

## **Joint Comments on the draft Policy on Children of the Office of the Prosecutor by Child Rights International Network and Child Soldiers International**

August 2016

1. We commend the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) for developing a Policy on Children (the Policy) to not only address international crimes under the Rome Statute against or affecting children, but to also inform the office's interaction with children. We also commend the OTP for giving an opportunity to child rights and child protection actors, such as the Child Rights International Network (CRIN) and Child Soldiers International, to comment on the Policy, and hope our suggestions will be helpful.
2. **As the present Policy specifically aims to strengthen respect for children's rights under international law, we suggest it be called a "Child Rights Policy".**

### **Special attention to violations of children's rights**

3. The OTP plays a key role in giving survivors of international crimes access to justice, including adequate reparation. Children are more vulnerable to human rights violations, especially in situations of violence and armed conflict and in the contexts of the crimes addressed by the ICC. It is therefore critical for the OTP to prioritise investigations of violations of children's rights.
4. The Policy states that "wherever the evidence permits", the OTP will seek to include charges for crimes directed specifically against children (paragraph 4 on page 3, paragraph 75 on page 27, paragraph 78 on page 28). In paragraph 58 on page 24, the Policy explains that:

From the early stage of developing the case hypothesis, the Office will carefully consider crimes against or affecting children, and will proactively include specific lines of inquiry to determine whether such crimes were committed, in all situations under investigation.

5. While these paragraphs reflect the OTP's intention to prosecute crimes committed against children, we feel that a policy on children's rights should highlight the special vulnerability of children to the crimes addressed by the ICC and the need to prioritise investigations of those crimes committed against them. In that regard, it is important to consider the various dimensions of how children's rights can be affected. This may include prosecuting crimes amounting to violations of children's rights or taking into consideration how children are affected by other crimes, and how the work of the ICC can impact children.
6. **We strongly suggest that the Policy recognises children's need for higher standards of protection and therefore gives priority to investigating crimes committed against or affecting children. We urge the OTP to strengthen the language used in the above-mentioned paragraphs to clearly state that priority will be given to crimes committed against children. To this end, paragraph 58 could be re-phrased as follows:**

**From the early stage of developing the case hypothesis, the Office will carefully consider and prioritise investigations of crimes against or affecting children, and will proactively include specific lines of inquiry to determine whether such crimes were committed, in all situations under investigation.**

#### **Sentencing former child soldiers<sup>1</sup>**

7. On the matter of prosecuting children as offenders, international criminal tribunals usually refrain from indicting anyone for crimes committed under the age of 18. The Rome Statute provides that the ICC has no jurisdiction over an individual who was under the age of 18 at the time of the commission of the alleged offence. In the case of *ad hoc* tribunals such as the Special Court for Sierra Leone (SCSL) and the International Criminal Tribunal for

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<sup>1</sup> Child Soldiers International and CRIN consider the term child soldier to be equivalent to the following description of children associated with armed forces or groups: "A child associated with an armed force or armed group refers to any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes. It does not only refer to a child who is taking, or has taken, a direct part in hostilities." UNICEF, *Paris Principles and guidelines on children associated with armed forces or armed groups*, February 2007.

the Former Yugoslavia, their Statutes did not contain a minimum age of criminal responsibility, but neither of these tribunals indicted anyone under the age of 18. Early in his tenure, the first Chief Prosecutor of the SCSL stated that as a matter of policy he did not intend to indict persons for crimes committed when they were children, but to indict those most responsible, meaning their adult recruiters and commanders. However, on the matter of crimes committed after the age of 18 by former child soldiers, there are no specific standards or positions stated by international courts.

8. The matter is of particular importance with Dominic Ongwen currently standing trial at the ICC. He is the only former child soldier to appear before the ICC so far. While the charges he faces only relate to acts allegedly committed as an adult, we believe the ICC should consider whether, as a former child soldier, Mr Ongwen should receive more leniency at the sentencing stage than other war criminals.
9. Many child soldiers will have endured severe beatings and sexual violence, and will have witnessed killings. Some will have victimised others. Extremely traumatic experiences within these groups are associated with marked emotional distress, behavioural difficulties and traumatic stress symptoms. Children's ways of coping will be affected by whether they were able to demobilise, at what age, and by their post-conflict experiences. Those likely to fare better in the longer term are those who, on return to their communities, can receive family, peer and community understanding, support, acceptance and forgiveness. However, defendants like Mr Ongwen never went back: unlike child soldiers who were demobilised while they were still children, he grew into adulthood outside a non-violent familial and community socialisation and developmental experiences.
10. Understanding and empathy towards victims of armed conflict must also be extended to those who emerge from such war-ravaged childhoods to commit crimes, even on a scale such as this. We believe that defendants such as Mr Ongwen should not avoid justice because of their childhood experiences. However, it would be a potential injustice not to take into account his traumatic experiences when determining an appropriate sentence,

should he be found guilty.<sup>2</sup> We urge the OTP to consider this argument for the treatment of former child soldiers accused of crimes committed as adults.

