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# CHILDREN

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### **CRIMES AGAINST HUMANITY**



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## CHILDREN

### *Proposed Additions to the Articles 2 and 6 of the Draft Articles on the Prevention and Punishment of Crimes against Humanity [ILC Draft]*

#### **Article 2 Definition of crimes against humanity**

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[...]

- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, **age**, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph; [...]

#### **Article 6 Criminalization under national law**

[...]

7. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

**7bis. No person who was under the age of 18 at the time alleged conduct occurred shall be criminally punished for an offence enumerated in Article 2 of this Convention.**

[...]

*Explanatory Notes*

1. With nearly one-third of the world’s population under 18, children are at the center of nearly all of humanity’s affairs. This is surely true – as the UN Secretary-General’s annual Report on Children and Armed Conflict establishes – with regard to the violent situations that produce crimes against humanity.<sup>1</sup> Children are killed and maimed, deprived of homes, health care, sustenance, and schooling. They are separated, often forcibly and sometimes permanently, from their loved ones. Children of all ages and genders are subjected to sexual and gender-based violence, and sometimes children are born as a result. Some children are recruited into armed service, and some are slave traded or enslaved. In short, all crimes within the jurisdiction of international criminal tribunals affect children. Such conduct also often constitutes what the UN calls the “Six Grave Violations”.<sup>2</sup>
2. Crimes against humanity may have a disproportionate effect on persons whose age renders them more vulnerable than others. Younger persons are more likely both to bear war’s traumas longer and to transmit them to future generations. Children’s age-related vulnerabilities – alone and in intersection with gender, ethnicity, socio-economic status, and other identities – likewise differ from those of adults. So, too, age-related capacities: Children often are capable of deeper thoughts and greater action than adults presume.
3. These factors underscore the urgent need to ensure that children’s issues are duly included in the forthcoming Convention on Crimes against Humanity. At a minimum, States should consider two concrete additions.
4. First, **Draft Article 2(1)(h)** should recognize that “**age**” is a ground on which persecution can be and frequently is perpetrated. Committing persecution against a child inevitably violates multiple provisions of the almost universally ratified Convention on the Rights of the Child,<sup>3</sup> thus constituting an “intentional and severe

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<sup>1</sup> UN Secretary-General, “Children and Armed Conflict: Report of the Secretary-General” (3 June 2024) UN Doc A/78/842-S/2024/384, paras 4-10 (identifying more than 30,000 grave violations against children in 2023 – “a shocking 21 per cent increase” in one year – and proceeding to discuss “situations” in more than 20 countries).

<sup>2</sup> UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, ‘The Six Grave Violations’ <<https://childrenandarmedconflict.un.org/six-grave-violations>> (listing these violations as: (i) killing and maiming of children; (ii) recruitment or use of children as soldiers; (iii) sexual violence against children; (iv) abduction of children; (v) attacks against schools or hospitals; and (vi) denial of humanitarian access for children).

<sup>3</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) (196 parties). For regional counterparts, see African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) (ACRWC); European Convention

deprivation of fundamental rights contrary to international law by reason of the identity of the group”.<sup>4</sup> But sole reliance on that catchall phrasing of “other grounds” in Draft Article 2(1)(h) runs the risk that instances of child-targeting will not be recognized as such. This is enhanced by the fact that children’s experiences of persecution may differ from those of adults, further urging that “age” be included as an enumerated ground of persecution to facilitate recognition.

5. Examples of targeting that have constituted crimes against humanity include child-takings by the Nazis and child-killings by the Khmer Rouge (among other groups),<sup>5</sup> as well as child-conscription in far too many situations. Children may be targeted “as a calculated means to harass, intimidate or undermine the resistance of their parents or the ‘group’ or ‘side’ to which they belong”.<sup>6</sup> Children also are targeted on the premise that “they are weaker and cannot defend themselves as well as adults”, or that they are “more malleable and more easily coerced or convinced to serve a range of purposes – from servants to sexual slaves – in addition to participating in combat, as well as to commit atrocities and terrorise populations”.<sup>7</sup>
6. A decade ago, the ICC Office of the Prosecutor recognized that age may be a ground of persecution as a crime against humanity,<sup>8</sup> which it recently reaffirmed.<sup>9</sup> In 2025, the ICC Pre-Trial Chamber affirmed multiple charges of persecution on “age and

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on the Exercise of Children’s Rights (adopted 25 January 1996, entered into force 1 July 2000) ETS 160 (ECECR). See also Mary Beloff, ‘The Rights of the Child According to the Inter-American Court of Human Rights: A Latin American Translation’ in Armin von Bogdandy et al, *The Impact of the Inter-American Human Rights System: Transformations on the Ground* (OUP, 2024) 326.

