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# CHILD SOLDIERS

## Criminals or victims?

### 1. Background

This document concerns Amnesty International's position on whether child soldiers should be prosecuted for serious violations of international criminal law. It has been prepared mainly as contribution to the discussion surrounding the proposed Special Court for Sierra Leone, and the debate between the United Nations, child protections agencies and the people of Sierra Leone about whether child soldiers should be prosecuted: therefore many of the examples given in this document will concern the actions of child soldiers in Sierra Leone. However, this document outlines issues which are of concern in any situation where child soldiers are recruited by adults to participate in hostilities, and where they are suspected to have committed serious breaches of international criminal law: and unfortunately, the phenomenon of child soldiers is prevalent in all regions of the world.<sup>1</sup>

### 2. Summary

Child soldiers have been responsible for a great many gross human rights abuses; many of the worst atrocities during conflicts have been carried out by children, some of whom have been abducted and subjected to horrifying acts of violence. Recent Amnesty International papers, particularly those on Uganda<sup>2</sup> and Sierra Leone<sup>3</sup> have provided many case studies which illustrate the way in which children have been drugged, brutalized or threatened with physical abuse or death if they did not comply with orders to commit atrocities. Many of their victims have also been children.

International criminal tribunals, such as the Special Court for Sierra Leone, which is to be established, the International Criminal Court (which has not yet been set up), and national courts must bring prosecutions against persons who recruited and controlled child soldiers. Wherever appropriate, these people must be held responsible for the atrocities committed by the children under their control through the legal doctrine of command responsibility.

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<sup>1</sup>For further information on the use of child soldiers worldwide, see the website of the Coalition to Stop the Use of Child Soldiers <[www.child-soldiers.org](http://www.child-soldiers.org)>. Amnesty International is a member of the Coalition to Stop the Use of Child Soldiers.

<sup>2</sup>"Breaking the Lord's commands: the destruction of childhood by the Lord's Resistance Army." (AI Index AFR 59/01/97) of September 1997.

<sup>3</sup>"Sierra Leone: Childhood, a casualty of conflict"(AI Index: AFR 51/69/00) of August 2000.

Should the children themselves be prosecuted, and required to provide reparations to their victims?

As a general principle, Amnesty International calls for all those who commit serious crimes such as genocide, crimes against humanity, and war crimes, to be held accountable for their actions.

In a situation where crimes have been committed by children, particularly when they have been terrorized and brutalised into submission, complex questions about their criminal responsibility are raised. For example, in some cases in Sierra Leone, child soldiers were drugged and not in control of their actions, or were forced under threat of death to commit atrocities. It is highly unlikely that those who were drugged against their will would be prosecuted, as it is not in the interests of justice to prosecute someone who, clearly, on the evidence, was not in control of their actions. It makes little sense to hold someone criminally responsible for their actions in such circumstances. Those who were threatened would be able to argue that they acted under duress, either as a defence or in mitigation of punishment.

Although these will account for a number of cases, there are some cases in which the child soldier concerned was clearly in control of his or her actions, and not coerced, drugged, or forced into committing atrocities. Some have become child soldiers voluntarily<sup>4</sup> and committed atrocities voluntarily.

Amnesty International recognises the need of victims and society for justice and accountability. In some cases, child soldiers must be held accountable for their actions, but any criminal action against them must respect international fair trial standards. International standards for fair trial for persons under 18 are vitally important: these standards place the best interests of the child as a priority, recognise the special needs and vulnerabilities of children, and place an emphasis on rehabilitation and the reintegration of the child into society, rather than punishment. The United Nations (UN) Convention on the Rights of the Child states that arrest, detention or imprisonment of a child must be “in accordance with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>5</sup> Any child who is detained should be held separately from adults, unless it is in the child’s interests to remain with a particular adult, for example, a parent.

