

# **Application of Child Trial Protocols in Terrorism Cases**

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## **Introduction**

The Court room and its proceedings are daunting. To the untrained eye and the outsider to the system, the language, dress and general business of the court will seem strange. To a child stepping into this arena, this unfamiliar terrain if not effectively managed can become an obstacle rather than a solution.

Terrorism has gravely affected and interrupted childhood in the areas most affected by the conflict happening in parts of Nigeria. For reason of accountability, children accused of terrorism offences will at some point come in contact with the justice system.

Terrorism is a serious offence and acts of Terrorism are life altering. When a person deemed to be a child by law commits these offences, justice sector personnel are often at loss as to how to deal with these situations.

At the international level, these situations have not been figured out and there are no rules set in stone on how to deal with them. Justice Sector stakeholders in different countries around the world still grapple with which applicable legal framework to use.

Whether the law covers their subject matter and their status or not, for the sake of justice, equity and good practice, certain protocols need to be put in place. Lists and check boxes need to be drawn and checked to ensure a fair trial for children in terrorism cases.

## **Children and Terrorism**

The circumstances through which children become associated with terrorism and violent extremist vary from those who join because their family members joined, those who were abducted and joined forcibly, those enticed by rewards and gains, those who joined voluntarily and those who are angry at the actions of certain state actors.

Children recruited into terrorism often end up playing key roles in the groups they find themselves. To violent extremist, children are malleable since their characters are not fully formed. They are the future as they represent continuity.

Their roles vary from being

- Combatants (Child soldiers)
- Spies/scouts
- Use as foreign fighters
- Use as suicide bombers (young girls coerced and groomed into such roles)
- Use for domestic labour
- Forced marriages/sex slaves/forced prostitution (SGBV elements)
- Those born of rape and forced marriages often tagged “bad blood”

### Questions raised

- a) Should the recruitment of a child by a terrorist or violent extremist group determine that the legal status of the child is that of a victim? And if so, would the child’s victim status exonerate the child from being held criminally liable for the commission of terrorism related offences?
- b) In addition to be considered a victim, is it possible to hold the child accountable for the terrorism offence that he or she has allegedly committed? Can a child be a victim and a perpetrator at the same time?
- c) How should children be treated when in contact with the justice system?
- d) Which authorities have the competence to deal with such children?
- e) What procedures should be applied? (UNODC, 2017)<sup>1</sup>

### Treat as Victims

*“In most conditions of child recruitment even the most “voluntary” of acts are taken in a desperate attempt to survive by children with a limited number of options.”<sup>2</sup>*

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<sup>1</sup> Page 70 UNODC Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice Sector

<sup>2</sup> Radhika Nations SRSG CAAC, 2008Coomaraswamy, United

Children associated with violent extremist groups cannot legally give consent even if they assent and actively take part in acts of terrorism.

According to expert child psychologist who have worked with children in terrorism and post conflict situations,<sup>3</sup> brain development in children especially those under conflict situations severely affects the parts of the brain that controls decision making.<sup>4</sup>

The list below, is the type of effect observed in children post conflict and also in terrorism cases:

- Behavioural disorders
- Feelings of isolation
- Learning disorders / concentration
- Identity disorder
- Risk behaviour
- Self-destructive behaviour
- Psycho-trauma
- Mood disorders
- Anxiety disorders
- Personality disorder
- Aggression
- Addictive disorders
- Eating disorders
- Sleeping troubles
- Sexuality disorders
- Dissociative disorders
- Poor self-esteem

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<sup>3</sup> Valerie Chmara, Impact of Violence and Trauma on Child Development, 2022 UNODC Child Victims and Witnesses Training for Stakeholders, Strive Juvenile Project

<sup>4</sup> The Impact of Early Adversity on Children's Development Centre on the Developing Child, Harvard University. Marshal, Fox and the BEIP Group 2004

## **A case by case needs basis**

The Child Rights Act defines a child as someone under the age of 18.<sup>5</sup> However, how a child in early infancy is treated is greatly different from how a teenager in their late teens will be treated.

The level of understanding and ability to participate in any proceeding need to be considered before each matter is heard. A one-size-fits-all approach will not be just or fair in these matters. While a minimum standard of operation is needed, individual needs must be considered.

The gravity of the offence, educational level, resource and many other factors also go into consideration to determine matters affecting children.

Consider the attention span of children according to their ages as proposed by child psychologists.

