

PUBLIC ANNEX B

Article 26

Exclusion of jurisdiction over persons under eighteen

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.

Literature: The European Law Students' Association (ELSA) (ed.), *Handbook on the Draft Statute for an International Criminal Court* 62 (2nd ed. 1998); Crane, D.M., 'Prosecuting Children in Times of Armed Conflict: The West African Experience', (2008) 15 (3) *Human Rights Brief* 11; Frulli, 'Jurisdiction *ratione personae*', in: Cassese, A. et al., *The Rome Statute of the International Criminal Court. A Commentary*, Vol. I (2002) 527; Holmes, J.T., 'The protection of children's rights in the statute of the International Criminal Court', in: Politi, M. and Nesi, G. (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 119; Nill-Theobald, C., 'Defences' bei Kriegsverbrechen am Beispiel Deutschlands und der USA. Zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrafrechts (1998) 358 *et seq.*; Ottenhof, R., 'Criminal Responsibility of Minors in National and International Legal Order', (2001), 72 *RIDP* 663; Saland, P., 'International Criminal Law Principles', in: Lee, R.S. (ed.), *The International Criminal Court. The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 189, 200–202; Schabas, W.A., 'General Principles of Criminal Law in the ICC Statute', (1998) 6 *EJCLCJ* 400; van Sliedregt, E., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 301–306; Triffterer, O., 'The New International Criminal Law – Its General Principles Establishing Individual Criminal Responsibility', in: Koufa, K. (ed.), *Thesaurus Acroasium, the New International Criminal Law*, Vol. XXXII (2003) 639.

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A. General remarks

1. Historical overview

- 1 Early drafts for the establishment of an international criminal jurisdiction did not pay much attention to regulations concerning the general part¹. Correspondingly the Nuremberg Statute, Control Council Law No. 10 and Ordinance No. 7 did not contain provisions concerning the age when criminal responsibility should start. The Prosecutors perhaps assumed that, under international law, criminal responsibility begins at the age of 18, since in all these instances no one under the age of 18 was charged with any crime under any of these three jurisdictional provisions². Moreover, the 1948 Genocide Convention, the 1950 Nuremberg principles, the 1951 and 1954 ILC Draft Codes, the 1951 and 1953 ILC Draft Statutes as well as the 1949 Geneva Conventions, their 1977 Additional Protocols, and the 1972 Bellagio-Wingspread Drafts did not even mention this aspect³.
- 2 However, the 1979 ILA Draft Statute for an International Criminal Court, confirmed at the Belgrade Conference 1980, included a relevant article 21, contained in Part 3, 'Competence',

¹ For such documents see Triffterer, *Preliminary Remarks* (2008), mn 1 *et seq.*; see also *id.* (2003) *Thesaurus Acroasium, the New International Criminal Law*, Vol. XXXII, 639.

² Information confirmed by Benjamin Ferencz, one of the American Prosecutors at Nuremberg. For background information see Triffterer, in: Heer (ed.), *Der Minsker Prozess* II 3 f dd (forthcoming). Three accused persons (Hetterich, Höchtl, Fischer) were just eighteen at the time they committed the crimes, a fact which the Red Army tribunal hearing the case noted and considered as a partly mitigating circumstance.

³ See for those drafts Triffterer, 2nd edition (2008), *Preliminary Remarks*, fn. 5, 6 and 9.

and headed 'Law to be applied by the Court'. The article referred, in the context of other questions 'concerning general provisions on defences' and 'complicity', to the laws concerning the 'minimum age of criminal responsibility in that country where the offence is alleged to have been committed or, when such country did not confer jurisdiction, in the country of citizenship of the suspect, provided that they are not in conflict with international law'⁴.