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<sup>4</sup>This issue of when a person under 18 can be said to have joined an army or armed group “voluntarily” should be assessed critically. The Optional Protocol to the Convention on the Rights of the Child (Annex 1 to General Assembly Resolution A/RES/54/263 of 25 May 2000) includes safeguards to ensure that recruitment is genuinely voluntary, for example, recruitment should take place with the informed consent of the young person’s parents or guardians, the young person should be fully informed of the duties involved in military service, and should supply proof of his or her age.

<sup>5</sup>Article 37(b) of the Convention on the Rights of the Child.

### **3. Amnesty International's view on impunity: investigations and prosecutions are vital.**

Amnesty International calls for all perpetrators of crimes involving serious violations of human rights - genocide, war crimes, and crimes against humanity - to be brought to justice. To do otherwise contributes to the phenomenon of impunity, that is, those who have perpetrated serious crimes or might consider doing so will be encouraged to commit further atrocities, knowing that the matter will not be investigated, and they will not be held accountable. It is extremely important to set an example for others. Impunity also denies victims their right to reparations, which includes the right to an apology and to justice. Amnesty International does not have a position on truth commissions or other forms of restorative justice *per se*, provided that these are not a substitute for justice.

Amnesty International has underlined the following basic requirements to combat impunity:

“First, there should be thorough investigations into allegations of human rights violations. The object of such investigations should be to determine individual and collective responsibility and to provide a full account of the truth to the victim, their relatives, and society. Investigations must be undertaken by impartial institutions, independent of the security forces, and must be granted the necessary authority and resources for their task. The results of such investigations should be made public.

Second, those responsible for human rights violations must be brought to justice whether they are officials of a past or current government and regardless of whether they are members of the security forces or unofficial paramilitary groups. Alleged perpetrators should be brought to trial and such trials should conclude with a clear verdict of guilt or innocence. Although Amnesty International takes no position on the nature of the sentence, the systematic imposition of penalties that bear little relationship to the seriousness of the offences brings the judicial process into disrepute and does not serve to deter further violations. It is, of course, also important that such trials are conducted in full conformity with internationally-recognised standards and that the defendants are not subjected to the death penalty.

Third, amnesty laws which have the effect of preventing the emergence of the truth and subsequent accountability before the law, should not be acceptable, whether effected by those responsible or by successor governments. However Amnesty International

takes no position regarding the granting of post-conviction pardons once the truth is known and the judicial process has been completed.”<sup>6</sup>

#### **4. Amnesty International’s policy on child soldiers.**

Amnesty International believes that the voluntary or compulsory recruitment and participation in hostilities, whether on the part of governments or armed opposition groups, are all activities that ultimately jeopardize the mental and physical integrity of anyone below the age of 18. For this reason, the organization actively opposes the voluntary or compulsory recruitment, not just the participation in hostilities, of persons below 18 years of age by governments or armed opposition groups.

Recent international standards have underlined that the use of children as soldiers is an abuse of human rights. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict prohibits absolutely any forced recruitment of children under 18 into the armed forces (Article 2). It allows those under 18 to be recruited voluntarily to state armed forces under certain strict conditions to ensure that such recruitment is voluntary (Article 3). Article 4 of the Optional Protocol to the Convention on the Rights of the Child states that “*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.*” This is an absolute prohibition.

ILO Convention No.182 of June 1999 on the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour includes the prohibition of forced or compulsory recruitment of children under 18 for use in armed conflict.

Article 22(2) of the African Charter on the Rights and Welfare of the Child<sup>7</sup> states that all parties “*shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting any child.*”

These recent developments follow the prohibitions on the use of children under 15 in Additional Protocols I<sup>8</sup> and II<sup>9</sup> of 1977 to the Geneva Conventions of 1949. Both Additional Protocols forbid

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<sup>6</sup>Statement to the 43<sup>rd</sup> session of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, delivered on 20 August 1991. AI Index IOR 41/06/91.

