.”<sup>84</sup> A person has intent where “in relation to conduct, the person

75. *Lubanga Trial Judgment*, *supra* note 64, ¶ 609 (emphasis in original).

76. CDF Appeal Judgment, *supra* note 73, ¶ 141.

77. *Lubanga Confirmation of Charges*, *supra* note 68, ¶ 247.

78. See *Prosecutor v. Sesay*, SCSL-04-15-T, Judgment, ¶ 187 (Mar. 2, 2009) [hereinafter *RUF Trial Judgment*]; *Prosecutor v. Fofana*, SCSL-04-14-A, Judgment, ¶ 192 (May 28, 2008).

79. See *Lubanga Trial Judgment*, *supra* note 64, ¶ 611.

80. *Lubanga Confirmation of Charges*, *supra* note 68, ¶ 247.

81. See *WASCHFORT*, *supra* note 53, at 126; *MCBRIDE*, *supra* note 62, at 202.

82. *AFRC Trial Judgment*, *supra* note 73, ¶ 737.

83. *Lubanga Confirmation of Charges*, *supra* note 68, ¶ 261.

84. Rome Statute, *supra* note 6, art. 30(1).

means to engage in the conduct,” or “in relation to consequence, that person means to cause the consequence or is aware that it will occur in the ordinary course of events.”<sup>85</sup> Knowledge refers to “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>86</sup>

As regards the crime of child soldier recruitment, the Rome Statute’s supplementary Elements of Crimes document requires that a perpetrator “knew or should have known that [the child was] under the age of 15 years.”<sup>87</sup> The articulation “should have known” imports a standard of negligence into the child soldier crime. As such, the ICC has determined that Article 30’s intent and knowledge requirements apply to the existence of an armed conflict and to the conscription, enlistment, or use of a child within that armed conflict, and that the Elements of Crimes’ negligence standard applies to the age of the child.<sup>88</sup>

### C. Policies Driving the Inclusion of Child Soldier Recruitment as a War Crime

It is important to understand why child soldier recruitment is a war crime to better recognize how the recruitment of Isis brides fits within the crime’s legal framework.

First, domestic and international jurisdictions across the world recognize children’s reduced culpability for their actions, as compared to adults.<sup>89</sup> Culpability is at the heart of criminal law; one of the law’s oldest principles is that a person must be blameworthy before they can be punished. Understanding this, the drafters of the Rome Statute felt that “the international crimes covered by the Rome Statute involve such stringent *mens rea* requirements that children could never fulfill them.”<sup>90</sup> Criminalizing the recruitment of child soldiers recognizes that children are less blameworthy for their actions because it shifts the focus of prosecution from the direct perpetrator of wrongful acts (the child) to the indirect perpetrator (the recruiter).

Second, children are particularly vulnerable to coercion and control. As U.S. and international courts have noted, children are easily influenced

85. *Id.* art. 30(2).

86. *Id.* art. 30(3).

87. Int’l Crim. Ct. [ICC], *Elements of Crimes*, at 31, ICC Publication RC/11 (2011). The Court is required to apply the Rome Statute and then the Elements of Crimes. See Rome Statute, *supra* note 6, art. 25; Prosecutor v. Omar Al Bashir, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir (Mar. 4, 2009).

88. See Lubanga Confirmation of Charges, *supra* note 68, ¶ 359.

89. For a summary of the age of criminal responsibility in countries around the world, see *The Minimum Age of Criminal Responsibility Continues to Divide Opinion*, ECONOMIST (Mar. 15, 2017), <https://www.economist.com/graphic-detail/2017/03/15/the-minimum-age-of-criminal-responsibility-continues-to-divide-opinion> [<https://perma.cc/5CSL-ADT2>].

90. MCBRIDE, *supra* note 62, at 54-55.

and easily manipulated,<sup>91</sup> making them easy targets for recruiters. The ICC very recently confronted the issue of children's vulnerability to coercion in *Prosecutor v. Ongwen*, a case decided by the Court in February 2021. Dominic Ongwen was recruited as a child by the Lord's Resistance Army, an armed group in Northern Uganda, and Ongwen alleged that the coercive effects of his recruitment shaped many of his subsequent actions.<sup>92</sup> According to Human Rights Watch, leaders from the Lord's Resistance Army targeted children "because they are easier to manipulate than adults"<sup>93</sup> and that they used "mind control methods" to control children.<sup>94</sup> Child soldiers are often the subject of brutality which also contributes to their being easy to control, a theme which repeatedly emerged during Dominic Ongwen's trial,<sup>95</sup> though it ultimately did not aid his defense.<sup>96</sup> The development of the child soldier recruitment crime recognizes the harms that recruiters perpetuate when they exploit children's vulnerability to coercion.

Finally, the Rome Statute's goals of deterrence and ending impunity are best served by targeting those who recruit children. Although the deterrence value of international criminal law is the subject of debate,<sup>97</sup> the preamble of the Rome Statute states that the ICC was created to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."<sup>98</sup> The first President of the ICC, Judge Kirsch, has also noted that "the ICC is intended to contribute to the deterrence of [international] crimes."<sup>99</sup> Children are unlikely to be deterred by the criminalization of the acts that they are coercively or brutally recruited to commit, all the more so when the children are recruited from vulnerable groups who are easy to manipulate. Rather, the ICC realizes its goals more effectively if it seeks to deter the recruitment of children in the first place.

### III. Applying the Child Soldier Recruitment Framework to the Situation of Isis Brides

The Rome Statute states that the definitions of the crimes contained therein "shall be strictly construed and shall not be extended by anal-

91. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 559 (2005); *R. v. Secretary of State for the Home Department, Ex Parte Vernables and Thompson*, House of Lords (1997).

92. See *Prosecutor v. Ongwen*, ICC-02/04-01/15-T-258-Red-ENG WT, Transcript, ¶ 4 (Mar. 12, 2020) [hereinafter *Ongwen*, Defense Closing].

93. *Questions and Answers on the LRA Commander Dominic Ongwen and the ICC*, HUMAN RIGHTS WATCH (Dec. 5, 2016), <https://www.hrw.org/news/2016/12/05/questions-and-answers-lra-commander-dominic-ongwen-and-icc#> [https://perma.cc/QXK7-ETBU].

94. *Id.*

95. See *Ongwen* Defense Closing, *supra* note 92.

96. See *Prosecutor v. Ongwen*, ICC-02/04-01/15-1762-Red, Trial Judgment (Feb. 4, 2021) [hereinafter *Ongwen* Trial Judgment].

97. See WASCHEFORT, *supra* note 53, at 132-133.

98. Rome Statute, *supra* note 6, Preamble.

99. *A Deterrent International Criminal Court—The Ultimate Objective*, PARLIAMENTARIANS FOR GLOBAL ACTION (2005), <https://www.pgaction.org/pdf/pre/deterrent%20Note%20rev%20Tokyo.pdf> [https://perma.cc/UT8J-PS7V].

ogy.”<sup>100</sup> There is no analogy at work here. Rather, we can, and should, understand the situation of Isis brides as being within the existing framework for child soldier recruitment.