More precise in this respect is a 'Draft International Criminal Code', presented by M. Cherif Bassiouni for the AIDP 1980. It contains for the first time in the drafting history of international documents relevant to the establishment of an international criminal jurisdiction, as an Appendix, a comprehensive 'General Part for an International Criminal Court Direct Enforcement Model'. In article 5, 'Responsibility', section 1 on individual responsibility commences with the sentence: 'A person is criminally responsible under this Code when he reaches the age of eighteen'⁵; this proposal is verbally repeated in Bassiouni's 'A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal' 1987⁶ as well as in later publications by that author. Neither Draft mentions whether this age has to be reached at trial or at the time when the act was committed. But since this question is answered by national laws in the sense that, when acting, the perpetrator has to have reached the age on which his or her criminal responsibility depends, it has to be assumed that this is the decisive fact in international criminal law as well.

In 1986 the ILA adopted Protocol II to its 1984 'Statute for an International Criminal Court' and also to its 'Statute for an International Commission of Criminal Inquiry' containing defences. In this Protocol II the ILA mentioned, beneath the heading 'Criminal liability' in section I, subsection (1), 'Immaturity', that '[e]veryone is exempt from criminal liability for his conduct prior to the attainment of 18 years of age'⁷.

It is surprising that even though all relevant proposals by non governmental organizations since 1980 mention immaturity, mostly in the context of other defences, later activities within the UN, like the 1991 ILC Draft Code and its 1994 Draft Statute did not touch upon the question of lack of responsibility of minors. Therefore, a Committee of Experts, commenting in its 'Siracusa Draft' on the 1994 ILC Draft Statute, mentions in a list of 'Open questions and elements of the crime to be regulated in a General Part' under objective elements of a crime (*actus reus*) the 'Age of responsibility', pointing out however, that some members thought this question was better dealt with as a defence (justification or excuse); the majority did not share this opinion⁸.

The *Ad Hoc* Committee on the Establishment of an International Criminal Court, holding its Second Session in August 1995, where the Siracusa Draft was presented, did not include any provisions at all in its Report, but mentioned in its list of open questions the age of responsibility⁹. Responding to this, the Committee of Experts expanded upon its former list early in 1996, proposing in its Updated Siracusa Draft an article 33-3:

1. A person under the age of sixteen at the time of the commission of a crime shall not be responsible under this Statute.
2. A person between the age of sixteen and twenty-one at the time of commission of a crime shall be evaluated as to his maturity whether he is responsible under this Statute¹⁰.

⁴ See L. Kos et al., in: ILA, *Belgrade Conference* (1980), Appendix B, Draft Statute for an International Criminal Court 15.

⁵ See Bassiouni, *International Criminal Law. A Draft International Criminal Code* (1980), Appendix – General Part, article V, section 1.1, 152. See also Triffterer, *Preliminary Remarks* (2008), mn 19 and 34.

⁶ Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) Draft International Criminal Code, Part I, General Part, article V, section 1.1, p. 95.

⁷ ILA Seoul Conference 1986, Annex C, Protocol II, p. 10.

⁸ See Siracusa Draft, General Part, III. Elements of Crime, A. Objective (*actus reus*) No. 1, respectively IV. Defences (Justification and Excuse), p. 41 with fn. 2 there.

⁹ See for the *Ad Hoc* Committee Report, Annex II (Guidelines) B 3, p. 59.

¹⁰ Updated Siracusa Draft II, the relevant parts are reprinted in: Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung* (2002) 942 et seq. For a widely corresponding proposal elaborated by Eser, Koenig, Lagodny and Triffterer, presented for consideration by the ILC when discussing its Draft Code 1996 see

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- 6 The lack of agreement in the Preparatory Committee appears very clearly from the profusion of brackets in its proposals presented in 1996 under the heading ‘Age of responsibility’ and discussed in a Working Group on the General Principles of Criminal Law:

- ‘1. A person under the age of [twelve, thirteen, fourteen, sixteen, eighteen] at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute, [unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].
2. [A person who is between the age of [sixteen] and [twenty-one] at the time of the (alleged) commission of a crime shall be evaluated (by the Court) as to his or her maturity to determine whether the person is responsible under this Statute].’

