



# **Avocats sans Frontières**

Italy

## ***CHILD SOLDIERS IN AFRICA***

**A CRISIS IN CRISIS**

Presentation of a Report by Amnesty International

“21,000 child soldiers in Liberia”

Rome 8 November 2004

### ***“Triability and punishability of minors in international law: Jurisdiction of the International Criminal Court”***

The problem of the protection of the rights of minors is one that arose frequently during the preparations which led to the adoption of the Statute of Rome, the founding instrument of the International Criminal Court. Three of the most important issues which arose were:

1. The recruitment of minors in armed conflict;
2. The lack of criminal responsibility of minors for war crimes;
3. The need to protect child victims and witnesses.

It is right to point out in the context of analysis of the legal situation regarding rights of minors according to the Statute of Rome, that the unique situation of minors requires without doubt a special protection, due on the one hand to their young age, and on the other the fact that they are considered to be without liability or legal status

by the law. In the legal sense, the term *minor* is defined as a person under 18 years of age.

*The Declaration of the Rights of the Child*, in 1959, and above all the *Convention on the Rights of the Child*, adopted by the General Assembly of the United Nations on 20th November 1989 (which entered into force in 1990), includes a wide range of minimum guarantees for minors, guarantees which the State is obliged to respect and enforce. The 1989 *Convention* has to date been ratified by all but two States of the international community. This is therefore a widely recognised instrument which must be observed by almost every country in the world.

The *Convention*, on account of the particular situation in which minors are treated given that all too often they are the victims of crime and abuse, grants them the right to be protected from malicious treatment, oppression and all forms of mental and physical violence. Furthermore, they are granted the right to an identity and a nationality, the right to education, the protection against exploitation including at work, protection against sexual exploitation, torture, and wide-ranging guarantees in respect of the legal system including detention.

The protection of minors in wartime deserves a special mention, being dealt with not only by **Article 38** of the *Convention*, but also by other important international instruments. In particular, the 1949 *Geneva Convention* and the two *Additional Protocols* of 1977 prohibit the enlistment of children and minors in the armed forces, with particular provisions for the protection of child prisoners-of-war. These provisions – and prohibitions – were not only reinforced in the 1989 *United Nations Convention* but, as we will see shortly, were also included in the Statute of the International Criminal Court.

Turning to the 1989 *United Nations Convention*, it would be interesting to remind ourselves briefly of the system of protection which this Convention offers. **Article 43** provides for the establishment of the **Committee on the Rights of the Child**, made up of **18 members, with the task of** guaranteeing the effective application of the Convention through supervisory and control mechanisms. For example, the Committee shall receive periodically reports from States Parties and can request a State to provide further information on measures of prevention, protection and repression adopted at a national level. The Committee then has to carefully consider and evaluate the reports presented by the States Parties. The consideration of these reports and the responses by the States are carried out openly and in public. Non-Governmental Organisations working in this area are often invited to take part in the meetings and debates of the Committee. The Committee may then make informal visits to verify the correct application of the Convention.

In the context of this general background of the protection of minors, on an international level, the Statute of Rome, the founding instrument of the International Criminal Court, is a useful instrument to reinforce the protection of minors and give legal protection to children in case of abuse of or crimes committed against them. One of the aspects of major concern during the preparatory works for the drawing up of the ICC was the problem of the enlistment of minors in the armed services, the lack of criminal responsibility for minors in respect of war crimes and the need to give them adequate protection, above all as victims and witnesses.

The prohibition on the enlistment and involvement of minors in armed conflict is set out in **Article 8** of the Statute, which deals with **war crimes**. The prohibition clearly covers both international as well as internal conflicts. The provisions of Article 8 are very similar to those of the two 1977 *Additional Protocols* to the Geneva Convention, namely **Article 77** of the *First Protocol* and **Article 4** of the *Second Protocol*, which prohibit the State from recruiting minors to use in armed conflict. There is one

important difference, however, that in the two 1977 Protocols these prohibitions were not precisely defined as “*crimes*”, as they were not included in the provisions relating to “*grave breaches*”. The new development of the Statute of Rome was to “criminalise” such conduct, to render this type of action one of the **crimes** of international law. Now the recruitment and enlistment of minors under the age of 15 in the armed forces may properly be considered a “**war crime**”.