#### A. Child Soldier Recruitment as a Developing Area of Law

Child soldier recruitment is a developing area of law that is still being shaped by current prosecutions. The Rome Statute codified child soldier recruitment as a crime in 2002, and since then, there have only been a handful of prosecutions for child soldier recruitment at the ICC and SCSL.<sup>101</sup> The judicial interpretation of this body of law is still in its infancy, and the international community is moving out of an era of norm creation to an era of application. As courts transition to this era of application, the international community must ask what enforcement of this crime will look like, who the Rome Statute was designed to prosecute, and who the Rome Statute was designed to protect.

#### B. Elements of the Crime

The recruitment of Isis brides fits within the scope of child soldier recruitment, as defined by the ICC and the SCSL. As a threshold matter, the girls were recruited to join Isis in the midst of the Syrian conflict, an international armed conflict.<sup>102</sup> Their recruitment has a strong nexus to the conflict because the girls’ contributions to Isis were instrumental to the organization’s initial territorial and populational expansion.

##### 1. *Actus reus*

During the Syrian war, Isis brides were variously *enlisted* into Isis’s armed forces and *used* to participate actively in hostilities. Turning first to enlistment, recruiters enlisted many of the girls in the Isis armed forces. The Rome Statute criminalizes the enlistment of persons under fifteen into national armed forces, which entails “accepting and enrolling individuals when they volunteer to join an armed force or group.”<sup>103</sup> Isis is a “national armed force” as defined in *Lubanga*. Since the national armed forces are “not limited to the armed forces of a state,” but rather interpreted as “belonging to the opposing forces in armed conflict,”<sup>104</sup> it is clear that Isis—an armed group opposing the allied military powers in Syria—constitutes a “national armed force.”

Isis recruiters also accepted and enrolled the girls into the armed group. When the girls travelled to Syria and committed to joining Isis, they committed their lives to the group and became part of its structure. Isis leaders married the girls into the fabric of the organization, requiring them to take on core roles within Isis. Recruiters not only accepted these chil-

100. Rome Statute, *supra* note 6, art. 22(2).

101. The SCSL issued four final judgments regarding child soldiering, and the ICC ruled on child soldier charges in *Lubanga*. See Section II.B, *supra*.

102. See RULE OF LAW IN ARMED CONFLICTS, *supra* note 7.

103. AFRC Trial Judgment, *supra* note 73, ¶ 733.

104. *Lubanga* Confirmation of Charges, *supra* note 68, ¶¶ 268–85.

dren, but refused to let them leave.<sup>105</sup>

Recruiters also accepted the girls into Isis before their arrival in the Middle East. Most of the girls entered into individualized contact with recruiters on social media in the months preceding their journeys to Syria or Iraq.<sup>106</sup> Recruiters worked to align the girls with the Isis cause during these months, enticing them with promises of “the good life,” presenting the violent conflict between Isis and the West as an attraction of joining the group,<sup>107</sup> and enveloping the girls in a community to which they were told they belonged.<sup>108</sup> The girls committed to Isis before they arrived on Isis soil. Many of the girls adopted markedly different and more conservative dress in the months preceding their departure.<sup>109</sup> Linda Wenzel’s recruiter set up her marriage with a Chechen Isis fighter “over the phone” before she travelled to Syria,<sup>110</sup> and Isis organizers arranged Shamima Begum’s marriage to a Dutch fighter before she left the UK.<sup>111</sup> Although the recruiters’ conduct does not reflect a formal enlistment process, it should rise to the level of “accepting and enrolling” the girls into an armed group. Indeed, non-state armed groups rarely have formal enlistment processes resembling those of state armies.<sup>112</sup> It would defeat the Pre-Trial Chamber’s interpretation of “national armed forces” to require enlistment to resemble a formal, state-esque enrollment procedure. The ICC must take a broad view of “enlistment” to focus on conduct that effectively accepts and enrolls children, such as that of Isis recruiters to bring girls into Isis’s folds.

Moreover, the ICC held in *Lubanga* that child soldiers do not need to participate in hostilities for recruiters to enlist them. Consequently, those girls whose conduct in Syria may not have reached the threshold of participation in the conflict were nevertheless enlisted by the organization.

The girls’ enlistment was also a “voluntary act,” as required by the ICC.<sup>113</sup> The ICC recognized the complexity of the voluntariness requirement in *Lubanga*; this complexity is abundantly apparent in the situation of Isis brides. The girls travelled to the Middle East of their own accord, but they were extensively coerced in order to get there (as detailed in Section III.C, *infra*). The depth of recruiters’ coercive methods is revealed by the fact that they were able to convince teenage girls that their religious beliefs required them to leave their families, move across continents, and participate in a violent crusade. As such, the girls’ decision to join Isis was voluntary in that they were not recruited through violence or other uses of force

105. GEN. INTEL. & SEC. SERV., *supra* note 26, at 11.

106. See *ISIS’s Media Network*, *supra* note 37, at 32.

107. See, e.g., BBC NEWS, *supra* note 21.

108. Bakker & de Leede, *supra* note 5, at 5.

109. *Id.*

110. See Roberts, *supra* note 46.

111. See David Brown & John Simpson, *Shamima Begum’s Dutch Husband is Convicted Terrorist*, TIMES (Feb. 15, 2019), <https://www.thetimes.co.uk/article/dutch-husband-is-convicted-terrorist-xbx2msnck> [https://perma.cc/DU6R-HWQZ].

112. U.N. INST. FOR DISARMAMENT RSCH., DISARMAMENT FORUM: ENGAGING NON-STATE ARMED GROUPS 40 (2008).

113. *Lubanga Confirmation of Charges*, *supra* note 68, ¶ 247.



(as would be required for conscription<sup>114</sup>), even if it was not voluntary in that they acted under coercion.

Many of the girls also meet the elements for the “use” incarnation of the child soldier recruitment crime. Jurisprudence from both the SCSL and the ICC demonstrates that courts analyze the “active participation in hostilities” threshold on a case-by-case basis.<sup>115</sup> The girls’ roles and activities amount to active participation under the broad interpretation of the term that the ICC adopted in *Lubanga*. They participated in “combat-related activities”<sup>116</sup> such as preparing suicide vests, as in the case of Shamima Begum,<sup>117</sup> or serving as snipers, as in the case of Linda Wenzel.<sup>118</sup> These activities helped to maintain Isis’s operations during conflict, which the SCSL has deemed to be sufficient for an activity to constitute “active participation in hostilities.”<sup>119</sup> Under the Isis regime, military wives also commonly punished civilians, an act which the SCSL has specifically held to meet the “active participation” threshold.<sup>120</sup>

The girls’ gender-specific roles should also constitute “active participation” in the conflict. The girls were recruited for their reproductive function, despite their young age. Requiring children to produce children, which is a common experience for girl soldiers,<sup>121</sup> constitutes sexual abuse. The ICC has addressed the issue of whether the sexual abuse of girl soldiers amounts to “use” of child soldiers, however, and the *Lubanga* majority “found that such conduct was irrelevant in the context of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).”<sup>122</sup> The situation of Isis brides is nevertheless distinguished from *Lubanga* because of the context in which the girls were abused, which the Court must consider in its case-by-case analysis of the active participation threshold. The situation before the *Lubanga* court involved girls who were used as sex slaves, for soldiers’ enjoyment.<sup>123</sup> Here, however, the sexual abuse of the girls was integral to Isis’s war effort. Isis’s survival depended on building an ever-growing community of loyal supporters in Isis-held territories. As Judge Odio Benito’s dissent to the *Lubanga* majority on the topic of sexual abuse concluded, “Sexual violence is an intrinsic element of the criminal conduct of ‘use to participate actively in the hostilities’. Girls who are used as . . . ‘wives’ of commanders or other group members of the armed group provide essential support to

114. *Id.*

115. See, e.g., *id.* ¶¶ 262, 263 (listing activities that may meet the threshold); RUF Trial Judgment, *supra* note 78, ¶ 1720 (finding that whether a specific case meets the active participation threshold depends on “the particularities of each armed conflict and the *modus operandi* of the warring factions”).

