Captured child combatants

by María Teresa Dutli

The forms of violence which are all too frequently encountered in armed conflicts today have given rise to an increase in the numbers of civilian victims, and particularly of children, who, an account of their special vulnerability, are the most seriously affected. The active participation of children in hostilities, too, is a disturbing factor – serious enough to justify the increasing attention the subject is receiving within the international community.

Until the Second World War the active participants were primarily regular troops. Children certainly did play a role in resistance movements in Europe and were arrested, deported and sent to concentration camps. But particulary since the emergence of new types of conflicts – in which there are regular troops on one side and guerrillas on the other – we have been seeing all too frequently boys who are little more than children in combat theatres, brandishing weapons and ready to use them indiscriminately. Children participating in hostilities are a deadly threat, not only to themselves, but also to the persons whom their impassioned and immature nature may lead them to shoot at.

For several decades the ICRC has been concerned about the particularly tragic plight of children during armed conflicts. As early as 1924 it made a major contribution to the Geneva Declaration of the Rights of the Child.

In 1939, in co-operation with the Save the Children Fund International Union, the ICRC prepared a draft convention for the protection of children in cases of armed conflict.[1] Unfortunately the outbreak of war prevented its adoption. Notwithstanding this setback, the ICRC took a number of initiatives during the Second World War to improve the lot of children, directed in particular to the reuniting of families.

[1] André Durand: *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, Vol. 2, Henry Dunant Institute, International Committee of the Red Cross, Geneva, 1984, pp. 162-166.

Immediately following the end of the war the ICRC resumed its efforts to secure the adoption of special provisions concerning the protection of children. These provisions were included in the Fourth Geneva Convention of 1949, which not only affords general protection to children as civilians not taking part in hostilities but also, in no less than seventeen of its provisions, provides special protection for them.

The 1977 Protocols additional to the Geneva Conventions of 1949 marked a substantial step forward in the provision of protection for children in times of armed conflict. Not only did they afford children greater protection against the effects of hostitilies, but they also regulated for the first time the actual participation of children in hostilities – a development which has become an alarming reality in conflicts today.[2]

The protection granted to children in international law was reaffirmed in the Convention on the Rights of the Child, adopted by the United Nations on 20 November 1989. This Convention, which is the outcome of a long process of negotiation initiated by the Government of Poland in 1978, protects the dignity, the equality and the fundamental rights of children. It contains fifty-four articles, covering all the human rights – civil, political, economic, social and cultural – of children. It also contains a provision (Article 38) specifically relating to children in armed conflicts, which in its essentials refers back to the rules of international humanitarian law protecting children in such situations.[3]

I. AGE BELOW WHICH CHILDREN MAY NOT PARTICIPATE IN HOSTILITIES

There is no precise definition of a child in international humanitarian law.[4] However, the latter does in a number of places give the

---

[2] On the subject of the protection of children during armed conflicts see Denise Plattner: "The protection of children in international humanitarian law", in *International Review of the Red Cross,* No. 240, May-June 1984, pp. 140-152; and Sandra Singer: "The protection of children during armed conflict situations", in *International Review of the Red Cross,* No. 252, May-June 1986, pp. 133-168.

[3] For further details see Françoise Krill: "United Nations Convention on the rights of the child: a controversial article on children in armed conflicts", in *Dissemination,* No. 12, August 1989, pp. 11-12, and, by the same author: "The United Nations Convention on the Rights of the Child and his protection in armed conflicts", in *Mennesker og Rettigheter* (Oslo), Vol. 4, No. 3, 1986.

[4] The United Nations Convention, in Article 1, defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".

age of fifteen years as that below which children should be afforded special protection. It is generally accepted that from the age of 15 the development of a child's faculties is such that there is no longer the same need for special, systematic measures.[5] However, the age of fifteen years is considered to be a minimum beyond which, according to the nature of the actions or interests to be protected, some provisions nonetheless require or recommend that a higher age be taken into consideration.

