

Juvenile justice, counter-terrorism and children

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Since 1979, the United Nations, the International Red Cross and Red Crescent Movement and non-governmental organizations (NGOs) have successfully documented and raised the level of international concern about the recruitment and use of children¹ in armed conflict.² The entry into force of the Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict³ and of other international and regional standards, such as the International Labour Organization's Worst Forms of Child Labour Convention (No. 182), the African Charter on the Rights and Welfare of the Child and the Rome Statute for an International Criminal Court, raise hopes that substantial changes on the ground will follow. However, some aspects of the problem of child participation in armed conflict, internal strife or situations of militarized violence remain little explored and even less well understood.

In the past few years the subject of juvenile justice and child soldiers has received greater attention. In particular, the move to establish a Special Court for Sierra Leone led to considerable discussion about how to treat the many children who had been active participants in that conflict and had killed and committed other atrocities in the course of it.⁴ The debate focussed on two issues:

- should juveniles,⁵ between the ages of 15 and 18, be tried in the Special Court; and
- how should the experience of children be brought in to the Truth and Reconciliation Commission.

The events of 11 September 2001 and their consequences have resulted near worldwide attention on and support for counter-terrorism mechanisms. The current focus on 'the war against terrorism', and the demands for action against terrorism by the United Nations Security Council, have encouraged this trend. Armed opposition groups often include children or are claimed to do so. Are the Security Council's Counter-Terrorism Committee, national governments and concerned organizations considering the legitimacy and impact of the counter-terrorism legislation and actions reported to it on such children?

The situation in Sierra Leone highlighted the need for more serious consideration of how child participants in armed conflict, internal violence and other militarized situations are treated by the justice system. The Committee on the Rights of the Child has taken a first step towards increasing our understanding of this issue. In its guidelines for states parties' initial reports on the implementation of the Optional Protocol on involvement of children in armed conflict, the Committee requests information on 'the criminal liability of children for crimes they may have committed during their stay with armed forces or groups and the judicial procedure applicable, as well as safeguards to ensure that the rights of the child are respected.'⁶

When thinking about juvenile justice issues, we need to examine the treatment of children and juveniles in four fundamentally different contexts:

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- children legally recruited into government armed forces;
- child participants in armed internal or international armed conflicts;
- children who surrender, are demobilized or captured during an armed conflict; and
- children caught up in what is (or may be designated by those who oppose them) as 'terrorism'.

CHILDREN IN GOVERNMENT ARMED FORCES

Despite efforts to prohibit *all* military recruitment of children, thousands of under-18s continue to be recruited legally into government armed forces. These recruits/young soldiers are subject to a

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military legal system, punishment and discipline whose compatibility with the international standards and norms on juvenile justice should be examined. This situation is relatively straightforward. The problem is in essence a conceptual one: the need to recognize that the age of these young soldiers remains a relevant consideration despite their membership in the armed forces. Issues include the nature of trial procedures, the safeguards applicable because they are juveniles, the nature of punishment, including in some instances (in particular in wartime) the possible application of the death penalty. Stark examples of this have been the death sentences imposed by the Court of Military Order on 16- and 17-year-old soldiers in the government forces of the Democratic Republic of the Congo.⁷ Less clear is whether the military justice systems in other countries, such as the United Kingdom, which continues to recruit thousands of under-18s each year, provide adequate safeguards for the protection of juveniles. In 2000, the Committee on the Rights of the Child recommended that:

States parties review all provisions of criminal legislation, including on criminal procedure, dealing with children under 18 (including any special legislation applying to armed forces) so as to ensure that it reflects appropriately the provisions of the Convention on the Right of the Child (arts. 37 and 40) ... [and] consider incorporating into all relevant domestic laws and regulations ... the provisions of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules", adopted by General Assembly resolution 40/33 of 29 November 1985), of the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines, adopted by General Assembly resolution 45/112 of 14 December 1990), of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (adopted by General Assembly resolution 45/113 of 14 December 1990), and of the Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines, annexed to ECOSOC resolution 1997/30 of 21 July 1997).⁸

In some countries children are educated in military schools or academies, in which they are also under military jurisdiction. Some of the schools are from the age of 15 (as in Japan); others may be for even younger children, but this is a subject about which little is known. The compatibility of these regimes to the juvenile justice standards and norms should be reviewed.⁹

It is important to continue to bear in mind the situation of children and juveniles in government armed forces—both those recruited lawfully and those incorporated illegally under domestic or international law—when considering the situation of children and juveniles in internal or international armed conflicts and post-conflict situations.