2 years old: 4 to 6 minutes

4 years old: 8 to 12 minutes

6 years old: 12 to 18 minutes

8 years old: 16 to 24 minutes

10 years old: 20 to 30 minutes

12 years old: 24 to 36 minutes

14 years old: 28 to 42 minutes

16 years old: 32 to 48 minutes

18 years old: 36 to 54 minutes<sup>6</sup>

A Right to be Heard checklist<sup>7</sup> for police officers in matters where children come in conflict with the law which takes into account other factors when dealing with children in their custody also makes a great guide. Tips including not wearing uniforms when interviewing children, use of interpreters when primary language of

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<sup>5</sup> S.277 Child Rights Act 2003

<sup>6</sup> STRIVE Juvenile, 26th January 2022, Fostering the participation of child victims and witnesses in Proceedings, Capacity Building Workshop for Justice Sector Stakeholders.

<sup>7</sup> Nigeria Police Force Training Package on Handling Cases involving Children UNICEF/EU/UNODC/CORAM 2016-2017

communication is different, use of simple language, avoiding legal jargon, ensuring the environment is safe, spacious, well ventilated and has adequate light.

The checklist also includes, Logistics, place of interview, ensuring the child rests in between and is well rested before commencing interviews, providing support or ensuring the child has the support they need from an adult.

Other protocols on how to treat children who may lack capacity and what to build rapport with the person being interviewed are all to be considered.

### **Pre-Trial and Diversionary Means**

Certain offences committed by children under the Terrorism prevention and prohibition legislations are such that coercion and adult influence can be inferred. A case in point is the young women and girls apprehended with suicide vests strapped to them.

With the cases of young girls apprehended on suicide missions, the approach is to treat primarily as victims since their situation take them through the whole gamut of going from being children in conflict with the law, to being children at risk and as well as being children in need of care and protection.

When such extraordinary cases occur, concerned state actors and stakeholders have often stepped in to provide alternative means to ensure treatment.

### **The Federal High Court**

Section 76 of the Terrorism Prevention Act 2022 which repealed the 2011 Act alongside its 2013 Amendment Act confers jurisdiction on the Federal High Court for all things Terrorism.

The Act further empowers the court under S.76(3) of the TPA 2022 to:

*“In any trial for an offence under this Act, the Court may, notwithstanding anything to the contrary in any other enactment, adopt all legal measures necessary to avoid unnecessary delays and abuse in the conduct of matters.”*

The Federal High Court's Practice Direction 2022(on Trial of Terrorism Cases)<sup>8</sup> toes the same lines as the Administration of Criminal Justice Act on Protection of Victims and Witnesses but giving specific directions on screening<sup>9</sup>.

Many of the protective measures under Order III of the Practice Direction would go a long way in adapting to Child Trial protocols, however more is needed.

## **The Court Room**

Who needs to be in the court room when children cases come up? Trials where children are involved are not open to the public. Also, add the danger associated Terrorism.

Protection of privacy for the child whether as a child in conflict with the law or as a victim or witness is paramount.

Consider the following guidelines listed below for a former child soldier from Afghanistan who was also a child soldier to the Taliban Group:

- Informal court dress for advocates and judge
- Informal venue for the hearing
- Informal seating arrangements (i.e., round tables or other seating that appears less confrontational and less adversarial)
- Exclusion of members of the public when child gives evidence
- Restriction of people present in the courtroom when child gives evidence, to legal representatives, the judge, the court clerk and, where he requests one, a person nominated to personally support him
- Questions asked by both parties to be open-ended where possible and broken down so that each question is simple and self-contained
- Points to be raised during cross-examination to be identified by the judge<sup>10</sup>

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<sup>8</sup> Federal High Court of Nigeria Practice Direction (on Trial of Terrorism Cases) 2022

<sup>9</sup> The Practice Direction expands on Section 232 of the Administration of Criminal Justice Act 2015

<sup>10</sup> AM (Afghanistan) vs. Secretary of State for the Home Department, Court of Appeal (27/09/2017). b Practice Direction First Tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses, Tribunals Judiciary (30/10/2008).

The court in using their discretionary powers can direct for other measures to be used for these high security risk and sensitive cases.