<sup>7</sup>OAU Document CAB/LEG/24.9/49 (1990).

<sup>8</sup>Article 77(2) of Additional Protocol I.

<sup>9</sup>Article 4(2)(c) of Additional Protocol II.

the recruitment of children under 15 to armed forces, and the use of children under 15 in hostilities. Both Additional Protocols emphasise children's special right to care, respect and protection.

The rehabilitation of child soldiers is a paramount concern of international law: Article 6(3) of the Optional Protocol to the Convention on the Rights of the Child requires that "*States parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilised or otherwise released from service. States parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and social reintegration.*"

### **5. Should the recruiters - not the child soldiers themselves - be held responsible for the actions of the children they recruit?**

Amnesty International considers that the focus and priority should be on prosecuting those who committed crimes against children, particularly the crime of recruiting children who are under 15. This was specifically recognized as a crime in the Rome Statute for the International Criminal Court<sup>10</sup> (hereinafter "the Rome Statute") both in situations of international and non-international armed conflicts.<sup>11</sup> The Rome Statute criminalizes conscripting or enlisting children under 15 (whether this is forced or voluntary) into armed forces or groups: therefore, the

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<sup>10</sup>UN Doc A/CONF.183/9.

<sup>11</sup>"War crimes

1. *The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*

2. *For the purpose of this statute, "war crimes" means:*

... (b) *Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts..*

A8(2)(b) (xxvi): *Conscripting or enlisting children under the age of fifteen years into armed forces or using them to participate actively in hostilities.*

... (e) *Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts..*

A8(2)(e)(vii): *Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."*

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prohibition applies both to government armies and armed opposition groups. During the negotiations on the Rome Statute, it was accepted that “participation” would include direct participation in combat, and military activities linked to combat such as scouting, spying, sabotage, and use of children under 15 as decoys, couriers and at military checkpoints; and also using children for any activities (even transporting food) at the front line.<sup>12</sup> Wherever an appropriate link can be drawn, those adults who controlled the child soldiers who committed atrocities should be prosecuted for the atrocities committed by those child soldiers under the doctrine of command responsibility. This doctrine makes commanders criminally responsible for the actions of their subordinates, where they gave a command to commit atrocities. In cases where no order was given, but the commander was aware that their subordinates were committing war crimes or crimes against humanity (or were about to commit them) but failed to take reasonable and necessary action to stop them or to have them prosecuted, such a commander will also be liable to be prosecuted for the action of the subordinates. The validity of this legal doctrine was confirmed in the Rome Statute.<sup>13</sup>

## **6. Amnesty International’s position on the prosecutions of child soldiers.**

Amnesty International supports the prosecution of any person who is responsible for serious crimes such as genocide, crimes against humanity and war crimes, as long as any trial takes place with all the appropriate fair trial standards in place, and without the possibility of the death penalty or other cruel, inhuman or degrading treatment or punishment being imposed.

Amnesty International considers that due to the nature of the conflicts in which child soldiers are most often used, it will be very clear in many cases that children were not acting voluntarily - in some cases, they were drugged against their will - and therefore may not be criminally responsible. In other cases they were threatened and might be able to assert a defence of duress or to have duress taken into account in mitigation of punishment. However, it is vitally important that in those cases where persons under 18 acted entirely voluntarily, and were in control of their actions, they should be held to account for their actions in an appropriate setting. Due weight should be given to their age and other mitigating factors, for example, if they were abducted and brutalised by their recruiters. The assessment of a child’s awareness of the choices open to him or her, whether to join the armed groups or to commit atrocities, should be undertaken critically,

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<sup>12</sup>PrepCom draft Statute, p. 21, cited in R.Lee (ed) “The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results.” (1999, Kluwer Law International) p 117, and note 8 above in this document. The draft Statute for Sierra Leone also makes the recruitment of children under 15 a criminal offence, but only if such recruitment is forced, and for the purpose of making a child take a direct part in hostilities. Amnesty International has serious concerns about this definition, which is far narrower than the definition in the Rome Statute. For details, see Amnesty International Document “Sierra Leone: Recommendations on the draft Statute of the Special Court.” (14 November 2000, AI Index: AFR 51/83/00).