CHILD PARTICIPANTS IN INTERNAL OR INTERNATIONAL CONFLICTS

The fundamental question here is whether child soldiers and child participants in an armed conflict should be tried for war crimes and other acts. This is the situation facing Sierra Leone. If they are to be tried, what form of trial and what form of punishment should be applied to them? If trials are not considered appropriate, for whatever reason, what accountability mechanisms or means should be used to enable children (and their families and communities) to come to terms with, and take responsibility for, what they have done?

It may be important to distinguish between the different ways in which children have participated, for example in government armed forces, in armed opposition groups, in paramilitaries, militias or other groups. These distinctions may not be relevant, but depending on the nature of the conflict and the way it ends, they could be important. The situation is likely to be very different in relation to an international armed conflict than an internal one. However, it remains essential to look at general rules or principles to be clear whether the same rules should apply or whether distinctions in the type of conflict are integral to the rules. For example, some of the debate around the question of juveniles and the Sierra Leone Special Court seemed to suggest that no soldier who was under 18 at the time of the commission of the offence should ever be tried. In a situation where national reconciliation after a civil war is seen as the primary objective, this might be a defensible position (although the issue of impunity should also be considered). However, if a British teenage soldier commits a war crime in another country as part of an international armed conflict, do the same rules apply as at the end of an internal armed conflict such as Sierra Leone?

In addition to the questions of principle, there are the practical problems of how functional the judicial system, and in particular the juvenile justice system, is in the post-conflict situation. Such a system may not have existed prior to the conflict and considerable investment may be required to build or rebuild a functioning, effective juvenile justice system compatible with the relevant international standards. The Sierra Leone situation helped to draw international attention to this problem. The United Nations Commission on Human Rights resolution 2002/47, on 'Human rights in the administration of justice, in particular juvenile justice', devotes a number of paragraphs to encouragement and support of rebuilding and strengthening the administration of justice (including juvenile justice), with special attention to post-conflict situations.

CHILDREN WHO SURRENDER, ARE DEMOBILIZED OR CAPTURED DURING AN ARMED CONFLICT OR UNSETTLED SITUATION

The treatment of children who surrender, are demobilized or captured during an armed conflict is an extremely delicate and problematic issue. The distinction as to whether the child is in government armed forces, in a government-aligned group or in an armed opposition group may be crucial in terms of the legal situation (as well as the *de facto* one). The idea of trying to demobilize soldiers during an armed conflict is unique to the issue of child soldiers as demobilization normally occurs once a conflict has ended. However, the international or domestic reaction to the use of children sometimes reaches a point at which governments or armed groups feel obliged to respond. While recognizing the urgent imperative of removing children from fighting forces, the demobilization of child soldiers while a conflict is ongoing can have unintended consequences. Once demobilized, a former child soldier can easily be re-recruited or forced to participate in the continuing violence.

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In an international armed conflict, children in government armed forces who are captured or surrender are entitled to be treated as prisoners of war under the provisions of international humanitarian law, even if they are below the 15 year minimum lawful age for recruitment and participation in hostilities.

The problem is much more complex in non-international armed conflicts. In practice, too often children are simply killed by their captors—whether government or opposition forces. Summary executions are a problem in many regions and children as young as 8 have been amongst the victims.¹⁰

If not killed, children may be detained, tortured or ill treated, interrogated, held in military barracks, and/or incorporated into the fighting force that captured them.¹¹ The latter is a particular hazard for child, as opposed to adult, soldiers. This reflects the vulnerability of children to exploitation in this fashion through: threats, pressure, persuasion or role-modelling; their normalization into violence and their self-identity as soldiers; and in many instances their participation in the conflict as a survival strategy rather than for ideological or other reasons.¹²

The issue of juvenile justice as such (that is, in law) only arises when the children are in the hands of the government. Unfortunately, the abuses listed above are not exclusive to non-governmental armed groups. In Colombia, specific concerns have been raised about the fact that ‘comprehensive care for children who have previously taken part in hostilities is still unavailable. Minors who surrender and those who are captured are treated differently: while those who surrender may benefit under State welfare programmes, those who are captured face criminal penalties.’¹³

Furthermore, detentions by the military are not exclusive to national forces. In addition to the abuses alleged to have been perpetrated by ECOMOG forces in Sierra Leone, KFOR ‘military holds’ (i.e. arrests and detentions) in Kosovo have included juveniles perceived as a ‘threat to KFOR’, with no guaranteed right of access to defence counsel.¹⁴ When KFOR began its operation, neither the civilian police system nor the courts functioned. The result was that arrested suspects were detained and held, and then ‘released when the security forces felt inclined to do so’.¹⁵ In fact, their mandate was unclear as to whether they had the power to detain or to try persons accused of crimes.