116. *Lubanga* Confirmation of Charges, *supra* note 68, ¶ 261.

117. Hall & Dearden, *supra* note 32.

118. Ensor, *supra* note 33.

119. See AFRC Trial Judgment, *supra* note 73, ¶ 737.

120. RUF Trial Judgment, *supra* note 78, ¶¶ 1714–43.

121. Roberts, *supra* note 9, at 102.

122. WASCHEFORT, *supra* note 53, at 128.

123. See K’Shaani O. Smith, *Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo*, 54 HOWARD L.J. 467, 468 (2011).

the armed groups.”<sup>124</sup>

The ICC has yet to encounter a situation similar to that of Isis brides, and it remains to be determined whether the Court would consider the girls’ reproductive and spousal roles to be “active participation” in the Syrian conflict. The ICC has, however, appeared willing thus far to adopt broad interpretations of the Rome Statute’s requirements to increase child protection. Given that this area of law is still developing, the Court should continue to increase child protection by understanding sexual abuse in the case of Isis brides as constituting their “use” in hostilities.

## 2. *Mens rea*

It is uncontroversial to assert that the recruiters acted with intent and knowledge. Although there is very little information available about the specific mental state of each recruiter, recruiters on the whole knew that they acted in the context of an armed conflict because they encouraged the girls to join them in conflict. Videos propagated by Isis recruiters depicted fighters in combat, executions of supposed prisoners of war, and the organization’s preparations for combat.<sup>125</sup> Recruiters also intended the consequences of their actions—that the girls would join Isis—and were aware that these consequences would result from their actions; indeed, the entire purpose of their recruitment efforts was to engage the girls in the Isis war effort.

The ICC’s negligence standard regarding the age of the girls constitutes a relatively low threshold. Although understanding the recruiters’ mens rea with respect to each girl’s age necessitates a case-by-case assessment, it is clear from European intelligence reports that recruiters gathered information about each of their recruits to assist them with travel and preparations for their new lives with Isis.<sup>126</sup> Given this involvement, it is reasonable to suggest that Isis recruiters “knew or should have known” the girls’ ages.

### C. Policies Favoring the Inclusion of Isis Brides’ Recruitment as a War Crime

The rationales behind the creation of child soldier recruitment as a war crime apply readily to the situation of Isis brides. Narratives of vulnerability dominate the girls’ stories. Most of them were so young that they had not finished high school when they travelled to Syria.<sup>127</sup> Some came

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124. Lubanga Trial Judgment, *supra* note 64, Dissenting Opinion of Judge Odio Benito, ¶ 20.

125. See, e.g., Rudow, *supra* note 39; *Healing the Believers’ Chests*, *supra* note 41 (depicting combat preparations, Isis’s military takedown of Jordanian fighter planes, and the execution of Muadh Al-Kasasbeh, a Jordanian pilot captured by Isis). For a description, see Abby Ohlheiser & William Booth, *Islamic State Video Claims to Show Burning Death of Jordanian Pilot*, WASH. POST (Feb. 3, 2015), <https://www.washingtonpost.com/news/world/wp/2015/02/03/islamic-state-video-appears-to-show-burning-death-of-jordanian-pilot/> [https://perma.cc/6EKH-GJZJ].

126. See Bakker & de Leede, *supra* note 5, at 7.

127. See *id.* at 4.

from difficult familial or social backgrounds.<sup>128</sup> Others wanted to find a community that accepted them, sparked by feelings of not belonging at home.<sup>129</sup> Many of the girls bear the hallmarks of teenage immaturity and vulnerability, declaring that they wanted to join Isis as an act of rebellion against their parents.<sup>130</sup> Non-state armed groups, like the Lord's Resistance Army in Uganda, have long recognized that children are easier to manipulate than adults.<sup>131</sup> Isis followed in kind, targeting young and impressionable girls to join their cause. It is precisely because of the girls' vulnerability that the international community should focus on the wrongs perpetuated by the recruiters, not the girls.

The girls also need the international community's help. While not seeking to diminish the horrific acts that the girls and their co-fighters were party to, press coverage describing the girls as "bloodthirsty zealot[s]," "hardened women," or "security threats" paints a picture of the girls as mature and callous monsters by ignoring entirely the severe harm that they faced.<sup>132</sup> Girl soldiers routinely experience extensive sexual abuse. During Sierra Leone's civil war, for example, girl soldiers faced "torture, sexual abuse, and deprivation, and were themselves sometimes perpetrators of violence. Many had borne children from the men who had captured them."<sup>133</sup> In recognition of this, the Chief Prosecutor of the SCSL announced after the Court's establishment that "the children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes."<sup>134</sup> Similarly, Isis brides experienced sexual abuse and harm. The girls were married to strangers whom they did not choose as spouses.<sup>135</sup> They were recruited to bear children while they themselves were children. They were embroiled in extreme violence while they were minors. States seeking to prosecute the girls must come to the same recognition as the Chief Prosecutor of the SCSL: The girls, in spite of the acts they committed, have suffered

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128. See *id.* at 7.

129. *Id.* at 5.

130. *Id.* at 7.

131. See HUM. RTS. WATCH, *supra* note 93.

132. See Jan Moir, *I Feel Precious Little Sympathy for Shamima Begum the Trapped Jihadi Bride*, DAILY MAIL (Sept. 26, 2019), <https://www.dailymail.co.uk/debate/article-7509991/JAN-MOIR-feel-precious-little-sympathy-Shamima-Begum-trapped-jihadi-bride.html> [<https://perma.cc/P3CN-D455>]; Camilla Cavendish, *Returning Isis Brides Expose A Woe-fully Inadequate Legal Armoury*, FIN. TIMES (Feb. 15, 2019), <https://www.ft.com/content/157c8e12-3053-11e9-8744-e7016697f225> [<https://perma.cc/8FPT-UA3Z>]; *Djihadistes: pour l'Europe, la menace vient des revenants*, COURRIER INTERNATIONAL (Jan. 31, 2018), <https://www.courrierinternational.com/article/djihadistes-pour-leurope-la-menace-vient-des-revenants> [<https://perma.cc/RG5R-85LD>].