In addition, under a slightly different heading, ‘Age of persons liable to punishment’, an alternative proposal was presented:

‘[Persons aged 13 to 18 years at the time of the facts shall be criminally responsible but their prosecution, trial sentence and the regime under which they serve their sentence may give rise to the application of special modalities specified in the Statute]’¹¹.

- 7 In a note, the Preparatory Committee pointed out that, especially with regard to the age of responsibility, different views were expressed. It was further mentioned ‘that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors’. The discussion, ‘whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption’ did not (then) lead to any result, for instance on the question, ‘as to what would be the criteria for the evaluation process’ and if this should ‘be left for the Court to develop in supplementary rules or by jurisprudence’. In addition, reference was made to the Convention on the Rights of the Child and the definition in article 1 of a child as ‘every human being younger than eighteen years of age and that, in its article 37, it lays down a series of limitations as regards the applicable penalties, ruling out the death penalty and life imprisonment without parole’¹². These proposals and the notes were confirmed at the February Session 1997¹³.

- 8 At the December 1997 session of the Preparatory Committee, a somewhat different approach was pursued, not in the Working Group on the General Principles of Criminal Law but in the Working Group on Penalties. A proposal had been made there to deal with the sentencing of juveniles. Language drafted primarily by Argentina and Samoa suggested a ‘jurisdictional’ solution that would avoid the potentially intractable debate over substantive issues, both of criminal responsibility and of sentencing, by simply precluding the trial of any minors at all. As reported by the Committee in a footnote, the basic proposal read:

‘[The Court shall have no jurisdiction over those who were under the age of 18 years at the time they are alleged to have committed a crime which would otherwise come within the jurisdiction of the Court]’¹⁴.

Ambos, *ibid.*, and Triffterer, ‘Annex 2: Acts of Violence and International Criminal Law’ (1997) 4 *Croatian Ann-CrimL&Prac* 2, 872. It was argued by these authors that in many legal systems the general age of responsibility starts with fourteen and in many wars all over the world soldiers under sixteen could be found. They should not as such *generally* be excluded from responsibility and punishment. To start responsibility with fourteen would not place in jeopardy those ‘children’, who have been misused as soldiers in a war for instance. This is because when they are ‘not mature enough to see the amount of damage they may cause or the illegality of their individual conduct, they are anyhow not responsible’ (*id.*). See also *Prosecutor v. Taylor*, Case No. SCSL-2003-01-01, Amended Indictment, 17 Mar. 2003, p. 6.

¹¹ Cf. 1996 Preparatory Committee II, p. 87.

¹² 1996 Preparatory Committee II, pp. 87 and 88.

¹³ Preparatory Committee Decisions Feb. 1997.

¹⁴ Preparatory Committee Decisions Dec. 1997, Annex V (Penalties), fn. 4. The paragraph in the note was introduced by this comment: ‘The following proposals were made which should be treated either under age of responsibility or the jurisdiction of the Court’.

To this, States which preferred to keep the possibility of prosecuting minors alive in this part of the Statute insisted on adding:

‘[; however, under exceptional circumstances, the Court may exercise jurisdiction and impose a penalty on a person aged 16 to 18 years, provided it has determined that the person was capable of understanding the unlawfulness of his or her conduct at the time the crime was committed]’¹⁵.

This language, which by the end of the Preparatory Committee’s work had significant support both from NGOs and Governments, was carried forward into the Zutphen Draft¹⁶ and the Consolidated Draft submitted by the Preparatory Committee to the Rome Conference¹⁷.

The Zutphen Draft, however, reprinted the proposals on age of responsibility that had been before the Working Group on General Principles unchanged, aside from moving the explanatory note into the footnotes¹⁸. With regard to the framework for penalties, it included newly bracketed sentencing proposals. In the case of ‘[... a convicted person under the age of 18 years at the time of the commission of the crime, a specified term of imprisonment of no more than 20 years]’ was provided as well as an alternative that ‘[... the Court shall determine the appropriate measures to ensure the rehabilitation of the offender]’ under the age of 18. There was also a plea that this article, 68 [A] (a), ‘Applicable penalties’, ‘should be harmonized with article 20 [E] (Age of responsibility)’¹⁹. The Consolidated Draft forwarded to Rome corresponded to the Zutphen Draft in respect of the proposals on age of responsibility and penalties²⁰.