The age below which the participation of children in hostilities is prohibited is as follows:

1. In situations of international armed conflict

Article 77, paragraph 2, of Additional Protocol I sets the minimum age at fifteen, at the same time encouraging States, where persons between ages fifteen and eighteen are recruited, to begin with the oldest.

The paragraph reads as follows:

"The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest".

The wording *"The Parties to the conflict shall take all feasible measures"* is less mandatory than that proposed by the ICRC, which had suggested that the Parties should *"take all necessary measures"*. The governments which negotiated this Article adopted the wording finally used to avoid entering into absolute obligations with regard to the voluntary participation of children in hostilities.

Conversely, Article 77, paragraph 2, of Protocol I contains an extremely important obligation, requiring States party not to recruit children under fifteen years of age into their armed forces. The English text – *"they shall refrain from recruiting them into their*

---

[5] See also Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (editors): *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, ICRC, 1987) (hereinafter referred to as *Commentary on the Additional Protocols*), p. 899, paragraph 3179.

armed forces..." is more explicit than the French (which says "... in particular by refraining..."). The word "recruitment" covers both compulsory and voluntary enrolment, which means that the Parties must also refrain from enrolling children under fifteen years of age who volunteer to join the armed forces.

The wording of this paragraph has the additional advantage of encouraging the raising of the minimum age at which children may be recruited. During the negotiation of this provision one delegation had proposed that the limit on non-recruitment should be raised from fifteen to eighteen years. The majority of the delegates were opposed to extending the prohibition of recruitment beyond fifteen years, but in order to take this proposal into account it was provided that in the case of recruitment of persons between fifteen and eighteen, priority should given to the oldest.[6] This compromise is an extremely important one, as it clearly reflects the desire of certain governments to extend the protection to which children are entitled.

It is this recommendation that enables the ICRC to impress upon Parties to a conflict the importance, on humanitarian grounds, of not allowing adolescents under eighteen to participate in hostilities, thus increasing the protection afforded to them. Naturally, the ICRC is also continually reminding belligerents that international humanitarian law prohibits both the recruitment of children under 15 years of age and the acceptance of their voluntary enrolment and calls on States to take all feasible measures to ensure that children do not take a direct part in hostilities.

2. In situations of non-international armed conflict

The age under which children do not have the right to participate in hostilities is laid down in Article 4, paragraph 3(c), of Protocol II, which reads as follows:

"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".

---

[6] *Commentary on the Additional Protocols, op. cit.*, p. 901, paragraph 3188; *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (Geneva, 1974-1977), Berne, Federal Political Department, 1978, Vol. III, p. 301 (CDDH/III/325, 30 April 1976).

This prohibition is an absolute one covering direct or indirect participation in hostilities, i.e. by gathering information, transmitting orders, transporting munitions or foodstuffs or committing acts of sabotage.[7] The obligation imposed on States party here is stricter than that applicable in situations of international armed conflict.

There is no formal recommendation to refrain from recruiting children under eighteen years of age in situations of non-international armed conflict. However, in pursuance of its mandate as a humanitarian institution, the ICRC can in such situations, too, approach Parties which have children fighting for them to draw their attention to the importance of ensuring that those adolescents do not participate in hostilities. It also reminds such Parties that the recruitment of children under fifteen years of age or the acceptance of their voluntary enlistment is prohibited by international humanitarian law and that this absolute prohibition applies both to their direct and to their indirect participation in hostilities.

3. Article 38 of the Convention on the Rights of the Child

Despite the efforts of a number of States to have the age below which children should not participate in hostilities raised from fifteen to eighteen years, Article 38 of the Convention on the Rights of the Child does not constitute an advance, since it merely repeats the wording of Article 77, paragraph 2, of Protocol I.[8] It thus prohibits

---

[7] *Commentary on the Additional Protocols, op. cit.*, pp. 1379-1380, paragraphs 4555-4558. See also F. Krill: "The United Nations Convention on the Rights of the Child and its protection in armed conflicts", *op. cit.*, p. 42.