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If international forces are to have the power to detain, it should be clearly spelled out on what basis, for how long, and so on, and should be subject to safeguards. The normal safeguard is some form of judicial involvement. If this is not available within the country, then it needs to be imported with the international force itself. Specific questions in relation to juveniles also need to be considered: in particular, the age of criminal responsibility to be applied (since there is no universal standard age) and the additional safeguards and processes to be used. When available, the domestic law would be an obvious source for these, if it is acceptable to the parties on the ground and is compatible with international standards.

CHILDREN AND TERRORISM

Until recently, the international debate on terrorism had tended to focus on distinguishing between ‘freedom fighters’, ‘legitimate resisters’ and ‘terrorists’. However, the reactions of states and of the United Nations Security Council to the events of 11 September 2001 have given a new urgency to this issue. In addition to the political and semantic debate, there has been much legal and human rights concern expressed about the use of force, unlawful killings, military tribunals, indefinite detention without trial, restrictions on those seeking asylum, discrimination against those of Arab, Asian or Islamic

appearance and so on. While these concerns are not arising for the first time, the 'war on terrorism' has both exacerbated and given apparent legitimacy to these trends.

In the midst of the rush to enact counter-terrorism legislation, little if any consideration has been given to the fact that some of the suspected or alleged 'terrorists' could be children or juveniles under the age of 18. Where some children participate, other children from the same region, ethnic group, or with other similar defining characteristics also tend to come under suspicion.

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The child soldier research done for the United Nations Study on the Impact of Armed Conflict on Children (The Machel Report) of 1996 noted: 'It so happens that in many instances under-age suspects never do reach [the] courts and are often nothing more than the usual daily news headlines on [government] television: "Troops have killed so many terrorists today".'¹⁶

Around the world, children are fighting in many of the armed groups engaged in internal armed conflicts or internal strife.¹⁷ Some governments have long dubbed such opponents as 'terrorists'—sometimes with justification, sometimes not. Governments are notoriously reluctant to accept that they are involved in an internal armed conflict, preferring to declare a state of emergency or to claim that they are engaged in police action against terrorism. The current climate has encouraged governments in this tendency.

The increasing recognition of the involvement of children in armed groups has not yet leapt the conceptual boundary that if governments—with or without international support—designate these groups as 'terrorist', inevitably some children will also become 'terrorist' suspects.

Actions that raise concern or condemnation about the way terrorist suspects are treated in general need to be considered in relation to the particular impact they may have on child suspects. For example, arresting suspects late at night, detaining them for months and at a distance from their families or in circumstances in which family visits are very difficult, interrogation in order to secure confessions, ill-treatment and even torture, and trials under military justice systems have more or different impacts on children because of their age, dependence on family, greater vulnerability to intimidation by adults, the different concept of time, etc.

Children detained as terrorist suspects confront several additional dangers. In many countries, there are no military courts or judges designated especially for children, no officers trained specifically for their interrogation, no probation officers and no social workers to accompany them. When there is not a separate facility for juveniles, they are imprisoned with adults and are vulnerable to assault by other inmates as well as guards. These problems have been highlighted in relation to Palestinian children who are charged with throwing stones at Israeli soldiers. Such children face a maximum penalty of six months' imprisonment for a child between 12 and 14, and twelve months' imprisonment for a child between 14 and 16.¹⁸

A well-documented earlier case is that of Peru. The Report of the United Nations Working Group on Arbitrary Detention on its mission to Peru¹⁹ details the progressive steps taken by the then-government in the judicial field in its efforts to combat the activities of the Shining Path and MRTA. These included lowering the age of criminal responsibility, allowing military courts to try civilians, extending the scope of legislation so that even those *forced* to join or provide assistance to the 'terrorists' could be convicted under the anti-terrorism laws, weakening the presumption of innocence and the rules on evidence, and extending the scope of the crime of treason (for which the death penalty could be applied). The Working Group took note of the fact that juveniles were falling within the anti-terrorism laws and that some of the 'innocent prisoners'—convicted under laws that had subsequently been repealed and yet were still in prison—were juveniles.