There was only a brief discussion of the various aspects of the matter in Rome. The compromise offered by the first part of the footnote which emerged from the Working Group on Penalties in New York migrated both from the footnote into the text (with only minor drafting improvements) and from the Part of the Statute dealing with penalties into the Part dealing with general principles of criminal law²¹. It had apparently been accepted that prosecuting minors, which would inevitably involve trying to provide a special regime for them, was not a good way to use the Court’s probably limited resources. This jurisdictional solution had the consequence that proposals in the drafts of the Preparatory Committee to include in Part 7 on Penalties reduced penalties for persons under eighteen became irrelevant. They were deleted²². However, the last word on the age of responsibility in international criminal law has not yet been said. This is shown by the Statute of the Special Court for Sierra Leone in which the age of responsibility starts with fifteen. In theory perpetrators between fifteen and eighteen would be prosecuted but not go to jail if convicted; in practice, the Prosecutor decided not to prosecute any such persons²³. Also, the fact, that article 6 of the

¹⁵ *Ibid.*

¹⁶ Zutphen Draft, p. 127, article 68, fn. 233.

¹⁷ Preparatory Committee (Consolidated) Draft, p. 143, article 75, fn. 3.

¹⁸ Zutphen Draft, p. 56.

¹⁹ *Ibid.*, pp. 127–128.

²⁰ Preparatory Committee (Consolidated) Draft, pp. 61–62, (age of responsibility); *ibid.*, pp. 142–143, (penalties).

²¹ See, generally, Saland, in: Lee (ed.), *The International Criminal Court. The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 189, 201–202.

²² Fife, in: Lee (ed.), *The International Criminal Court. The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 327.

²³ Article 7 Statute of the Special Court for Sierra Leone, available under www.specialcourt.org/documents/Statute.html (internet), See also note 31. For further information see du Plessis, ‘Children Under International Law’, (2004) 13 *AfricanSecurityRev* 2, 110; Amnesty International, Sierra Leone: *Recommendations on the Draft Statute of the Special Court* (AI Index, AFR 51/083/2000), available under <http://web.amnesty.org/library/print/ENGAFR510832000>; I. Cohn, ‘The Protection of Children and the Quest for Truth and Justice in Sierra Leone’ (2001) 55 *JIAff* 1; Amann ‘Message as Medium in Sierra Leone’ (2001) 7 *ILSA JI&CompL* 237; Trittin and Weiß ‘Das Sondergericht Sierra Leone’, (2003) *Menschenrechtsmagazin* 3, 179, 180. On the decision not to prosecute, explained by the Prosecutor, see Crane (2008) 15 (3) *Human Rights Brief* 11. Those guilty of recruiting and using child soldiers in Sierra Leone were, however, tried and convicted. In the first trial completed before the ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, the accused was convicted in 2012 of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities.

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ICTY Statute and article 5 of the ICTR Statute say nothing about the age of responsibility shows that the situation is not yet completely clear.