[8] Article 38 of the Convention on the Rights of the Child reads as follows:
"1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but have not attained the age of eighteen years, the States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict".

It should be mentioned that, during the negotiations on the Convention on the Rights of

the direct participation in hostilities of children under fifteen years of age. It is even weaker than the existing law in that international humanitarian law applicable to non-international armed conflicts, as explained above, prohibits both the direct and the indirect participation of children in hostilities.[9]

However, paragraph 1 of Article 38 contains a reference to the rules of international humanitarian law relevant to the protection of the child. As a result of this clause and of the *lex specialis* character of international humanitarian law, Article 4, paragraph 3(c), of Protocol II will apply in doubtful cases. As was seen earlier, the latter provision offers children greater protection.

II. STATUS AND TREATMENT OF CHILD COMBATANTS CAPTURED IN INTERNATIONAL ARMED CONFLICTS

1. Child combatants who become prisoners of war

A. Status

• *Children between ages fifteen and eighteen.* Notwithstanding the recommendation that priority be given in enrolment to the oldest – an indication that humanitarian law deems their participation in hostilities abnormal – children between ages fifteen and eighteen, enrolled in the armed forces or taking part in a mass uprising of the population (*levée en masse*), do in fact have combatant status[10] and are *ipso facto* entitled to prisoner-of-war status if captured.[11]

• *Children under fifteen years of age* who, notwithstanding the injunctions in Article 77, paragraph 2, of Protocol I, are recruited or are enrolled as volunteers in the armed forces, also have combatant status and will if captured have prisoner-of-war status. Although the

---

the Child, the States invoked the same arguments as regards age and the "feasible" (rather than "necessary") measures to be taken in the case of participation in hostilities as they did during the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law.

[9] See F. Krill, *op. cit., supra,* Note 3.

[10] Under the terms of Article 43 (paragraph 2) of Protocol I, concerning members of the armed forces, and of Article 2 of the Regulations respecting the Laws and Customs of War on Land, Annex to the Hague Convention of 18 October 1907, concerning the spontaneous uprising of the population (*levée en masse*).

[11] They acquire this status under the terms of Article 4A, paragraph 1, of the Third Geneva Convention.

participation of children in hostilities is prohibited, it was nonetheless necessary to ensure that they are protected if captured. There is for that matter no age limit for entitlment to prisoner-of-war status;[12] age may simply be a factor justifying privileged treatment. However, a child combatant under age fifteen who is captured cannot be sentenced for having borne arms. Since the prohibition contained in Article 77, paragraph 2, of Protocol I is addressed to the Parties to the conflict and not to the children, the participation of the latter in hostilities does not constitute a breach of the law by them. Responsibility for such a breach lies with the Party to the conflict which recruited and enrolled the children.

B. Treatment

All child combatants, on account of their age, must be given privileged treatment. Such treatment – to which reference is made in Article 77, paragraph 1, of Protocol I – is specifically provided for in the provisions of international humanitarian law which afford special protection to children.[13]

C. Responsibility

As with other prisoners of war, this special status does not exclude penal proceedings in respect of serious breaches of international humanitarian law committed by children, in particular war crimes or offences against the legislation of the detaining Power. In such circumstances, however, their responsibility should always be evaluated according to their age, and as a general rule educational measures, rather than penalties, will be decided on. Although penal sanctions may be applied against them, no person can be condemned to death if at the time of committing the offence that person was under eighteen years of age; and even if so sentenced, the sentence can in no case be carried out.[14]

During visits to prisoner-of-war camps under the mandate conferred on it by the States party to the humanitarian law treaties (and in particular Article 126 of the Third Geneva Convention), the ICRC monitors compliance with the rules which grant special protec-

---

[12] *Commentary on the Additional Protocols, op. cit.*, p. 902, paragraph 3194.