More recently, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions found some cases in Turkey of high school students (aged 14, 15, and two 17-year olds) reportedly abducted and killed by JITEM, the intelligence and anti-terror unit of the gendarmerie, or shot by the police in the course of unarmed demonstrations, while distributing a political newsletter, or during incommunicado detention in a police station.²⁰

In March 2002, the Coalition to Stop the Use of Child Soldiers reported that: "The application of justice and security measures to child soldiers and other children in conflict zones has emerged as a critical protection issue. The Coalition's recent workshop in India highlighted the ways children are subjected to national security or "anti-terrorist" legislation and emergency measures, resulting in "disappearances", arbitrary detention, torture and even summary killings."²¹

Conclusion

The issues examined in this article raise two fundamental concerns: that the agreed international standards on how children and juveniles should be treated are too little known and even less implemented; and that where 'exceptional legal regimes'—whether called anti- or counter-terrorist, state or national security or emergency laws—are introduced, the question of whether these should be applicable to children and, if so, how they relate to the international standards, is given little or no attention.

The identification of the complex set of issues relating to juvenile justice, child soldiers and counter-terrorism received a boost at the 2002 United Nations Commission on Human Rights. In addition to the specific references given above,²² the Report of the High Commissioner for Human Rights pointed out that:

Persons under 18 years of age enjoy the full range of rights provided in the Convention on the Rights of the Child. This Convention, which has been ratified by almost every state in the world, does not allow for derogation from rights. As article 38 clearly states, the Convention is applicable in emergency situations. All the rights of the child embodied in the Convention must be protected even in times of emergency. Particularly significant is the recognition that every child has the inherent right to life. This includes the prohibition against imposing death sentences for crimes committed by persons below 18 years of age, which should not be disregarded at any time. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) are also relevant.²³

The Commission resolution 2002/47 on 'Administration of Justice, in particular juvenile justice',²⁴ which was adopted without a vote, contained a number of clear and specific provisions²⁵ relevant to this area, including reiterating that the Secretary-General's in-depth study on the issue of violence against children should consider children who are affected by national security, state security, counter-terrorism and similar laws; and that states should review their national legislation to ensure that any such laws under which children or juveniles could be tried are compatible with the provisions of international law. The resolution also emphasized the necessity of ensuring the effective implementation of relevant international standards relating to juvenile justice; and urged states to ensure that neither capital punishment nor life imprisonment without the possibility of release are imposed for offences committed by persons below 18 years of age.

In relation to international forces, the solution proposed by Françoise Hampson,²⁶ United Nations Sub-Commission on the Promotion and Protection of Human Rights expert, is the development of ‘packages’ or model provisions that could be inserted into United Nations mandates as and when needed. One package could include authority to detain, powers of search and seizure, grounds for detention, minimum age of criminal responsibility, and so on. For example, no ‘administration of justice package’ would be needed in situations with a functioning court system. In others, the package could include a ‘mechanism that is overseen by some form of judicial officer, so that the detention can be authorized or confirmed’. She points out that in Somalia, the Australians used local people applying the Somali Penal Code and Code of Criminal Procedure, but that another approach would be needed if the local law was not acceptable (for example because it is discriminatory and/or incompatible with international standards).

Military trials have been the subject of a study by another expert of the United Nations Sub-Commission, Louis Joinet.²⁷ He concludes that civilians should not be tried by a military tribunal, and recommends that military tribunals not have the competence to judge anyone under the age of 18.

The attention given to these issues at the Commission on Human Rights and its Sub-Commission is welcome. Even better would be the universal implementation of the provisions of these recommendations and the international standards relating to the rights of the child and juvenile justice on which they are based. The first step, however, needs to be recognition that the concept underpinning why under-18s need special protection when they come into conflict with the law does not become invalid merely because they are members of the armed forces or because additional or exceptional legal powers apply. The reasons why children and juveniles are recognized as needing and deserving different treatment remain applicable—so should the requisite standards, even if this challenges long-held assumptions.

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Notes

1. The term ‘children’ is used to cover all persons under the age of 18, in line with the Convention on the Rights of the Child and ILO Convention 182.
2. See, for example, the *United Nations Study on the Impact of Armed Conflict on Children* (The Machel Study), and its five-year review, the reports of the Special Representative of the United Nations Secretary-General on Children and Armed Conflict, studies by UNICEF, the Coalition to Stop the Use of Child Soldiers, Amnesty International, Human Rights Watch, various Save the Children organizations, as well as G. Goodwin-Gill and I. Cohn, 1994, *Child Soldiers*, Oxford, Oxford University Press; R. Brett and M. McCallin, 1996, *Children: The Invisible Soldiers*, Stockholm, Radda Barnen (2nd ed. 1998).
3. 12 February 2002.
4. See, for example, Amnesty International, 2000, *Child Soldiers—Criminals or Victims?*, December; AI-index IOR 50/002/2000, <<http://web.amnesty.org/802568F7005C4453/0/988CA1EDF887FF40802569CA00421760?Open>>.
5. Criminal justice systems tend to make a distinction between the older ‘juveniles’ and younger ‘children’. In the interests of clarity and consistency, this distinction is maintained in this article.
6. Committee on the Rights of the Child, *Guidelines regarding initial reports to be submitted by States Parties under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, CRC/OP/AC/1 of 14 November 2001, article 6, para. 3(f).
7. See, for example, the Commission on Human Rights, *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2001/45*, E/CN.4/2002/74 of 9 January 2002, para. 108.
8. Committee on the Rights of the Child, *Report on the twenty-fifth session*, CRC/C/100 of 14 November 2000, p. 131.