2. Reasons for '[e]xclusion of jurisdiction'

- 11 The reasons for this exclusion were to avoid a conflict with regulations in different national criminal jurisdictions about the age when criminal responsibility should start and how the period of growing maturity should be dealt with. It was argued that an absolute age of responsibility was equally unsatisfying as a presumptive age that included the possibility of rebutting such a presumption.
- 12 If an evaluation of maturity is needed, it should not be left exclusively with the trial judges. The reason for this is that conducting an investigation procedure concerning juvenile suspects could do as much harm to him or her as a trial. If evaluated at all, the Prosecutor right from the beginning of the case is endowed with the discretion to conclude that there is insufficient basis for a prosecution, owing to the immaturity of the alleged offender, under the same conditions as he could stop or proceed in other cases of doubt²⁴. In practice such an exercise would contribute to alleviating the negative effects caused by criminal proceedings on the rehabilitation of young offenders.
- 13 Besides, an evaluation of maturity strongly depends on the social surrounding in which the offender has grown up. Such investigations together with those concerning the whole scale of his or her behaviour need specific facilities and persons trained in juvenile delinquency and social influences for which the ICC is not likely to have the necessary equipment or the corresponding laws providing special proceedings for juveniles.
- 14 The execution of sentences on perpetrators who were under eighteen when committing the crimes, would require, in addition, specific care to take into consideration their whole behaviour and their former situations, their growing maturity since then as well as the social surrounding to which they will return.
- 15 It may seem – at first glance – contradictory to protect by article 8 para. 2 (b) (xxvi) 'children under the age of fifteen years' (and not all minors under eighteen) against 'conscripting or enlisting ... into the national armed forces or using them to participate actively in hostilities' and not holding those older than fifteen responsible for crimes falling within the jurisdiction of the Court. But taking into consideration that complementarity and thereby the priority of national criminal jurisdiction prevails anyhow, it appears not only justifiable but also preferable to leave the group under eighteen to the national courts. They are much better equipped to take care of the specific situation in which children have been when committing crimes under international criminal law²⁵.

B. Analysis and interpretation of elements

- 16 Article 26, situated in Part 3, General Principles of Criminal Law, regulates an aspect of substantive criminal law from its procedural side, by excluding the jurisdiction of the Court 'over persons under eighteen' thus showing the close connection between these two fields²⁶.

²⁴ See also Bergsmo and Kruger, *article 53*, mn 23 and 29. The age meant in article 53 para. 2 (c) does not refer to article 26. In cases of article 26 there exists no jurisdiction of the Court and therefore the Prosecutor has to proceed according to article 53 para. 1. If the perpetrator was just 18 when committing the crime, there is no discretion of the Prosecutor for a decision based on article 53 para. 2 (c).

²⁵ This opinion does not exclude a statement given by some scholars, including one of the authors of this article, that soldiers under sixteen 'should not as such generally be excluded from responsibility and punishment'. See to this point of view Triffterer 'Annex 2: Acts of Violence and International Criminal Law', (1997) 4 *CroatianAnnCrimL&Prac* 2, 872, for the context and the other authors holding this opinion. See also mn 23 and 24. – For the contrary opinion see Frulli, in: Cassese et al., *The Rome Statute of the International Criminal Court. A Commentary*, Vol. I (2002) 534 who suspects that 'it may happen that adults are brought to trial before the ICC in full respect of their rights whereas youngsters are tried by national courts without their rights being respected'.

²⁶ Triffterer, 2nd edition, *Preliminary Remarks*, mn 14.

1. ‘person ... under the age of 18’

A person is ‘under the age of eighteen’ as long as he or she has not completed the eighteenth year of his or her life. The exact time is at 12.00 p.m. (24.00) of the day before the date of his or her birth appears again, for the eighteenth time. Even when born at the very end of the original birthday, the next birthdays are counted as such and not by the hour. When the day he or she was born begins again after eighteen years have passed, at 00.01 a.m., criminal responsibility starts even for those who have been born later in the day. Those born on 29 February in a ‘leap-year’ are ‘under the age of eighteen’ only until the end of the 28th eighteen years later, because the next day necessarily follows in a non leap-year and, therefore, is already the 1 March.

This time limit is an absolute border completely independent of maturity or immaturity. But responsibility of persons above the age of 18 may be excluded by a defence listed in article 31 para. 1 (a), when their immaturity results from a mental disease²⁷. In addition, the Court is free to mitigate the punishment in cases where the defendant reached this age of 18 very shortly before he committed the crime, by arguing that his or her maturity has not yet stabilized sufficiently. This follows because, included in the criterion ‘... individual circumstances of the convicted person’, mentioned in article 78 para. 1, is his or her status of maturity, which may be even above the age of 18 individually very differently developed.