- 11. We therefore recommend that the Policy be amended to include provisions that ensure unlawful association with armed forces and armed groups during childhood is considered as a mitigating factor in cases when the OTP proposes sentences.**

### Age assessment and age determination

12. Assessing and determining the age of individuals interacting with the OTP, and who do not have birth certificates or other reliable documents proving their age, may be necessary in at least three circumstances:

- i. To establish whether a crime has occurred (such as the crime of using, conscripting and enlisting persons under the age of 15);
- ii. To establish whether a suspect is over 18 (since the ICC has no jurisdiction over individuals who are under 18);
- iii. To determine whether child sensitive techniques are needed when eliciting evidence from a potential child witness.

13. The Policy raises the issue of age determination in paragraph 9 on page 4 and paragraph 55 on page 23, explaining in footnote 65, that:

The options for determining a person's age include: school and medical records; statements from family members, community leaders and teachers; photographic or video images; or a physical examination.

14. International child protection standards very clearly advise against the use of physical methods for age assessment and determination, as they raise ethical concerns and are not deemed to be sufficiently reliable. In guidelines published in 2011, UNICEF warned:

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<sup>2</sup> Child Soldiers International, "Children in Armed Conflict: A War Crime We Have the Responsibility to Prevent", 26 March 2015: <http://icrtopblog.org/2015/03/26/children-in-armed-conflict-a-war-crime-we-have-the-responsibility-to-prevent>

Age assessments based on physical development can be carried out using a number of anthropometric measurements, including height, weight and skin, and puberty rating. However, these methods have been highly criticised because they do not take into consideration variations between ethnicity, race, nutritional intake and socio-economic background.<sup>3</sup>

15. The guidelines further recommend that “*social assessments that incorporate local knowledge about the child and/or childhood in a particular location, should form the basis of all age assessments.*”<sup>4</sup>

16. To avoid harming children, methods used to assess and determine the age of a victim, a suspect, or a witness should never rely on physical examinations, but rather on more than one form of documentation or approach, all of which should aim to provide, or cumulatively provide, objective proof of age. These can include identity cards, school diplomas, school or medical records, and methodologies involving cross-checking information with families, local officials and others in a position to know the age of the concerned individual. These efforts should in no way compromise the safety, privacy or dignity of the individual concerned.

**17. We urge the OTP to remove the mention of “physical examination” as a means of determining a person’s age and adopt methods described in paragraph 16. Footnote 65 could instead read as follows:**

**Methods used to determine a person’s age should rely on social investigations involving gathering and cross-checking data from photographic or video images; school and medical records; and statements from family members, community leaders and teachers. These methods should aim to respect and guarantee the safety, privacy and dignity of the individual concerned.**

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<sup>3</sup> UNICEF, *Age assessment practices: a literature review and annotated bibliography*, 2011, page 20: [http://www.unicef.org/protection/files/Age\\_Assessment\\_Practices\\_Literature\\_Review2010.pdf](http://www.unicef.org/protection/files/Age_Assessment_Practices_Literature_Review2010.pdf)

<sup>4</sup> UNICEF, *Age assessment practices*, page 42.

18. For potential child suspects and witnesses only, if evidence gathered in the assessment is inconclusive and age determination fails, the individual concerned should be given the benefit of the doubt and presumed to be under 18 in order to be provided with the highest level of protection, as recommended by the Committee on the Rights of the Child.<sup>5</sup> (We note that presumption of age can in no circumstances be applied to potential child victims as it would undermine the principle of proving criminal responsibility beyond reasonable doubt.)

**19. We recommend including the below in paragraph 55 on page 23 of the Policy:**

**When the age assessment of a potential child suspect or a potential child witness is inconclusive, and if there is any possibility that the concerned individual is under 18, such individual should be given the benefit of the doubt and treated as such.**

#### **Right of the child to be heard**

20. Article 12 (2) of the Convention on the Rights of the Child (CRC), on the right to be heard, provides that the child should have “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.” This provision applies to all relevant judicial proceedings affecting the child, without limitation.