133. Roberts, *supra* note 9, at 103.

134. Special Court for Sierra Leone [SCSL], Public Affairs Office Press Release, *Special Court Prosecutor Says He Will Not Prosecute Children* (Nov. 2, 2002), <http://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf> [<https://perma.cc/VT3X-UBS9>].

135. Lubanga Trial Judgment, *supra* note 64, Dissenting Opinion of Judge Odio Benito, ¶ 20.

enough, are themselves victims, and the international community would be better served by focusing on those who forced the girls to participate in the Isis regime.

Indeed, the ICC has heard testimony on the effects that recruitment can have on a child. During the *Ongwen* trial, the Court heard that witnessing and experiencing violence can lead a child to develop post-traumatic stress disorder (PTSD).<sup>136</sup> Children who have been exposed to such trauma may need to receive psychiatric or rehabilitative care in order to mitigate the harmful effects of PTSD, such as reduced social functioning.<sup>137</sup> The Isis brides themselves have expressed regret for their behavior in Syria and have made pleas for assistance. Linda Wenzel, for example, told reporters that she “want[s] to go home to [her] family” and believes that she has “completely ruined [her] life.”<sup>138</sup> Shamima Begum is trying to return to the United Kingdom and has expressed her desire for psychological treatment.<sup>139</sup> The child soldier recruitment crime recognizes the harm that armed combat inflicts on a child and targets recruiters accordingly. The international community must show Isis brides this same understanding.

Finally, if international criminal law is to fulfill its deterrence value, then it must seek to deter the recruitment of Isis brides. The Rome Statute was drawn up to “put an end to impunity for the perpetrators of . . . crimes,”<sup>140</sup> an aim which remains unfulfilled if recruiters of teenage girls to violent conflicts are not considered perpetrators of war crimes. To push this further, international criminal law’s potential to prevent child soldiering lies just as much, if not more, in its domestic prosecution as in prosecutions before the ICC.<sup>141</sup> It is thus all the more significant for the ICC, and the international community as a whole, to understand the recruitment of Isis brides as an international crime.

#### IV. An Imperfect Approach

This section discusses two issues that complicate recognizing the recruitment of Isis brides as a war crime under the Rome Statute: the age of the girls and the girls’ status as both recruits and recruiters.

##### A. Age

Perhaps one of the most complex issues with the child soldier model is that the Rome Statute criminalizes the recruitment of children under the age of fifteen, yet some of the girls recruited to Isis were aged fifteen and above.

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136. See Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-T-248-Red-ENG WT, Trial Hearing Transcript, 46 (Nov. 18, 2021) [hereinafter *Ongwen* Trial].

137. See *id.* at 62, 37–41 (2013).

138. See DEUTSCHE WELLE, *supra* note 1.

139. Loyd, *supra* note 22.

140. Rome Statute, *supra* note 6, Preamble.

141. See *infra* Section V.B.

The situation for children recruited below the age of fifteen is clear: They come within the purview of the Rome Statute, and their recruitment should be considered a war crime. Though few of the girls were under the age of fifteen when they arrived in Syria, many were under fifteen during their recruitment in the months preceding their travel to Syria,<sup>142</sup> thus bringing them within the existing legal framework for child soldier recruitment. What is more controversial, however, is the position of the girls who were already fifteen when recruiters began to target them.

The drafters of the Rome Statute discussed the question of age during the Rome Diplomatic Conference, debating the minimum age at which a child could acceptably participate in hostilities.<sup>143</sup> A variety of cultural notions about children informed these discussions, and continue to inform debates about the child soldier recruitment crime today.<sup>144</sup> Some scholars argue that “the notion of child soldiering and the international attention it has garnered . . . is an example of western conceptions of childhood and ideals of child protection being forced upon non-western states.”<sup>145</sup> Because international law “exists to create a minimum threshold of norms to which all states are bound,”<sup>146</sup> and because the age of fifteen emerged as that “minimum threshold” during the Rome Conference, the drafters of the Rome Statute determined that the child soldier recruitment crime should cover children recruited before their fifteenth birthday.<sup>147</sup>

This justification regarding cultural notions of childhood does not present a satisfactory argument as to why the recruitment of children under the age of eighteen should not be covered by the Rome Statute. First, the African Charter on the Rights and Welfare of the Child has some of the most developed standards around the protection of children in conflict.<sup>148</sup> This document, which was neither created by western states nor applies to western states, prohibits the recruitment and use of children in armed conflict, and defines children as persons under eighteen years.<sup>149</sup> Moreover, the Convention on the Rights of the Child (CRC), which has near-universal ratification—including by non-western states—defines children as persons under eighteen.<sup>150</sup> Second, the international community has moved gradu-

142. See, e.g., Loyd, *supra* note 22.

143. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of Plenary Meetings*, ¶¶ 96–97, U.N. Doc. A/CONF.183/SR.7 (Vol. II) (June 15–July 17, 1998).

144. MCBRIDE, *supra* note 62, at 54–55; WASCHFERT, *supra* note 53, at 9.

145. DAVID M. ROSEN, *ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM*, 4 (2005).

146. WASCHFERT, *supra* note 53, at 11.

147. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Reports and Other Documents*, 18, 19, 97, 98 U.N. Doc. A/CONF.183/2 (Vol. III) (Apr. 14, 1998).

148. See African Charter on the Rights and Welfare of the Child, art. 22, Nov. 29, 1999, O.A.U. Doc. CAB/LEG/24.9/49.

149. *Id.* art. 2, 22.

150. G.A. Res. 44/25, Convention on the Rights of the Child, art. 1 (Sep. 2, 1990), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [https://perma.cc/A8RA-AX9S].

ally towards recognizing that the abuse of children aged between fifteen and eighteen is just as egregious as that of children under fifteen. The CRC's Optional Protocol on Children in Armed Conflict, which entered into force in 2002, amended Article 38 of the CRC to require States Parties to prohibit the use and recruitment of children under eighteen in armed conflict. The 2007 Paris Principles, which have been endorsed by 105 states, also regard the use and recruitment of children below the age of eighteen as contrary to international law.<sup>151</sup> In spite of these more recent developments, not to mention the abundance of psychiatric research showing that the effects of combat on a seventeen-year-old are just as severe as on a fourteen-year-old,<sup>152</sup> the international criminal law framework on child soldiering continues to create impunity for those who recruit children over the age of fifteen. The international community should reconsider the current criminal law framework in light of the developments in international human rights law. Assessing the situations of Isis brides would provide an excellent prism through which the international community could revisit the issue of age in the crime of child soldier recruitment.

Since Article 8(2) of the Rome Statute does not currently include as a war crime the recruitment of children aged between fifteen and eighteen, prosecutors today should use the cases of girls who have "aged-out" of the Rome Statute's provisions strategically. The policies underscoring the child recruitment crime, and, thus, the recruitment of Isis brides, apply equally to girls who were recruited at fifteen and sixteen, as they do to girls who were recruited at fourteen. Older girls have displayed the same vulnerabilities and immaturities as their fourteen-year-old peers. While the Rome Statute cannot be invoked to treat the recruitment of older girls like their younger counterparts, prosecutors can use information gathered about older girls to help courts understand recruiters' methods, show how recruiters targeted their prey, and demonstrate the recruiters' roles in the girls' decisions to join Isis. In addition, the international community's inclusion of Isis brides' situations within the child soldier recruitment framework could incentivize states to target recruiters using their own domestic law provisions. This may well allow for domestic prosecutions of those who recruited children aged between fifteen and eighteen.