## **Trial**

The first thing to ensure in Terrorism trials involving children is that they must be given a chance to **participate**.<sup>11</sup>

The UNODC suggests that;

*“In order to be meaningful, the information provided must be adapted to the developmental level of the child. The flow of regular information should not be interrupted at the time of judicial proceedings, and judges who may not have directly interacted with the child before should be made aware of existing guidelines on child-sensitive communication.”<sup>12</sup>*

A specialised juvenile court is ideal but for reason of legislative ambiguity, it is important that the court where a child accused of terrorism find themselves be adapted to a **child friendly environment**. *These may include modifications to the court environment and adaption of the length of the proceedings, taking into account the age and maturity of the child, as well as the potential of the proceedings to harm him or her.*<sup>13</sup>

**Legal representation** is important and a requirement for due process, let’s not forget, a constitutional right. Not just any defence lawyer but one with special training on children matters especially in the context of terrorism which requires certain level of security clearance. It is suggested that;

*Defence lawyers must also have the means to seek and obtain special protection measures for themselves and for witnesses (lay or expert) who are required to mount an effective defence of their client.*<sup>14</sup>

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<sup>11</sup> CRC, African Charter on the Rights of the Child, ACJA and the CRA stresses on this.

<sup>12</sup> UNODC 2017 supra

<sup>13</sup> HRI/GEN/1/Rev.9 (Vol. II), chap. VI, para. 46; see also rule 14 of the Beijing Rules

<sup>14</sup> Handbook on Criminal Justice Response to Terrorism, Criminal Justice Handbook Series (UN Publication) NO. E.09.IV.2 page 83

Other things to ensure, **Privacy, Effective Court security measures, social enquiry reports** to assure the court saddled with Terrorism case have at least done their best to ensure justice and equity for this category of persons in this subject matter.

## **Sentencing**

This is a tough balancing act for the judges who are the key decision makers in the justice sector and the entire proceedings in court. They are burdened with balancing the need for rehabilitation and re-integration with the seriousness of terrorism.

The legislation, rules of procedure and practice direction they have to work with must somehow align with the best interest of the child without raising the ire of the public. The scrutiny of the appellate courts is also to be considered.

Custodial sentence is a measure of last resort. Sadly, the court may find that this measure may be utilized to achieve the goal of rehabilitation. Custodial order in this context would also mean extraction from dangerous environment, likely association with people and situations that lead to recidivism. Custodial order may help in a child getting access to education and other psycho-social support they may need for re-integration.

The court in passing a sentence would need some of the orders resident in the Child Rights Act to effectively deal with cases involving children.<sup>15</sup>

**Administration of Criminal Justice Act (ACJA) Section 452** on child trials refers to the CRA whilst going further to spell under its section 260 and 262 as follows:

### Sections 260

*Where a person who, in the opinion of the court has not attained the age of 18 is called as witness in any proceeding in relation to an offence against or any conduct contrary to decency or morality, the court may direct that all or any person not being:*

*(a) members or officers of the court, or*

*(b) parties to the case, their legal representatives or persons otherwise*

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<sup>15</sup> See page 10 – 11 below



*directly concerned in the case,*

*be excluded from the court during the taking of the evidence of such person*

and 262

*An infant, other than an infant in the arms of parent or guardian, or child shall not be permitted to be present in court during the trial of a defendant charged with an offence or during any proceeding preliminary to the trial except:*

*(a) he is the defendant charged with the alleged offence; or*

*(b) his presence is required as a witness or otherwise for the purposes of justice in which event he may remain for so long as his presence is necessary*

## **Terrorism(Prevention and Prohibition) Act (TPPA) 2022**

**The TPPA 2022** is a missed opportunity to adequately address the many and varied dimensions of terrorism. The new Act still leaves women and children in a limbo by not specifically mentioning these two groups who have been greatly affected by acts of terrorism since the last amendment to the legislation back in 2013. Terrorism offences that children are likely to be accused of range from:

- *Providing, receiving* training, training materials or instruction, 25 years to Life, <sup>16</sup>
- Concealing information 20 years <sup>17</sup>
- Recruitment 20 years, <sup>18</sup> Planning or attending a meeting known to be held by terrorist, 20years, <sup>19</sup>
- Knowingly Rendering Support directly or indirectly 20 years to life <sup>20</sup>
- Harboring, concealment, hinders or interferes with arrest of terrorists 20 years, <sup>21</sup>

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<sup>16</sup> S.15 TPA

<sup>17</sup> S.16 TPA

<sup>18</sup> S.18 TPA

<sup>19</sup> S.12 TPA 2022

<sup>20</sup> s.13 TPA

<sup>21</sup> S.14 TPA

The Act however fails to expressly criminalize the recruitment of children into terrorist and violent extremist groups. Children can be accused, arrested and tried for crimes under Terrorism but no express provisions exist in that same law for crimes committed against them.