<sup>13</sup>Article 28 of the Rome Statute.

with due consideration to a child's vulnerability and limited understanding. Such an assessment should contribute to mitigation of the child's responsibility.

Alongside the more complex cases, there may be examples of young commanders of units who committed mass atrocities, including murder and rapes, who were clearly willing and acted without coercion, and who may have forced other children to commit such acts. Where an individual can be held responsible for their actions, failure to bring them to justice will support impunity and lead to a denial of justice to their victims. It may even encourage the use of children to commit atrocities.

### **6.1. Does international law permit the prosecution of children?**

International law has not addressed directly the issue of whether child soldiers should face prosecution for atrocities they committed during armed conflict. The recent Optional Protocol to the Convention on the Rights of the Child<sup>14</sup> on the involvement of children in armed conflict does not contain any specific provisions on whether child soldiers should be prosecuted, or what would be an appropriate age of criminal responsibility (the age when a young person can be considered to appreciate right from wrong actions and to have some measure of responsibility for his or her acts; and when therefore it would be appropriate for a criminal investigation into such acts). Some child protection agencies working in Sierra Leone have opposed any prosecution of persons who were under 18 at the time the alleged crimes were committed on the grounds that they would be stigmatized and their rehabilitation into the community would be seriously compromised.<sup>15</sup>

However, the Convention on the Rights of the Child<sup>16</sup> does allow for young people to be prosecuted if the procedure can be fair and take into account the particular needs and vulnerabilities of young people. Article 3 of the Convention on the Rights of the Child requires that any legal action taken by the authorities must have the best interests of the child as a primary consideration. It is possible that in certain cases where a child soldier did act with full awareness of what he was doing and with full intent to commit atrocities, then it would be in his best interests to take responsibility for his acts, and the consequences of these acts, through a

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<sup>14</sup> The Optional Protocol (Annex 1 to General Assembly Resolution A/RES/54/263 of 25 May 2000) will enter into force three months after it has been ratified by 10 states. At the time of publication, 75 states have signed the Optional Protocol and three have ratified it.

<sup>15</sup> "UNICEF voices concern over Sierra Leone war crimes court proposal." AFP press agency report, 10 October 2000.

<sup>16</sup> Article 40.

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criminal process specially adapted for children. The principle of the best interests of the child requires that any criminal process involving children must have their needs at the heart. Other UN standards require that “*The well-being of the juvenile shall be the guiding factor in the consideration of his or her case.*”<sup>17</sup>

## **6.2. Prosecutions in an international criminal tribunal of those under 18 at the time of the offence.**

Those who oppose the prosecution of child soldiers under any circumstances have argued that they should certainly not be prosecuted in international criminal courts, such as the proposed Special Court for Sierra Leone, because the International Criminal Court, when it has been set up, will not have jurisdiction over children. The Rome Statute<sup>18</sup> states clearly that “the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.” However, this is a misunderstanding of the true position, because the Rome Statute provision was the result of a political compromise rather than a statement of principle.<sup>19</sup>

The statutes of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda are silent on the subject of whether those under 18 can be tried, or whether a person under 18 could use his or her age as a defence to a criminal charge. Therefore, if allegations of sufficient seriousness were brought against an individual who committed crimes while under the age of 18, the Prosecutor could then use her or his discretion. Similarly, the Chambers of the International Military Tribunals for the Far East and at Nuremberg, Allied Control Council Law No.10 and the Draft Code of Crimes against the Peace and Security of Mankind of 1996 are silent on this issue. The Convention on the Rights of the Child does not define an appropriate age of criminal responsibility, but it does envisage trials of children under 18 in Article 40.