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151. *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, UNICEF (Feb. 2007).

152. See, e.g., Michelle Liu, *War and Children*, 12 AM. J. PSYCHIATRY RESIDENTS 3 (2017); Kenneth Miller & Mark Jordans, *Determinants of Children's Health in War-Torn Settings: Translating Research Into Action*, 18 CURRENT PSYCHIATRY REPS. 58 (2016). Some will argue that this is a slippery slope: if the effect of combat on a person is the threshold by which we analyze whether the person's recruitment falls within the child soldier crime, then this crime could apply to anyone. While true, this does not rebut the argument advanced here. As shown above, international laws and standards have a bright-line age cut off for child soldier recruitment. Indeed, international law cannot function unless there is a bright-line cut off. This age limit is increasingly eighteen, and not fifteen, in international human rights law, and the international criminal law threshold should be revised to eighteen in line with human rights law. Social science on the effects of combat on children would support this raised threshold.

It is clear that the child soldier model is imperfect. It does not acknowledge the harm that recruiters have done to older children. Perhaps domestic systems will take up this call, and one can only hope that the international community may yet revisit the issue of age and bring the Rome Statute in line with human rights and soft law guidelines on child soldiering.<sup>153</sup>

## B. When the Recruit Becomes the Recruiter

A second complication arises in the case of girls who were both Isis recruits and recruiters. This situation was not uncommon. Upon the girls' arrival in Syria, Isis's leadership often required the girls to bring over new recruits to join them in jihad.<sup>154</sup> Aqsa Mahmood, a teenager from the UK who was one of the first European girls to go to Syria in 2013, is known to have subsequently convinced at least three other girls to join the conflict in Syria through social media.<sup>155</sup> How, then, should international criminal law regard these girls' status as both recruit and recruiter?

The situation of a child recruit who became a recruiter was recently before the ICC. Dominic Ongwen, a leader of the Lord's Resistance Army (LRA) in northern Uganda who was conscripted into the LRA, was charged with the conscription and use of children in hostilities.<sup>156</sup> Although the ICC ultimately found Ongwen guilty of the crimes with which he was charged<sup>157</sup>—and, thus, that his status as a recruit did not present a complete defense—the ICC entertained extensive testimony on the brutalities that Ongwen experienced. Ongwen was abducted by the LRA around the age of ten and was “brutalized” to become a “fighting machine,” a point not contested by the prosecution.<sup>158</sup> Ongwen later became known as one of the LRA's most ruthless commanders<sup>159</sup> and, the prosecution alleged, oversaw the recruitment of other children in the LRA. His defense team characterized him as “a victim just like other former soldiers who managed to escape and are now participants in this courtroom as victims,”<sup>160</sup> and highlighted the trauma he suffered as a child conscripted into a violent

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153. Critically, Article 26 of the Rome Statute does not grant the ICC jurisdiction over girls under the age of eighteen. This does not prohibit domestic prosecutors from charging girls under eighteen, though, as Iraq has shown with the prosecution of Linda Wenzel. The risk of domestic prosecution highlights the need for the international community's focus to shift from regarding these girls as perpetrators, to regarding them as victims of an international crime. Rome Statute, *supra* note 6, art. 26.

154. Amanda Spencer, *The Hidden Face of Terrorism: An Analysis of the Women in Islamic State*, 9 J. STRATEGIC SEC. 74, 74 (2016).

155. U.N. Sec. Council, Aqsa Mahmood (Sept. 28, 2015), [https://www.un.org/securitycouncil/sanctions/1267/aq\\_sanctions\\_list/summaries/individual/aqsa-mahmood](https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/individual/aqsa-mahmood) [<https://perma.cc/7JAS-MSQ3>].

156. Prosecutor v. Ongwen, ICC-02/04-01/15, Pre-Trial Chamber II, Decision on the Confirmation of Charges, ¶ 144 (Mar. 23, 2016) [hereinafter Ongwen Confirmation of Charges].

157. See Ongwen Trial Judgment, *supra* note 96, ¶ 144.

158. See Ongwen Defense Closing, *supra* note 92, at 4.

159. See HUM. RTS. WATCH, *supra* note 93.

160. See Ongwen Defense Closing, *supra* note 92, at 4.

fighting force.<sup>161</sup> It is clear that the ICC does not accept as a full defense that a recruiter was formerly a child recruit, and nor does this Note take the position that it should. However, the story of Ongwen and others similarly situated raises questions about who exactly prosecutions should target.

Should international criminal law focus on recruits-turned-recruiters like Dominic Ongwen or Aqsa Mahmood? This question, like that of age, goes to prosecutorial strategy. Through different modes of liability, prosecutors can choose who to bring under the umbrella of culpability and can structure their case to only charge the most culpable. Prosecutors at the SCSL used the command responsibility doctrine successfully in child soldier recruitment cases to ensure that the highest commanders, and not just the direct perpetrators, shared in criminal responsibility for acts of recruitment.<sup>162</sup> The ICC has gone a step further than the SCSL in ensuring that it targets only the most culpable for a crime, choosing to focus on the doctrine of co-perpetration. Co-perpetration, which the prosecution successfully used in *Lubanga*<sup>163</sup> and alleged in *Ongwen*,<sup>164</sup> allows the prosecution to charge those who are indirectly responsible for a crime without charging the direct perpetrator of the crime. Co-perpetration requires two or more perpetrators to work together in the commission of a crime, such that their coordinated efforts result in the commission of the crime.<sup>165</sup> As the Pre-Trial Chamber explained in Ongwen's Confirmation of Charges, though, co-perpetration allows the Court to recognize unequal distributions of power among co-perpetrators: Co-perpetration "refer[s] to situations in which a person commits a crime . . . 'through' someone else"<sup>166</sup> by subjugating that person's will to their own.<sup>167</sup> In this way, the co-perpetrator controlling the situation (the indirect co-perpetrator) executes the crime through another person (the direct co-perpetrator). The action of the direct co-perpetrator must be attributed to the indirect co-perpetrator "as if it were [the indirect co-perpetrator's] own."<sup>168</sup> As such, the prosecution can charge the indirect perpetrator—he who controlled the crime—without charging the direct perpetrator—she who committed the crime.

Charging co-perpetration would allow girls who become recruiters to not be the focus of prosecution, as their recruitment efforts can be attributed to those who instructed them to recruit. In the aftermath of conflicts, international prosecutors seek to charge those who are most responsible for atrocities committed.<sup>169</sup> Even when Aqsa Mahmood enlisted other children in Isis, her superiors remained the root cause of the harm: They

161. Ongwen Trial Judgment, *supra* note 96.

162. Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?* 32 MICH. J. INT'L LAW, 395, 424-26 (2011).

163. See *Lubanga* Trial Judgment, *supra* note 64, ¶¶ 1351-1355.

164. Ongwen Confirmation of Charges, *supra* note 156, ¶ 36.

165. *Id.* ¶ 38.