9. There may also be questions about the nature of the education received. The whole subject of children in military schools is one ripe for research.
10. An 8-year-old boy caught in possession of a pistol was allegedly killed by ECOMOG soldiers in Sierra Leone. Commission on Human Rights, *Report of the UN High Commissioner for Human Rights pursuant to Commission on Human Rights resolution 1999/1: Situation of human rights in Sierra Leone*, E/CN.4/2000/31 of 22 December 1999.
11. See, for example, Human Rights Watch, 2001, *Rwanda: Observing the Rules of War?*, vol. 13, no. 8(A), December, at <<http://www.hwr.org/reports/2001/rwanda2/>>.
12. See Brett and McCallin, *op. cit.*
13. Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the human rights situation in Colombia*, E/CN.4/2001/15 of 8 February 2001, para. 79. The response of the Government of Colombia, dated 21 March 2001, is contained in document E/CN.4/2001/139.
14. Commission on Human Rights, *Situation of human rights in the former Yugoslavia: Report of Mr. Jiri Dienstbier, Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia*, E/CN.4/2000/39 of 28 December 1999.
15. See the Commission on Human Rights, Working Paper of the Sub-Commission on the Promotion and Protection of Human Rights, *Administration of Justice: The accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations*, E/CN.4/Sub.2/2001/WP.1 of 13 August 2001.
16. Quotation from Brett and McCallin, *op. cit.*, citing one of the case studies for the Child Soldier Research Project.
17. See the Coalition to Stop the Use of Child Soldiers, *Global Report on Child Soldiers 2001*, at <http://www.child-soldiers.org/report2001/global_report_contents.html>.
18. Commission on Human Rights, *Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, E/CN.4/2002/32 of 6 March 2002, section XII. The response of the Government of Israel, dated 28 March 2002, is contained in document E/CN.4/2002/159.
19. Commission on Human Rights, *Civil and Political Rights, including questions of: torture and detention, Report of the Working Group on Arbitrary Detention, Addendum, Report of the mission to Peru*, E/CN.4/1999/63/Add.2 of 11 January 1999.
20. Commission on Human Rights, *Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2001/45, Addendum, Mission to Turkey*, E/CN.4/2002/74/Add.1 of 18 December 2001. The response of the Government of Turkey, dated 16 April 2002, is contained in document E/CN.4/2002/177.
21. Coalition to Stop the Use of Child Soldiers, 2002, Editorial, *Child soldiers newsletter*, issue 3 (March), <<http://library.amnesty.it/cs/childsoldiers.nsf/c01485f116ed11e880256b20004bbd8a/9ca132295e19c57d80256b7e002f240e?OpenDocument>>.
22. Commission on Human Rights, *Written statement submitted by Friends World Committee for Consultation (Quakers)*, E/CN.4/2002/NGO/18 of 24 January 2002 also focused on these juvenile justice issues.
23. Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, E/CN.4/2002/18 of 27 February 2002.
24. E/CN.4/2002/L.11/Add.4, p. 67.
25. These built upon the Committee on the Rights of the Child's recommendation 'that States parties review emergency and/or national security legislation to ensure that it provides appropriate safeguards to protect the rights of children and prevent violence against them, and that it is not used inappropriately to target children (for example, as threats to public order or in response to children living or working on the streets)'. See Committee on the Rights of the Child, *Report on the twenty-fifth session*, CRC/C/100 of 14 November 2000, para. 10, p. 131.
26. Commission on Human Rights, *Working Paper of the Sub-Commission on the Promotion and Protection of Human Rights, op. cit.*
27. Commission on Human Rights, *Issue of the administration of justice through military tribunals: report submitted by Mr. Louis Joinet pursuant to Sub-Commission decision 2001/103*, E/CN.4/Sub.2/2002/4 of 9 July 2002.