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<sup>17</sup> Article 17 (1) (d) United Nations Standard Minimum Rules for the Administration of Juvenile Justice, GA Resolution 44/33 (29 November 1985) known as the “Beijing Rules.”

<sup>18</sup> Article 26, Rome Statute.

<sup>19</sup> This provision was a compromise position due to the great variety of opinion among the negotiating states on the appropriate limit for the age of criminal responsibility, and does not represent a consensus that children could not be held criminally responsible by national courts or other international jurisdictions under certain circumstances. As no specific age for criminal responsibility could be agreed on, it was decided instead to simply say that the International Criminal Court would not have the power to try those who allegedly committed crimes under the age of 18. However, this does not of itself debar the prosecution of children in domestic courts, it simply means that the International Criminal Court could not bring a prosecution.

Most recently, the draft Statute for a Special Court in Sierra Leone<sup>20</sup> has specified that accused persons who were between the ages of 15 and 18 at the time of the commission of the crimes may be prosecuted. However, it is unlikely that many children will be prosecuted in the Special Court, given that only the “most responsible” - particularly those who had a leadership role - will be prosecuted.

Amnesty International would not oppose such prosecutions of children between 15 and 18, as long as the court concerned implements fair trial guidelines for children in full, particularly, excluding the possibility of imposing the death penalty or life imprisonment without possibility of release. Any court in which children take part in proceedings must take into account the special needs of persons under 18 who may participate in the trial in any way, as defendants or as witnesses.

The UN Secretary-General has indicated that the prosecution of children might occur in exceptional circumstances, and has asked the Security Council to make the final decision on whether the Special Court for Sierra Leone should have jurisdiction over suspects aged between 15 and 18 years.<sup>21</sup> If such cases arise in any court, the international community should respond by providing the necessary resources to ensure a fair trial for such children. It is particularly important that such children be dealt with in a fair international court with sufficient resources, as often domestic juvenile justice systems lack resources and often breach international standards for juvenile justice. For example, the juvenile justice system in Sierra Leone has been virtually destroyed by the civil war, and even when it was functioning, the juvenile justice system in Sierra Leone frequently sentenced boys to corporal punishments.<sup>22</sup>

In general, the international community must be aware of the conditions under which children are held and tried, whether in international or domestic courts, and take action to improve them. Frequently, the conditions of detention in domestic systems may be considered to amount to cruel, inhuman and degrading treatment to children, due to lack of food, overcrowding, or being held in close proximity to adult detainees, which can lead to bullying or sexual abuse of children. Child witnesses should also be given appropriate support and protection.

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<sup>20</sup> This document is annexed to UN Doc. S/2000/915 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, “the Secretary-General’s report.”

<sup>21</sup> See para 32-38 of the Secretary-General’s report. The draft Statute states that, wherever possible, child defendants should be dealt with by non-judicial measures, such as truth and reconciliation procedures (Article 15(5) of the draft Statute).

<sup>22</sup> See report to the Committee on the Rights of the Child, UN Doc. CRC/C/15/Add.116, para 34-35, and para 46-47.

### **6.3. Fair trial standards for children under 18: rehabilitation, not stigmatization**

It has been argued that any prosecution of any child soldier will stigmatise all of them, and inhibit their reintegration into society. However, if persons under 18 are prosecuted, such trials will be extremely rare, as only the most serious cases will be prosecuted: therefore such prosecutions are unlikely to stigmatize all former child soldiers.