[13] Article 16 of the Third Convention, Article 49 (paragraph 1) of the Third Convention and Article 77 (paragraphs 4 and 5) of Protocol I. See also D. Plattner, *op. cit.*

[14] Article 68 (paragraph 4) of the Fourth Convention and Article 77 (paragraph 59) of Protocol I.

tion to children. It also insists that their age and resultant limited capacity be taken into account by according them the requisite more favourable treatment. This special protection stems from the provisions of the Fourth Geneva Convention of 1949 (which ought also to be included in the Third Convention); it relates primarily to the physical and psychological conditions of their internment.[15]

2. Child combatants who become civilian internees

Children who participate in hostilities but are not combatants within the meaning of international humanitarian law remain subject to the domestic legislation of the countries of which they are nationals.

If they are captured by the enemy Power and come within the category of persons protected by the Fourth Geneva Convention,[16] such children are "civilian internees" and as such have the right to be reunited with their parents in the same place of internment, to be given physical conditions of internment appropriate to their age and additional food in proportion to their physiological needs, to receive education and be able to have physical exercise, etc.[17]

Any disciplinary punishments must also take account of their age.[18] They may not be punished for having taken a direct part in hostitilies unless, at the time of that participation, their level of discernment was such as to enable them to understand the implications and the consequences of their actions. No sentence of death may be pronounced against them or carried out.

3. Minimum protection

Even if children who have taken part in hostilities are not entitled to any special status, they must in all cases, under Article 45, paragraph 3, of Protocol I, be granted the general protection afforded by Article 75 thereof. The latter provision covers all persons in the power of a Party to a conflict who do not enjoy more favourable treatment

---

[15] Articles 82, 85 (paragraph 2), 89 (paragraph 5), 94 and 119 of the Fourth Convention. If they are in occupied territory, Articles 50, 51, 68 and 76 of the same Convention are also applicable.

[16] Subject to the provisions of Article 5.

[17] Respectively Articles 82, 85 (paragraph 2), 89 (paragraph 5) and 94 of the Fourth Convention.

[18] Fourth Convention, Article 119.

under the Conventions and the Protocol, and lays down a minimum of recognized humanitarian rules for the protection of all persons – including children – affected by an armed conflict.

III. REPATRIATION OR INTERNMENT IN A NEUTRAL COUNTRY

1. Repatriation

The 1949 Geneva Conventions and Additional Protocol I of 1977 do not contain any specific provisions on the subject of the repatriation of children captured during armed conflicts. Consequently they are subject to the general rules concerning repatriation.

A. Child combatants who become prisoners of war

- *Repatriation during hostilities*

There is no express provision concerning the repatriation of child combatants, whether between ages fifteen and eighteen or below age fifteen, while hostilities continue. However, in view of their age, attemps might be made to secure agreements between the parties to the conflict providing for their early repatriation, applying by analogy the rules applicable to seriously wounded and sick persons and to prisoners of war whose intellectual and physical capacities are seriously endangered by continued detention.

Where early repatriation takes place it may be necessary, depending on the child's age and degree of discernment, to obtain his or her consent, since Article 109, paragraph 3, of the Third Geneva Convention stipulates that prisoners may not be repatriated against their will during hostilities.

The limited degree of discernment of children may lead the detaining authorities systematically to circumvent the obligation to take into account the wishes of each person concerned. This would certainly be an injustice in the case of children fifteen and eighteen years old, particularly if under their national legislation they are deemed to be of age. In contrast, the need to obtain the consent is easier to circumvent in the case of children under fifteen years of age, in whose interest it is – except where there is incontrovertible evidence to the contrary – that they be returned to their families.

However, it would be reasonable to grant such favourable treatment only in so far as assurances are given by the Power of Origin that the children concerned will not be sent back to the front. The Detaining Power can also ask the Power of Origin for guarantees that the children will not be sent back into combat. Such a request could be based on Article 117 of the Third Convention, which states that *"no repatriated person may be employed on active military service"*, and is justifiable by the interests of the Detaining Power, since the reenrolment of the children, once repatriated, would constitute a threat to its own security.