166. *Id.* ¶ 38 (emphasis added).

167. *Id.* ¶¶ 39-40.

168. *Id.* ¶ 39.

169. Rome Statute, *supra* note 6, Preamble.



recruited her, harmed her, and then instructed her to recruit. By charging co-perpetration, prosecutors can target Isis's leadership without ascribing culpability to the girls who directly carried out the recruitment. The international community must acknowledge that girls who occupied victim-perpetrator status were puppets to the whims of others, even if they were perpetuating the cycle of harm, and thus it is not in prosecutors' interests to focus on these girls as anything other than witnesses against their own superiors.

## V. Forums for Prosecution

Both international and domestic courts hear international crimes. This Note proposes that the most effective approach to tackling the recruitment of Isis brides is for states to pursue prosecutions on a domestic level through universal jurisdiction.

### A. International Criminal Courts

International criminal courts include the permanent International Criminal Court (ICC), ad hoc courts, and hybrid courts. Ad hoc courts refer to those established by the UN Security Council to try alleged perpetrators of international crimes arising out of particular conflicts, for example the International Criminal Tribunal for Rwanda, and hybrid courts refer to those set up by both the Security Council and the government of the country in question, for example the SCSL.<sup>170</sup>

The ICC is a court of general jurisdiction that was created to adjudicate the international crimes laid out in the Rome Statute, including the war crime of child soldier enlistment, conscription, and use. Although an international prosecution is a coherent and cohesive response to the international issue of the Isis brides' recruitment, several jurisdictional issues complicate pursuing prosecution at the ICC.

First, Articles 12 and 13 of the Rome Statute limit the ICC's jurisdiction to territorial and active personality jurisdiction. That is to say, States Parties to the Rome Statute can refer situations to the ICC's Office of the Prosecutor for investigation and prosecution where:

1. the alleged wrongdoing happened in the State Party's territory, or
2. the accused perpetrators are nationals of the State Party.<sup>171</sup>

The Prosecutor can also bring investigations *proprio motu* if the alleged wrongdoing occurred on the territory of a State Party or the accused is a national of a State Party.<sup>172</sup> Additionally, the UN Security Council can refer situations for investigation to the ICC's Office of the Prosecutor under its Chapter VII powers.<sup>173</sup>

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170. See *UN Documentation: International Law*, DAG HAMMARSKJÖLD LIBRARY (last updated Nov. 3, 2021), <https://research.un.org/en/docs/law/courts> [<https://perma.cc/829B-H793>].

171. Rome Statute, *supra* note 6, arts. 12-14.

172. *Id.* arts. 12, 15.

173. *Id.* art. 13.

Second, the ICC's jurisdiction complements domestic criminal jurisdictions.<sup>174</sup> As the Pre-Trial Chamber articulated in *Prosecutor v. Gaddafi*, the Court only has jurisdiction if a national court with jurisdiction is unable or unwilling to pursue the prosecution.<sup>175</sup> The ICC thus acts as a gap-filler to prevent impunity.

In the cases of Isis brides, then, three critical questions arise: (1) In which states did the crime of recruitment occur; (2) what are the nationalities of the recruiters; and (3) are the states in question able and willing to pursue prosecution? These questions matter because neither Syria nor Iraq is party to the Rome Statute, which severely limits the ICC's jurisdiction over crimes that happened in their territories.

Returning to the elements of the crime,<sup>176</sup> the answer to the first of these questions depends on whether a perpetrator is charged with enlisting or using Isis brides. The acts constituting enlistment—the recruiters' targeted social media communications, arrangement of the girls' arrival in Isis territories, and the girls' commitment to joining Isis—happened in the European countries from which the children travelled. The United Kingdom, France, Germany, and the Netherlands are all parties to the Rome Statute, and all have a strong basis for referring the recruitment that happened within their borders to the ICC based on territorial jurisdiction. Because of the principle of complementarity, however, these states would have to declare their unwillingness to pursue prosecution for the ICC to be able to take up these cases.<sup>177</sup> Public opinion regarding Isis and extremist Islamic terrorism in Europe is very strong. Reporting on Isis brides in the UK and France, for example, has strongly encouraged governments to take action against the girls.<sup>178</sup> Politicians in the UK, France, and Germany have all run on a platform of eradicating domestic terrorism.<sup>179</sup> Think-tanks also suggest that the European public strongly supports robust political action against terrorists.<sup>180</sup> It is unlikely that many of these prominent European states would be willing to forego the political opportunity that

174. *Id.* Preamble.

175. *Prosecutor v. Gaddafi*, ICC-01/11-01/11-344-Red, Pre-Trial Chamber, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶ 138 (May 31, 2013) (finding that the Court had jurisdiction because "Libya is found to be unable genuinely to carry out the investigation or prosecution against Mr. Gaddafi.").

176. See *supra* Sections II and III.

177. See *supra* Section III.

178. See, e.g., Cavendish, *supra* note 132; COURRIER INTERNATIONAL, *supra* note 132.

179. See, e.g., Raffaello Pantucci, *Tougher Sentencing Won't Stop Terrorism*, FOREIGN POLICY (Feb. 10, 2020), <https://foreignpolicy.com/2020/02/10/uk-streatham-london-bridge-whitemoor-tougher-sentencing-wont-stop-terrorism/> [<https://perma.cc/E86W-SL25>]; François-Xavier Bourmaud, *Macron Prend l'Antiterrorisme en Main*, LE FIGARO (May 24, 2017), <https://www.lefigaro.fr/actualite-france/2017/05/24/01016-20170524ARTFIG00314-macron-prend-l-antiterrorisme-en-main.php> [<https://perma.cc/DMJ5-MHDK>].

180. See Susi Dennison, Ulrike Franke, & Pawel Zerka, *The Nightmare of the Dark: The Security Fears That Keep Europeans Awake at Night*, EU COUNCIL ON FOREIGN RELATIONS [ECFR] (July 23, 2018), [https://ecfr.eu/special/the\\_nightmare\\_of\\_the\\_dark\\_the\\_security\\_fears\\_that\\_keep\\_europeans\\_aware\\_at\\_n/](https://ecfr.eu/special/the_nightmare_of_the_dark_the_security_fears_that_keep_europeans_aware_at_n/) [<https://perma.cc/V9QF-YQ3C>].

domestic prosecution of terrorists presents in favor of a faceless, distant international court.

To charge recruiters with the use of the girls as child soldiers, the Office of the Prosecutor would have to rely on active personality jurisdiction. Since recruiters used the girls only once they actively participated in hostilities, which happened after the girls arrived in Syria or Iraq, the European States Parties have no territorial claim. If the recruiter is a national of a State Party, however, the ICC can assert jurisdiction. Unfortunately, very little publicly available information about recruiters exists other than those featured prominently in propaganda videos.<sup>181</sup> For example, the Isis militant who beheaded James Foley in one of the organization's early propaganda videos was British,<sup>182</sup> but little is publicly known about his involvement in other recruitment efforts. Should the girls' recruiters be nationals of States Parties, those States Parties should refer the recruitment to the ICC's Office of the Prosecutor for investigation. Again, though, such a referral may not be forthcoming for the political concerns about public opinion identified above.