International standards relating to justice for children clearly state that the aim of prosecuting children under 18 must be to rehabilitate them, and their interests should be at the heart of the process. They also require that the child's privacy should be protected throughout the trial process, which means that if trials of children are undertaken fairly, then the child will not be publicly stigmatised.<sup>23</sup>

Safeguards to ensure the well-being of child defendants include:

#### **6.3.1. The right to be heard.<sup>24</sup>**

A defendant must be able to participate in any proceedings with full information and full understanding. Amnesty International's basic position is that there should be no impunity: if someone who has committed a crime goes through a trial without understanding the procedure and taking responsibility for his or her actions, then the crime will not have been addressed effectively. A child who is prosecuted must be able to understand and participate in any trial if that trial is to be fair, and the court must take into account a child's age, level of maturity and intellectual and emotional capacities in its procedures.<sup>25</sup>

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<sup>23</sup>Rule 8(1) and 8(2) of the Beijing Rules state that the child's name must not be published.

<sup>24</sup>Article 12 of the Convention on the Rights of the Child 1989 states:

*"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

<sup>25</sup>This issue was addressed in the European Court of Human Rights case of *V v. UK* (Application no 24888/94, judgment of 16 December 1999) paragraph 81 - 91, in which it was held that an 11 year old boy could not have been expected to participate in the intimidating atmosphere of an

**6.3.2. Deprivation of liberty should be used as a last resort, and detained children have the right to legal advice and care according to their age.<sup>26</sup>**

**6.3.3. The right to assistance to aid physical and psychological recovery and social reintegration.<sup>27</sup>**

This provision ensures that any child defendant should also receive assistance and rehabilitation alongside appropriate criminal sanctions.

It is particularly important that children receive this type of help even before trial, and while any criminal trial is continuing. If the provision of such help is withheld until a determination of guilt or innocence is arrived at, then serious psychological damage may be done. Continuing psychological assistance may be vital in helping the child to realise his responsibility for his acts and come to terms with them.

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adult courtroom, with procedures only minimally adapted to his age.

<sup>26</sup>Article 37 (b) of the Convention on the Rights of the Child 1989 states that:

*“The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time .”*

Article 37 (c) states that:

*“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”*

Article 37 (d) states that:

*“Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”*

<sup>27</sup>Article 39 of the CRC 1989 states that:

*“States parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation and abuse; torture or any form of cruel, inhuman and degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”*

#### **6.3.4. Fair trial guarantees appropriate to the needs of children.** <sup>28</sup>

Article 40 of the Convention on the Rights of the Child emphasises that a person under 18 who is undergoing a criminal investigation or trial must be treated with dignity and respect, and the aim of the criminal process is to increase the child's respect for human rights of others, and to promote his or her reintegration into society.

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<sup>28</sup>Article 40 of the CRC 1989 states that:

*"1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."*

*2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:*

*(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;*

*(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:*

*(i) To be presumed innocent until proven guilty according to law;*

*(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;*

*(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;*

*(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;*

*(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;*

*(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;*

*(vii) To have his or her privacy fully respected at all stages of the proceedings.*

This provision underlines Amnesty International's basic position on the prosecution of child soldiers: that it is important that the young person realises the gravity of their act, acknowledges guilt and makes reparation through apology to the victim or their relatives. This reinforces the child's respect for the human rights of others. This provision also underlines that the child's sense of dignity is central to the criminal process, and that any process must be consistent with the child's age and understanding, and the final aim of the criminal process must be the child's reintegration into society.

The criminal process should include all the usual fair trial provisions applicable to adults, including:

- ! the right to be presumed innocent until proven guilty
- ! the right to be informed promptly of any allegations or charges
- ! the right to have legal assistance
- ! the right to be heard before a fair and independent court
- ! the right not to be compelled to give evidence against oneself; and
- ! the right to appeal against any decision.

The Convention on the Rights of the Child<sup>29</sup> states that prosecutions of children should take place in private. This provision is specific to cases involving children and acknowledges the special vulnerability of children to publicity and stigmatization if they are convicted, or even prosecuted. It reflects Article 14 (1) of the International Covenant on Civil and Political Rights which requires public hearings of legal proceedings, except "*where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*"

The "Beijing Rules" expand Article 40 of the Convention on the Rights of the Child 1989 further: "*The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender shall be published.*"<sup>30</sup> Clearly if a child is labelled as criminal or delinquent in a public forum, the long-term effects may be extremely detrimental and will make it extremely difficult for the child to be rehabilitated psychologically and reintegrated into society. However, when deciding whether to close a hearing to the press and the public, the court must take into account the interests of the victim or the victim's family.