When the ICRC seeks to obtain the repatriation of child combatants during hostilities, it stresses the desirability for the children themselves of being repatriated and thus reunited with their families. However, it cannot disregard the security of the Detaining Power, which can legitimately demand guarantees from the Power of Origin; these guarantees are in turn an additional safeguard for the interests of the children themselves.

- *Repatriation at the close of hostilities*

Child combatants who are prisoners of war must, like all other prisoners of war, be repatriated as soon as active hostilities cease[19] except when they form the subject of criminal proceedings.[20] When the ICRC helps with repatriation at the close of hostilities, it makes every effort to ensure that children are given priority on account of their vulnerability. In ascertaining children's wishes with regard to repatriation, consideration must be given to their age at the time of repatriation.

B. Child combatants who become civilian internees

Internment is an exceptional measure and can be justified only by the most imperative of security considerations. Consequently the Fourth Convention stipulates that all interned persons (including children) must be released as soon as the reasons which necessitated their internment cease to exist.

Children must be able to rejoin their families at the latest and "as soon as possible after the close of hostilities".[21] The only exceptions

---

[19] Third Convention, Article 118.

[20] Third Convention, Article 119 (paragraph 5).

[21] Fourth Convention, Article 133.

are children who must serve sentences for having taken part in hostilities (and who may consequently be further detained).

The Fourth Geneva Convention also stipulates that the Parties to the conflict shall endeavour, even while hostilities are continuing, to conclude agreements for the release and repatriation of certain categories of persons, one such category being children.[22] This provision does not create an obligation to reach such agreements; nevertheless, it is an urgent recommendation addressed to belligerent States on account of the particularly vulnerable nature of children. The ICRC can play an important part in proposing agreements of this kind and has done so on many occasions since the Second World War.

2. Internment in a neutral country

There is one possible alternative to the traditional system, as laid down in the Third Geneva Convention, for the detention of prisoners of war, namely their internment in a neutral country.

The internment of prisoners of war in a neutral country is possible only under a tripartite agreement concluded between the Detaining Power, the Power of Origin and the neutral Power. Article 111 of the Third Convention, which provides for the internment of prisoners of war in a neutral country, not only authorizes Powers to opt for this solution, but also encourages them to conclude agreements making it possible.

The Fourth Convention contains no specific provision for such agreements, as regards civilian internees, but does not exclude them either. They might well be concluded where they would be in the interests of the children – provided, of course, that they do not infringe the guarantees afforded to children by humanitarian law.

However, the Fourth Geneva Convention does contain a provision, Article 24, which might be assimilated with Article 111 of the Third Convention. It reads as follows:

"The Parties to the conflict shall facilitate the reception of such children [i.e., children under fifteen years of age who have become orphaned or separated from their families as a result of war] in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for observance of the principles stated in the first paragraph [i.e., the children's

[22] Fourth Convention, Article 132 (paragraph 2).

maintenance, the exercise of their religion, and their education, as far as possible, by persons of a similar cultural tradition]."

However, this rule must be understood as relating solely to the protection of children; it speaks not of internment but of "reception". There is no mention here of the "security of the Detaining Power", a notion directly associated with the combatant concept.

These two provisions are reconciled in Article 78 of Protocol I. The desirability of evacuation at all costs was challenged during the Diplomatic Conference on the Reaffirmation of Development of International Humanitarian Law applicable in Armed Conflicts. Article 78 therefore provides that:

"No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require."

Thus internment in a neutral country may take place only for reasons relating to the safety or the health of the child, and then only with the agreement of all the Parties, including the legal representative of the child (except in the cases of children who have become orphaned or separated from their families because of the conflict).

For this purpose the conclusion of an *ad hoc* agreement between the Parties concerned is essential. Within the context of agreements of this kind the ICRC can serve as a neutral intermediary and must ensure that the interests of the children concerned are safeguarded. In particular, the psycho-social elements necessary for their development must be taken into account by ascertaining that the neutral Power which agrees to receive the children is able to ensure that their maintenance and education are provided, to the greatest possible extent, by persons of a similar cultural tradition.