21. At paragraph 64 on page 25 (similar to paragraph 12 on page 4) the Policy explains that:

[T]he Office will seek to limit the number of interviews with children, in order to, *inter alia*, reduce their exposure, and avoid undue disruptions to their lives. Very young children will generally not be considered for interviews, unless they appear to be important sources of relevant evidence.

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<sup>5</sup> See for example Committee on the Rights of the Child, *General Comment No. 10: Children’s rights in juvenile justice*, 2007, paragraph 39: “If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.”

22. We consider that refraining from interviewing young children “unless they appear to be important sources of relevant evidence” could undermine their right to be heard as enshrined in CRC Article 12 (2).

**23. We urge the OTP to rephrase this section in order to clarify that there is no minimum age at which a child should be able to give evidence, ensuring respect for children’s right to be heard on matters affecting them, based on an individualised decision that takes into consideration the child’s capacity, best interests and desire to give evidence – as set out in paragraphs 65-72 on pages 25-27 (summarised on paragraphs 12-14 on pages 4-5). Consideration of the best interests of the child in this context takes account of any risk to the child in giving evidence, and of child-friendly measures available to elicit evidence from the child.**

24. We recognise that creating child-friendly mechanisms for children to give evidence is not solely within the remit of the OTP, but we would also encourage the OTP to include within this Policy a reference to facilitating child friendly ways of giving evidence. We welcome the inclusion within the Policy of a provision allowing children to give evidence without a solemn undertaking, but we encourage the OTP to expand the section on evidence (paragraphs 88-90 on page 31) to reflect the development of international standards in this area to minimise the harmful effects that giving testimony may have on children. The UN Guidelines for Action on Children in the Criminal Justice System, for example, encourage States to amend their codes of procedure to permit the videotape pre-recording of children’s testimony,<sup>6</sup> while the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime provides that all “interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner.”<sup>7</sup> The Committee on the Rights of the Child has also noted the importance of “adequate support for self-advocacy, appropriately

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<sup>6</sup> UN Guidelines for Action on Children in the Criminal Justice System, Guideline 50.

<sup>7</sup> UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Guideline 13.

trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms”.<sup>8</sup>

25. With regards to the privacy of children who give evidence, the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime emphasise that victims and witnesses should “have their privacy protected as a matter of primary importance”.<sup>9</sup> As such, child victims and witnesses should be permitted to testify outside the presence of the public and media, and “special procedures for the collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and... unnecessary contact with the justice process.”<sup>10</sup>

26. In its General Comment No.12 on the right of children to be heard, the Committee on the Rights of the Child explains that:

The child victim and child witness of a crime must be given an opportunity to fully exercise her or his right to freely express her or his view in accordance with United Nations Economic and Social Council resolution 2005/20, “*Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*”. In particular, this means that every effort has to be made to ensure that a child victim or/and witness is consulted on the relevant matters with regard to involvement in the case under scrutiny, and enabled to express freely, and in her or his own manner, views and concerns regarding her or his involvement in the judicial process.

27. Finally, on paragraph 6 on page 3 and paragraph 21 on page 14, the Policy states that “views of children are not necessarily dispositive, yet they are important in the decision-making process.” While the views of children and adults are not necessarily dispositive, we believe that including the mention of children’s views not necessarily being dispositive risks singling out children and may imply that there is something specific about the views

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<sup>8</sup> UN Committee on the Rights of the Child, *General Comment No. 12 on the right of children to be heard*, 2009, paragraph 34.

<sup>9</sup> UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, Guideline 26.

<sup>10</sup> UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Guidelines 28, 31.



of children that can impact their ability to resolve an issue. We therefore urge the OTP to remove this line.

### **Best interest of the child**

28. According to Article 3 of the CRC, children's best interests should be at the forefront of all decisions that affect them in every situation: a child's best interests must be a primary concern in all matters affecting them. This right is one of the general principles of the CRC - or overarching rights - which are particularly necessary for the fulfilment of all other rights.

29. Paragraph 8 on page 3 of the Policy (paraphrased at paragraph 24 on page 14) state that:

A best interests assessment will generally involve a two-step process: Firstly, the Office will make an assessment of the best interests of the child, having considered the child's specific situation, the views of the child, and other relevant persons, and the child rights at issue. Secondly, it will examine whether there are any other factors, which may require a balancing of the various interests. This second step will establish whether or not, other competing concerns, either alone or cumulatively, outweigh the best interests of the child. The Office will, in this process, place substantial weight on the child's best interests. Where the ultimate determination is that other considerations outweigh the best interests of a child, the Office will strive to implement appropriate measures to mitigate any negative impact that such a decision may have on the child.