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<sup>29</sup> Article 40 (2) (b) (vii) Convention on the Rights of the Child.

<sup>30</sup> Rule 8(1) and (2) of the Beijing Rules.

Most of the above points are basic procedural safeguards which apply to adults and are recognised in existing international instruments such as the International Covenant on Civil and Political Rights, Article 14.

#### **6.4.5. The right to a hearing in a setting appropriate to a child's understanding.**<sup>31</sup>

International law states that persons under 18 must be prosecuted in an institution which is built around their needs and appropriate to their level of understanding. They should not be tried alongside adults. Therefore a specialist chamber of a court should be set up which deals solely with persons under 18 (as is the intention in the Special Court for Sierra Leone) or it should be guaranteed that the judges and all other court staff have specialist training and experience in dealing with child defendants.

Amnesty International believes that any criminal proceedings must be adapted to the needs and capabilities of the young people being investigated and prosecuted, including their age, level of education, level of understanding and development, and the possibly traumatic effect of their past experiences in armed conflict. Amnesty International recommends that all staff - including judges, advocates and detention officers - should be trained to deal with persons under 18.

The Convention on the Rights of the Child<sup>32</sup> specifies two important measures to implement child-centred criminal justice: the setting of a fixed age of criminal responsibility and the desirability of using non-judicial measures wherever possible. These issues require particular assessment.

### **7. The age of criminal responsibility**

In international law there is no presumption that persons under 18 cannot be held criminally responsible. However, the Convention on the Rights of the Child requires states parties to establish "a minimum age below which children shall be presumed not to have the capacity to

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<sup>31</sup>The Convention on the Rights of the Child 1989 states:

*Article 40 (3). States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law and, in particular:*

*(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;*

*(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.*

<sup>32</sup>Article 40(3) of the Convention on the Rights of the Child.

infringe the penal law,”<sup>33</sup> although it does not specify what is an appropriate age of criminal responsibility. The preparatory negotiations for the Rome Statute showed that there is a wide divergence of opinion on the matter among states and experts on children and juvenile justice.

The Committee on the Rights of the Child has not specified a general appropriate age for criminal responsibility, but has expressed concern that it is fixed at a low level in some states (seven,<sup>34</sup> eight,<sup>35</sup> even fourteen<sup>36</sup> has been considered low) and has welcomed other states’ proposals to set the age of criminal responsibility at eighteen.<sup>37</sup>

The Beijing Rules (Rule 4) require that:

*“In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age should not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”*

Amnesty International considers that a minimum age limit for criminal responsibility should be set, and the fixing of any age should take into account the moral and psychological components of criminal responsibility - that is, whether a child has the discernment and understanding to choose certain acts and therefore be held legally responsible for those acts. A balance must be drawn between attributing responsibility appropriately and protecting children from a process they are too young to understand.

As well as setting a minimum age of criminal responsibility, the authorities dealing with criminal justice issues in the domestic and the international setting should also put in place guidelines and safeguards for protecting and rehabilitating children who have committed offences when they were below the age of criminal responsibility. Such children may often be dealt with by social care services or mental health service. Without appropriate safeguards, procedures to review

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<sup>33</sup>Article 40(3)(a).

<sup>34</sup>Committee on the Rights of the Child (CRC) report on Hong Kong CRC/C/SR.329, para 79.

<sup>35</sup>CRC Concluding Observations on Sri Lanka, CRC/C/15/Add.40, paras 22 and 40.

<sup>36</sup>CRC report on Hong Kong, as above, note 34.