<sup>4</sup> UNGA, ‘Report of the International Law Commission (71<sup>st</sup> Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto’ (20 August 2019) UN Doc A/74/10, art 2(2)(g) (defining “persecution” in Draft Article 2(1)(h)).

<sup>5</sup> *Trial of the Major War Criminals before the International Military Tribunal* (Judgment) (30 September-1 October 1946) XXII Blue Series 411, 480 (discussing the crimes against humanity as part of “a plan to get rid of whole native populations by expulsion and annihilation”, and quoting Heinrich Himmler’s statement that Nazi Germany would take any “good blood of our type” including “by kidnapping their children and raising them here with us”); ECCC (Appeal Judgment) Case 002/01 (23 November 2016) paras 449, 453, 455-460 (addressing murder as a crime against humanity, and upholding the finding that “children in particular [...] died from a combination of exhaustion, malnutrition or disease” during the course of forced evacuations).

<sup>6</sup> Cécile Aptel, *Atrocity Crimes, Children and International Courts: Killing Childhood* (Routledge, 2023) 23.

<sup>7</sup> *Ibid* 23-24.

<sup>8</sup> ICC Office of the Prosecutor, *Policy on Children* (November 2016) <[https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF)> para 51 (stating that “acts targeting children on the basis of age or birth may be charged as persecution on ‘other grounds’” and adding that “children may also be persecuted on intersecting grounds, such as ethnicity, religion and gender”).

<sup>9</sup> ICC Office of the Prosecutor, *Policy on Children* (December 2023) <<https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-children-en-web.pdf>> (ICC OTP Policy on Children 2023) para 35.

gender grounds” as crimes against humanity against Joseph Kony, the leader of the Lord’s Resistance Army in Uganda.<sup>10</sup>

7. In addition to accounting for the unique experiences of children, including “age” as a recognized ground of persecution will also cover adults who are targeted due to their age. This includes adults of military age, adults of reproductive age, and older persons, all of whom can be expected to experience persecution in situations of crimes against humanity.<sup>11</sup>
8. Second, the Study Group proposes a **new paragraph** in Draft Article 6 to **exclude children, meaning persons under the age of 18, from criminal punishment for crimes against humanity**. This would reflect international human rights law and treaty obligations, which already require States to treat alleged juvenile offenders differently.<sup>12</sup>
9. The threshold of age 18 was set in the 1989 Convention on the Rights of the Child, and confirmed unequivocally in the 1990 African Charter on the Rights and Welfare of the Child, the 1996 European Convention on the Exercise of Children’s Rights, a 2002 advisory opinion of the Inter-American Court of Human Rights, and the 2024 European Union Guidelines on Children and Armed Conflict.<sup>13</sup> Other instruments with this threshold include the 2000 UN Trafficking Protocol, the 1999 International

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<sup>10</sup> ICC, Press Release ‘Kony case: ICC Pre-Trial Chamber III confirms the charges of war crimes and crimes against humanity; accused still at large’ (6 November 2025) <<https://www.icc-cpi.int/news/kony-case-icc-pre-trial-chamber-iii-confirms-charges-war-crimes-and-crimes-against-humanity>>.

<sup>11</sup> See, e.g., UNGA, ‘Report of the Open-ended Working Group on Ageing on its Fourteenth Session’ (31 May 2024) UN Doc A/AC.278/2024/2, para 21; UN Human Rights Council, “Open-ended intergovernmental working group for the elaboration of a legally binding instrument on the promotion and protection of the human rights of older persons” (28 March 2025) UN Doc A/HRC/58/L.24/Rev.1, para 1 (establishing a working group to elaborate and submit a draft internationally legally binding instrument on the human rights of older persons).