Regarding Security Council referral, Russia and China vetoed Security Council efforts to refer situations arising during the Syrian conflict to the ICC.<sup>183</sup> For this reason, the international community should not look to the creation of a Security Council-created ad hoc court or hybrid court to address matters arising from the war in Syria. If the international community does wish to rely on international courts to respond to the recruitment of Isis brides, the European States Parties on whose territory girls were enlisted, or whose nationals would be accused of recruitment, would have to refer the situation to The Hague.

## B. Domestic Courts

Domestic courts can also adjudicate issues of international law. Prosecuting recruiters may be more efficient and more politically palatable in domestic courts.

Domestic courts can prosecute international crimes using universal jurisdiction where domestic legislation permits.<sup>184</sup> International bodies have called on states to use universal jurisdiction to reduce impunity for international crimes. The U.N. Fact Finding Mission on the Gaza Conflict and the former U.N. Special Rapporteur on Torture have both advocated for states to expand their jurisdiction to include universal jurisdiction, and

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181. See *supra* Section I.

182. Dominic Casciani, *Profile of Mohammed Emwazi aka Jihadi John*, BBC NEWS (Nov 13, 2015), <https://www.bbc.com/news/uk-31641569> [<https://perma.cc/73CJ-53K2>].

183. *Russia, China Block Security Council Referral of Syria to the International Criminal Court*, UN NEWS (May 22, 2014), <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court> [<https://perma.cc/2P27-8DJQ>].

184. See Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW. ENG. L. REV. 241, 243 (2001).

to use such jurisdiction to bring an end to impunity.<sup>185</sup> States' increased use of universal jurisdiction also increases the effectiveness of international criminal law by prominently connecting domestic communities to issues of international law.

European states have adopted two forms of universal jurisdiction, depending on the state's incorporation of domestic legislation for universal jurisdiction. "Pure" universal jurisdiction is exceptionally powerful; the concept refers to jurisdiction solely based on the universal concern of the crime at issue.<sup>186</sup> That is to say, states that have adopted pure universal jurisdiction, such as Germany and Sweden, require no specific link between the crime and the state to prosecute international crimes.<sup>187</sup> They can investigate crimes even if the conduct did not happen on the nation state's territory and if the suspect is not a national of their country. This concept is best explained by the premise that all states have an interest in matters of universal concern, such as war crimes, no matter where they occurred. Other countries, such as France and Belgium, have narrower universal jurisdiction laws.<sup>188</sup> The 2010 amendment to France's Criminal Procedure Code, for example, extended French courts' jurisdiction to include war crimes committed anywhere in the world but restricted that jurisdiction to accused persons who regularly reside in France.<sup>189</sup> French courts must also ascertain that no other national or international court has opened an investigation into the accused person before asserting universal jurisdiction.<sup>190</sup>

European states have already used both forms of universal jurisdiction to pursue prosecutions in relation to the Syrian conflict. In June 2018, the German Federal Court of Justice issued an arrest warrant for the head of the Syrian Air Force Intelligence for his alleged involvement in crimes against humanity and war crimes.<sup>191</sup> In November 2018, a French judge issued arrest warrants for three officials within the Syrian regime for

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185. See Rep. of the H.R.C., *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, ¶ 1975(a), U.N. Doc. A/HRC/12/48 (Sept. 25, 2009); Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention*, ¶¶ 134, 152-155, U.N. Doc. A/HRC//13/39/Add.5 (Feb. 5, 2010).

186. Sienho Yee, *Universal Jurisdiction: Concept, Logic, and Reality*, 10 CHINESE J. INT'L L. 503, 505-06 (2011).

187. Germany's 2002 Code of Crimes Against International Law incorporated the Rome Statute and provided German courts with pure universal jurisdiction. See HUM. RTS. WATCH, *THE LEGAL FRAMEWORK FOR UNIVERSAL JURISDICTION IN GERMANY* 1-2 (2014).

188. *Id.*

189. HUM. RTS. WATCH, *THE LEGAL FRAMEWORK FOR UNIVERSAL JURISDICTION IN FRANCE* 2-3 (2014).

190. *Id.* at 3.

191. *German Authorities Issue Arrest Warrant Against Jamil Hassan*, ECCHR, <https://www.ecchr.eu/en/case/german-authorities-issue-arrest-warrant-against-jamil-hassan-head-of-the-syrian-air-force-intelligence/> (last visited Nov. 8, 2021) [<https://perma.cc/8W57-W8YK>].

alleged crimes against humanity and war crimes.<sup>192</sup> Austria, Sweden, and Spain have also exercised universal jurisdiction to prosecute war crimes committed in Syria.<sup>193</sup> Evidently, some of the European states whose citizens were recruited as Isis brides are willing to use universal jurisdiction to prosecute individuals for crimes committed during the Syrian conflict. A shift of focus in the international community to consider the recruitment of Isis brides as child soldier recruitment could encourage the European states at issue to open investigations into this war crime, too.

States using universal jurisdiction to prosecute international crimes may face problems lawfully securing custody of perpetrators if the perpetrator does not reside in the forum state. Though some countries, such as the Netherlands, have responded to extradition issues by proceeding with in absentia trials,<sup>194</sup> trials in the absence of the perpetrator risk undermining the accused's right to a fair trial, as well as undermining the legitimacy of the justice process itself. Where extradition issues arise, states should ideally be able to fall back on mutual support and the common goal of impunity for international crimes. Germany, for example, recently asked Lebanon for help in extraditing the head of the Syrian Air Force Intelligence so that he could face trial in Germany.<sup>195</sup>

Domestic courts provide an effective response to international crimes. While the ICC has remained inactive on questions surrounding the Syrian conflict, domestic courts in Europe have completed trials and initiated investigations. Moreover, European states have the political will to pursue prosecutions for war crimes committed against their nationals in Syria. For domestic courts to effectively contribute to the prevention of child soldiering, states must also commit to increased international cooperation in holding perpetrators accountable and ending impunity for war crimes.

## VI. Contributions from International Human Rights Law

This section will address the role of international human rights law in the recruitment of Isis brides. Whereas international criminal law contributes to the protection of vulnerable girls by ensuring that the focus of crim-

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192. *French Judges Issue International Arrest Warrants Against Three High-Level Syrian Regime Officials*, INT'L FED'N FOR HUM. RTS. (Nov. 5, 2018), <https://www.fidh.org/en/issues/litigation/breaking-french-judges-issue-international-arrest-warrants-against> [<https://perma.cc/Y3C2-7JGY>].

193. *Syrian Civil/Criminal Cases and Investigations of War Crimes (Compiled March 2018)*, CTR. JUST. & ACCOUNTABILITY (2018), <https://cja.org/wp-content/uploads/2018/06/Syria-Cases-Updated-March-2018.pdf> [<https://perma.cc/PT7P-GUM3>]. This document lists all of the national prosecutions of war crimes relating to the Syrian regime.