Consider this:

*In 2015, the International Criminal Court Prosecutor was considering charging Boko Haram leaders with counts of war crimes, including recruitment and use of children under the age of 15 years to participate in hostilities.<sup>22</sup>*

This is because the Optional Protocols on the CRC states:

*Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.*

*States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.<sup>23</sup>*

The TPPA not addressing this issue still leaves it firmly in the hands of the International Criminal Court.

**The Child Rights Act** criminalises many of the acts done to children affected by Terrorism for example;

1. Trafficking, abducting or unlawfully removing children from lawful custody is prohibited<sup>24</sup>
2. Using children in criminal activities is prohibited<sup>25</sup>
3. Forced or exploitative labour and the employment of children as domestic help outside their own home or family is prohibited<sup>26</sup>

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<sup>22</sup> The case is currently at the International Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities 2015, para. 203.

<sup>23</sup> Article 4, General Assembly A/RES/54/263

<sup>24</sup> Section 27 CRA

<sup>25</sup> Section 26 CRA

<sup>26</sup> Section 28 CRA

4. Buying, selling, hiring or otherwise dealing in children for the purpose of begging, hawking, prostitution or for other unlawful immoral purposes are prohibited<sup>27</sup>
5. Recruiting children into the armed forces is prohibited<sup>28</sup>

A number of measures also exist under the Child Rights Act for the Federal High Court to adopt even though the CRA clearly does not have the FHC in mind when it was being drafted but then neither was Terrorism a national issue back in 2003 when the CRA was passed. The Act after all these years is due for review as it enters its second decade. Technology for instance has travelled in leaps and bounds since 2003 and any policy in between to address issues won't have the force that a proper legislation would have.

However, any justice sector personnel who encounters children in this context should consider some of the orders and remedies available under the CRA that might help:

- Wardship and commitment to appropriate authority Section 93 -99
- Refuge for Children at risk Section 48
- Care and protection order Section 53
- Foster care Section 100 - 125
- Education supervision Section 58
- Emergency protection orders Section 42
- Child assessment orders Section 41
- Disclosure of whereabouts Section 74

## **The International Approach**

*"The UN Assembly strongly condemned the systematic recruitment and use of children to perpetrate terrorist attacks, as well as the violations and abuses committed by terrorist groups against children and noted that such violations and abuses may amount to war crimes."*<sup>29</sup>

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<sup>27</sup> Section 30 CRA

<sup>28</sup> Section 30 CRA

<sup>29</sup> Resolution 70/291 UN General Assembly

All children in terrorism matters as well as post conflict matters are primarily treated as victims. This should not detract from accountability for offences committed

Justice Sector personnel in many countries around the world still grapple with how to effectively treat children in terrorism cases.

Guidelines are often made and reviewed to allow for the evolving roles children play in terrorism. The Optional Protocol of the Convention on the right of a Child (CRC) leaves a lot of leeway for individual states to decide how to handle these matters.

The United Nation's Convention on the Rights of the Child<sup>30</sup> says:

*In criminal cases, the best interest principle applies to children in conflict (i.e., alleged, accused or recognized as having infringed) or in contact (as victims or witnesses) with the law, as well as children affected by the situation of their parents in conflict with the law.*

*... protecting the child's best interests means that the*

*traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders<sup>31</sup>*

The African Charter on the Rights and Welfare of Children<sup>32</sup> states:

*"In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law."<sup>33</sup>*

## **International Best Practices**

At the moment we can look at some International best practices to see if we can adopt and adapt them to our need taking into consideration many local nuances that shape Nigerian legal, social and cultural terrain.

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<sup>30</sup> Ratified by Nigeria 19<sup>th</sup> April 1991

<sup>31</sup> UN CRC General Comment No. 14, 2013 paragraph 28

<sup>32</sup> Ratified by Nigeria 23<sup>rd</sup> June 2001

<sup>33</sup> Article 4 The African Charter on the Rights and Welfare of the Child

In addition to the guidelines set out in *AM(Afghanistan) v Secretary of State*<sup>34</sup>

The following was also suggested and later codified by the Canadian Evidence Act in the treatment of children and vulnerable person

- Support person
- Witness screen
- Close-circuit television
- Publication ban
- Exclusion of the public from the courtroom
- Video-recorded evidence witnesses in court

The Canadian courts also recognises that children under 14 years old are capable of testifying in court though, not under oath but a “promise to tell the truth”<sup>35</sup>

With all this in mind the Canadian system prescribes remedies that:

- reinforce respect for societal values
- encourage the repair of harm done
- be meaningful to the offender
- respect gender, ethnic, cultural, and linguistic differences<sup>36</sup>

It is important to note that some of the improvisation made by our state actors who work with so little to solve a huge and daunting problem should be mentioned and acknowledged. It is however important that this well-intentioned good work stand the test of time and when scrutinized, it can be shown to have met a minimum standard and that certain checkboxes were ticked appropriately.