One problem, however, is clear in the ambit of the provision of **Article 8** of the Statute of Rome. This relates to the age limit for enlistment.

In the course of the Conference of Rome, numerous efforts were made to improve the protection given to minors by the *Protocols* to the *Geneva Convention* of 1949 and the *United Nations Convention* of 1989. One of the most discussed aspects was that relating to the age limit within which protection should be guaranteed.

At the conclusion of the works, the result was not completely satisfactory insofar as there was no consensus regarding raising the age limit which was therefore fixed at **15 years**.

Turning to the aspect of *non-punishability* of minors for the commission of crimes as provided for by the Statute of Rome, this issue was also strongly debated. *assando poi ad esaminare l'aspetto della non-punibilità dei minori per la commissione di crimini previsti dallo Statuto di Roma, anche in questo caso la questione fu altamente dibattuta.* In particular, the difficulty was how to find the right balance between the intention, on the one hand, to punish those persons responsible for the most serious international crimes and the need, on the other hand, to ensure the maximum protection for the rights of children. There was once again much debate on the age limit up to which to exclude the criminal responsibility of minors.

Some of the delegates emphasized the fact that the standard used on a national level differed enormously between States. Many others insisted that the age limit could not be fixed at 18, considering the high numbers of child soldiers across the world and their growing responsibility in the commission of grave crimes which could not go unpunished. Other delegates considered that minors must be considered “*punishable*” by the International Criminal Court, otherwise it would have been necessary for the Statute of Rome to provide for a separate system of juvenile courts, in the light of the provisions of the *International Covenant on Civil and Political Rights* of 1966 and the 1989 *United Nations Convention on the Rights of the Child*.

The solution which was finally adopted during the works of the Rome Conference was to separate the question of the responsibility of children from the jurisdiction of the International Court.

Dealing with this issue, **Article 26** of the Statute was adopted, which excludes the jurisdiction of the ICC over persons who, at the moment of commission of the crime, were under **eighteen years old**. In this way, the Statute did not take a position on the question of the responsibility of minors or on the age over which such responsibility should arise, but rather excluded the possibility of the court having any jurisdiction in such cases.

There are two principle reasons to justify the adoption of this solution. In the first place, it would without doubt be very difficult to set up and develop a separate system of “*juvenile justice*” within the ambit of the International Criminal Court. In this regard, international instruments on human rights and on the rights of minors are extremely clear and precise, in particular in the requirement of standards and safeguards for the exercise of justice relating to minors. Any attempt to establish a system of that nature, complying with all the characteristics necessary for the

functions of a juvenile court system, would have required endless negotiations without the certainty of arriving at a common point of agreement between States.

Secondly, and even more importantly, the possibility of prosecuting minors in the ambit of the ICC would have had the result of doubly “victimising” minors! The use of minors in situations of armed conflict is undoubtedly already a terrible violation of their rights. A successive “punishment” for such participation in war operations and subsequently being put on trial – with all that that usually entails – would surely have the effect of unfairly penalizing and “victimising” minors and children a second time! We must therefore welcome the final decision of the Statute of Rome concerning the exclusion of jurisdiction of the the Court over minors under 18 years old.

### **Conclusions**

The way in which the rights of minors and their protection are treated within the ambit of the system of the Statute of Rome represents a modest but important development in humanitarian and human rights law. Unfortunately, the provisions of the Statute reflect the sad reality of the modern world, that too often children and minors are simply pawns used in situations of armed conflict, and as such are very often victims of grave breaches of human rights and serious international crimes. We must only hope that the adoption of the Statute of Rome and the inauguration of the International Criminal Court can play an important role in the prosecution (and reduction) of these crimes.

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