Article 26 blocks the exercise of the jurisdiction of the Court including the initiating of investigations *proprio motu*, pursuant to article 15, because the exercise of jurisdiction has to be, according to article 13, ‘in accordance with the provisions of this Statute’, which excludes the prosecution of persons under eighteen, according to article 26.

This question also has to be dealt with according to article 19 para. 1 by the Court *ex officio*. In addition, the Prosecutor and the defendants may challenge the jurisdiction of the Court according to article 19 para. 6 at any time ‘prior to the confirmation of the charges’. But this limitation does not mean that later, at trial, evidence on this question may not be brought in irrespective of whether it is new or earlier withheld²⁸.

2. ‘time of the alleged commission of a crime’

A crime is committed at the time when the perpetrator has acted or when he or she has omitted what should have done according to his or her legal duty. When the perpetrator needs more than one act to fulfill all material and mental elements of the crime, the last one is decisive for triggering or not triggering the jurisdiction of the Court. Because this part of the relevant behaviour causes the completion and when at that time he or she was not yet eighteen, they cannot have reached this age before. All earlier acts are insofar preparatory elements, independent whether they are a punishable attempt in the meaning of article 25 para. 3 (f), for which the jurisdiction of the Court is excluded.

The time when the result of the crime appears, is not decisive; neither is an action with which the perpetrator tries – in vain – to withdraw from an attempt²⁹. What in such situations counts is whether the perpetrator was eighteen when ‘taking action that commences its execution by means of substantial step, but the crime does not occur...’ article 25 para. 3 (f).

When during the investigation it appears that the alleged commission perhaps occurred earlier than originally assumed, the case has to be dismissed because of lack of jurisdiction of the Court by all court organs, independent of whatever stage of the proceeding the case may have reached, as already expressed in mn 12.

²⁷ See A. Eser, *article 31*, mn 17 *et seq.*

²⁸ See also mn 22.

²⁹ See also mn 19.

C. Special remarks: No exclusion of national jurisdiction over persons under eighteen

23 Only the jurisdiction of the ICC is excluded. As can be seen from the historical development of this article, criminal responsibility may not be excluded for persons under eighteen in general. Therefore, it cannot be assumed that persons under eighteen are not responsible for crimes under international law in general. Quite the opposite. They are responsible for crimes for which the ICC has jurisdiction according to article 5 before national courts under the principle of universality and insofar as national law provides for such a jurisdiction over minors³⁰. This proposition has indeed been acted upon in the creation of the Special Court for Sierra Leone which, on paper, had particular arrangements for juveniles³¹. Excluded according to article 26 is merely the jurisdiction of the ICC.

24 However, in the case of youngsters under the age of fifteen years who are conscripted or enlisted into the national armed forces in a criminalized way falling under article 8 para. 2 (b) (xxvi) or (e) (vii) such juveniles are indispensable victims of crimes violating international law and established to protect them; they should not be victimized a second time by being brought before a national criminal jurisdiction.

Persons over fifteen and those younger but not victimized in the sense of article 8 para. 2 (b) (xxvi) and (e) (vii) could be held responsible if the relevant national law so provides. This legal situation has the consequence that States contemplating prosecuting crimes of juveniles between sixteen and eighteen should proceed where the exceptions mentioned in article 17 para. 1 (a) and (b) are not applicable. However in cases where States are unable or unwilling to do so, the Court, nevertheless has no jurisdiction, because this lack of competence is expressly declared by article 26 for all crimes according to the Rome Statute under the jurisdiction of the Court.

³⁰ See also Triffterer, *Preliminary Remarks* (2008), mn 62; Ottenhof 72 *RIDP* 663 *et seq.*, available under www.cairn.info/revue-internationale-de-droit-p%C3%A9nal-2001-3-page-669.htm.

³¹ *Supra* note 23.