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<sup>34</sup> See page 6 Ibid

<sup>35</sup> Section 16(3) (3.1) Evidence Act Canada

<sup>36</sup> <https://www.justice.gc.ca/eng/csj-sjc/just/11.html> Accessed at 6:49pm 17/07/2022

## Challenges

Some of the Challenges observed by various experts in other jurisdictions are listed below:

- Enhanced risks of victimization and retaliation by terrorist and violent extremist groups
- Resistance of the child and mistrust of public authorities
- Inability of the child to recall events in detail and chronological order
- Intimidating attitudes of practitioners and disregard of child-appropriate language
- Biological, personal or loyalty relationship between the child and the accused
- Insufficient coordination leading to repeated interviewing of children
- Lack of mechanisms to ensure that information is provided to the child concerning his or her rights procedures and requirements
- Delays in the proceedings
- Lack of an environment such as an interview room or court setting adapted to the needs of the child
- Lack of coordination with child protection and welfare actors to ensure appropriate

supervision and assistance when dealing with child victims<sup>37</sup>

### Challenges peculiar to Nigeria

1. Grievous offences committed by these children and reluctance of communities to accept them considering the gravity of the offences.
2. Rehabilitation may be possible but re-integration may take a while assuming there exist a community to go back to.
3. The facilities to adequately cater to the needs of children. In the instances where custodial order becomes necessary. How prepared is the Nigerian Correctional Services for this task?

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<sup>37</sup> UNODC supra

4. Considering the legislative gaps, who takes charge of this situation? Do we leave the international agencies, NGOs, CSOs and charities to handle this outside the view of state actors?
5. Inter-agency co-operation still needs work especially in counter terrorism

### **Legislative gaps vs Best Interest of the Child**

Terrorism greatly affected the North-East Region of Nigeria, but Borno, Yobe and Adamawa were disproportionately affected.

Of the three states, only Yobe State has passed a Child Protection Law<sup>38</sup> which creates the family court at four levels.<sup>39</sup> There is a dire need for the states where these crimes happen to have legal and institutional framework to better handle these matters. Leaving federal authorities handle this may not be sustainable in a few years from now. If the local legislation adequately seeks to remedy this situation, it would have been ideal.

### **Who is going to supervise this?**

Co-ordinating agencies like the Office of the National Security Adviser with a bird's eye view of issues who ensures that the necessary policies are in place and updated regularly works with other agencies of government, Civil Societies and International Partners to tackle the issues. The court cannot give orders in vacuum.

The Office of the National Security Adviser is tasked with all matter relating to terrorism. The agency mainly focuses on preventing and countering violent extremism by adopting what they call a ***whole society approach***.<sup>40</sup> The agency co-ordinates all agencies involved in counter terrorism and is responsible for bringing all state actors together on this subject matter.

There exists a Disarmament De-radicalization and Re-Integration program whose effectiveness so far is yet to be gauged.

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<sup>38</sup> Child Protection Bill of Yobe State 2022

<sup>39</sup> The Sharia Court of Appeal and the Sharia Court have jurisdiction on child matters as well and are expected to sit with assessors

<sup>40</sup> Policy Framework And National Action Plan For Preventing And Countering Violent Extremism 2017

## **Suggestions and Possible Remedies**

- A whole society approach as proposed by the supervising agency in charge of terrorism matters. The Policy Framework on Counter Terrorism by the Office of the National Security Adviser which focuses mainly on Preventing Violent Extremism but a lot more focus needs to focus on those already in custody either awaiting trial or have been ordered to undergo Deradicalization programs.
- Psycho-social assistance is key as children accused of terrorism offences will have a tough time re-integrating into a society they have been taught to be at odds.
- Reform, rehabilitation and Reintegration.
- Constant monitoring and update to avoid recidivism
- A whole society approach, The village nation
- Custodial Measures as last resort. How prepared is the Nigerian Correction Services?
- Whatever order we can use from the Child Rights Act to solve this problem.

## **Conclusion**

The best way to deal with this would have been a strong legislative framework at both the state and federal level. The TPA 2022 missed a great opportunity and the Child Rights Act for all it took for it to be passed at the federal and state levels would have done with some legislative review to bring it up to date since it was passed nineteen years ago.

In the meantime, the lives of the children affected by this cannot remain in a limbo. We will use the little available in terms of law and resources to do as much as we can.