<sup>12</sup> See, e.g., CRC (n 3) arts 37, 40; ACRWC (n 3) art 17 (titled “Administration of Juvenile Justice”); ECECR (n 3) arts 3-15 (concerning “Procedural measures to promote the exercise of children’s rights”).

<sup>13</sup> CRC (n 3) art 1 (“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”); ACRWC (n 3) art 2 (“For the purposes of this Charter, a child means every human being below the age of 18 years.”); ECECR (n 3) art 1 (“This Convention shall apply to children who have not reached the age of 18 years.”); *Juridical Condition and Human Rights of the Child* (Advisory Opinion) (28 August 2002) OC-17/2002, para 42 (“taking into account international norms and the criterion upheld by the [Inter-American Court of Human Rights] in other cases, ‘child’ refers to any person who has not yet turned 18 years of age”); European Union, EU Guidelines on Children and Armed Conflict 2024 (24 June 2024) <<https://www.eeas.europa.eu/sites/default/files/documents/2024/EEAS-EU-Guidelines-CAAC%20v5.pdf>> para 7 (“The EU will continue to ensure the full realization of the obligations in the Convention on the Rights of the Child [...] including with regard to the definition of the child as every human being below the age of 18”).

Labour Organization Convention on the Worst Forms of Child Labour, the ICC Elements of Crimes, and the UN Convention against Cybercrime.<sup>14</sup>

10. No international criminal tribunal prosecutes children. The Rome Statute forbids the ICC to exercise jurisdiction over children,<sup>15</sup> and the Special Court for Sierra Leone held fast to its first Prosecutor's refusal to do so: "The children of Sierra Leone have suffered enough both as victims and perpetrators. [...] I want to prosecute the people who forced thousands of children to commit unspeakable crimes".<sup>16</sup> Indicative of such views, there have been few, if any, State prosecutions of children for crimes against humanity.
11. A range of international law instruments prescribes special protection for children in situations of conflict and similar violence. Of special note is the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which was adopted after the Rome Statute and which entered into force after the establishment of the Special Court for Sierra Leone, both courts that have adjudicated crimes against children.<sup>17</sup> This Optional Protocol's 173 Parties include all UN Security Council Permanent Members, plus many other States from Africa, the Americas, Asia, Europe, and Oceania.<sup>18</sup> It emphasizes that children need

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<sup>14</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (185 Parties), art 3(d) ("Child" shall mean any person under eighteen years of age."); International Labour Organization Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161, art 2 ("For the purposes of this Convention, the term 'child' shall apply to all persons under the age of 18."); ICC, Elements of Crimes (2013), art 6(e)(2) element 5 (for genocide by forcibly transferring children, requiring that "[t]he person or persons [transferred to another group] were under the age of 18 years"); United Nations Convention against Cybercrime (adopted 24 December 2024) UN Doc A/Res/79/243 annex, art 14(2) ("For the purposes of this article, the term 'child sexual abuse or child sexual exploitation material' shall include visual material, and may include written or audio content, that depicts, describes or represents any person under 18 years of age"). See also ICC OTP Policy on Children 2023 (n 9) 15 ("For the purpose of this Policy, a 'child' is considered to be any person from birth to the age of 18. This is consistent with the definition adopted in the UN Convention on the Rights of the Child [...] and the provisions of the Rome Statute.").

<sup>15</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 26 ("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.").

<sup>16</sup> Special Court for Sierra Leone Public Affairs Office, Press Release, "Special Court Prosecutor Says He Will Not Prosecute Children" (2 November 2002) <<https://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf>>.

<sup>17</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222 (173 Parties) (CRC OPAC).

<sup>18</sup> See UN Treaty Collection, 'Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict' <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-11-b&chapter=4&clang=\\_en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11-b&chapter=4&clang=_en)>.

increased protection on account of “the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development”.<sup>19</sup>

12. Subjecting a person to criminal punishment for conduct occurring when the person was a child would perpetuate such harms. Thus branding a very young person with the lifelong stigma of being a “criminal against humanity” also would contravene States’ pledges, in the near-universally ratified Convention on the Rights of the Child, that they “shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts”.<sup>20</sup>

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<sup>19</sup> CRC OPAC (n 17) preamble para 3.

<sup>20</sup> CRC (n 3) art 39.