<sup>37</sup>CRC Concluding Observations on Nigeria CRC/C/15/Add.61 para 39. In cases where the age of criminal responsibility is set high, young people who commit illegal acts will normally be dealt with by social services. In such cases, the state will be responsible under Article 3 of the Convention on the Rights of the Child for ensuring that the actions of social services have the best interests of the child at the centre of all their rehabilitative programs.

progress and to appeal against decisions, there is a risk that children in the care of social services or the mental health care system may be detained for longer than is appropriate or not receive proper treatment.

### **8. Non-judicial measures, such as truth commissions**

As outlined above, Amnesty International calls for all perpetrators of crimes involving serious violations of human rights - genocide, war crimes, and crimes against humanity - to be brought to justice. To do otherwise denies victims their right to reparations,<sup>38</sup> which includes the right to justice.

It also contributes to the phenomenon of impunity, that is, those who have perpetrated serious crimes and human rights violations or might consider doing so could be encouraged to commit further atrocities, knowing that the matter will not be investigated, and that they will not be held accountable. It is important to set an example to others that the truth about crimes and human rights violations will be exposed; although in the case of child soldiers, the crime should be exposed, but the identity of the perpetrator should not.

Any truth commission should respect due process, establish the truth, facilitate reparations to victims and make recommendations designed to prevent a repetition of the crimes. Truth commissions are not a substitute for bringing perpetrators of serious crimes and human rights violations to justice.

### **9. Appropriate sentences for child soldiers**

Amnesty International opposes the death penalty and any other cruel, inhuman and degrading treatment, in all circumstances. Other than this, Amnesty International has no position on what would be an appropriate sentence for a young person who was convicted after a fair trial which respected all the international standards regarding justice for persons under 18.

However, international law specifies that some punishments should not be imposed on children under 18. The prohibition of the death penalty for children is a norm of customary international law.<sup>39</sup> The Convention on the Rights of the Child obliges states parties to ensure that neither

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<sup>38</sup>Reparations include rehabilitation to assist recovery from the effects of the human rights violation; restitution of any financial or other losses caused; compensation; apology or public acknowledgement of wrong-doing suffered by the victim; and guarantees of non-repetition of the violation of human rights.

<sup>39</sup>In paragraph 8 of its General Comment 24 on reservations of 4 November 1994, the Human Rights Committee confirmed that the execution of pregnant women and children was a breach of a peremptory norm of customary international law.

corporal punishment nor life imprisonment without possibility of release will be imposed on a person who committed an offence while under the age of 18.<sup>40</sup>

The Convention on the Rights of the Child 1989<sup>41</sup> states clearly that care and rehabilitation should be the main focus of any order of the court on conviction. The principle of the best interests of the child<sup>42</sup> (in Article 3 of the Convention on the Rights of the Child) should be central. Detention should be used as a last resort.<sup>43</sup>

## **10. Amnesty International's recommendations**

### ***Child soldiers should be seen primarily as victims of conflicts.***

1. In the rare cases where it is in the interests of justice to prosecute child soldiers, the criminal process should be specially adapted, according to the provisions of the Convention on the Rights of the Child, and other international standards such as the Beijing Rules, to their needs and level of understanding. The best interests of the child should be the guiding principle in any criminal process. The international community should ensure that sufficient resources are made available to implement these standards.
2. Children should be held in detention as a last resort and for the shortest possible period of time. In such situations, a child should be held in appropriate conditions and kept separately from adult prisoners. No child should ever be sentenced to the death penalty, corporal punishment or other cruel, inhuman or degrading treatment under any circumstances.

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<sup>40</sup>Article 37a of the Convention on the Rights of the Child.

<sup>41</sup>Article 40 of the Convention on the Rights of the Child.

<sup>42</sup>Article 3 of the Convention on the Rights of the Child.

<sup>43</sup>Article 40 (4) states: "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."