194. Van Ginkel & Minks, *supra* note 28, at 62. As of 2018, authorities in the Netherlands began to open investigations and start prosecutions while foreign fighters were still abroad; they no longer waited for fighters to return home. Van Ginkel and Minks note that "the aim of prosecuting terrorists in absentia is to ensure they can be jailed as soon as they return to the Netherlands." *Id.*

195. *Deutschland fordert Auslieferung von Assads Geheimdienst-Boss*, DER SPIEGEL, (Feb. 17, 2019), <https://www.spiegel.de/politik/ausland/syrien-bundesregierung-fordert-auslieferung-von-maechtigem-geheimdienst-boss-a-1253662.html> [<https://perma.cc/44UF-NMA4>].

inal responsibility is on the recruiter, international human rights law protects the girls as victims. The contribution that human rights law adds to the understanding of Isis brides merits an article in its own right; any discussion on this topic would be incomplete without recognizing the girls as victims of egregious human rights violations.

Human rights law provides remedies to victims of abuses, responding to an area that international criminal law fails to address. Although some scholars view child soldiers solely as perpetrators of heinous crimes,<sup>196</sup> they commonly suffer immense brutality after recruitment. Susan McKay describes how girl soldiers in a number of different wars across the African continent regularly experienced forced sexual relations, exposure to extreme violence, deprivation of adequate food, shelter, healthcare and education, and lack of access to reproductive care during their forced pregnancies.<sup>197</sup> Gus Waschefort adds that girl soldiers are routinely recruited for sexual exploitation.<sup>198</sup>

The girls recruited to join Isis experienced this pattern of brutality. Isis militants subjected the girls to extreme violence, repeatedly forced them to bear children while they were still children themselves, and forced them to live in dangerous conditions. When Linda Wenzel was captured by Iraqi forces, she was living in squalor.<sup>199</sup> Shamima Begum lost two of her children to disease while she was living in Isis territories.<sup>200</sup> Additionally, widowed women, which many of the girls became, lived in “women’s houses” under the Isis regime, which were “cramped, dirty and crawling with vermin, and often there [was] not enough to eat. Residents [were] only to leave the house once a week.”<sup>201</sup>

International human rights instruments protect the girls’ rights to be free from child marriage, from gender-based violence, and from torture and cruel, inhuman and degrading treatment, among other rights.<sup>202</sup> For

196. Rachel Brett, for example, laments that girl soldiers are “named and treated as passive objects” when in fact, according to her, many receive a measure of fulfillment from their involvement in armed conflict and should not be considered victims. See Rachel Brett, *Girl Soldiers: Denial of Rights and Responsibilities*, 23 REFUGEE SURVEY QUART. 30, 31-34 (2004).

197. Susan McKay, *Reconstructing Fragile Lives: Girls’ Social Reintegration in Northern Uganda and Sierra Leone*, 12 GENDER & DEV. 19, 21-23 (2004).

198. WASCHEFORT, *supra* note 53, at 16.

199. See Rutvi Ajmera, *Prosecuting the Women of Isis*, MANTLE (last visited May 11, 2020), <https://www.themantle.com/international-affairs/prosecuting-women-isis> [<https://perma.cc/R928-BT4C>].

200. See Loyd, *supra* note 22.

201. GEN. INTEL. & SEC. SERV., *supra* note 26, at 10.

202. Although international humanitarian law narrows the application of international human rights law, these rights remain enforceable in conflict situations. Not only is the prohibition of torture and cruel, inhuman, and degrading treatment a non-derogable right under Article 4 of the International Covenant on Civil and Political Rights (ICCPR), but the ICCPR makes clear that states must derogate from their human rights obligations only “to the extent strictly required by the exigencies of the situation.” G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 4 (Mar. 23, 1976). See U.N. Gen. Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11(Aug. 31, 2001).

example, the Convention on the Rights of the Child (CRC) classifies child marriage as an impermissibly harmful practice and protects a woman's right to freely choose her spouse.<sup>203</sup> Although a deeper analysis of the lives of Isis brides than this Note allows is necessary to fully analyze the human rights violations at play, it is clear that the girls suffered under the Isis regime. The girls' suffering likely rises to the level of human rights violations under an array of instruments, including the CRC, the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Violence Against Women (CEDAW).

Though human rights law provides redress for the girls as victims, it is inherently limited. Victims of human rights abuses can only bring complaints against a state. Where the direct perpetrator of abuse is a private party, the victim will only see reparations from a human rights tribunal when the private violations in question are attributable to the state. If a former Isis bride were to seek redress, she would need to demonstrate that a state did not discharge its due diligence obligations to protect her.<sup>204</sup>

Despite its limitations, international human rights law plays a vital role in protecting girls who joined Isis. Unlike international criminal law, human rights law addresses the phenomenon of child soldiering by focusing on the child victim. Like international criminal law, human rights law has evolved to prioritize child protection. These areas of law must grow together to tackle the issues raised by the phenomenon of Isis brides.

## Conclusion

Linda Wenzel, who was recruited aged fourteen, narrowly escaped execution and is currently serving a prison sentence in Iraq. Shamima Begum, who was recruited aged fifteen, is currently stateless and is struggling to return to the UK. Meanwhile, no state has begun an investigation into the recruitment of Isis brides.

Child soldier recruitment is an international crime. This Note has shown that the recruitment of Isis brides is child soldier recruitment and

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203. See Comm. on the Rights of the Child, Gen. Comment No. 13: The Right of the Child to Freedom from All Forms of Violence, U.N. Doc. CRC/C/GC/13, ¶¶ 16, 29, 72 (Apr. 18, 2011).

204. Numerous human rights bodies, from the European Court of Human Rights to the UN CEDAW Committee, have found that states have an obligation to protect girls from human rights abuses, such as gender-based violence, from private actors. In order to prove a violation, the complainant must show that the state knew of the violation and did not take adequate preventative or investigative action when the state was made aware of the violation. This is broadly known as a state's "due diligence" obligation. See, e.g., *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/fre?i=003-2759276-3020932> [<https://perma.cc/2ZVA-T5YE>]; Comm. on the Elimination of Discrimination Against Women [CEDAW], General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, U.N. Doc. CEDAW/C/GC/35 (July 27, 2017); Yakin Ertürk (Special Rapporteur on Violence Against Women, its Causes and Consequences), *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006), <https://www.un.org/unispal/document/auto-insert-184389/> [<https://perma.cc/LM4V-JRL4>].

thus should be considered an international crime. The girls' situation and the recruiters' actions fall within the existing framework for child soldier enlistment and use. The international community must reframe the discussion around the culpability of Isis brides. If the recruiters are viewed as the ultimate wrongdoers, states can concentrate their efforts on prosecuting those most responsible for the harms inflicted by Isis. The need for reframing is increasingly urgent now that many states are engaging in litigation against Isis fighters.

The inclusion of Isis brides in the existing framework for child soldier recruitment requires no change in the law. Rather, it necessitates the adaptation of prosecutors and courts to the realities of the conflict in Syria. This would not be the first time that international law systems develop in response to the global reach of an armed conflict. International criminal law as we know it today was born at the Nuremberg trials. There, Justice Jackson stated that "international law must develop to meet the needs of the times just as the common law has grown, not by enunciating new principles but by adapting old ones."<sup>205</sup> Justice Jackson's words ring as true now as they did on the day he spoke them.

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205. ROBERT JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 37 (1945).