*
* *

The Geneva Conventions also provide for the hospitalization of sick children in a neutral country for the duration of hostilities.[23] In this field, too, although the relevant texts do not impose an obligation, they constitute an urgent recommendation to the Parties to the conflict, and specific tripartite agreements should be concluded on the subject.

---

[23] Fourth Convention, Article 132 (paragraph 2).

IV. CHILD COMBATANTS DETAINED DURING NON-INTERNATIONAL ARMED CONFLICTS

It should be remembered that in non-international armed conflicts the status of combatant does not exist, and consequently that of prisoner of war, which derives from it, does not exist either. Equally, there are no categories of protected civilians or of civilian internees.

In this situation child combatants, regardless of whether they are members of the armed forces or not, may be punished under the internal legislation of the country concerned for the simple fact of having taken part in the hostilities. However, the assessment of their level of responsibility must take into account their limited capacity of discernment, which is inherent in their youth. Consequently educational measures, rather than penal sanctions, should be imposed.

A child combatant captured during a non-international armed conflict is nevertheless still protected by Article 3 common to all four Geneva Conventions of 1949, which is applicable to all persons who are not taking part in hostilities or have ceased to do so.

In addition, these children are specifically protected by Article 4, paragraph 3, of Protocol II, which contains detailed provisions on the care and assistance to be given to all children during conflicts of this kind, namely education, reunion with their families and temporary evacuation. The list is illustrative only and does not in any way prejudice other measures which may be taken on their behalf.[24]

In addition, Article 6, paragraph 4, of Protocol II prohibits the pronouncement of the death penalty on any person under eighteen years of age at the time the offence was committed. Here again – as with the age limit below which children may not take part in hostilities – the obligation is more extensive than that applicable to international armed conflicts, which prohibits only the execution of the death penalty on such persons.

As a general principle, when approaching the problem of child combatants in internal conflicts the ICRC lays primary emphasis on the interests of the children. If children are detained, the ICRC endeavours to secure their release wherever guarantees that they will not return to the field of battle can be given. In practice, the ICRC also requests the Parties to bear in mind the limited capacity of discernment of children under 15 years of age and endeavours to ensure that children in captivity receive special treatment appropriate to their age. It also moni-

---

[24] *Commentary on the Additional Protocols, op. cit.*, p. 1377, paragraph 4545.

tors compliance with the special rules concerning the protection of children contained in Protocol II.

CONCLUSION

Children are entitled to extensive protection under international humanitarian law. First and foremost, they are protected as civilians not taking part in hostilities and with regard to their particularly vulnerable character as children. This special protection is enshrined in no less than twenty-five of the provisions of the Geneva Conventions of 1949 and their Additional Protocols of 1977. International humanitarian law also regulates, through the Additional Protocols of 1977, the participation of children in hostilities. The participation of children under fifteen years of age in actual fighting is prohibited. In addition, Protocol I encourages the Parties to the conflict, if they enrol persons over fifteen years of age but under eighteen, to take only the oldest.

However, it is all too evident that, notwithstanding the prohibitions contained in the law, children are still taking part in hostilities and continue to be the innocent victims of armed conflicts. To end their suffering, it is essential that the provisions already in force be observed and upheld by the international community. The responsibility to respect and ensure respect for these norms rests first and foremost with the States party to the humanitarian law treaties. The ICRC, through its various activities – and in particular by its visits to children in captivity and its assistance programmes – helps to render more effective the protection which children so sorely need. But it is above all by taking preventive action – by making the rules of international humanitarian law as widely known as possible – that genuine respect for the rights of children can be secured.

María Teresa Dutli

María Teresa Dutli was born in 1955. In 1979 she took her bar finals at the Faculty of Law of the National University of Buenos Aires. From 1979 to 1982 she worked as a lawyer in chambers in Buenos Aires. In 1989, she obtained a doctorate in political science at the Graduate Institute of International Studies, Geneva University. Since 1988 Mrs. Dutli has been a member of the ICRC's Legal Division.