

# Caucus on Children's Rights in the ICC

## Jurisdiction Over Minors

### Part 3: General Principles of Criminal Law

#### *Article 26: age of responsibility*

- **Recommendation:** The International Criminal Court should have no jurisdiction over persons who were under the age of eighteen at the time they are alleged to have committed a crime which would otherwise come within the jurisdiction of the Court.<sup>1</sup>
- **Comment:** Much discussion has already focused on the age of criminal responsibility,<sup>2</sup> and on the related issue of sentencing of minors,<sup>3</sup> reflecting widely divergent views on the issues. The Children's Caucus supports the position of UNICEF which recommends the age of responsibility be set at eighteen years. In the alternative, the Children's Caucus supports treating the issue as one of jurisdiction, as proposed in footnote three of Article 75 of the Draft Statute.

The punitive purpose of the Court is fundamentally at odds with the rehabilitative purpose of international standards on juvenile justice. Children accused of committing crimes are entitled under international law to adjudication by specialized juvenile justice systems, whose principle goal is rehabilitation and promotion of the well-being and best interests of the young person.<sup>4</sup> The Court, however, is conceived of as an extraordinary court, to try persons charged with committing or ordering the most egregious offenses, and serves an essentially punitive function. The principle penalty envisioned under the Statute is imprisonment, including the possibility of life

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<sup>1</sup> This proposal was put forward by delegations during the December 1997 PrepCom, and is referenced in footnote 3 of article 75 of the Draft Statute, on applicable penalties. A/CONF.183/2/Add.1, 14 April 1998.

Current proposals regarding the establishment of an age of criminal responsibility, range from setting that age at thirteen to twenty-one years. See Article 26 of the Draft Statute. A/CONF.183/2/Add.1.

<sup>2</sup> Current proposals regarding the establishment of an absolute or presumptive age of responsibility range from setting the age at thirteen to twenty-one years. See A/CONF.183/2/Add.1, 14 April 1998, Article 26, on age of responsibility.

<sup>3</sup> See A/CONF.183/2/Add.1, 14 April 1998, Article 75, on applicable penalties

<sup>4</sup> See Convention on the Rights of the Child, Article 40(1); U.N. Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), Articles 5.1, 14.2, 17.1, 26; International Covenant on Civil and Political Rights, Articles 10(3) and 14(4); American Convention on Human Rights, Article 5(5); European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5(1)(d); African Charter on the Rights and Welfare of the Child, Article 17(3).

The Commentary to Article 17 of the Beijing Rules is particularly on point: "Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person."



imprisonment and even the death penalty.<sup>5</sup> This is incompatible with established *international juvenile justice standards*.

The Court, as it is envisioned to be structured, is a wholly inappropriate forum for the adjudication of minors. Were the Court to take on the responsibility of prosecuting and trying minors, the Court would be required to impose specialized procedural measures regarding their trial and treatment, including their possible detention, and their rehabilitation. Detailed international standards exist which must be followed if the Court will adjudicate minors.<sup>6</sup> Its limited resources would be far better used in pursuit of justice for more serious adult offenders.

Excluding children under eighteen from the Court's jurisdiction does not mean that crimes carried out by children would go unpunished. As the report of the U.N. Secretary General's expert on the Impact of Armed Conflict on Children noted, children are rarely autonomous actors in the commission of crimes such as those covered by the Statute.<sup>7</sup> Under the principles of individual criminal responsibility, as set forth in Article 23 of the Draft Statute, or under the principles of command responsibility, as set forth in Article 25, the Court could impose accountability on adults who used children to commit crimes.

In cases where adults deliberately used persons under the age of eighteen to commit crimes within the jurisdiction of the Court, such gross exploitation of children should be considered an aggravating factor in sentencing. The Caucus recommends the retention of "the use of minors in the commission of the crime" in a non-exhaustive list of factors to be considered by the Court in determination of the sentence.<sup>8</sup> The Caucus further recommends that the Court consider the targeting of children as victims of crimes, as an aggravating factor in determination of the sentence.

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<sup>5</sup> See Article 75 of the Draft Statute, on applicable penalties. A/CONF.183/2/Add.1. While proposals also exist for special sentencing measures for young persons, these are inadequate; one of the proposals sets twenty years as the maximum imprisonment term for persons under the age of eighteen, an excessively long period for incarceration of a minor.

<sup>6</sup> See Convention on the Rights of the Child, Articles 37 and 40; Beijing Rules; U.N. Rules for the Protection of Juveniles Deprived of their Liberty; International Covenant on Civil and Political Rights, Articles 10(2) and (3) and 14(4); American Convention on Human Rights, Article 5(5); African Charter on the Rights and Welfare of the Child, Article 17.

<sup>7</sup> "One of the most disturbing and difficult aspects of children's participation in armed conflict is that, *manipulated by adults*, they may become perpetrators of war crimes including rape, murder, and genocide." Report of Graca Machel, Expert of the Secretary-General of the United Nations, on the impact of armed conflict on children, A/51/306, para. 250 [emphasis added].

<sup>8</sup> A/CONF.183/2/Add.1, 14 April 1998, Article 77, footnote 13, on determination of the sentence.