30. These provisions recognise the principle of the best interest of the child but the wording falls short of the standards developed by the Committee on the Rights of the Child, which explicitly recognises the primacy of the child's best interests when balanced against other considerations.

31. We therefore urge the OTP to consider rephrasing the above-mentioned paragraphs to reflect the position taken by the Committee on the Rights of the Child, especially in General Comment No. 14:<sup>11</sup>

Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.

32. We recommend that paragraph 8 on pages 3-4 and paragraph 24 on page 14 of the Policy be amended as follows:

A best interests assessment will generally involve a two-step process: Firstly, the Office will make an assessment of the best interests of the child, having considered the child's specific situation, the views of the child, and other relevant persons, and the child rights at issue. Secondly, it will examine whether there are any other factors, which may require a balancing of the various interests. This second step will establish whether or not, other competing concerns, either alone or cumulatively, could outweigh the best interests of the child. The Office will, in this process, place substantial weight on the child's best interests, bearing in mind the recommendation of the Committee on the Rights of the Child to give larger weight to what serves the child best in the event of such conflict, and giving a high priority to the child's best interest. Where the ultimate determination is that other considerations

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<sup>11</sup> Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 2013:  
[http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

**outweigh the best interests of a child, the Office will strive to implement appropriate measures to mitigate any negative impact that such a decision may have on the child.**

#### **Note on the definition of the child**

33. We commend the Policy for confirming the OTP's definition of a child as any person under the age of 18 (paragraph 15 on page 11). This is consistent with the CRC and other relevant instruments. However, we note that there is an inconsistency between the Policy's definition of a child and the Rome Statute's definition of a child for the war crime of "using, conscripting or enlisting children". Under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, only use, conscription or enlistment of children under the age of 15 years can be prosecuted as a war crime. Use, conscription or enlistment of children aged 15 to 17 cannot currently be prosecuted at the ICC.

34. Based as it is on the relevant provisions of the 1949 Geneva Conventions, the Rome Statute's failure to criminalise recruitment and use in conflict of *all* children, regardless of their age, is inconsistent with the higher international standards which have evolved since the Rome Statute came into force. These standards include, most notably, the African Charter on the Rights and Welfare of the Child (ACRWC), the CRC's Optional Protocol on the involvement of children in armed conflict (OPAC), and the International Labour Organization's Convention No.182, the latter two of which have significantly more ratifications than the Rome Statute (165 parties and 180 ratifications respectively, compared to 124 for the Rome Statute). Jointly, they prohibit all forms of recruitment and use in hostilities of children by non-state armed groups, and further prohibit states from conscripting, forcibly recruiting, recruiting without adequate safeguards, and failing to take all feasible measures to prevent the direct involvement in hostilities of *all* individuals under the age of 18. OPAC further prohibits *any* form of recruitment under the age of 16 and the ACRWC prohibits all recruitment under the age of 18. Two thirds of states worldwide now have a minimum enlistment age in law of at least 18 years.<sup>12</sup>

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<sup>12</sup> Child Soldiers International, "International law and Child Rights": <http://www.child-soldiers.org/international-laws-and-child-rights>.

35. We commend the Policy for enshrining the definition of a child as an individual under the age of 18, in accordance with many international standards, and will continue our advocacy to raise the Rome Statute's 15-standard to 18, in line with this growing international consensus.

#### About the organisations making this submission

36. **Child Soldiers International** was formed in 1998 as the Coalition to Stop the Use of Child Soldiers by a group of leading human rights organisations, including Amnesty International, Human Rights Watch and Save the Children. Our goal is to end all recruitment, use and exploitation of children by armed forces and groups. We build mutually supportive partnerships and strategies that empower families, communities, local civil society organisations, and local and national governments to bring about positive changes to end all military recruitment, use and exploitation of children. Our aim is to work towards a world where children can grow up realising their full potential and enjoying all their human rights.
37. **Child Rights International Network - CRIN** is a global research, policy and advocacy organisation. Our goal is a world where children's rights are recognised, respected and enforced, and where every rights violation has a remedy. We have five core values that guide our work: we believe in rights, not charity; we are stronger when we work together, information should be free and accessible; societies, organisations and institutions should be open, transparent and accountable; and we should promote children's rights, not ourselves.